IN THE MATTER OF SECTIONS 10 AND 17 OF THE NIAGARA ESCARPMENT PLANNING AND DEVELOPMENT ACT, R.S.O. 1980, C.316

SUBMISSIONS OF THE COALITION ON THE NIAGARA ESCARPMENT (CONE) REGARDING PROPOSED REVISIONS TO THE NIAGARA ESCARPMENT PLAN

(VOLUME I - MEMORANDUM OF FACT AND LAW)

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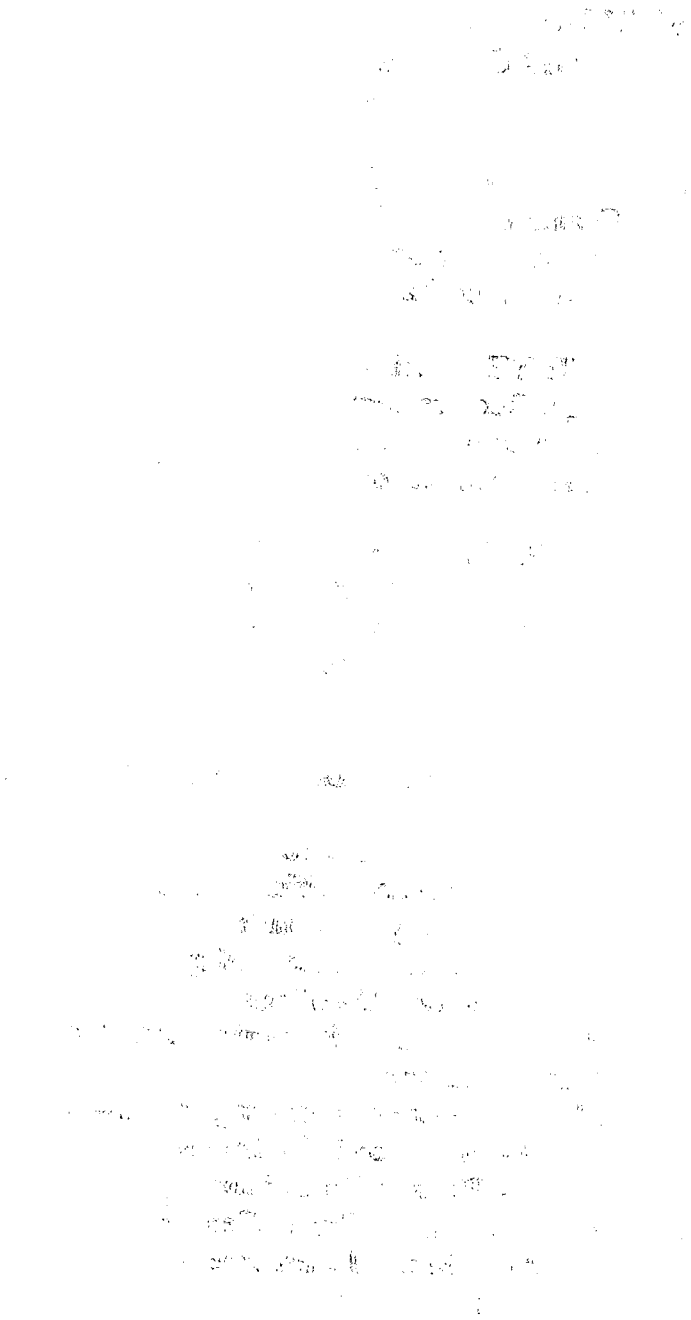
NIAGARA ESCARPMENT PLAN REVIEW HEARING

SUBMISSIONS OF THE COALITION ON THE NIAGARA ESCARPMENT (CONE)

(VOLUME I)



SUBMISSIONS OF THE COALITION ON THE NIAGARA ESCARPMENT (CONE) (VOLUME I)

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PART I - INTRODUCTION AND OVERVIEW

A. Coalition on the Niagara Escarpment

1. The Coalition on the Niagara Escarpment (CONE) was founded in 1978. CONE's membership includes six environmental and conservation groups: the Federation of Ontario Naturalists; Pollution Probe; Canadian Environmental Law Association; Canadian Parks and Wilderness Society; Sierra Club of Eastern Canada; and Bruce Trail Association. CONE's membership also includes a large number of private citizens and individual landowners, many of whom live within the Niagara Escarpment Plan (NEP) Area.

   Transcript, Volume 52, pp. 9586 - 89 (Ian Fraser)
   Transcript, Volume 53, p. 9867 (Ian Fraser)

2. CONE's mandate is to ensure:

   (i) the protection and conservation of the unique natural environmental features, values and landscapes of the NEP Area; and

   (ii) the achievement of environmentally sustainable land use within the NEP Area.

   Transcript, Volume 52, pp. 9586 - 89 (Ian Fraser)

3. CONE represents constituents with diversified interests in the Plan area. Moreover, CONE has a long history of involvement in the legislation and planning for the Plan area. Accordingly, CONE brings a comprehensive perspective to bear on environmental planning and implementation issues respecting the Plan. Since 1985, CONE has monitored the implementation of the NEP and, inter alia, attended meetings of the Niagara Escarpment Commission; commented on proposed amendments to the NEP; recommended changes to the NEP; and participated within the current Plan review process and attended all open houses on the Plan Review Document (PRD). CONE strong supports the NEP and the role of the NEC in administering the Plan.

   Transcript, Volume 52, pp. 9587 - 89 (Ian Fraser)

4. In light of CONE's experience with the NEP since its approval, CONE concurs with the opinion of the Minister of the Environment that "the basic principles of the Plan are sound."

> Transcript, Volume 4, p. 563 - 64 (Cecil Louis)
> Exhibit #5(A), Tab 1, p. 2

5. It is CONE's view, however, that certain policies within the NEP must be improved and strengthened in order to fulfil the primary purpose of the NEP and the Niagara Escarpment Planning and Development Act (NEPDA), viz. the protection of the continuity and integrity of the natural environment within the NEP Area. Accordingly, CONE supports most of the changes proposed within the PRD (Exhibit #9) as well as other changes proposed by the Niagara Escarpment Commission (NEC) in its PRD position paper (Exhibit #14). At the same time, CONE submits that several PRD and NEC recommendations require further modification, as described herein.

> NEPDA, s.2
> Transcript, Volume 52, pp. 9663 - 66 (Ian Fraser)
> Exhibit #9 (Plan Review Document)
> Exhibit #14 (NEC Position Paper on PRD)

B. Rationale for Strengthening the Niagara Escarpment Plan

6. CONE's proposed changes to the NEP are premised on the need to protect and conserve the unique natural environment and associated values and features within the Plan area:

> The Niagara Escarpment includes a variety of topographic features and land uses extending 725 kilometres from Queenston on the Niagara River to the islands off Tobermory on the Bruce Peninsula.
>
> The particular combination of geological and ecological features results in a landscape unequalled in Canada. It is also a source of some of Ontario's prime rivers and streams and one of the province's principal outdoor recreation areas....
>
> Exhibit #9 (Plan Review Document), p. 1

7. The Plan area covers approximately 190,300 ha, and includes:

- portions of the Deciduous and Great Lakes - St. Lawrence Forest Regions, including significant tree species at their northern distribution limits;

- portions of different terrestrial ecoregions and physiographic site regions, including numerous site districts;

- extremely varied and species-rich plant communities, including rare flora and those with Arctic, Boreal, Atlantic, Alleghanian, Cordilleran and Prairie affinities;

- diverse aquatic, riparian and terrestrial habitat for numerous wildlife species, including 53 mammal species, over 300 bird species, and many significant or sensitive "forest interior" species (i.e. red shouldered hawk) as well as rare or threatened species (i.e. Massassaga rattlesnake);

- diverse municipal, provincial and national parks and trail systems; and

- significant historic, archaeological, cultural and natural heritage resources.

Exhibit #111 (NEP Biosphere Reserve Nomination), Part 2
Exhibit # 247 (Ontario Breeding Bird Atlas excerpt)

8. The provincial significance of the Niagara Escarpment and the exceptional quality of its resource features and values have been well-documented and long-recognized by the government and the general public.

Exhibit #8(B), Tab 11, pp. 6 - 16
Exhibit #12(E) (Public Comments on PRD)
Exhibit #87 (Gertler Report), pp. 10 - 12
Exhibit #88 (Niagara Escarpment Task Report) p. 14

9. In February, 1990, the international significance of the Niagara Escarpment was recognized when the Bureau of the UNESCO Man and Biosphere Programme designated the Niagara Escarpment as a Biosphere Reserve. At present, there are only five Biosphere Reserves across Canada, which are intended to form part of a global network of significant ecosystems and representative natural regions.

Transcript, Volume 4, p. 565 (Cecil Louis)
Transcript, Volume 13, p. 1916 (Cecil Louis)
Exhibits #109 - 111 (Biosphere Reserve documentation)
Exhibit #20, p. 2

10. Given the local, regional, provincial, national and international significance of the Niagara Escarpment, CONE submits that environmental protection and resource conservation imperatives must predominate within the NEP. As described below, CONE further submits that the paramountcy of environmental protection and resource conservation is specifically mandated under the NEPDA. Thus, it is CONE's view that all NEP policies must contribute to the preservation of the Niagara Escarpment by protecting the continuity and integrity of the NEP Area and by excluding development or land uses which are incompatible with this fundamental objective. Moreover, various government policies and programs must be strengthened in order to reinforce the implementation of the NEP. It must be noted that the current Plan area is approximately two-thirds smaller than the Niagara Escarpment Planning Area established by the provincial government in 1973. Accordingly, CONE submits that this "shrinkage" of the Plan area makes it imperative to protect and maintain the remaining resources within the Plan area.

Transcript, Volume 18, pp. 2604 - 05 and pp. 2613 - 14 (Cecil Louis)
Transcript, Volume 52, pp. 9594 - 98 (Ian Fraser)
Exhibit #33 (Development Planning in Ontario: The Niagara Escarpment)
Exhibit #298 (CONE Witness Statement #1), Tab 1, p. 1

PART II - THE FIVE YEAR REVIEW PROCESS

A. Legal Requirements

11. Section 17 of the NEPDA provides that the Minister shall cause a review of the Plan every five years. This section further provides that the provisions of the Act relating to consultation, the submission of comments, and the holding of hearings apply with necessary modifications to the Five Year Review. The Act, however, contains no other explicit directions or requirements respecting the content or process for the Five Year Review.

NEPDA, s.17

12. The incorporation of s.10 procedures under s.17 of the NEPDA means that the Five Year Review must include the following elements:

- circulation of the proposed Plan changes to local municipalities and the invitation to municipalities to comment thereon;

- publication of public notices in newspapers and the invitation to the public to comment on the proposed Plan changes;

- circulation of the proposed Plan changes to advisory committees and the invitation to comment thereon;

- appointment of Hearing Officers and the holding of public hearings with respect to the proposed Plan changes; and

- presentation of the proposed Plan changes and the justification therefor by the NEC at the public hearings;

NEPDA, s.10

13. It is CONE's submission that the present Five Year Review was properly initiated on June 12, 1990 by the Minister of the Environment, who had been assigned responsibility for the NEPDA by Order-in-Council. The Hearing Officers in the present Five Year Review have held that the Minister was the appropriate person to initiate the review process.

Transcript, Volume 3, p. 429 (Ruling of Hearing Officers)
Exhibit #5(A), Tab 6, pp. A1-A9 and pp. B1-B5

14. CONE further submits that the notice and comment requirements of s.10 and s.17 of the NEPDA have been fully satisfied by the NEC in the present Five Year Review. In particular, the NEC has ensured that:

- the proposed Plan changes were circulated to local municipalities within the Plan area with an invitation to municipality to comment thereon;

- public notices respecting the proposed Plan changes were published in newspapers of general circulation with an invitation to the public to comment thereon;

- the proposed changes were circulated to the Public Interest Advisory Committee and the Municipal Advisory Committee with an invitation to comment thereon;

- the present Hearing Officers were appointed and public hearings were held respecting the proposed Plan changes; and

- the proposed Plan changes were presented and justified by the NEC at the public hearings.

Transcript, Volume 4, pp. 519 - 35 (D. Ramsay)
Transcript, Volume 13, pp. 1907 - 12 (D. Ramsay)
Exhibit #5(A) - Tab 4 (Open House Notice)

- Tab 5 (Press Release)
- Tab 6 (Hearing Officers)
- Tab 6 (Appointment of Hearing Officers)
- Tab 7 (PRD Public Notice)
- Tab 8 (PRD Government Circulation)
- Tab 9 (Special PRD Newsletter)
- Tab 10 (Appointment of Advisory Committees)
- Tab 11 (Notice of NEP Review Hearing)

Exhibit #5(B) (Affidavit respecting Open House Notice)
Exhibit #5(C) (Appointment of Hearing Officers)
Exhibit #5(D) (Affidavit respecting PRD Public Notice and Hearing Notice)
Exhibit #9 (Plan Review Document)
Exhibit #10 (Comments of Advisory Committee on Proposed Plan Changes)
Exhibit #12(A) to (E) (Comments on Proposed Plan Changes)
Exhibit #76 (Municipal Comments on Proposed Plan Changes)
Exhibit #77 (Notices/Invoices regarding PRD)
Exhibit #78 (Notices/Invoices regarding Hearing)
Exhibit #79 (Comments on Proposed Plan Changes)

15. In summary, it is CONE's submission that the Five Year Review undertaken by the NEC satisfies the requirements of the NEPDA and the Minister of the Environment's Terms of Reference. CONE further submits that the Five Year Review has been undertaken in an organized and publicly accessible manner.

NEPDA, s.10 and s.17
Transcript, Volume 13, pp. 1908 -12 (Cecil Louis)
Exhibit #5(A), Tab 2, pp. 1 - 3

B. Scope of the Review

16. The nature or the scope of the Five Year Review is not expressly defined or constrained under the NEPDA. However, there is a clear legislative intent that the Five Year Review should address general policy matters as opposed to site-specific Plan amendments, which may be initiated at any time under s.12 of the NEPDA.

NEPDA, s.12 and s.17
Transcript, Volume 3, pp. 433 - 440 (Ruling of Hearing Officers)
Transcript, Volume 64, pp. 11745 - 49 (Ruling of Hearing Officers)

17. As a matter of law, it is open to the Minister of the Environment to require a "focussed" Five Year Review of general policy issues rather than require a complete

"re-doing" of the Plan. Accordingly, in the present Five Year Review, the Minister properly directed the NEC to conduct a "focussed" review:

> The Minister requests that, as a general guide, the Commission focus the Five Year Review on issues that have been raising concerns among the various interested parties. The basic principles of the Plan are sound. I will forward to you shortly the Terms of Reference which will include an initial list of issues to be examined in the Review. Additional issues may be raised during the Review (emphasis added).

NEPDA, s.27
Exhibit #5(A), Tab 1, p. 2

18. The necessity and benefits of a "focussed" Five Year Review have been recognized and accepted by the NEC, various consultants, and the provincial government. CONE supports the principle of focusing on the Five Year Review.

Transcript, Volume 81, pp. 14873 - 87 (Cecil Louis)
Exhibit #83 (Heritage Resources Centre Report) p. iv
Exhibit #447(J) (Chapter 18 of Implementation Strategy), p. 345

C. Issue Identification and the Terms of Reference

19. In the present Five Year Review, the Minister of the Environment directed the NEC to focus the review on the following matters outlined in his Terms of Reference:

- lot creation policies (eg. low density subdivisions, severances and infilling);
- mineral extraction and associated activities (eg. Escarpment as a source, overall environmental impacts);
- park system policies (eg. additions/deletion, Bruce Trail policy, nodal parks);
- pond construction, water taking and diversions (eg. impacts on water quality/quantity and the natural environment);
- heritage resource policies (eg. protection of built environment and archaeological sites); and
- relationship of Provincial Policy Statements to the Plan.

Transcript, Volume 4, pp. 563 - 64 (Cecil Louis)
Transcript, Volume 13, pp. 1913 - 15 (Cecil Louis)

Exhibit #15 (Basis of Five Year Review), pp. 1 - 2
Exhibit #5(A), Tab 2

20. In addition, the Ministry of the Environment required NEC to prepare and distribute background documentation on the issues contained in the Terms of Reference. Similarly, the Minister of the Environment directed the NEC to:

> ...consult on these issues (and other issues which may be brought forward) with members of the public, municipalities, provincial agencies and other interested parties...
>
> The NEC shall review public comments received on these and other issues, and shall consider these comments in the drafting of a Plan Review Document for adoption.

Exhibit #5(A), Tab 2, pp. 1 - 3

21. On September 4, 1990, the NEC adopted the Minister's Terms of Reference with the following additions to the list of review issues:

- second dwellings;
- contour changes (eg. ski hills, golf courses);
- Minor Urban policies (eg. expansion and optimum size of minor urban centres);
- commercial development (eg. cottage wineries, agricultural/commercial development); and
- housekeeping changes (eg. map changes, rewording).

Transcript, Volume 4, pp. 563 - 64 (Cecil Louis)
Exhibit #5(A), Tab 3, pp. A1-A5 and pp. B1-B3

22. As described below, CONE would have preferred to have "implementation issues" (see PART VII herein) expressly included as matters to be addressed within the present Five Year Review. However, CONE submits that the finalized Terms of Reference have been broad enough to enable the public, the NEC, municipalities, provincial agencies and other interested parties to consider and make submissions on key planning and development issues within the Plan area.

Transcript, Volume 52 p. 9588 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1), Tab 4, pp. 6 - 7

PART III - JUSTIFICATION AND NEED FOR PLAN AMENDMENTS

23. CONE submits that s.10(5) of the NEPDA requires all amendments to the NEP be justified, and that justification must be based, inter alia, on the purpose and objectives of the NEPDA and the NEP.

> NEPDA, s.10(5)
> Exhibit #8(B) (NEP Amendment Guidelines) Tab 11, p. 58
> Exhibit #222 (Letter dated October 2, 1987 from T. Marshall to G.H.U. Bayly), p. 3

A. Purpose of the NEPDA and NEP

24. The purpose of the NEPDA is described as follows:

> The purpose of this Act is to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment.

> NEPDA, s.2
> Transcript, Volume 13, p. 1914 (Cecil Louis)

25. The NEC's proposed description of the purpose of the NEP is as follows:

> The purpose of this Plan is to provide for the long-term maintenance of the natural environment of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment. The policies, objectives and development criteria provide a framework within which the compatibility of all development can be assessed.

> Transcript, Volume 18, pp. 2604 - 05 (Cecil Louis)
> Exhibit #14 (NEC Position Paper on PRD), Tab 16, p. 4
> Exhibit #20, p. 4

26. CONE supports the NEC's proposed description of the purpose of the NEP, and submits that it accurately reflects the purpose of s.2 of the NEPDA. In addition, CONE submits that the proposed description is consistent with the Plan objectives mandated by s.8 of the NEPDA:

...the objectives to be sought by the Commission in the Niagara Escarpment Planning Area shall be,

(a) to protect unique ecologic and historic areas;
(b) to maintain and enhance the quality and character of the natural streams and water supplies;
(c) to provide adequate opportunities for outdoor recreation;
(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery;
(e) to ensure that all new development is compatible with the purpose of this Act as expressed in section 2;
(f) to provide for adequate public access to the Niagara Escarpment; and
(g) to support municipalities within the Niagara Escarpment Planning Area in their exercise of the planning functions conferred upon them by the Planning Act (emphasis added).

NEPDA, s. 8

27. Individually and collectively, the above-noted statements of purpose and objectives make it clear that the primary purpose of the NEP is the protection and maintenance of the physical, natural and visual environment of the Niagara Escarpment and land in its vicinity.

Transcript, Volume 18, pp. 2603 - 05 (Cecil Louis)
Transcript, Volume 52, pp. 9593 - 96 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1), Tab 2, p. 1

B. Implications of the Purpose of the NEPDA and the NEP

28. Given the purpose and objectives of the NEPDA and NEP, no particular land use development is guaranteed or mandatory within the Plan area. Development is secondary to the pre-eminent and overriding provincial goal of environmental protection within the Plan area.

Transcript, Volume 18, pp. 2603 - 05 (Cecil Louis)
Transcript, Volume 52, pp. 9594 - 95 (Ian Fraser)
Exhibit #222 (Letter dated October 2, 1987 from T. Marshall to G.H.U. Bayly) p. 3
Exhibit #298 (CONE Witness Statement #1), Tab 2, p. 21

29. The primacy of environmental protection objectives within the Plan Area has several important consequences for the current Five Year Review, including that:

- all NEP policies, criteria and objectives must be directed at achieving the overall goal of environmental protection;

- lands designated as Escarpment Natural, Escarpment Protection and Escarpment Rural Areas perform essential roles in maintaining the integrity and continuity of the Escarpment area;

- lands designated as Escarpment Rural Areas perform crucial ecological buffering and linking roles and are not expendable;

- the NEC's proposed limitations on new urban, commercial and industrial development are fully consistent with the purpose of the Act and NEP;

- resource extraction and management policies, priorities, and programs of broad provincial application are generally inappropriate for the Plan area;

- aggregate operations, by their very nature, conflict directly with the purpose of the Act and the NEP;

- urban-like development must be strictly controlled within Escarpment Recreation Areas, particularly given that many of Escarpment Recreation lands which would otherwise be designated as Escarpment Natural and Escarpment Protection Areas.

- the NEC must be given increased authority over matters relating to the Niagara Escarpment Parks System, and to environmental protection and resource conservation matters in general throughout the Plan Area;

- the NEC must be given the responsibility and necessary staff and other resources for developing a comprehensive, long-term environmental protection strategy that would be progressively incorporated in the NEP in order to complement and reinforce the development-regulatory component now in place; and

- the NEC must be given the responsibility and necessary staff and other resources for developing and implementing a comprehensive integrated environmental monitoring system within the Plan area.

Transcript, Volume 18, pp. 2603 (Cecil Louis)
Transcript, Volume 18, pp. 2683 - 84 (K. Whitbread)
Transcript, Volume 52, pp. 9596 - 602 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)
: Tab 2, p. 21
: Tab 3, pp. 9 - 14

: Tab 4, pp. 3 - 4
Exhibit #303 (CONE Witness Statement #2), Tab 2, pp. 11 - 13

30. In CONE's view, the primacy of environmental protection objectives has equally important consequences for legislation, policy, and program matters crucial to the success of the NEP but not specified in the Terms of Reference for the Five Year Review. The Ministry of the Environment undertook to coordinate the review of these matters, which include, inter alia, environmental monitoring, program monitoring, compliance monitoring, and land acquisition. With respect to these matters, CONE submits that:

- the government's attempted distinction between those issues to be dealt within the Five Year Review and those issues to be accorded separate treatment by the Ministry have unnecessarily constrained the Five Year Review;

- the Ministry's review appears to have no rigorous work plans, no formal process for public participation, and no mechanisms or timetables for coordinating or integrating its output with the Five Year Review;

- the false dichotomy between the Plan and its implementation means that critically important issues (i.e. monitoring) could readily escape effective scrutiny under the Five Year Review or the Ministry's separate review; and

- the Hearing Officers should consider and formulate recommendations on the need to integrate the two review processes.

Transcript, Volume 52, pp. 9656 - 59, 9664 - 66 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1), Tab 4, pp. 6 - 10

31. CONE furthers submits that the successful long-term implementation of the NEP requires the eventual establishment of a comprehensive integrated environmental monitoring system within the NEP. This system must be designed to objectively track changes in environmental quality, quantify the environmental impacts of development, and serve as the benchmark for evaluating the future effectiveness of the NEP. In particular, CONE submits that:

- environmental monitoring must be regarded as an integral part of the NEP rather than as a peripheral matter;

- systematic environmental monitoring encompasses more than the limited, though valuable, sectoral impact studies and routine

approvals/development monitoring that the NEC has proposed in its Final Submissions;

- the NEC must lead the development and implementation of an appropriate environmental monitoring system; and

- the Hearing Officers should consider and formulate recommendations on the need for comprehensive environmental monitoring within the Plan area.

Transcript, Volume 52, pp. 9656 - 59, 9666 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)
: Tab 3, pp. 15 - 16
: Tab 4, pp. 9 - 10

32. Notwithstanding the foregoing recommendations for long-term changes to the NEP, CONE strongly supports the overall policy direction of the NEC's proposals for improving the existing NEP. CONE submits that these proposals have been satisfactorily documented and justified by the NEC and other parties, and submits that CONE's proposed revisions (described in Volume II of these submissions) will serve to further strengthen the NEP.

Transcript, Volume 52, p. 9665 (Ian Fraser)
Transcript, Volume 54, p. 10018 (Ian Fraser)

C. Justification and Need

33. As described above, s.10(5) of the NEPDA requires amendments to the Plan to be justified in relation to the purpose and objectives of the Act and the NEP. The Act and the NEP are premised on the broad public interest in maintaining and protecting the Niagara Escarpment and lands in its vicinity. Accordingly, CONE submits that applicants must be required to demonstrate that, inter alia, the proposed amendment is in the public interest.

NEPDA, s.10(5) and s.12
Transcript, Volume 15, pp. 2263 - 64 (Marion Plaunt)
Exhibit #9 (Plan Review Document), p. 6

34. A consideration of "public interest" necessarily includes an examination of the public "need" for proposed amendments to the NEP. Proposed amendments to permit uses or developments for which no public need is demonstrable cannot be justified and conflict with the purpose and objectives of the Act and the NEP.

Transcript, Volume 15, pp. 2263 - 64 (Marion Plaunt)

Exhibit #9 (Plan Review Document), p. 6
Exhibit #222 (Letter dated October 2, 1987 from T. Marshall to G.H.U. Bayly), p. 3

35. The Joint Board and Environmental Assessment Board have held that where no "public need" for a proposal can be demonstrated, then the proposal cannot be said to be in the "public interest". CONE submits that "public need" is an appropriate test to evaluate proposed amendments to the NEP.

Jefferies, Environmental Approvals in Canada, s.5.23 -.31

36. To assist applicants in justifying proposed amendments to the Plan, the NEC approved draft "NEP Amendment Guidelines" in 1988 and circulated these Guidelines for comment. These Guidelines provide, inter alia, that when addressing public need, the applicant should demonstrate that:

- it is necessary to locate the use within the Plan area; and
- no alternative sites exist outside the Plan area or within appropriate designations in the Plan area to satisfy the demand for the use.

Transcript, Volume 81, pp. 14857 - 63 (Cecil Louis)
Exhibit #8(B), Tab ll, Appendix XX, p. 58

37. The development of the Guidelines on justification and need was supported by the Public Interest Advisory Committee, Municipal Advisory Committee, and the Ministry of Municipal Affairs. The Ministry of Natural Resources supported the intent of the Guidelines and raised no objection to the inclusion of public need as a component of justification.

Transcript, Volume 81, pp. 14857 - 63 (Cecil Louis)
Exhibit #447(b) to (g) (Reports on Justification /Need)

38. CONE strongly supports Part 1.3 (Plan Amendments) proposed by the NEC, and submits that these provisions are essential to the proper functioning of the Plan and the fulfilment of the purposes of the Act and the NEP.

Transcript, Volume 52, pp. 9643 - 44 (Ian Fraser)
Exhibit #9 (Plan Review Document), p. 6
Exhibit #298 (CONE Witness Statement #1), Tab 2, p. 38

39. In addition, CONE supports the inclusion of specific criteria to be applied to specific amendments (i.e. second dwellings). Because pits or quarries conflict with the

purpose of the Act and the NEP, CONE supports the NEC's proposed deletion of amendment criteria for new Mineral Resource Extraction Areas. This deletion is also supported by the Public Interest Advisory Committee.

Transcript, Volume 16, pp. 2324 - 26 (Marion Plaunt)
Exhibit #10 (MAC/PIAC Minutes), Tab 2(3), pp. 11 - 14
Exhibit #14 NEC Position on PRD), Tab 11, pp. 13 - 14
Exhibit #20, p. 7
Exhibit #298 (CONE Witness Statement), Tab 2, p. 39
Exhibit #324 (Halton Witness Statement), pp. 17 - 21

40. CONE supports the NEC's proposal that all post-extractive "after uses" require an amendment to the NEP. As described below, however, CONE submits that the Plan must include enhanced mechanisms to address the linkages between rehabilitation and after uses. CONE supports the development of ecological/biological criteria related to after use, and particularly supports the requirement that sites "shall be rehabilitated in accordance with the objectives of the applicable redesignation of the NEP and be compatible with and would have minimal impact upon the surrounding natural and visual environment and existing uses."

Transcript, Volume 52, pp. 9637 - 42 (Ian Fraser)
Exhibit #10 (MAC/PIAC Minutes), Tab 2(2), p. 14
Exhibit #14 (NEC Position on PRD), Tab 11, p. 14
Exhibit #20, p. 8
Exhibit #298 (CONE Witness Statement #1)
: Tab 2, p. 39
: Tab 4, p. 6

PART IV - NEC POLICY PAPERS #1 - 21

(i) Introduction: The Need for Environmental Protection Strategies

41. While the current NEP has worked well to regulate development pressures within the Plan area, the Plan lacks a comprehensive, integrated long-term strategy for environmental protection. It may be possible to infer elements of the environmental protection strategy in the current Plan; however, from a planning perspective, it would be preferable to have an explicit set of environmental protection goals, objectives and targets (i.e., for the Plan and for specific designations) to assist all parties in the implementation and monitoring of the NEP.

Transcript, Volume 18, pp. 2606 - 12 (Cecil Louis)
Transcript, Volume 52, pp. 9602 - 03 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)

: Tab 2, pp. 5 - 6; pp. 12 - 13; pp. 14 - 15
: Tab 3, pp. 2 - 4
Exhibit #324 (Halton Witness Statement), p. 6

42. The lack of a strong and explicit environmental protection strategy in the NEP will eventually lead to a diminution of environmental quality within the Plan Area. Accordingly, the NEC and the provincial government must undertake the following actions:

- develop and incorporate into the Plan a comprehensive, integrated long-term environmental protection strategy for public and private lands within the Plan area; and

- provide the NEC with greater authority over planning and implementation for environmental protection and resource management.

Transcript, Volume 52, pp. 9604-05 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)
: Tab 3, pp. 3 - 4 and pp. 7 - 8
: Tab 4, pp. 6 - 8

(ii) Issues Arising out of NEC Policy Papers

A. PR #1: Municipal Official Plans

43. Section 8(g) of the NEPDA provides that the Plan should:

> ...support municipalities within the Niagara Escarpment Planning Area in their exercise of the planning functions conferred upon them by the Planning Act.

NEPDA, s.8(g)

44. Where there is conflict between the NEP and an official plan concerning any part of the Plan Area, then the provisions of the NEP prevail. Moreover, where there is a conflict between the NEP and an official plan, the Minister can require the plan to be brought into conformity with the NEP.

NEPDA, ss.14-15

45. Although the NEP prevails over official plans in cases of conflict, it is open to municipalities to pass official plan policies which, in fact, are more restrictive than NEP policies. Where such policies are passed, they serve as additional restrictions

which are tailored to local conditions, and which supplement the "minimum" standards found within the NEP.

Exhibit #8(A), Tab 1, pp. 1 - 4
Exhibit #134 (NEP Implementation Proposals), pp. 6 - 7

46. The NEP Implementation Proposals recognize the ability of municipalities to enact official plan notices more restrictive than the NEP:

> Accordingly, the Minister will consider the NEP as a minimum standard against which conflicts in local plans will be evaluated. It also means that official plans could be more restrictive than the NEP, provided the policies are not in conflict with the Plan's general intent and purpose or other provincial policies.

Exhibit #134 (NEP Implementation Proposals), p. 7

47. Notwithstanding the above-noted legislative requirements and implementation proposals, some confusion has arisen regarding the paramountcy of official plan policies where they are more restrictive than NEP policies. Accordingly, CONE supports Part 1.1.2 (Municipal Official Plans) proposed by the NEC in Exhibit #20 because, inter alia, this provision:

- reflects the requirements of s.8(g) of the NEPDA;
- provides municipalities with a clear direction that their official plans may be more restrictive than the NEP;
- reflects the NEC's practice and various decisions made by the Minister, the Ontario Municipal Board, and the Joint Board.

Transcript, Volume 14, pp. 2043 - 50 (Marion Plaunt)
Exhibit #10 (MAC/PIAC Minutes), Tab 1(1), pp. 3 - 4 and Tab 2(1), pp. 3 - 4
Exhibit #8(A), Tab 1, pp. 4 - 9
Exhibit #14 (NEC Position on PRD), Tab 1, pp. 1 - 3

48. Similarly, CONE supports the other consequential amendments to the NEP (i.e pp. 12, 18, 26, 32, 37, 41, 45, 54) which follow from the provision that more restrictive official plan policies should prevail over NEP policies.

Exhibit #14, Tab 1, p.1
Exhibit #20, p. 5

B. PR #2: Density Approach

49. The NEP's "new lots" policies should be directed at achieving the purpose in s.2 of the Act and the objectives described in s.8 of the Act, including:

> (d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.
>
> NEPDA, s.2 and s.8(d)

50. In 1978, at least 10,960 lots were known to exist within lands designated as Escarpment Natural, Escarpment Protection and Escarpment Rural. This figure must be accepted as a minimum estimate since the 1978 study excluded certain areas due to the lack of land fragmentation data.

> Transcript, Volume 14, pp. 2053 - 62 (Marion Plaunt)
> Exhibit #8(B), Tab 2, p. 5 (Appendix III)
> Exhibit #447 (NEC Reply), Tab 5 p. 1

51. From 1980 to 1990, approximately 3,746 new lots were potentially created within the three major designations. This represents a 34% increase in the number of lots that existed in 1978.

> Transcript, Volume 82, pp. 15023 - 28 (Marion Plaunt)
> Exhibit #447 (NEC Reply), Tab 5, p. 1

52. The current NEP "new lots" policies have generally failed to restrain this excessive lot creation, which has served to fragment the Escarpment area landscape. Excessive lot creation has also caused site-specific and cumulative impacts upon the natural and visual environment within the Plan area (e.g. strip development, deterioration of water systems), contrary to the purpose and objectives of the Act and the NEP.

> Transcript, Volume 14, pp. 2053 - 59 (Marion Plaunt)
> Exhibit #8(A), Tab 2, pp. 9 - 10
> Exhibit #14 (NEC Position on PRD), Tab 2, pp. 2 - 3

53. There is continuing pressure for new lots within the Plan Area, and in most areas the current Plan, in fact, would permit more than a 50% increase in the number of severances than currently exists.

> Transcript, Volume 14, pp. 2053 - 2054 (Marion Plaunt)
> Exhibit #14 (NEC Position on PRD), Tab 2, pp. 2 - 3

54. The NEP is intended to be a long-term (eg. 100 year) plan which, as a matter of law, must maintain and enhance the natural environment and open landscape character of the Plan area. Therefore, "the fewer houses built in the Escarpment Protection and Escarpment Rural Areas over time... the longer will the open landscape character be preserved."

NEPDA, s.2
Exhibit #8(A), Tab 2, p. 14 (Appendix VIII)

55. In order to fulfil the purpose and objectives of the Act and the NEP, CONE submits that the Plan must be amended to make the "new lots" policies more restrictive. Subject to CONE's position on re-creation of original township lots (see PART IV (G) below), CONE strongly supports the NEC's proposed restrictions on lot creation within the three major designations (i.e. no new lots in Escarpment Natural and Escarpment Protection Area and one new lot in the Escarpment Rural Area). Such restrictions should dampen or eliminate the intense pressure for lot creation and residential development within a major portion of the Plan area.

Exhibit #8(A), Tab 2, pp. 17-18 and pp. 27 - 30 (Appendix X)
Exhibit #14 (NEC Position on PRD), pp. 2 - 4
Exhibit #20, pp. 12, 18, 19, 26, 27
Exhibit #298 (CONE Witness Statement #1)
: Tab 2, pp. 6, 13, 15
: Tab 4, p. 2

56. In addition, CONE supports the clarification proposed by the NEC that a lot may be created for acquisition by a public body provided that no new building lots are created. Similarly, CONE supports the NEC's proposed amendments relating to previous or remnant lots owned by public bodies.

Exhibit #8(B), Tab 2, pp. 18 - 19
Exhibit #14 (NEC Position on PRD), Tab 2, pp. 4 - 6
Exhibit #20, pp. 13, 20, 28

C. PR #3: Retirement Lot Policy

57. The NEP's "retirement lots" policies should be directed at achieving the purpose in s.2 of the Act and the objectives described in s.8 of the Act, including;

(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

NEPDA, s.2 and s.8

58. Since approval of the NEP in 1985, 57 retirement lots have been proposed within the Plan Area. Of these applications, 42 have been approved by the NEC, including 29 which were directly contrary to the NEP. Given the current pressure to sever rural land and the continuing loss of agricultural land through urbanization, there is a clear need to re-evaluate the current NEP policies relating to retirement lots. This is particularly true in light of questionable interpretation of the existing NEP retirement lot policies by the Joint Board.

Transcript, Volume 14, pp. 2069 - 71 (Marion Plaunt)
Exhibit #8(A), Tab 3, pp. 5 - 8; pp. 11 - 13; and Appendix I

59. There are a number of long-term impacts associated with the continued creation of retirement lots within the Plan Area, including:

- retirement lots ultimately become non-farm residential lots which conflict with existing agricultural uses;
- retirement lots frequently have not been used for retirement purposes; instead, they have often been sold subsequent to the severance; and
- further fragmentation of the rural area conflicts with the purpose and objectives of the Act and NEP.

Transcript, Volume 14, pp. 2069 - 71 (Marion Plaunt)
Exhibit #8(A), Tab 3, p. 11

60. The historical rationale for farm retirement lots is no longer applicable, and the land base within the Plan Area should not be used as the means to ensure adequate retirement income for farmers. Other forms of economic incentives and subsidies to farmers should be explored and enhanced to ensure that farmers can retire with a reasonable standard living without becoming land subdividers.

Transcript, Volume 14, pp. 2069 - 71 (Marion Plaunt)
Exhibit #14, Tab 3, pp. 1 - 2

61. In order to fulfil the purpose and objectives of the Act and the NEP, CONE submits that the Plan must be amended to delete the current provisions for retirement lots within the Plan area. Such a deletion is consistent with the Food Land Guidelines and the official plans of several municipalities within the Plan Area which do not contain any provisions for retirement lots. Accordingly, CONE supports the NEC's proposed deletion of those provisions as well as the NEC's proposed rewording of development criteria under Part 2.9 (Agriculture).

Transcript, Volume 82, pp. 15027 - 28 (Marion Plaunt)
Exhibit #20, pp. 13, 20, 27, 70
Exhibit #298 (CONE Witness Statement #1) pp. 6, 13 and 15
Exhibit #447 (NEC Reply), Tab 5, p. 5

D. PR #4: Second Dwellings

62. The NEP's "second dwelling" policies should be directed at achieving the purpose of s.2 of the Act and the objectives of the Plan described in s.8, including:

> (d) to maintain and protect the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

NEPDA, s.2 and s.8(d)

63. The current NEP contains provisions for second dwellings for full-time farm help, as do several official plans within the Plan area. However, these second dwellings increase the density of development within the rural lands of the Plan area and have the same environmental and visual impacts as a new lot and its subsequent development, and therefore should be treated in the same manner as new lots.

Transcript, Volume 14, pp. 2073 - 79 (Marion Plaunt)
Exhibit #8(A), Tab 4, pp. 3 - 5
Exhibit #14 (NEC Position on PRD), Tab 4, p. 1

64. The historical rationale for permitting farm second dwellings is no longer applicable within the Plan area due to changing farm economics and other factors. There has been virtually no demand for second dwellings for full-time farm help that would conform to the NEP. Instead, most applications considered by the NEC involved second dwellings proposed for guest accommodation, seasonal workers, domestic help, or relatives. Since Plan approval, the NEC has dealt with 55 second dwelling applications and has approved 36, including 23 which were contrary to the NEP.

Transcript, Volume 14, pp. 2074 - 79 (Marion Plaunt)
Exhibit #8(A), Tab 4, p. 9 and Appendices I and III
Exhibit #14 (NEC Position on PRD), pp. 2 - 4

65. Accordingly, CONE supports the PRD's proposed deletion of the current policies for farm second dwellings, thereby requiring all second dwellings to be processed through the amendment process in accordance with the "new lots" density provisions. In addition, CONE supports the PRD's proposed inclusion of Part 1.3.1 (Second Dwellings) to provide amendment criteria for such applications, and the proposed lot creation policies concerning surplus lots. However, CONE does not support the

NEC's proposal to allow "mobile" or "portable" second dwellings as permitted uses because of the potential for such units to become permanent over time and because they create the same environmental and visual impacts as ordinary buildings. In addition, the NEC has consistently taken the position that surplus dwellings may be severed; therefore, additional dwellings should be considered in the same manner as a proposed lot.

Transcript, Volume 14, p. 2073 (Marion Plaunt)
Exhibit #9 (PRD), pp. 7, 15, 23, 57, 70
Exhibit #298 (CONE Witness Statement #1): Tab 2, pp. 13, 15
: Tab 4, p. 2

E. PR #5: New Lots for Agricultural Purposes

66. The NEP's policies for new lots for agricultural purposes must be directed at achieving the purpose of s.2 of the Act and the objectives of the Plan described in s.8, including:

(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

NEPDA, s.2 and s.8(d)

67. The current NEP provides for the creation of new lots for agricultural purposes provided that the severed and remnant parcels are of sufficient size to remain viable for agricultural purposes.

Exhibit #20, pp. 19, 26

68. Although only one such severance has been applied for since Plan approval, the current NEP policies create the clear potential for abuse by permitting the creation of lots in excess of the Plan's density provisions. Further fragmentation of the rural lands within the Plan area would conflict with the purpose and objectives of the Act and Plan, particularly since s.8(d) clearly provides that maintenance of the "open landscape character" takes precedence over agriculture.

Transcript, Volume 14, p. 2097 (Marion Plaunt)
Exhibit #8(A), Tab 5, pp. 1 - 4

69. Accordingly, CONE supports the NEC's proposed amendment which would permit new lots for agricultural purposes provided that the Plan's "new lots" density provisions are not exceeded. As described below, CONE also supports the NEC's proposal to delete the reference to the Food Land Guidelines in these provisions.

Transcript, Volume 14, pp. 2096 - 98 (Marion Plaunt)
Exhibit #10 (MAC/PIAC Minutes), Tab 1(5), pp. 1 - 4
Exhibit #14 (NEC Position on the PRD), Tab 5, pp. 1 - 2
Exhibit #20, pp. 19, 26
Exhibit #298 (CONE Witness Statement #1): Tab 2, pp. 13, 15
: Tab 4, p. 2

F. PR #6: Infilling

70. The current NEP contains no specific policies which permit infilling because of the environmental and visual impacts which would occur if infilling were to be allowed within the existing strip developments in the Plan area, particularly within Niagara and Hamilton-Wentworth Regions. Because few "infilling" applications have been submitted or approved since Plan approval, CONE submits that it is not necessary at this time to develop a specific infilling policy. However, this should not preclude future consideration of an "urban intensification" policy which would encourage compact urban development/redevelopment in order to avoid further urban sprawl.

Transcript, Volume 14, pp. 2098 - 99 (Marion Plaunt)
Exhibit #8(A), Tab 5, pp. 1 - 4
Exhibit #10 (MAC/PIAC Minutes), Tab 1(5), p. 4

G. PR #7: Re-creation of Original Township Lots

71. The NEP's policies relating to re-creation of original township lots should be directed at achieving the purpose of s.2 of the Act and the objectives for the Plan described in s. 8, including:

(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

NEPDA, s.2 and s.8(d)

72. The current NEP policies would permit severances in order to re-create original township lots and to create 40 ha lots along half-lot lines where the original township lot is 80 ha.

Transcript, Volume 14, pp. 2100 - 06 (Marion Plaunt)
Exhibit #20, pp. 13, 19, 26, 27

73. While CONE agrees with the NEC that clarification of these policies is necessary, CONE does not support the NEC's proposed rewording for these policies. Because of concern respecting the further fragmentation of lots within the Plan area, CONE

submits that in order to re-create an original township or half-township lot, both original lots must not have had any previous severances.

Exhibit #298 (CONE Witness Statement #1): Tab 4, p. 2

74. CONE's position is supported by the Deputy Minister of Municipal Affairs, who has taken the position that the intent of the policy is to allow re-creation of original lots, not the general creation of new lots along township lot lines. CONE's proposed tightening of these policies would have the effect of further restricting lot creation and fragmentation within the Plan area.

Transcript, Volume 14, p. 2104 (Marion Plaunt)
Transcript, Volume 18, pp. 2637 - 38 (Marion Plaunt)
Exhibit #8(A), Tab 7, p. 3

H. PR #8: Food Land Guidelines

75. The Food Land Guidelines were approved by the provincial government in 1978 as policy on planning for agriculture, but the Guidelines have not been issued as a "policy statement" under s.3 of the Planning Act.

Transcript, Volume 39, p. 7174 - 75 (Sharon Johnston)
Exhibit #212 (Government Witness Statement), Tab 5

76. The Food Land Guidelines are currently incorporated into the NEP by reference in the "new lots" policies for Escarpment Protection and Escarpment Rural Areas, and in the Development Criteria. Most municipalities (except, for example, Grey County) within the Plan Area have official plans which refer to and/or implement the policies of the Food Land Guidelines.

Transcript, Volume 14, pp. 2108 - 12 (K. Houghton)
Exhibit #8(A), Tab 8, pp. 1 - 2, 5 - 6
Exhibit #20, pp. 19, 26 - 27, 49, 56, 70, 73

77. As described below in Part IV (Q), CONE supports the NEC position that the NEP takes precedence over provincial policy statements, including the Food Land Guidelines, because the Plan is a detailed provincial plan for a specific area, approved by Cabinet pursuant to a special Act of the Legislature. While the NEC must "have regard for" relevant policy statements, it is left to the NEC to determine what weight should be given to policy statements within the special context of the NEP. Accordingly, it is not necessary for the NEP to include express references to the Food Land Guidelines.

Transcript, Volume 14, pp. 2109 - 10 (K. Houghton)

Transcript, Volume 42A, p. 7844 (Ted Harvey)
Exhibit #8(A), Tab 8, pp. 6 - 7

78. For the foregoing reasons, CONE supports the NEC's proposed deletion of the references to the Food Land Guidelines within the NEP. Similarly, CONE supports the NEC's proposed reference to, and definition of, "matters of provincial interest", which would subsume the Food Land Guidelines and other provincial policy statements. CONE submits that these amendments would clarify that the NEP is a "stand alone" document, but would also provide the NEC with the flexibility to assess the relative weight to be given to provincial policy statements in individual circumstances. In addition, these amendments would ensure that local official plans remain as the appropriate vehicle to implement the policies and definitions of "Agricultural Areas" within the Food Land Guidelines.

Transcript, Volume 14, pp. 2109 - 10 (K. Houghton)
Exhibit #8(A), Tab 8, pp. 8 - 10
Exhibit #14 (NEC Position on PRD), Tab 8, pp. 1 - 3
Exhibit #20, pp. 19, 26, 27, 49, 56, 70, 73, 148
Exhibit #447 (NEC Reply), Tab 3

I. PR #9: Plans of Subdivision

79. The NEP's policies regarding plans of subdivision must be directed at achieving the purpose of s.2 of the Act and the Plan objectives described in s.8, including:

(a) to protect unique ecologic and historic areas;

(b) to maintain and enhance the quality and character of natural streams and water supplies; and

(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

NEPDA, s.2 and s.8

80. The current NEP does not permit low-density rural plans of subdivision in the Escarpment Natural or Escarpment Protection Areas. However, these subdivisions are presently permitted within the Escarpment Rural Area as well as the Escarpment Recreation, Urban and Minor Urban Centre designations.

Transcript, Volume 14, pp. 2113 - 14 (K. Whitbread)
Exhibit #8(A), Tab 9, pp. 2 - 3

81. Since Plan approval, a limited number of subdivision applications have been processed with respect to the Escarpment Rural Area. However, it is anticipated that subdivision applications will become increasingly common in the future as existing lots are built upon and as the Plan area is marketed as a desirable are in which to live.

Transcript, Volume 14, p. 2115 (K. Whitbread)
Exhibit #8(A), Tab 9, pp. 8 - 9

82. Escarpment Rural Areas represent approximately one-third of the Plan Area. If low-density subdivisions continue to be permitted in this designation, then incrementally these subdivisions, together with other forms of development, will adversely affect the natural environment and reduce the open landscape character of the Plan Area. Accordingly, the continued approval in principle of low-density subdivisions in the Escarpment Rural Area conflicts directly with the purpose and objectives of the Act and the NEP.

Transcript, Volume 14, pp. 2115 - 16 (K. Whitbread)
Exhibit #8(A), Tab 9, pp. 8 - 9
Exhibit #14 (NEC Position on PRD), Tab 9, pp. 1 - 2

83. Accordingly, CONE strongly supports the NEC's proposal to continue excluding subdivisions from the Escarpment Natural and Escarpment Protection Areas. Similarly, CONE strongly supports the NEC's proposed exclusion of low-density subdivisions from the Escarpment Rural Area. CONE submits that subdivision development within these three designations cannot be justified when suitable areas exist in other NEP designations and outside the Plan Area.

Transcript, Volume 14, pp. 2115 - 16 (K. Whitbread)
Transcript, Volume 52, pp. 9623 - 24 (Ian Fraser)
Exhibit #8(A), Tab 9, pp. 18 - 19
Exhibit #10 (MAC/PIAC Minutes), Tab 1(5), p. 9 and Tab 2(2), pp. 23 - 24
Exhibit #14 (NEC Position on PRD), Tab 9, p. 2
Exhibit #20, pp. 22, 27, 50, 55
Exhibit #298 (CONE Witness Statement #1), Tab 4, p. 2

84. CONE further submits that the proposed deletion of subdivisions from the Escarpment Rural designation is consistent with the purpose and objectives of the Act and the Plan. Similarly, the proposed deletion will ensure that any future subdivision applications are dealt with on a case-by-case basis under the NEP's amendment procedures, which will require a comprehensive site-specific assessment of the proposed development. This approach would be consistent with municipal official plans, which typically require official plan amendments to permit rural estate subdivisions.

Transcript, Volume 14, pp. 2115 - 16 (K. Whitbread)
Exhibit #8(A), Tab 9, pp. 13-14
Exhibit #14 (NEC Position on PRD), Tab 9, pp. 1 - 2

J. PR #10: Minor Urban Centres

85. The NEP's "Minor Urban Centre" policies must be directed at achieving the purpose of s.2 of the Act and the Plan objectives described in s.8.

NEPDA, s.2 and s.8

86. The current NEP identifies hamlets, villages and similar rural settlement with a "Minor Urban Centre" symbol. The actual boundaries and land use policies for each Minor Urban Centre are to be established through official plan/secondary plan exercises which must meet the development objectives set out in Part 1.6 of the present Plan. Once approved, the official plan/secondary plan becomes part of the NEP, and the municipality may retain the development control system or replacing it with zoning. The present NEP does not place any clear limits on the number or growth of Minor Urban Centres.

Transcript, Volume 14, p. 2117 (K. Whitbread)
Exhibit #8(A), Tab 10, pp. 2 - 3
Exhibit #20, pp. 29 - 35

87. At the time of Plan approval, 33 Minor Urban Centres were identified in the NEP. Since Plan approval, many of these areas have increased in size and density, and a number of new Minor Urban Centres have been considered. Although Minor Urban Centres were not intended to become major urban areas, the trend has been towards the conversion of such settlements into larger urban areas which have lost their traditional rural character. In addition, such expansions place considerable stress on the built and natural environment (e.g. water supplies), and they make increasingly difficult to protect the remaining Escarpment values and features.

Transcript, Volume 14, pp. 2121 - 25 (K. Whitbread)
Exhibit #8(A), Tab 10, pp. 3 - 6
Exhibit #14 (NEC Position on PRD), Tab 10, pp. 3 - 4

88. For the foregoing reasons, CONE supports the NEC's proposals to amend the NEP so that:

- an amendment to the Plan would be required in order to expand identified Minor Urban Centres once the boundaries have been fixed;

- an amendment to the Plan would be required for growth and development within Escarpment Natural Areas which are included within Minor Urban Centres;

- heritage values within Minor Urban Centres are protected against inappropriate development (eg. "monster homes");

- the Minister of the Environment determines whether an official plan/secondary plan conforms with the NEP; and

- the Plan clarifies the application of the policies of underlying designations (eg. Escarpment Natural or Protection) in Minor Urban Centres without a secondary plan or boundary.

Transcript, Volume 14, pp. 2117 - 20 (K. Whitbread)
Transcript, Volume 52, pp. 9624 - 25 (Ian Fraser)
Exhibit #8(A), Tab 10, pp. 5 - 12
Exhibit #10 (MAC/PIAC Minutes), Tab 2(2), pp. 24 - 27
Exhibit #14 (NEC Position on PRD), Tab 10, pp. 1 - 7
Exhibit #20, pp. 29 - 35, 48, 54, 55, 139
Exhibit #298 (CONE Witness Statement #1): Tab 2, p. 17
: Tab 4, p. 4

K. PR #11: Mineral Resource Extraction

(i) General

89. The NEP's policies relating to mineral resource extraction must be directed at achieving the purpose in s.2 of the Act and the Plan objectives described in s.8, including:

(a) to protect unique ecologic and historic areas;

(b) to maintain and enhance the quality and character of natural streams and water supplies; and

(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

NEPDA, s.2 and s.8

90. Subject to applicable Development Criteria, the current NEP permits:

- limited expansion of existing sandstone quarries in Escarpment Natural, Escarpment Protection, and Escarpment Rural Areas;

- municipal and provincial wayside pits and quarries in Escarpment Protection and Escarpment Rural Areas;

- new licenced pits and quarries producing less than 20,000 tonnes annually in Escarpment Rural Areas;

- new licenced pits and quarries producing more than 20,000 tonnes annually in Escarpment Rural Areas; and

- licenced mineral extraction operations in Mineral Resource Extraction Areas.

Transcript, Volume 15, pp. 2260 - 62 (Marion Plaunt)
Exhibit #8(B), Tab 11, pp. 3 - 5
Exhibit #20, pp. 12, 17, 24, 25, 45 - 47, 72 - 77

91. There are numerous pits and quarries, including waysides, which currently exist within the Plan area for the purposes of extracting shale, sandstone, dolostone, sand and gravel. The vast majority of these operations were licenced in the early 1970's without detailed environmental impact studies. Several large operations are located on or near the Escarpment brow, and some operations have resulted in the removal of the Escarpment itself. Other operations have large licenced areas which remain unexploited to date, including areas which have been designated as a provincially significant ANSI's. Few operations within the Plan area have undertaken purposeful or extensive rehabilitation.

Transcript, Volume 15, pp. 2267 - 93 (Marion Plaunt)
Transcript, Volume 18, pp. 2720 - 21 (Marion Plaunt)
Exhibit #8(B), Tab 11, pp. 33 - 35
Exhibit #212 (Government Witness Statement #1), Tab 11, pp. 37 - 44

92. As described below, CONE strongly supports the NEC's position that the Niagara Escarpment must no longer serve as long-term source of aggregate. CONE further submits that existing aggregate extraction operations within the Plan area must be phased out and rehabilitated as expeditiously as possible. In summary, CONE's position is premised upon:

- historical and current public concern over the undesirability of mineral extraction operations within the Plan area;

- the fundamental incompatibility of mineral extraction operations with the purpose and objectives of the Act and the Plan;

- the broad range of adverse site-specific and cumulative environmental effects associated with mineral extraction operations within the Plan area;

- the well-documented availability of alternative aggregate sources, including the Lockport/Amabel formation, outside the Plan area; and

- the available of alternative materials and technologies to meet or reduce the demand for aggregate.

Transcript, Volume 15, p. 2262 (Marion Plaunt)
Transcript, Volume 52, pp. 9619 - 22, 9630 - 39 (Ian Fraser)
Exhibit #8(B), Tab 11, p. 31
Exhibit #10 (MAC/PIAC Minutes), Tab 2(3), pp. 1 - 9
Exhibit #14 (NEC Position on PRD), Tab 11, pp. 1 - 4
Exhibit #34 (Excerpt from Proposed NEP), p. 65
Exhibit #298 (CONE Witness Statement #1)
: Tab 2, pp. 21 - 22
: Tab 4, pp. 3, 5
Exhibit #324 (Halton Witness Statement), pp. 17 - 22

(ii) Historical Background and Public Concern

93. Governmental and public concern over the integrity and future of the Niagara Escarpment emerged in the late 1950's, largely as a result of the significant removal and degradation of Escarpment landscapes by pit and quarry operations. As a result, numerous conferences, committee reviews, research studies and other initiatives were undertaken, including:

- a 1962 study by the Department of Municipal Affairs which concluded, inter alia, that quarrying should be prohibited within the Niagara Escarpment and that rehabilitation of existing pits and quarries be undertaken;

- the 1968 Niagara Escarpment Study (the Gertler Report) which concluded, inter alia, that new extraction operations should be prohibited within an "inner zone" approximately two miles wide centred on the Escarpment face;

- the provincial government's 1970 Design for Development proposal which recommended that "it is important to maintain... the Niagara Escarpment for recreation and open space";

- the passage of the Niagara Escarpment Protection Act, 1970 and the Pits and Quarries Control Act, 1971, which served to restrict and regulate extraction operations along the Niagara Escarpment;

- the 1972 Niagara Escarpment Task Force Report, which recommended that new pits and quarries, including waysides, be prohibited within a "restrictive zone" whose boundaries included prominent Escarpment features, unique natural areas, scenic areas and recreational sites. This Report also recommended that where a licenced pit or quarry within the restrictive zone conflicted with Escarpment objectives, the provincial government should make every effort to relocate the operation;

- the 1973 Niagara Escarpment Policy Statement, which stated: "Aggregate production is, by its very nature, disruptive to the natural environment. No amount of 'cosmetic surgery' can hide the fact that a pit or quarry is incompatible with the accepted policy of preserving the Niagara Escarpment." The policy also provided that new pits and quarries, including waysides, shall be prohibited within a broad "restrictive zone" (which was 25% larger than the current Plan area), and that the provincial government will work with site operators to relocate licenced pits and quarries which conflict with the goals and objectives for the Escarpment;

- the passage of the 1973 Niagara Escarpment Planning and Development Act, which did not (and still does not) guarantee that pit and quarry operations will remain permitted uses within the Plan area; and

- the 1979 Proposed Plan for the Niagara Escarpment, which provided, inter alia, that "the Escarpment not be considered as a permanent source of aggregate", and that existing licenced pits and quarries be re-evaluated with the objective of protecting the Escarpment, contiguous forests, environmentally sensitive areas, other areas of environmental concern (i.e. groundwater recharge areas) and sensitive archaeological sites.

Transcript, Volume 15, pp. 2248 - 60 (Marion Plaunt)
Exhibit #8(B), Tab 11, pp. 6 - 16
Exhibit #33 (Niagara Escarpment Policy Statement)
Exhibit #34 (Excerpt from Proposed Plan), pp. 64 - 65
Exhibit #87 (Gertler Report), p.6
Exhibit #88 (Task Force Report), pp. 58 - 59

94. Given this historical background, CONE submits that the NEC's proposed prohibition of new or expanded pits and quarries within the Plan area is consistent with the evolution of Escarpment-related policies and objectives. In CONE's view, this

prohibition is long overdue and must be recommended by the Hearing Officers during this Five Year Review. Similarly, CONE submits that the proposed phase-out and rehabilitation of existing operations is a long overdue, logical and necessary extension of the historical evolution of Escarpment-related policies and objectives.

Transcript, Volume 52, pp. 9630 - 43 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)
: Tab 2, pp. 21 - 22
: Tab 4, pp. 3, 5 - 6

95. CONE further submits that the proposed prohibition/phase-out is responsive to the increasingly widespread public disapproval of pits and quarries within the Plan area. CONE notes that numerous individuals and groups have participated within the Five Year Review in order to express strong opinions against the continuation of pits and quarries within the Plan area. It is submitted that the Hearing Officers should carefully consider and give considerable weight to these public submissions, particularly since they reflect a broad consensus on the undesirability of allowing extraction operations within the Plan area.

Transcript, Volume 7B, pp. 1069 - 74 (David Hughes)
Transcript, Volume 7B, pp. 1144 - 47 (P. Guenther)
Transcript, Volume 10, pp. 1600 - 03 (L. MacMillan)
Transcript, Volume 12, pp. 1838 - 39 (W. Bryden)
Transcript, Volume 12, pp. 1845 - 47 (E. Salmond)
Transcript, Volume 47, pp. 8813 - 14 (J. Smith)
Transcript, Volume 77, pp. 14324 - 25 (P. Follet)
Exhibit #10 (MAC/PIAC Minutes), Tab 2(3), pp. 1 - 9
Exhibit #12(C) :Tab 1, pp. 1 - 2
: Tab 6, pp. 1 - 4
: Tab 10, pp. 4 - 12
: Tab 11, pp. 1 - 3
: Tab 15, p. 2
: Tab 16, pp. 1 - 3
: Tab 17, pp. p. 1
: Tab 31, pp. 3 - 4
: Tab 32, p. 1
Exhibit #12(E) : Tab B, pp. 1 - 2
: Tab C, p. 20
: Tab D, pp. 1 - 4
: Tab G, pp. 3 - 4
: Tab H, pp. 5 - 6, 9
: Tab J, p. 3
: Tab K, p. 3
: Tab L, pp. 5 - 6, 11, 18

: Tab M, pp. 4 - 6, 29
: Tab S, p. 31
: Tab U, pp. 1 - 2
: Tab W, pp. 3, 16
Exhibit #29, (Caledon Ratepayers Association), pp. 1 - 6
Exhibit #79, (Supplementary Comments), Tab 10
Exhibit #183, (D. Alexander), pp. 2 - 3
Exhibit #241 (Ruth Grier Speech to CONE)

(iii) Conflict with the NEPDA and the NEP

96. As described above in PART III (A), the purpose and objectives of the Act and the Plan are primarily intended to protect and maintain the physical, natural and visual Escarpment environment:

> ...the Act emphasizes the maintenance and enhancement of the natural environment and provisions for development "compatible" with the natural environment. Neither the NEPDA nor the Plan has the purpose or objective of identifying, protecting or ensuring the availability of aggregate resources to meet future needs or demands.

NEPDA, s.2 and s.8
Exhibit #14, Tab 11, p. 2

97. Pits and quarries result in the permanent removal of Escarpment resources and the visual and physical degradation of the natural environment and the open landscape character of the Plan area. Accordingly, CONE firmly submits that extraction operations are not consistent with the purpose and objectives of the Act and the Plan:

> Aggregate mining operations by open pit and quarry conflict directly with the spirit and purpose of the Act and the Plan. The impacts of mining and associated activities are devastating and widespread. Over much of the Niagara Escarpment area, they continue to constitute the greatest threat to protection of the area's environment.

NEPDA, s.2 and s.8
Transcript, Volume 15, pp. 2266 - 67 (Marion Plaunt)
Transcript, Volume 18, pp. 2705 - 06 (Marion Plaunt)
Transcript, Volume 18, p. 2734 (M. Johnson)
Transcript, Volume 52, pp. 9630 - 32 (Ian Fraser)
Exhibit #8(B), Tab 11, pp. 30 - 31
Exhibit #14, Tab 11, pp. 2 - 3
Exhibit #298 (CONE Witness Statement #1), Tab 2, p. 21

98. For the foregoing reasons, CONE submits that mineral extraction operations are clearly and fundamentally incompatible with the purpose and objectives of the Act and the Plan. Due to their inherently disruptive nature, pits and quarries do not maintain or enhance the natural integrity or continuity of the Niagara Escarpment and land in its vicinity. Similarly, pits and quarries do not maintain or enhance the open landscape character of the Plan area, nor do they protect unique ecologic areas, preserve the natural scenery, or maintain the quality or character of natural streams and water resources within the Plan area. Accordingly, CONE submits that the Hearing Officers should firmly reject any suggestion that pits and quarries are somehow compatible with the purpose and objectives of the Act and the Plan.

Transcript, Volume 15, pp. 2266 - 67 (Marion Plaunt)
Transcript, Volume 18, pp. 2705 - 06 (Marion Plaunt)
Transcript, Volume 52, pp. 9630 - 32 (Ian Fraser)
Transcript, Volume 42A, p. 7768 (Dale Scott)
Transcript, Volume 82, pp. 15039 - 56 (Marion Plaunt)
Exhibit #8(B), Tab 11, pp. 30 - 31
Exhibit #14, Tab 11, pp. 2 - 3
Exhibit #298 (CONE Witness Statement #1), Tab 2, p. 21
Exhibit #448 (NEC Reply), Tab 1, p. 2

(iv) Environmental Impacts of Pits and Quarries

99. There is a broad range of adverse site-specific and cumulative environmental impacts which are associated with pits and quarries, including:

- physical removal of topsoil and vegetation cover;
- loss or degradation of wildlife habitat;
- increased off-site truck traffic;
- permanent alteration of the physical and natural environment;
- loss of landscape diversity and scenic value;
- noise and dust from blasting, drilling, crushing and related activities;
- degradation of surface water resources and permanent stream diversions;
- erosion and sedimentation of watercourses;
- groundwater interference and depletion; and
- alteration of watershed boundaries.

Transcript, Volume 18, pp. 2733 - 34 (M. Johnson)
Transcript, Volume 60, pp. 11108 - 12 (Mr. Stephen)
Transcript, Volume 63, pp. 11555 - 57 (A. Cooper)
Transcript, Volume 63, pp.11574 - 75, pp. 11579 - 81 (Dr. Kitchen)

Transcript, Volume 63, pp. 11593 - 96 (W. Clarke)
Transcript, Volume 82, pp. 15069 - 71 (Marion Plaunt)
Exhibit #14, Tab 11, pp. 2 - 3
Exhibit #316, Tab 2 (MOE Letter dated May 27, 1988)
Exhibit #327 (MOE Undertaking regarding Hydrogeological Impacts)
Exhibit #337 (Dr. Kitchen: Witness Statement), p. 3
Exhibit #343 (Summary of Environmental Impacts)
Exhibit #448 (NEC Reply), Tab 3, pp. 1 - 2

100. Even where rehabilitation is attempted, the environmental impacts resulting from extraction operations can be long-term or even permanent. These impacts have continued to occur notwithstanding the provisions of the Pits and Quarries Control Act, the Aggregate Resources Act or the Ontario Water Resources Act, which are Acts of general application and which are not "planning" statutes geared to the special circumstances of the Niagara Escarpment. In light of the apparent reluctance of the MNR to enforce its aggregate legislation, CONE submits that the existing regulatory regime for aggregate extraction is not adequate to safeguard the Escarpment environment, nor is it sufficient to ensure adequate public and NEC involvement in licencing decisions (i.e. the site plan replacement process) relating to the Plan area. Accordingly, CONE submits that pits and quarries cannot be viewed as innocuous "interim" uses; instead, they must be regarded as highly intensive and destructive activities with profound, long-term impacts upon the physical, natural and visual Escarpment environment. CONE submits that mineral extraction operations conflict directly with the purpose and objectives of the Act and Plan, and therefore requests that the Hearing Officers recommend the prohibition and phase-out of all pits and quarries, including waysides, within the Plan area.

Transcript, Volume 18, pp. 2710 - 14 (Marion Plaunt)
Transcript, Volume 42A, pp. 7695 - 97, 7710 - 15, 7719 - 27 (Dale Scott)
Transcript, Volume 42A, pp. 7832 - 37 (Z. Katona)
Transcript, Volume 63, pp. 11574 -81 (Dr. Kitchen)
Exhibit #243 (PQCA Enforcement Statistics), pp. 1 - 3
Exhibit #298 (CONE Witness Statement #1), Tab 4, p. 5

(v) Alternative Sources

101. Alternative sources of mineral aggregate resources, including the high-quality Lockport/Amabel formation, exist outside the Plan area, particularly within an 8 km distance of the Plan area. Even after applying various constraints, the amount of available resources outside the Plan area far exceed the licenced reserves and potential resources within the Plan area. It is noteworthy that no witness appearing before the Hearing Officers disagreed with this assessment, although comments were made about overburden thickness and other environmental and land use constraints

outside the Plan area. In addition, it must be noted that significant aggregate consumers (i.e. Ministry of Transportation) currently use non-Escarpment sources; for example, over 80 % of the Ministry of Transportation Central Region's "designated commercial sources" are outside the Plan area. Similarly, the Ministry of Transportation has not used wayside pits within the Plan Area since 1986. Accordingly, CONE submits that there is no justification for continuing to permit the Niagara Escarpment to serve as a source of cheap aggregate for road-building within the Greater Toronto Area (GTA) or for any other purpose. CONE further submits that undervaluing and rapidly depleting this resource is not consistent with the principles of sustainability or resource conservation. In summary, CONE concurs with the NEC's position that:

> In view of the significant mineral aggregate resources outside the Plan area, we have concluded that there is no "need" to consider the Niagara Escarpment Plan area as a source of aggregate both in the near and distant future.

Transcript, Volume 16, pp. 2337 - 46 (Marion Plaunt)
Transcript, Volume 16, pp. 2355 - 83 (M. Johnson)
Transcript, Volume 40, pp. 7352 - 53 (D. Cowan)
Transcript, Volume 42A, p. 7680 (Dale Scott)
Transcript, Volume 42A, p. 7774 (D. Billings)
Transcript, Volume 42A, pp. 7793 - 94 (D. Vanderveer)
Transcript, Volume 42A, pp. 7809 - 11 (Z. Katona)
Transcript, Volume 44, pp. 8313 - 14 (D. Billings)
Transcript, Volume 63, pp.11561 - 62 (A. Cooper)
Transcript, Volume 82, pp. 15071 - 90 (M. Johnson)
Exhibit #8(B), Tab 11, p. 30 and Appendices XVIII and XIX
Exhibit #14, Tab 11, p. 3
Exhibit #40 (NEC Technical Presentation), p. 25
Exhibit #213 (Government Witness Statement #2), Tab 7, p. 21
Exhibit #448 (NEC Reply), Tab 4, p. 1

102. CONE recognizes that utilizing non-Escarpment sources of aggregate may result in an increase in the delivered cost of aggregate within the GTA. However, CONE submits that this is a reasonable and necessary cost to bear in order to protect and maintain the Escarpment environment for the benefit of present and future generations. In addition, CONE submits that witnesses for the Aggregate Producers Association of Ontario (APAO) and the government ministries failed to provide credible or quantifiable estimates of the cost increases attributable to utilizing non-Escarpment sources. Similarly, although some witnesses speculated that the cost increases might be significant, these witnesses failed to conduct a full cost-benefit analysis to determine if these costs would be outweighed by the social, economic and ecological benefits associated with disallowing pits and quarries within the Plan area.

In CONE's view, the highest and best use of the Niagara Escarpment (and its mineral resources) is not to serve as raw material for road-building within the GTA; instead, the Escarpment (and land in its vicinity) will provide substantial social, economic and ecological benefits if it is allowed to remain intact as a continuous natural environment unimpaired by extraction operations. Finally, it is submitted that as long as Escarpment aggregate remains cheap and available for use, then aggregate producers and consumers have little or no incentive to field test and develop alternative sources outside the Plan area.

Transcript, Volume 16, pp. 2383 - 84 (M. Johnson)
Transcript, Volume 42A, p. 7691, 7764 (Dale Scott)
Transcript, Volume 42A, pp. 7775 - 76 (D. Billings)
Transcript, Volume 42A, p. 7807 (D. Vanderveer)
Transcript, Volume 42A, pp. 7818 - 20 (Z. Katona)
Transcript, Volume 42A, p. 7851 (Ted Harvey)
Transcript, Volume 62, pp. 11406, 11412 - 14, 11425, 11433 - 34 (C. Osler)
Transcript, Volume 63, p. 11563 - 64 (A. Cooper)

(vi) Specific Revisions Regarding Extraction Operations

103. For the foregoing reasons, CONE strongly supports the following revisions to the NEP proposed by the NEC staff:

- delete limited expansion of sandstone quarries as permitted uses within Escarpment Natural, Escarpment Protection, and Escarpment Rural Areas;

- delete provincial and municipal wayside pits as permitted uses within Escarpment Protection and Escarpment Rural Areas; and

- delete new licenced pits and quarries as permitted uses within Escarpment Rural Areas.

Transcript, Volume 15, pp. 2262 - 63 (Marion Plaunt)
Transcript, Volume 18, pp. 2646 - 49 (Marion Plaunt)
Transcript, Volume 52, pp. 9631 - 37 (Ian Fraser)
Exhibit #8(B), Tab 11, p. 47
Exhibit #20, pp. 6, 8, 12, 17, 25
Exhibit #298 (CONE Witness Statement #1), Tab 2, pp. 23 - 29

104. CONE has submitted a revised section on Mineral Resource Extraction Areas in order to reflect CONE's submission that existing operations should be phased out as expeditiously as possible (see CONE's proposed Part 1.10). This phase-out should

be planned in an open and consultative process, and the NEC should prioritize the most environmentally significant operations for early phase-out. CONE submits that all after uses should require an amendment to the NEP, and further submits that the NEC should be given a stronger and earlier role in determining appropriate rehabilitation for closed operations. CONE has submitted revised Development Criteria for Mineral Resource Extraction Areas to ensure that existing pits and quarries are phased out and re-designated to compatible after uses (see CONE's proposed Part 2.12).

Transcript, Volume 18, pp. 2707 - 08 (Marion Plaunt)
Transcript, Volume 52, pp. 9637 - 43 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)
: Tab 2, pp. 31 - 37
: Tab 4, pp. 5 - 6

L. PR #12: Commercial Development

105. The NEP's "commercial development" policies must be directed at achieving the purpose of s.2 of the Act and the Plan objectives described in s.8.

NEPDA, s.2 and s.8

106. Under the present NEP, the majority of non-agricultural commercial uses are directed towards urbanized or developed parts of the Plan Area. Only those uses with minimal impacts upon the open landscape character or the natural and visual environment are permitted within the protective designations of the Plan Area.

Transcript, Volume 14, pp. 2128 - 29 (K. Houghton)
Exhibit #8(B), Tab 12, pp. 1 - 2
Exhibit #14 (NEC Position on PRD), Tab 12, pp. 1-2

107. For example, new commercial uses are generally prohibited within the Escarpment Natural and Escarpment Protection Areas; however, a home occupation or cottage industry may be permitted within these two designations, and a home industry (within an accessory building) may also be permitted within the Escarpment Protection Area. New commercial uses are permitted within the Escarpment Rural Area, provided that they constitute "small scale commercial development servicing agriculture and the rural community". The definition of "agriculture" includes commercial uses directly related to or accessory to agriculture, and may include accessory buildings, structures or facilities associated with them.

Exhibit #8(B), Tab 12, pp. 1 - 2

108. Since Plan approval, the NEC has considered a number of commercial uses accessory to agriculture, including cottage wineries, fruit markets and livestock-related development. The development of small-scale commercial uses, directly related to and supporting existing compatible agricultural uses, is consistent with the purpose and objectives of the Act and the Plan. However, CONE submits that the NEP must define "small-scale" and place clear restrictions on the location and scale of small commercial uses accessory to agriculture in order to ensure that such uses are consistent with the purpose and objectives with the Act and the Plan.

Transcript, Volume 14, pp. 2125 - 26 and pp. 2129 - 30 (K. Houghton)
Exhibit #8(B), Tab 12, pp. 3 - 5
Exhibit #14 (NEC Position on PRD), p. 1

109. Accordingly, CONE supports the NEC's proposal to allow small-scale wineries and fruit markets as accessory agricultural uses within the Escarpment Protection Area and Escarpment Rural Area. Similarly, CONE supports the proposed definition of "small-scale", and submits that the proposed floor area limitation of 460 sq.m. is sufficient having regard for the size of existing commercial uses accessory to agriculture within the Plan area. Finally, CONE supports the NEC's proposed Development Criteria (Part 2.10, Agriculture) to evaluate individual proposals for such uses.

Transcript, Volume 14, pp. 2126 - 28 and pp. 2131 - 32 (K. Houghton)
Exhibit #8(B), Tab 12, pp. 22 - 25
Exhibit #20, pp. 16, 23, 70, 71, 149
Exhibit #447 (NEC Reply), Tab 3(J), pp. 1 - 2

M. PR #13: Niagara Escarpment Parks System

(i) General

110. The NEP's parks policies should be directed at achieving the purpose in s.2 of the Act and the Plan objectives described in s.8, including:

(a) to protect unique ecologic and historic areas;

(b) to maintain and enhance the quality and character of natural streams and water supplies;

(c) to provide opportunities for outdoor recreation;

(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible... and by preserving the natural scenery; and

(f) to provide for adequate public access to the Niagara Escarpment.

NEPDA, s.2 and s.8

111. The current NEP contains policies respecting the Niagara Escarpment Parks System, which includes over 100 parks owned and managed by a variety of public agencies. The Bruce Trail is an essential component of the Parks System since it links parks, distinctive landforms, and unique environments along the Niagara Escarpment. Each park has been classified in accordance with six Park classes created by the NEP, and it is intended that each park should have an approved management plan which conforms to the objectives and policies of the Act and the Plan.

Transcript, Volume 14, p. 2133 (K. Whitbread)
Exhibit #8(B), Tab 13, p. 3
Exhibit #20, pp. 87 - 135

112. CONE strongly supports the creation of a distinct and comprehensive Niagara Escarpment Parks System which provides both strategic and management direction in order to ensure that public lands are acquired and used in a manner consistent with the Act and the Plan. However, considerable amounts of public land are not currently caught by the Parks System, and the NEP contains no express policies which address non-park public land. CONE submits that this represents a significant shortcoming of the NEP, and submits that the Hearing Officers should recommend that the NEC inventory these excluded public lands and develop appropriate strategies and policies in the NEP to govern such lands.

Transcript, Volume 18, pp. 2668 - 69 (K. Whitbread)
Transcript, Volume 52, pp. 9645 - 46 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)
: Tab 3, p. 9
: Tab 4, pp. 8 - 9

113. CONE further submits that the efficacy of the current Niagara Escarpment Parks System is substantially hampered by:

- the fact that the MNR, not the NEC, is the lead parks agency within the Plan area;

- the fact that the NEC essentially plays a weak and consultative role regarding the management of parks;

- the excessive length of time sometimes required before public agencies (i.e. the Ontario Heritage Foundation) acquire critical properties;

- the inadequacy of the funding allocated for park acquisition, and the failure to establish an independent Niagara Escarpment Trust;

- the persistent failure of the MNR to produce a Parks System Manual;

- the general lack of approved park management plans which conform with the Act and the Plan;

- the fact that some public agencies (i.e. the Ontario Heritage Foundation) lack the expertise or staff to manage Escarpment public lands; and

- the fact that some public agencies (i.e. Ministry of Natural Resources) prefer to act as resource managers (i.e. timber production) rather than stewards or protectors of significant natural areas.

Transcript, Volume 18, pp. 2633 - 34, 2671 - 84 (K. Whitbread)
Transcript, Volume 39, pp. 7054 - 55 (Roger Martin)
Transcript, Volume 43, pp. 8091 - 92 (N. Hester)
Transcript, Volume 52, pp. 9646 - 49 (Ian Fraser)
Transcript, Volume 54, pp. 10050 - 52 (M. Taylor)
Exhibit #8(B), Tab 13, p.5
Exhibit #298 (CONE Witness Statement #1)
: Tab 3, pp. 10 - 12
: Tab 4. pp. 8 - 9
Exhibit #303 (CONE Witness Statement #2), Tab 2, pp. 11 - 13

114. For the foregoing reasons, CONE submits that the Hearing Officers should recommend the NEC be designated as the agency having primary responsibility for the planning and implementation of policies respecting the Niagara Escarpment Parks System. CONE further submits that the provincial government should establish within the NEC a special "public lands planning and administration branch" staffed with environmental planners and specialists in natural resource management. These persons would normally be expected to liaise with the technical staff of other agencies where particular expertise may be required for specific issues. Finally, CONE submits that an independent Niagara Escarpment Trust should be established to acquire lands, administer funds, sponsor research and other related activities.

Transcript, Volume 18, pp. 2683 - 84 (K. Whitbread)
Transcript, Volume 52, pp. 9651 - 55 (Ian Fraser)
Transcript, Volume 54, pp. 10050 - 52 (M. Taylor)
Exhibit #298 (CONE Witness Statement #1)
: Tab 3, pp. 12 - 14
: Tab 4, pp. 8 -9
Exhibit #299 (A Trust for the Niagara Escarpment), pp. 1 - 5

Exhibit #303 (CONE Witness Statement #2), Tab 2, pp. 11 - 12

(ii) Specific NEP Revisions Regarding Parks

115. Pending the implementation of the foregoing recommendations, CONE is in general agreement with the parks policy revisions proposed by the NEC. In particular, CONE supports the NEC's proposals in relation to:

- the objectives of the Parks System;
- the description of the Parks System concept;
- the acquisition and disposal of public land (Part 3.5);
- the addition and deletion of parks (Part 3.6);
- nodal parks, the Bruce Trail, municipal parks, and federal public lands;
- the park classification system (minus the Resource Management Area class due to its inappropriateness for public lands within the Plan area); and
- park zoning policy and master/management planning.

Transcript, Volume 14, pp. 2133 - 53 (K. Whitbread)
Exhibit #8(B), Tab 13, pp. 6 - 19
Exhibit #14 (NEC Position on PRD), Tab 13, pp. 3 - 17

116. CONE strongly opposes the MNR's suggestion that the park classifications within the Parks System be deleted pending the completion of park master planning. CONE agrees with the NEC's view that this proposal is regressive, and that it is essential that the NEP contain classifications and strategies which drive the master planning process. Moreover, very few public agencies have completed master plans which conform to the NEP, and there is currently little or no incentive for these agencies to engage in such planning. CONE further submits that MNR is in no position to advance such a proposal for two reasons; firstly, the MNR has failed to produce a Parks System Manual to assist public agencies in park planning and management; and secondly, the MNR's own "Provincial Parks Planning and Management Policies" are now 14 years old and are in need of serious revision.

Transcript, Volume 18, pp. 2674 - 75 (K. Whitbread)
Transcript, Volume 43, pp. 8077, 8090 - 94 (N.Hester)
Transcript, Volume 81, pp. 15007 - 10 (K. Whitbread)

Exhibit #212 (Government Witness Statement #1), Tab 9, p. 27
Exhibit #447 (NEC Reply), Tab 4(N), p. 2

117. CONE further opposes the MNR's suggestion that policies for resource management zones be deleted and that forest management policies be placed within the Parks System Manual. CONE agrees with the NEC's view that this "is unacceptable since it provides even less protection than the existing Plan". Again, it must be noted that the Parks System Manual is non-existent at this point, and there is no evidence from the MNR as to when the Manual will be approved and available for use. It is further submitted that the MNR's proposals on this point would effectively strip ANSI's of protection against the impacts of forest management, particularly since the MNR's own ANSI program provides no substantive protection of such areas. Similarly, CONE opposes the MNR's suggestion that existing uses under current park plans (including those not yet approved under Part 3 of the NEP) be recognized as permitted uses. CONE questions the necessity for such a change and submits that this proposal would serve as a disincentive for public agencies to bring existing non-conforming uses into conformity with the NEP.

Transcript, Volume 43, p. 8078 (N. Hester)
Transcript, Volume 81, pp. 15011 (K. Whitbread)
Exhibit #212 (Government Witness Statement #1), Tab 9, pp. 28 - 29
Exhibit #447 (NEC Reply), Tab 4(N), p. 2 - 4

118. CONE also opposes the suggestion by the MNR and the Ontario Heritage Foundation that proceeds from the sale or disposal of parks do not necessarily have to be returned to the acquisition fund. Given the well-recognized shortfall in the acquisition funding program, CONE submits that such proceeds should be specifically earmarked for the Fund.

Transcript, Volume 39, pp. 7064 - 66 (R. Martin) (N. Hester)
Transcript, Volume 81, pp. 15012 - 14 (K. Whitbread)
Exhibit #212 (Government Witness Statement #1)
: Tab 2, p. 9
: Tab 9, p. 31
Exhibit #447 (NEC Reply), Tab 4(N), pp. 5 - 6

119. Finally, CONE opposes the suggestion from the MNR and other agencies that the Parks System should be renamed as the "Niagara Escarpment Parks and Open Space System". CONE submits that such a name change is unnecessary and potentially confusing, and agrees with the NEC position that this name change should not be recommended by the Hearing Officers.

Exhibit #8(B), Tab 13, p. 6
Exhibit #212 (Government Witness Statement #1), Tab 9, pp. 24

N. PR #14: Heritage Resources

120. The NEP's "heritage resource" policies must be directed at achieving the purpose of the Act and the Plan objectives described in s.8, including:

(a) to protect unique ecologic and historic areas.

NEPDA, s.2 and s.8

121. Cultural heritage resources (i.e. heritage buildings, cultural landscapes, traditional use sites, etc.) are prevalent within the Plan Area and must be regarded as non-renewable resources. For example, 404 historic architectural sites have been inventoried, 79 of which are considered to be of major significance. Similarly, 230 archaeological sites have been registered in the Plan area, including 25 First Nations burial sites.

Transcript, Volume 14, pp. 2153 - 57 (Cecil Louis)
Transcript, Volume 39, p. 7140 (William Fox)
Exhibit #8(B), Tab 14, pp. 3 - 4
Exhibit #212 (Government Witness Statement), Tab 1, p. 8

122. The current NEP contains no objectives, policies or provisions which ensure meaningful protection and conservation of cultural heritage resources within the Plan area. Since Plan approval, the NEC has considered a number of proposals related to heritage resources, including applications to demolish buildings of heritage importance.

Transcript, Volume 14, pp. 14, 2155 (Cecil Louis)
Transcript, Volume 39, p. 7140 (William Fox)
Exhibit #8(B), Tab 14, pp. 1-4

123. CONE agrees with NEC's position that it is inappropriate to view cultural heritage resources merely as constraints to development within the Plan area. Instead, cultural heritage resources have inherent values worthy of protection in their own right, and specific objectives for cultural heritage protection must be set out within the NEP. CONE therefore supports the Ministry of Culture and Communication's proposed re-wording for the objective in Part 2.12 (Heritage) as well as the Ministry's proposed re-wording of s.1 thereunder.

Transcript, Volume 14, pp. 2154 - 2155 (Cecil Louis)
Transcript, Volume 39, pp. 7143 - 44 (William Fox)
Exhibit #8(B), Tab 14, pp. 4, 8
Exhibit #10 (MAC/PIAC Minutes), Tab 2(1), pp. 14 - 18
Exhibit #20, p. 77

Exhibit #212 (Government Witness Statement), Tab 1, p. 9
Exhibit #298 (CONE Witness Statement #1), Tab 2, pp. 5, 14

124. CONE supports the NEC's proposed references to cultural heritage throughout the NEP. CONE agrees in principle with the suggestion from the Ministry of Culture and Communication that a "Niagara Escarpment Heritage Master Plan" be developed for the Plan Area. However, given the Ministry's lack of specificity concerning the funding and implementation of this Master Plan, CONE submits that the Hearing Officers should only recommend that such a plan be given further consideration by the NEC.

Transcript, Volume 39, p. 7143 (William Fox)
Exhibit #14 (NEC Position on PRD), Tab 14, pp. 1 - 4
Exhibit #20, pp. 1 - 2, 10, 14 - 15, 22, 29, 40, 49 - 50, 78

O. PR #15: Pond Construction, Water Taking and Diversions

125. The NEP's policies related to water resources should be directed at achieving the purpose of s.2 of the Act and the Plan objectives described in s.8, including:

(a) to protect unique ecologic and historic areas; and

(b) to maintain and enhance the quality and character of natural streams and water supplies.

NEPDA, s.2 and s.8

126. Under the current NEP, farm ponds are permitted within the Escarpment Natural, Escarpment Protection and Escarpment Rural Areas as part of existing or new agricultural operations. Other ponds, such as recreational ponds, are permitted within the Escarpment Protection and Escarpment Rural Areas as "incidental uses" provided that they have minimal environmental impacts. The current NEP does not expressly address other water-related activities, such as water-taking or stream diversions, which are frequently undertaken by golf courses, aggregate operations, and other permitted uses within the Plan area. In summary, CONE agrees with the NEC's view that:

- the policies within the present Plan are deficient in providing direction regarding the evaluation of cumulative effects upon water resources; and

- the Development Criteria within the present Plan are weak in terms of protecting water resources and evaluating water-related applications.

Transcript, Volume 14, p. 2171 (D. Ramsay)

Exhibit #8(B), Tab 15, pp. 2 - 3 and pp. 42 - 43

127. Between June, 1985 to June, 1990, the NEC has considered 190 applications related to ponds. These applications have involved Escarpment Natural, Escarpment Protection, Escarpment Rural and Escarpment Recreation Areas, and approximately 90% of these applications have been approved by the NEC, largely within the Escarpment Protection Area.

Transcript, Volume 14, pp. 2163 - 65 (D. Ramsay)
Exhibit #8(B), Tab 15, pp. 5 - 7 and Appendix 1

128. Considerable concern has been expressed about the proliferation of ponds within the Plan area, particularly with respect to the potential public and private liability for damage or loss resulting from pond failure. Similarly, concern has been expressed about the site-specific and cumulative impacts of ponds on the water resources within the Plan area. Accordingly, in May, 1989 the NEC established a moratorium on new pond construction pending the completion of a comprehensive study of pond impacts. This moratorium was subsequently lifted to allow this issue to be examined in the context of the NEP Five Year Review.

Transcript, Volume 14, pp. 2157 - 58 (D. Ramsay)
Exhibit #8(B), Tab 15, pp. 9 - 10

129. When discussing the impacts of ponds, water-taking and water diversions, it must be noted that the Niagara Escarpment performs important hydrological functions:

> The Niagara Escarpment is a dominant physical feature of the landscape and provides the source and headwater areas of many streams, which in their natural state provided an unimpaired water quality. The highly permeable nature of the limestone and dolostone bedrock, particularly the Lockport and Amabel formation, makes it an important source of groundwater for springs feeding into numerous streams, wells for human use, and significant natural areas.

Exhibit #8(B), Tab 15, p. 24

130. There is a broad range of adverse environmental impacts associated with pond construction, water-taking, and water diversion activities, including:

- increase in water temperature and turbidity;
- fluctuation and/or reduction in downstream flows;
- loss of aquatic and riparian habitat;
- erosion and sedimentation;
- eutrophication from discharge or runoff of nutrients;

- degradation from discharge or runoff of contaminants;
- depletion of groundwater recharge; and
- interference with ecological functions and disruption of domestic, agricultural and municipal water supplies.

Transcript, Volume 14, pp. 2162 - 63 (D. Ramsay)
Exhibit #8(B), Tab 15, pp. 26 - 29

131. CONE supports the NEC position that pond construction, water-taking and water diversion activities within the Plan area "seriously jeopardize" the purpose and objectives of the NEPDA:

> Degradation of the quantity and quality of the surface and groundwater systems affects the health, aesthetics and quality of the natural Escarpment environment....

Transcript, Volume 14, p. 2158 and pp. 2166 - 67 (D. Ramsay)
Exhibit #8(B), Tab 15, p. 24

132. In addition, CONE supports the NEC's proposed "ponds" study and submits that it is appropriate, necessary and environmentally prudent to impose a moratorium on new non-essential ponds within the Plan area, particularly given the importance of the Escarpment's water resources. In particular, CONE supports the following changes to the NEP which have been proposed by the NEC:

- delete recreational ponds and other commercial ponds from the Escarpment Protection and Escarpment Rural Areas;

- delete farm ponds from the Escarpment Natural Area;

- permit only essential farm ponds in the Escarpment Protection and Escarpment Rural Areas;

- strengthen the Development Criteria in relation to enlargement of existing ponds, vegetative buffers, impoundment design, and water-taking and diversion in order to ensure that there are no further impacts on water quality or quantity; and

- define "farm pond", "cumulative effect", "Escarpment environment" and "non-farm/recreational pond" in the NEP.

Transcript, Volume 14, pp. 2157 - 81 (D. Ramsay)
Exhibit #8(B), Tab 15, pp. 43 - 44 and pp. 47 - 48
Exhibit #10 (MAC/PIAC Minutes), Tab 2(2), pp. 2 - 7

Exhibit #14 (NEC Position on PRD) Tab 15, pp. 1 - 2
Exhibit #20, pp. 11, 16, 23, 24, 48, 54, 60, 63 - 67, 141 - 143, 149 - 151
Exhibit #298 (CONE Witness Statement #1), Tab 3, p. 16
Exhibit #447 (NEC Reply), Tab 2 (G), pp. 1 - 8

133. In addition, CONE generally agrees with the NEC proposal to add new Development Criteria to protect fish habitat, but submits that these criteria must be expanded to include aquatic ecosystems in general.

Exhibit #14, Tab 21, p. 7
Exhibit #212 (Government Witness Statement #1), Tab , pp.

P. PR #16: Contour Changes

134. The NEP's policies related to contour changes must be directed at achieving the purpose in s.2 of the Act and the Plan objectives described in s.8, including:

(a) to protect unique ecologic and historic areas;
(c) to provide adequate opportunities for outdoor recreation; and
(d) to maintain and enhance the open landscape character of the Niagara Escarpment insofar as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

NEPDA, s.2 and s.8

135. The current NEP contains policies which permit the construction and use of facilities and structures which involve major regrading and contouring of Escarpment slopes. For example, golf courses, which require substantial terrain alteration and intensive management, are presently permitted within Escarpment Protection Areas despite the visual prominence and environmental significance of such Areas. Similarly, ski centre development, which requires ski runs, lifts and slides on Escarpment slopes, is presently permitted within Escarpment Recreation Areas. Golf courses and ski centres within the Plan area are subject to certain Development Criteria which are applicable to contour change and recreational development.

Transcript, Volume 14, pp. 2181 - 96 (D. Ramsay and K. Houghton)
Exhibit #8(B), Tab 16, pp. 2 - 4

136. Since 1985, the NEC has approved a number of proposed golf courses, many of which have resulted in extensive vegetation removal and significant contour changes within Escarpment Protection Areas. Similarly, the NEC has received many applications related to ski centre development, including proposals to place fill on the Escarpment brow in order to increase the topographic height of the Escarpment.

Transcript, Volume 14, pp. 2185 - 89 (D. Ramsay)
Transcript, Volume 14, pp. 2190 - 91 (K. Houghton)
Exhibit #8(B), Tab 16, pp. 2, 18 - 20, 24 - 28 and Appendix II

137. CONE submits that substantial alteration, re-contouring or placement of fill on the Escarpment brow or slopes is contrary to the objectives of the Act and the Plan. CONE agrees with the NEC view that the existing Plan policies are "inadequate in terms of providing for long-term protection of the Escarpment as a prominent and significant physical entity". CONE therefore submits that the Plan's policies and Development Criteria must be strengthened in order to protect the physical integrity and natural scenery of lands from the Escarpment brow to the toe of the slope. Similarly, CONE supports the NEC proposal to add a new "purpose" section to the Plan, but submits that the proposed wording should be modified to enhance the effectiveness of the statement of purpose.

NEPDA, s.2 and s.8
Transcript, Volume 14, p. 2182 (D. Ramsay)
Exhibit #14 (NEC Position on PRD), Tab 16, pp. 1, 4
Exhibit #20, p. 4

(i) Golf Courses

138. There are a number of adverse environmental effects associated with the construction, use and maintenance of golf courses and related commercial facilities, including:

- vegetation removal and habitat loss or fragmentation;
- regrading of terrain and infrastructure installation;
- filling, dredging, or drainage of riparian areas;
- drift, runoff or leaching of pesticides used for turf maintenance;
- runoff or leaching of fertilizers used for turf maintenance;
- depletion or degradation of surface water or groundwater resources; and
- loss of natural scenery and landscape character.

Transcript, Volume 14, pp. 2185 - 89 (D. Ramsay)
Transcript, Volume 81 p. 14911 - 24 (D. Ramsay)
Exhibit #8(B), Tab 16, pp. 9 - 10, 27 - 30
Exhibit #14 (NEC Position on PRD), Tab 16, pp. 1 - 2
Exhibit #343 (Summary of Environmental Impacts of Development)
Exhibit #447 (NEC Reply), Tab 2, pp. 1 - 5

139. In light of the foregoing discussion, CONE submits that golf courses cannot be viewed as environmentally benign or non-intensive recreational development. Accordingly, CONE adopts the NEC's position that golf course development conflicts with the

policies and objectives for Escarpment Protection Areas, particularly as golf courses become increasingly complex in terms of course design and construction. CONE therefore supports the NEC's proposal to specifically delete golf courses as a permitted use within Escarpment Protection Areas, and to add a specific Development Criterion that requires golf courses, where permitted, to be designed and maintained to minimize impacts upon the Escarpment environment. CONE further submits that golf courses should also be deleted as a permitted use within Escarpment Rural Areas on the grounds that such intensive development cannot be justified where suitable land for such development exists elsewhere within other designations and outside the Plan Area.

Transcript, Volume 14, p. 2183 and p. 2193 (D. Ramsay)
Transcript, Volume 53, pp. 9872 - 74 (Ian Fraser)
Exhibit #8(B), Tab 16, pp. 14, 17, 27 - 31
Exhibit #14 (NEC Position on PRD), pp. 1 - 6
Exhibit #20, pp. 16, 80
Exhibit #298 (CONE Witness Statement #1), Tab 2, p. 13

(ii) Ski Centres

140. The site-specific and cumulative effects of physical alteration and development of Escarpment brows, slopes and toes through extensive ski centre development are contrary to both the NEPDA and the Plan, which emphasize the protection and maintenance of the physical, natural and visual Escarpment environment. Thus, CONE submits that the Plan policies and Development Criteria must be strengthened to ensure that such development is consistent with the purpose and objectives of the Act and the Plan. In particular, CONE agrees with the NEC proposals that:

- the objectives for the Escarpment Recreation Area be revised to require the minimization of impacts of recreational development upon the Escarpment environment; and

- the addition of "Escarpment Slopes" Development Criteria to require that recreational uses be designed to utilize existing contours and to prohibit substantial regrading, recontouring or the placement of fill on Escarpment brows and slopes.

Transcript, Volume 14, pp. 2189 - 93 (K. Houghton)
Transcript, Volume 14, pp. 2194 - 96 (D. Ramsay)
Exhibit #8(B), Tab 16, pp.15 - 17, 21 - 23, 32 - 35
Exhibit #14 (NEC Position on the PRD), pp.1 - 6
Exhibit #20, pp. 4, 16, 40, 43, 51-52, 79, 80
Exhibit #298 (CONE Witness Statement #1), Tab 2, pp. 19 - 20

Q. PR #17: Provincial Policy Statements

141. Section 3(5) of the Planning Act provides as follows:

> In exercising any authority that affects any planning matter, the council of every municipality, every local board, every minister of the Crown, and every ministry, board, commission or agency of the government, including the Municipal Board and Ontario Hydro, shall have regard to policy statements issued under subsection (1).
>
> Planning Act, s.3(5)

142. To date, only three provincial policy statements (Mineral Aggregate Resource Policy Statement; Floodplain Planning Policy Statement; and Land Use Planning for Housing Policy Statement) have been approved by Cabinet and issued pursuant to s.3 of the Planning Act. Other policy statements (i.e. wetlands protection; food land preservation) exist in draft form but have not been approved to date. The Food Land Guidelines, administered by the Ministry of Agriculture and Food, represent provincial policy but have not been formally approved as a policy statement under the Planning Act.

> Transcript, Volume 15, pp. 2605 - 06 (Cecil Louis)
> Transcript, Volume 39, pp. 7174 - 75 (Sharon Johnston)
> Transcript, Volume 42A, p. 7885 (N. Hester)
> Exhibit #8(B), Tab 17, pp. 3 - 4
> Exhibit #213 (Government Witness Statement #2), Tab 8, p. 9

143. The current NEP contains both generic and specific references to provincial policy statements and the Food Land Guidelines. However, CONE submits that the NEP is a self-contained "stand-alone" provincial policy document for the Plan area. Accordingly, CONE supports the NEC's proposed deletion of references to provincial policy statements from the NEP for the following reasons:

(a) The NEP is a detailed provincial environmental land use plan which has been developed publicly, approved by Cabinet, and governed by special legislation (i.e. NEPDA);

(b) The NEP does not require specific reference to provincial policy statements in order to enable the NEC to "have regard" for such policy;

(c) As a matter of statutory interpretation, the specific provisions of the NEP prevail over the general provisions of provincial policy statements in cases of conflict; and

(d) The NEC would be provided greater flexibility to give appropriate weight to provincial policy statements when considering Escarpment-specific proposals which would otherwise be caught by general provincial policy.

Transcript, Volume 15, pp. 2205 - 06 (Cecil Louis)
Transcript, Volume 42A, pp. 7843 -44 (Ted Harvey)
Exhibit #8(B), Tab 17, pp. 4 - 9
Exhibit #10 (MAC/PIAC Minutes), Tab 2(2), p. 7
Exhibit #14, (NEC Position on PRD), Tab 17, pp. 1 - 2
Exhibit #20, pp. 19, 26, 27, 49, 70, 73
Exhibit #79, Tab 1, p. 2

144. It must be noted that the Ministry of Municipal Affairs' application guidelines for provincial policy statements clearly recognizes that there may be valid reasons not to follow or apply provincial policy at the local level. As noted above, CONE submits that there are compelling policy and legal reasons not to automatically apply provincial policy statements within the Plan area. Nevertheless, the NEC's proposed policy that "development shall have regard for matters of Provincial Interest" (as defined in the NEP) will ensure that the NEC continues to have regard for provincial policy.

Transcript, Volume 15, pp. 2206 - 07 (Cecil Louis)
Transcript, Volume 42A, p. 7839 (Ted Harvey)
Exhibit #14, (NEC Position on PRD), p.2
Exhibit #213, (Government Witness Statement #2), Tab 9, p. 4

R. PR #18: Escarpment Link

145. The matter referred to in Policy Paper #18 is not part of the Five Year Review since it is being processed as a separate NEP amendment.

Transcript, Volume 15, p. 2207 (M. Orr)
Exhibit #5(A), Tab 2, p. 1

S. PR #19: Kolapore Uplands

146. The matter referred to in Policy Paper #19 is not part of the Five Year Review since it is being processed as a separate NEP amendment.

Transcript, Volume 15, p. 2207 (M. Orr)
Exhibit #5(A), Tab 2, p. 1

T. PR #20: Housekeeping Changes

147. Since Plan approval in June 1985, a variety of site-specific amendments, policy interpretations, mapping updates, and other modifications have occurred which require "housekeeping" changes to the NEP within the current Five Year Review. Except as otherwise provided in these submissions, CONE generally supports the changes proposed by the NEC in Policy Paper #20. However, CONE remains concerned that proper notice has not been provided to owners of Valley Schuss, Vandeleur and Aspen Ski Areas, which may be affected by mapping changes proposed as "housekeeping" by the NEC. Accordingly, although CONE supports the proposed redesignations, CONE submits that these mapping changes should be deferred to allow these landowners to be notified and to make submissions, if any, on the proposed changes.

Transcript, Volume 15, pp. 2207 - 36 (K. Houghton)
Exhibit #8(B), Tab 20, pp. 1 - 23
Exhibit #10 (MAC/PIAC Minutes), Tab 2(2), p. 23
Exhibit #14 (NEC Position on PRD), Tab 20, pp. 1 - 15

U. PR #21: Comments Received and Other Issues Raised

(i) General

148. CONE made detailed submissions to the NEC in June and July, 1990 and attended all Open Houses in order to provide the NEC with its views on a wide variety of Escarpment-related matters, including parks acquisition and funding, resource management policies, NEP implementation, and environmental monitoring. Given the significance and relevance of these matters, CONE was surprised to learn that the NEC "staff review [of the comments received] did not identify additional major topics which needed to be included at this time." Similarly, CONE was surprised to discover that NEC staff characterized these matters as "non-plan issues" which were to be dealt with under the "parallel review" conducted by the Ministry of the Environment (MOE).

Transcript, Volume 52, pp. 9600 - 01, 9663 - 64 (Ian Fraser)
Exhibit #8(B), Tab 21, p. 1
Exhibit #298 (CONE Witness Statement #1), Tabs 2 and 3

149. CONE submits that the above-noted matters are plan issues and that they are properly before the Hearing Officers as part of this Five Year Review. CONE further submits that the Hearing Officers should consider and make recommendations respecting these matters (as described in these submissions),

particularly since the MOE's "parallel review" does not appear to include the same formal public consultation opportunities as the Five Year Review.

Transcript, Volume 18, pp. 2651 - 53 (Cecil Louis)
Transcript, Volume 40, pp. 7295 - 301 (Mel Plewes)
Transcript, Volume 52, pp. 9656 - 59, 9664 - 66 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1), Tab 4, pp. 6 - 10

(ii) Biosphere Reserve

150. CONE supports the NEC's proposal to include within the NEP a reference to the Escarpment's designation as an internationally significant Biosphere Reserve.

Transcript, Volume 15, p. 2337 (Cecil Louis)
Exhibit #14 (NEC Position on PRD), Tab 21, p. 1
Exhibit #20, p. 2

(iii) Escarpment Natural Area

151. CONE supports the NEC's proposal to revise the NEP's introduction, designation criteria, objectives, and permitted uses for the Escarpment Natural Area. However, CONE has submitted additional rewording as well as an implementation strategy, which will enhance the effectiveness of these policies. CONE has submitted similar implementation strategies for Escarpment Protection and Escarpment Rural Areas.

Transcript, Volume 15, pp. 2237 - 39 (Cecil Louis)
Transcript, Volume 52, pp. 9607 - 15 (Ian Fraser)
Exhibit #14 (NEC Position on PRD), Tab 21
Exhibit #20, pp.10 - 11
Exhibit #298 (CONE Witness Statement #1), Tab 2, pp. 5 - 7

(iv) General Development Criteria

152. CONE supports the NEC's proposal to amend Development Criteria 2.2 in order to ensure that development is located on the least restrictive designation within lots covered by more than one designation. CONE has submitted a number of new and modified Development Criteria with respect to proposed development within the Plan Area (i.e. sec CONE's proposed Part 2).

Transcript, Volume 15, pp. 2239 - 41 (Cecil Louis)
Exhibit #14 (NEC Position on PRD), Tab 21
Exhibit #20, p. 49

(v) New Development Affecting Water Resources

153. CONE is in general agreement with the NEC's proposal to incorporate Development Criteria designed to protect water resources, floodplains and fisheries habitat. However, CONE submits that the Development Criteria should aim to protect all elements of aquatic ecosystems, wildlife habitat, wooded areas, and other significant natural areas (i.e. see CONE's proposed Part 2.7).

Transcript, Volume 15, p. 2241 (Cecil Louis)
Exhibit #14 (NEC Position on PRD), Tab 21
Exhibit #20, pp. 63 - 64

(vi) Wetlands

154. CONE strongly supports the NEC's proposal to incorporate Development Criteria designed to protect all wetlands within the Plan area. Wetlands are increasingly threatened natural resources which perform important ecological functions and provide overall landscape diversity. Because approximately 75 - 80% of the original wetlands in southern Ontario have been lost or degraded, CONE submits that the NEP must aim to protect against any further loss of wetland area and function within the Plan area. CONE submits that the wetlands policies proposed by the MNR (which are based upon the flawed draft Wetlands Policy Statement) are fundamentally deficient because they fail to fully protect wetland area; fail to require restoration and fail to properly define wetland function. It is further submitted that in light of s.8(a) and (b) of the NEPDA, the wetlands policies within the NEP should be much stronger than the draft Wetlands Policy Statement and should extend protection to all classes of wetlands and provide adequate setback requirements.

NEPDA, s.2 and s.8
Transcript, Volume 15, pp. 2241 - 43 (Cecil Louis)
Transcript, Volume 18, pp. 2693 - 97 (D. Ramsay)
Transcript, Volume 42A, pp. 7887 - 98 and -- (N. Hester)
Transcript, Volume 43, pp. 8064 - 70 (N. Hester)
Transcript, Volume 81, pp. 14939 - 45 (D. Ramsay)
Exhibit #14 (NEC Position on PRD), Tab 21
Exhibit #20, p. 64
Exhibit #212 (Government Witness Statement #1), Tab --,p.
Exhibit #245 (NHL Wetlands Resolution)
Exhibit #298 (CONE Witness Statement #1), Tab 4, p. 4
Exhibit #447 (NEC Reply), Tab 2(H), pp. 1 - 3

(vii) Forest Management

155. CONE generally supports the NEC's proposal to incorporate Development Criteria designed to protect forests within the Plan area, particularly those within sensitive areas or steep slopes.

Transcript, Volume 15, pp. 2243 44 (Cecil Louis)
Exhibit #14 (NEC Position on PRD), Tab 21, p. 9

156. Forests perform important ecological functions (i.e. wildlife habitat and corridors, maintenance of genetic diversity) and provide significant non-timber values (i.e. aesthetic, scientific and recreational values), particularly where there are large contiguous stands of mature trees. Accordingly, CONE submits that it is important to maintain and protect forest resources throughout the Plan area. CONE further submits that clearcutting and commercial timber management should not be permitted on public lands within the Plan area because:

- such practices conflict with the objective of protecting unique ecologic or historic areas pursuant to s.8(a) of the NEPDA;
- such practices conflict with the objective of protecting water quality and character pursuant to s.8(b) of the NEPDA;
- such practices conflict with the objective of providing adequate opportunities for outdoor recreation pursuant to s.8(c) of the NEPDA;
- such practices do not represent "compatible forestry" pursuant to s.8(d) of the NEPDA;
- such practices conflict with the objective of "preserving the natural scenery" pursuant to s.8(d) of the NEPDA;
- there are alternative wood supply sources outside the Plan area; and
- provincial forestry policies and programs are not appropriate for the Plan area since they are generally driven by industrial production targets rather than environmental protection objectives.

NEPDA, s.2 and s.8
Transcript, Volume 15, pp. 2243 - 44 (Cecil Louis)
Transcript, Volume 18, pp. 2633 - 34 (K. Whitbread)
Transcript, Volume 18, pp. 2698 - 04 (Cecil Louis)
Transcript, Volume 52, p. 9615 (Ian Fraser)
Exhibit #14 (NEC Position on PRD), Tab 21, p. 9 - 10

Exhibit #20, pp. 68 - 69, 140

157. For the foregoing reasons, CONE further submits that "forest management" should not be a permitted use within Escarpment Natural, Escarpment Protection, and Escarpment Rural Areas. The term "forest management" includes a wide variety of exploitative activities, such as building access roads, clearcutting, and pesticide spraying. CONE submits that such activities conflict directly with the purpose and objectives of the Act and the Plan, and strongly submits that they should not be permitted within the three major designations. Moreover, Regulation 685/80 effectively places major aspects of forest management beyond the control or influence of the NEC. Accordingly, CONE submits that this Regulation must be amended to give the NEC greater jurisdiction over the location, design and intensity of forest management activities within the Plan area.

O.Reg. 685/80, s.5, para. 13
Transcript, Volume 18, pp. 2628 - 31 (Marion Plaunt)
Transcript, Volume 18, pp. 2631 - 33 (K. Whitbread)
Transcript, Volume 52, pp. 9612 - 15 (Ian Fraser)
Transcript, Volume 53, pp. 10048 - 552 (M. Taylor)
Exhibit #298 (CONE Witness Statement #1): Tab 2, p. 7
: Tab 3, p. 6
: Tab 4, p. 3
Exhibit #303 (CONE Witness Statement #2), Tab 2, pp. 11 - 13

(viii) ANSI's

158. CONE supports the NEC's proposal to redefine "Areas of Natural and Scientific Interest" and to incorporate Development Criteria which serve to protect significant ANSI's within the Plan area. However, CONE has submitted wording which enhances the effectiveness of these criteria (see CONE's proposed Part 2.7.2).

Transcript, Volume 15, pp. 2244 - 45 (Cecil Louis)
Exhibit #14 (NEC Position on PRD), Tab 21, p. 11
Exhibit #20, pp. 80 - 81, 138

PART V - EXISTING LOTS OF RECORD

159. As described above in Part IV (B), CONE generally supports the NEC's proposed "new lots" policies because they potentially dampen development pressures within the Escarpment Natural, Escarpment Protection and Escarpment Rural Areas. However, CONE is obliged to point out that approximately 14,000 lots already exist or have been potentially created within these designations since 1978. While it is unclear how many of these lots have been developed and how many remain vacant, CONE submits that such lots represent significant opportunities for new residential

development which may ultimately compromise the purpose and objectives of the Act and the Plan. As a result, CONE submits that the Hearing Officers must recommend the inclusion of restrictive "new lots" policies within the NEP to prevent further lot creation and fragmentation of the Escarpment landscape. Similarly, the Hearing Officers should direct the NEC to conduct an updated survey of these lots, and to identify and implement appropriate strategies and mechanisms (i.e. land trusts, stewardship agreements, public acquisition) to ensure that the use or development of existing lots does not adversely affect the physical, natural and visual Escarpment environment.

Transcript, Volume 14, pp. 2053 - 62 (Marion Plaunt)
Exhibit #8(A), Tab 2, p. 5 (Appendix III)
Exhibit #298 (CONE Witness Statement #1), Tab 4, p. 2
Exhibit #447 (NEC Reply), Tab 5, p. 1

PART VI - EXISTING vs. LEGAL NON-CONFORMING USES

160. The current Plan provides that "the objective is generally not to disrupt existing uses" (Part 2.3, Existing Uses). The intent of this provision was to allow the continuation or limited expansion of uses which legally existed at the time of Plan approval. However, CONE agrees with the NEC's view that the current wording fails to properly recognize and express the essential elements of legal non-conforming uses.

Transcript, Volume 15, pp. 2214 - 15 (K. Houghton)
Exhibit #8(B), Tab 20, pp. 8 - 10
Exhibit #14 (NEC Position on PRD), Tab 20, p. 1

161. Section 34(9)(a) of the Planning Act provides as follows:

> No by-law passed under this section applies...to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose (emphasis added).
>
> Planning Act, s.34(9)(a)

162. Under s.34(9)(a) of the Planning Act, there are two key prerequisites to establishing legal non-conforming status: first, the use must be legal when it commenced; and secondly, the use must be continuous since its commencement. Limited changes or expansions of a legal non-conforming use may occur over time; in general, however, such uses should eventually be brought into conformity with current regulatory requirements (i.e. by changing to a more compatible use).

Rogers, Law of Canadian Municipal Corporations, s.138.61 - .65
Transcript, Volume 15, pp. 2214 - 15 (K. Houghton)
Exhibit #8(B), Tab 20, pp. 9 - 10

163. CONE supports the NEC's proposal to revise the Development Criteria to better reflect the basic principles of legal non-conforming uses. In addition, CONE supports the NEC's proposal to delete "legal non-conforming uses" as "Permitted Uses" under the individual designations of the Plan. CONE submits that it is redundant, incorrect and misleading to list legal non-conforming uses as permitted uses. CONE further submits that the new date for assessing legal non-conformity is the date of the approval of the new NEP policies arising out of this Five Year Review.

Transcript, Volume 15, pp. 2214 - 15, 2225 - 27 (K. Houghton)
Exhibit #8(B), Tab 20, pp. 10 - 11
Exhibit #14 (NEC Position on PRD) pp. 1, 4 - 5, 12 - 14
Exhibit #20, pp.15, 23, 41, 46, 52-53, 142
Exhibit #447 (NEC Reply), Tab 3(L), p. 1

PART VII - IMPLEMENTATION ISSUES

164. As described above in PART III (B) and PART IV (U), CONE submits that matters related to NEP implementation are relevant and significant, and that these matters are properly before the Hearing Officers within this Five Year Review. In particular, CONE submits that the NEP and its implementation are inextricably linked and should be considered concurrently. CONE further submits that it is unfortunate that the Ministry of the Environment's "program review" appears to be proceeding independently of the Five Year Review and appears to lack formal public consultation opportunities.

Transcript, Volume 18, pp. 2649 - 53 (Cecil Louis)
Transcript, Volume 40, pp. 7310 - 11 (Mel Plewes)
Transcript, Volume 52, pp. 9656 - 59, 9664 - 66 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1)
: Tab 3, pp.5 - 6
: Tab 4, pp. 6 - 10

165. With respect to NEP implementation, CONE makes the following submissions:

- both the NEP and the individual designations should contain explicit integrated strategies for achieving the objectives and policies of the Act and the Plan;

- a comprehensive environmental inventory and monitoring plan must be developed and implemented by the NEC and/or Ministry of the Environment as expeditiously as possible;

- where possible, measurable targets for environmental objectives should be established within the NEP in order to assess the progress in achieving the objectives and policies of the Act and the Plan;

- the NEC must be given greater jurisdictional control over the planning and implementation for environmental protection and natural resource management within the Plan area;

- the roles and responsibilities of other ministries and agencies must be clarified with respect to environmental protection, natural resource management and development control within the Plan area; and

- responsibility for developing and administering the NEP should not be devolved to local or regional municipalities because, inter alia, these municipalities (unlike the NEC) have a direct and financial interest in seeing development proceed (i.e. increased tax base), and lack a holistic perspective on the Plan area.

Transcript, Volume 18, pp. 2605 - 12 (Cecil Louis)
Transcript, Volume 40, pp. 7310 - 11 (Mel Plewes)
Transcript, Volume 52, pp. 9602 - 05, pp. 10019 - 20 (Ian Fraser)
Exhibit #298 (CONE Witness Statement #1):
: Tab 3, pp. 5 - 8
: Tab 4, pp. 2, 7 - 10

166. With respect to monitoring, it is clear that the NEC has conducted various forms of monitoring leading up to the Five Year Review. Nevertheless, as described above in PART III (B), CONE submits that the nature and quality of the NEC's baseline information and monitoring programs must be substantially enhanced as soon as possible. However, CONE submits that it is appropriate and prudent for the NEC to propose new revisions to the Plan (i.e. regarding pond construction and aggregate extraction) where the preliminary evidence suggests that the activities in question are causing adverse and perhaps irreversible environmental harm. In such cases, it is undesirable and unnecessary to await the final results of a full-scale environmental monitoring program before NEP revisions can be considered. Given the provincial and international significance of the Niagara Escarpment, CONE submits that an "anticipate-and-prevent" approach is far more preferable and justifiable than a "wait-and-see" approach. CONE further submits that the NEC's proposed revisions have been properly documented and justified within this Five Year Review.

Transcript, Volume 52, pp. 9656 - 59, 9666 (Ian Fraser)
Transcript, Volume 54, pp. 10017 - 18 (Ian Fraser)
Transcript, Volume 81, pp. 14888 - 99 (Cecil Louis)

Exhibit #298 (CONE Witness Statement #1) : Tab 3, pp. 15 - 16
: Tab 4, pp. 9 - 10
Exhibit #447 (NEC Reply), Tab 1(D), pp. 1 - 2

PART VIII - RESOURCE MANAGEMENT ISSUES

167. As described above in PART IV (M) and PART VII, CONE submits that the current NEP does not provide the NEC with adequate jurisdictional control respecting natural resource management within the Plan area. Accordingly, natural resource management within the Plan area has largely been the exclusive domain of ministries and agencies whose mandates and programs are not necessarily consistent with the environmental protection imperatives of the Act and the Plan. The Ministry of Natural Resources, for example, "is driven by ... forest management quotas per Region and therefore there is some conflict with the Niagara Escarpment Plan in completing that quota." In CONE's view, environmental protection should supersede resource production considerations within the Plan area. Accordingly, CONE submits that the NEC must given greater authority over natural resource management activities on both private and public lands within the Plan area.

Transcript, Volume 18, pp. 2633 - 34, 2683 - 84 (K. Whitbread)
Transcript, Volume 39, p. 7073 (R. Martin)
Transcript, Volume 52, pp. 9651 - 52 (Ian Fraser)
Transcript, Volume 54, p. 10052 (M. Taylor)
Exhibit #298 (CONE Witness Statement #1) : Tab 3, pp. 5 - 8
: Tab 4, pp. 7 - 8
Exhibit #303 (CONE Witness Statement #2), Tab 2, pp. 11 - 13

PART IX - STATUS OF APPLICATIONS PRIOR TO CABINET DECISION

168. Assuming there are unapproved development applications at the time that the new NEP policies are approved by Cabinet, it is CONE's submission that such applications should governed by the new policies rather than the policies in effect at the time that the applications were first submitted. In particular, there is a legal presumption that laws should not be given retroactive operation so as to interfere with existing or vested rights or obligations. However, the law is clear that this presumption does not arise in this case because applicants have no existing or vested rights or obligations upon the mere filing of a development application. Instead, such rights only arise once the application has actually been granted. Moreover, there is no a priori "right" to develop land within the Plan area. At most, applicants are

entitled to have their development applications considered on the merits by the relevant authorities, who are free to grant or reject the application. Therefore, unless an applicant has received a final approval under the Act, all outstanding applications are subject to the new policies once they are in effect.

> Jones and de Villars, Principles of Administrative Law, p. 135
> Hunter v. Corporation of District of Surrey and Tan (1979), 18 B.C.L.R. 84 (B.C.S.C) at p. 89
> Wilkin et al. v. White (1979, 11 .P.L.R. 275 (B.C.S.C.) at p. 279

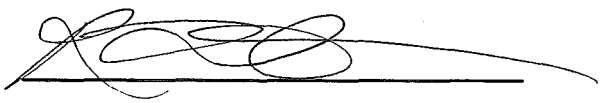
PART X - CONCLUSIONS

169. The NEPDA clearly requires the protection and maintenance of the physical, natural and visual environment of the Niagara Escarpment and land in its vicinity. In CONE's view, this Five Year Review is crucial because it offers an important opportunity to safeguard the Escarpment area by strengthening the Plan's objectives, policies and Development Criteria, and by improving the implementation of the Plan. CONE strongly supports the Plan and the role of the NEC in administering the Plan; however, CONE submits that the current NEP contains several provisions that permit the continuation of incompatible uses (i.e. mineral extraction, subdivision development, clear-cutting) which, individually and cumulatively, will result in the degradation and destruction of the Escarpment and its resources. The Niagara Escarpment is clearly at considerable risk if these provisions are not amended within this Five Year Review. The future of the Niagara Escarpment is at stake during this Five Year Review, and the policy and implementation issues raised during the hearing cannot be deferred until the next Five Year Review. Accordingly, CONE submits that it is incumbent upon the Hearing Officers to recommend NEP policies and procedures which ensure the protection and maintenance of this unique, diverse and internationally significant landscape.

170. CONE therefore requests that the Hearing Officers recommend the passage and implementation of the proposals advocated by CONE and described in Volume II of these submissions.

All of which is respectfully submitted.

April 15, 1992



Richard D. Lindgren

Counsel for the Coalition on the Niagara Escarpment

APPENDIX I - AUTHORITIES

(i) Jefferies, Environmental Approvals in Canada, s.5.23 - .31

(ii) Rogers, Law of Canadian Municipal Corporations, s.138.61 - .65

(iii) Jones and de Villars, Principles of Administrative Law, p. 135

(iv) Hunter v. Corporation of District of Surrey and Tan (1979), 18 B.C.L.R. 84 (B.C.S.C.)

(v) Wilkin et al. v. White (1979), 11 M.P.L.R. 275 (B.C.S.C.)

ENVIRONMENTAL APPROVALS IN CANADA

PRACTICE AND PROCEDURE

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1989

BUTTERWORTHS
TORONTO AND VANCOUVER

§5.22 An examination of the case law in both Canada and the U.S. indicates that most courts are in favour of a flexible approach concerning the "public interest" which will vary from situation to situation, yet at the same time will accommodate a variety of conflicting interests.[1]

[1] See, *e.g.*, *City of Portage la Prairie v. Inter-City Gas Utilities Ltd.* (1970), 12 D.L.R. (3d) 388 (Man. C.A.); *Re Loiselle and Town of Red Deer* (1907), 7 W.L.R. 42 (Alta. S.C.); *State v. Crockett*, 86 Okl. 124, 206 P. 816 (S.C., 1922); *Re Mississippi River Fuel Corp.*, 65 P.U.R. (N.S.) 1984 (Fed. Power Commn., 1946); *Memorial Gardens Assn. (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353. See also the recent case of *City of Calgary v. Public Health Advisory & Appeal Bd.; Genstar Corp. v. Public Health Advisory & Appeal Bd.* (1986), 43 Alta. L.R. (2d) 304 (Q.B.), affd 52 Alta. L.R. (2d) 260 (C.A.), dealing with the question of need as it relates to the public interest.

(2) Need for the Undertaking

§5.23 The issue of need is one which has been dealt with implicitly and explicitly by the Board in a number of decisions and is one which must be considered by all proponents seeking project approval. Although the legislation does not specifically refer to need as being a prerequisite for approval, it can be implied from the stated purpose of the *Environmental Assessment Act* and more directly from the statements expressed by the Board from time to time in its decisions.

§5.24 The issue of "need for the undertaking" was discussed at length by this author in his dissenting opinion in the *Hamilton-Wentworth (Redhill Creek Expressway)* decision, and many of the points made in that opinion bear repeating here since "need" will continue to be one of the primary issues which must be considered by the Board in the course of making a decision with respect to project approval. In the context of the *Hamilton-Wentworth* case the following statements appear:

> A proper evaluation as to whether or not the proposed undertaking contributes to the "betterment" of the people of the whole or any part of Ontario . . . would surely imply a need for the undertaking itself. If, on the evidence, there is no such need clearly demonstrated then, in this writer's opinion, it follows that the proposed undertaking *cannot* contribute in any meaningful way towards fulfilling the purposes of the Act.
>
> In addition, section 5(3) of the Act requires the proponent to submit to the Minister an "environmental assessment" consisting of both a description of the "purpose" of the undertaking and a description of and a statement of the "rationale" for,
>
> (i) the undertaking;
> (ii) the alternative methods of carrying out the undertaking; and
> (iii) the alternatives to the undertaking.
>
> Both the purpose and rationale in relation to the undertaking clearly depend upon an underlying concept of "need", either perceived or actual and this, in my view provides the only rational basis upon which a reasonable proponent could put forward a proposal for approval.

> Whether or not the requisite "need" for the undertaking has been proved to the satisfaction of the decision-maker will remain an important, if not *the* most important issue to be considered in any application under the *Environmental Assessment Act* and must be evaluated in the context of the wide definition of "environment" provided in the Act, as well as its stated purpose.
>
> The validity of this interpretation is further reinforced when one considers the specific wording contained in Form 1 enacted pursuant to the Regulations to the Act.[1] This form, entitled "Summary Form for an Environmental Assessment Submission", states that a resume of an environmental submission should contain, inter alia, "justification of the need for the undertaking".[2]

In the context of this case, a further qualification was added wherein this author stated the following:

> I would add, however, the further observation that, in my view, in circumstances where approval of the undertaking would result in a *fundamental irreversible change in the character* of a natural resource such as, in this case, of the Redhill Creek Valley, the need for the proposed roadway facility must be both *real, substantial and where projected for the future, reasonably certain to occur.*
>
> If a significant degree of uncertainty exists as to whether or not the projected need or perceived "betterment" will in fact be realized at some point in the future, then any *permanent irreversible* alternative to the intrinsic character of a resource in its natural state, should *not* be undertaken and approval to proceed with the undertaking should be refused.[3]

[1] O. Reg. 293, enacted pursuant to the *Environmental Assessment Act.*

[2] *Re Hamilton-Wentworth East-West North-South Transportation Facility (Redhill Creek Expressway)* (Registrar's File No. CH 82-08), Decision dated October 24, 1985, at pp. 229-30.

[3] *Ibid.*, at pp. 230-31.

§5.25 The Board again dealt with the issue of need in connection with the *Decom Medical Waste Systems Inc. Application*[1] referred to earlier in this chapter, although in that case in the context of the *Environmental Protection Act.* In allowing a party in opposition to introduce evidence concerning alternative facilities for the disposal of pathological waste in order to undermine the need for the proposed transfer facility which was before the Board for approval, the Board stated in its report the following:

> Given the indisputable fact that some element of risk, however small, will exist with the introduction into a community of the applicant's proposed (transfer) facility, in the absence of a need for such a facility, it is the Board's position that the application should be refused on the ground that it is not in the public interest.[2]

[1] (Registrar's File No. EP 85-06), Report dated August 14, 1986.

[2] *Ibid.*, at p. 34. A Joint Board expressed a similar view in the *Tricil (Sarnia) Ltd. Waste Disposal Site Expansion Application* (Registrar's File No. CH 85-02); see Reasons for Decision dated April 7, 1986, at p. 61.

§5.26 In its Reasons for Decision on the *Finch Avenue West Extension Application*[1] the Board, in commenting upon four alternatives to the undertaking put forward by the proponent, one of which was the "null" (do nothing) alternative, made the following statement:

> In the view of the Board, the null alternative is a useful tool to point out the need for the undertaking and provides a view of both the present and future conditions against which the results of the undertaking can be compared.[2]

In addition the Board, in the course of hearing this application, exercised its prerogative under s. 18(9) (now s. 18(10)) of the *Environmental Assessment Act* and retained an expert witness in transportation planning to assist the Board in its evaluation of this application. Appendix 1 to the Board's decision contained a letter dated July 20, 1987 addressed to this expert witness setting out his terms of reference which contained, *inter alia*, a request for his opinion on:

> . . . the adequacy of the ongoing program of intersection improvements undertaken by Metro, in light of Mr. Martin's suggested improvements to the existing system. Could intersection and other road planning improvements eliminate the "need" for a new road?[3]

[1] *Re Metropolitan Toronto (Finch Avenue West) Road Extension Application* (Registrar's File No. EA 87-01), Decision dated February 5, 1988.
[2] *Ibid.*, at p. 13.
[3] *Ibid.*; see p. 2 of the Board's letter dated July 20, 1987, question #1.

§5.27 A Joint Board in the *Regional Municipality of Halton Landfill Application*[1] under the *Environmental Assessment Act* dealt with the issue of need at the outset of its Reasons for Decision as follows:

> Under subsection 12(2)(*c*) of the *Environmental Assessment Act*, this Board is required to hold a hearing with respect to the acceptance, or amendment and acceptance, of an environmental assessment which includes:
>
> > "an evaluation of the advantages and disadvantages to the environment of the . . . alternatives to the undertaking".
>
> One of the alternatives might be not to have a landfill at all. Thus, one of the early steps in the hearing is to establish the "need" for the undertaking – in this case the need for a landfill as an essential part of the Region of Halton's waste management.[2]

After discussing various alternatives to landfilling, the Joint Board concluded:

> Irrespective of what else is done now, there would still have to be a landfill component to Halton's waste management program. Thus we conclude that there is a "need" for the undertaking, whatever may be done subsequently about alternatives.[3]

[1] *Re Regional Municipality of Halton Sanitary Landfill Site Application* (Registrar's File No. CH 86-02), Reasons for Decision and Decision dated February 24, 1989.

[2] *Ibid.*, at p. 9.
[3] *Ibid.*, at p. 13.

§5.28 It has been argued that a proponent should be able to establish need for the undertaking solely on the basis of setting out an economic justification or rationale. The Board, however, has generally rejected this argument in favour of requiring the proponent to satisfy the Board that the proposed undertaking serves a broader public purpose beyond that of only generating a profit.[1] Since almost any activity of man involves some environmental degradation, evidence that the proposed facility is needed or required in the sense that it fulfills some purpose in addition to providing economic gain for the proponent, will usually be necessary to satisfy the "public interest" component discussed earlier.

[1] This argument was advanced by counsel for the proponent in the *Decom Medical Waste Systems Inc. Application* referred to earlier.

§5.29 The Board was again confronted with the issue of need in the *Highway 416 Transportation Corridor Application*[1] and its views were somewhat at odds with those expressed by counsel for the Ministry of the Environment. In that case the Ministry of the Environment stated that it was the view of the Environmental Assessment Branch of the MOE that the *Environmental Assessment Act* does not require a proponent to demonstrate "need" for the proposed undertaking. The requirement of the Act for a description of the purposes of the undertaking is taken as a requirement for the definition of the problem or opportunity the proponent has chosen to address. The purpose deals with the proponent's goals, not the solutions, which should be dealt with on examining the advantages and disadvantages of the undertaking and the alternatives to it. The requirement for a statement of the rationale for the undertaking is interpreted to mean that the thought process by which a conclusion is arrived at should be described.

[1] *Re Ministry of Transportation and Communications Highway 416 Transportation Corridor* (Registrar's File No. EA 86-01), Decision and Reasons for Decision dated July 31, 1987.

§5.30 Counsel further argued that the Environmental Assessment Branch is of the opinion that only when the proponent has selected the preferred alternative with the best ratio of advantages to disadvantages, can need be determined. The Minister or the Board must make the decision on the need for the project by considering the ratio of advantages to disadvantages of the undertaking and testing this against the stated purpose of the Act. An undertaking then can be said to be needed when the decision-maker determines it has the best ratio of advantages to disadvantages compared to other alternatives. If the decision-makers consider that none of the alternatives have a favourable balance of

advantages to disadvantages, the undertaking is not needed and should not be approved.[1]

[1] (Registrar's File No. EA 86-01), at pp. 22-23 of the Decision and Reasons for Decision.

§5.31 The Board, in rejecting the arguments of counsel for the Ministry, stated the following:

> Section 5(3)(*a*) of the Act states that an environmental assessment submitted to the Minister shall include a description of the purpose of the undertaking and section 5(3)(*b*) of the Act states that an environmental assessment shall contain a statement of the rationale for the undertaking. In the opinion of the Board, need must be demonstrated as a reason for the undertaking. The phrases "the purpose of the undertaking" and "rationale for the undertaking", in the Board's view, point to need.
>
> The stated purpose of the *Environmental Assessment Act* is the betterment of the people of the whole or any part of Ontario. Therefore the Board must be convinced that there is a need that must be satisfied and that the undertaking proposed will satisfy the need, with the advantages outweighing the disadvantages to the proponent and the people of the province. If there is no need, the Board cannot accept that the wise management and conservation of the environment would in fact be accomplished.[1]

[1] (Registrar's File No. EA 86-01), at pp. 23-24 of the Decision and Reasons for Decision. See also the statement of the Board on "need" and "rationale" in its Reasons for Decision in *Re Ministry of Transportation and Communications (Highway 89) Highway Expansion Application* (Registrar's File No. EA 81-01), Reasons dated July 9, 1981, at p. 12.

(3) Overturning Decisions of Elected Municipal Councils

§5.32 This issue is one of increasing importance inasmuch as proponents under the *Environmental Assessment Act* are often municipalities whose governing councils are comprised of elected officials. It has been argued before both the EAB and the Joint Board that a tribunal consisting of appointed members should not overturn the decision of an elected council answerable to the people, which is in a better position to determine the relevant needs of the people affected by a proposed undertaking. Supporters of this view argue that the Board's role is to determine whether or not the municipal council exercised its discretion to proceed with the undertaking in a reasonable fashion. In the *Hamilton-Wentworth (Redhill Creek Expressway)* case,[1] counsel for the proponent, the Regional Municipality of Hamilton-Wentworth, put the argument in the following words:

> The elected representatives have voted in favour of the undertaking and I suggest that the role of the Board is an extremely important one because what the opponents of this project are asking you to do is to overturn the decision of the regional council and to overturn what appears to be the majority support for this project, overwhelming majority, in favour of those few who take some exception to it . . .

The Law of
CANADIAN MUNICIPAL CORPORATIONS

Second Edition

by **IAN MacF. ROGERS, Q.C.**
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Volume 2

THE CARSWELL COMPANY LIMITED TORONTO CANADA

structured to that limited purpose. A district court is not entitled to remit the matter for clarification under s. 15 of the Building Code Act(e). It would seem that they are not *res judicata* in the sense that the council is deprived of jurisdiction to deal with the same matter(f).

The applicant, the Minister or any other person who has an interest in the matter may appeal(g). A ratepayer appealing a decision granting a variance must establish some geographical proximity to the lands to give sufficient interest in the matter so as to have status to appeal(h).

Notice of appeal must be filed within 30 days of the sending of the notice of decision [s. 44(12)]. As an appeal was taken within the time allowed by s. 44(12), despite the fact that the notice of decision failed to identify the appeal period in accordance with s. 44(10), the notice of decision should not be treated as a nullity(i). The requirement of s. 44(12) of payment with the serving of the notice of appeal and service by registered mail or personally was held to be directory and any deficiency in the method of service which was by courier became immaterial when the secretary-treasurer of the committee acknowledged receipt(j). The stipulation in s. 44(12) that the notice of appeal set out the reasons in support of the objection to the decision of a committee of adjustment is directory only(k). The Board has only an appellate jurisdiction on such appeal and so cannot grant relief other than that asked for by the applicant before the committee(l).

§138.6 Non-conforming Uses

§138.61 *General*

By-laws placing restrictions on the use of property cannot have retroactive effect so as to prohibit a use to which a property was put before the passing of the by-law unless the statute so allows(m). Thus, to enable a corporation to interfere with the lawful user by an owner of property

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(e) *446159 Ont. Ltd. v. Chief Official for London* (1987) 35 M.P.L.R. 32 (Ont. Dist. Ct.).

(f) See *Napier v. Winnipeg* (1960) 67 Man. R. 322.

(g) S. 44(12). [am. 1989, c. 5, s. 20].

(h) *Re Victoria Wood Dev. Corp. and Jan Davies Ltd.* (1979) 25 O.R. (2d) 774, 10 O.M.B.R. 47, leave to appeal refused 25 O.R. (2d) 774n (S.C.C.). Unless the person who appeals is "affected", the Board has no jurisdiction to deal with an appeal on its own motion: *Pension Fund Properties Ltd. v. Calgary* (1981) 31 A.R. 66, 16 M.P.L.R. 193, (*sub nom. Re Pension Fund Properties and Calgary Dev. App. Bd.*) 127 D.L.R. (3d) 477 (C.A.).

(i) *Verdone v. Donato* (1985) 31 M.P.L.R. 85, 12 O.A.C. 382 (Ont. Div. Ct.).

If the notice under s. 44(10) indicates the last date for appeal incorrectly, it is invalid: *Re Hill and Minister of Intergovernmental Affairs and Economics* [1973] 3 O.R. 492 (D.C.). Failure to notify a solicitor of the committee's decision in order that it might be appealed was held to be a denial of natural justice: *Re Loblaws Ltd. and Ludlow Investments Ltd.* (1975) 7 O.R. (2d) 665 (C.A.).

(j) *Verdone v. Donato, supra.*

(k) *Luigi Stornelli Ltd. v. Centre City Capital Ltd.* (1985) 7 O.A.C. 318 (Div. Ct.).

(l) *Re Colicchia Const. Ltd. and Schmidt* [1968] 2 O.R. 806 (C.A.).

(m) *R. v. Clark Bros. & Hughes Ltd.* [1925] 1 D.L.R. 49, 34 Man. R. 521, [1924] 3 W.W.R. 689 (C.A.); *Re Dupuis* (1908) 17 Man. R. 416, 7 W.L.R. 619 (C.A.). See also *A. G. N.B. v. Fisher* (1923) 52 N.B.R. 262.

Section 38 of the Planning Act, prohibiting development at variance with a basic planning statement, is not retroactive so as to prohibit a development lawfully commenced prior to the adoption of the statement: *MSTW Planning Dist. Bd. v. Wiens* (1980) 117 D.L.R. (3d) 380 (Man. C.A.).

already erected, the power must be conferred in express terms(n). A statutory prohibition that buildings "constructed" on certain lands are to be used only for purposes of a private dwelling house was held to apply to residences built before the Act was passed and therefore applied to buildings existing at that date(o). Although vested rights cannot be interfered with by municipal legislation except where the language of the statute conferring the power to enact it clearly discloses such intent(p), such interference is inseparable from the exercise of the power to restrict the use of property and may, to the extent permitted by statute, be retrospective(q).

In Quebec by-laws likewise are construed prospectively(r). The doctrine of acquired rights protects non-conforming structures and uses in existence at the time of the coming into force of a zoning by-law which may be continued provided that the use is the same before and after the zoning restriction became effective(s). The concept of acquired rights resides in the character, the nature, the site and the type of occupation acquired at the date of the coming into force of a by-law(t).

Apart from statute, by merely applying for a permit and depositing plans, a land owner cannot secure his right to build in the face of the subsequent enactment of a prohibitory by-law(u). Before the enactment of the exemption provision, a municipality had the right, in some cases, to cancel a permit for the construction of a building at any time prior to the actual commencement of the work on the ground if, in the interval, it had passed a by-law prohibiting the erection of a building of like character within the area in which it was proposed to build(v).

§138.62 *Statutory Protection of Existing Uses*

Planning statutes have limited the scope of zoning by-laws by enacting that lands and buildings in respect of which there is a non-conforming use are exempted from their application. A non-conforming use is a use for which a building or land is lawfully occupied at the time a zoning by-law becomes effective but which does not comply with the zoning regulations of the by-law applying to the district in which it is located(w).

By s. 34(9) of the Ontario Act, no by-law enacted pursuant to s. 34 is to

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(n) *R. v. Girvin* [1956] O.W.N. 73; *Toronto v. Wheeler* (1912) 3 O.W.N. 1424, 4 D.L.R. 352. See also *R. v. Howard* (1884) 4 O.R. 377.

(o) *Shaughnessy Heights Property Owners' Assn. v. Northup* (1958) 12 D.L.R. (2d) 760 (B.C.S.C.); *Shaughnessy Heights Property Owners' Assn. v. Campbell*, 3 W.W.R. (N.S.) 407, [1951] 2 D.L.R. 62 (B.C.S.C.).

(p) *Toronto v. Wheeler, supra.*

(q) *Toronto v. Presswood Bros.* [1944] O.R. 145, [1944] 1 D.L.R. 569 at 281, reversing [1943] O.R. 670, [1944] 1 D.L.R. 569 at 270 (C.A.).

The repeal of a statute sanctioning a non-conforming use by suspending a by-law prohibiting such use was held to render such use illegal: *Vancouver v. Kessler* (1963) 43 W.W.R. 108, 39 D.L.R. (2d) 564, affirmed 48 W.W.R 622, 45 D.L.R. (2d) 535 (B.C. C.A.).

(r) *Hauschild v. Delson* [1972] Que. S.C. 189; *St-Bruno de Montarville v. Potvin* [1970] Que. C.A. 864.

(s) *Montréal v. Di Staulo* [1965] R.L. 208.

(t) *Savoie v. St. Léonard-de-Port-Maurice* [1964] Que. S.C. 283.

(u) *Salaberry de Valleyfield v. Hardy* [1958] R.L. 214.

(v) *Toronto v. Ford* (1913) 4 O.W.N. 1386 (C.A.); *Toronto v. Garfunkel* (1912) 23 O.W.R. 374; *Toronto v. Williams* (1912) 27 O.L.R. 186 (C.A.).

(w) *Ozohan v. Winnipeg* [1953] 3 D.L.R. 545 (Man. C.A.).

apply to any land or building which, on the date of the passing of the by-law(x) was lawfully used for any purpose prohibited by the by-law so long as it continues to be used for that purpose. Failure to incorporate the statutory exception is not necessarily fatal to the by-law(y) although it has been judicially stated that it is a good practice to include it(z). A by-law prohibiting adult entertainment parlours except in designated areas enacted under the authority conferred by the Municipal Act, s. 222(3) was held to apply to an existing parlour operating outside the designated area which was not exempted by s. 34(9) of the Planning Act(a).

If there is a doubt whether the use preceded the by-law, it may be resolved in favour of the owner(b). However, the onus is upon the person invoking an exemption to prove that he comes within it and such proof must go not only to the use of the lands at the time of the enactment of the by-law, but also to its continued use(c).

The purpose and effect of the exemption is to exclude the operation of restrictive by-laws from the buildings and lands referred to. According to Viscount Cave in *Toronto v. Toronto R.C.Sep.S. Trustees*(d), "the opera- of the proviso is confined to cases where at the date of the passing of a by-law either 1) a building is erected or used for a purpose prohibited by the by-law, or 2) a building is in the course of erection, or 3) the plans for a building have been approved by the city architect; and it would appear . . . to be a necessary inference from the express terms of the proviso that where plans have been deposited but not yet approved and the building is not in the course of erection, the operation of the by-law is not excluded"(e). The Privy Council advised that a *bona fide* intention to use a building in a manner that later is prohibited is not sufficient to bring the proviso into operation unless there is actual use(f). Therefore the mere

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(x) For purposes of the subsection a by-law is considered as "passed" on the date on which it is given its final reading by the council notwithstanding that it has not at that date been approved by the Municipal Board: *Central Jewish Institute v. Toronto* [1948] S.C.R. 101, [1948] 2 D.L.R. 1, affirming on this point [1947] O.R. 425, [1947] 3 D.L.R. 388, which affirmed [1947] O.W.N. 318.

(y) *Re Wilmot and Kingston* [1946] O.R. 437 (C.A.); *Re Toronto R.C. School Bd. and Price* (1923) 54 O.L.R. 224 at 230. This point was by agreement, not raised upon the appeal. See [1926] A.C. 81, [1925] 3 D.L.R. 880 at 884.

(z) *Wilmot v. Kingston* [1945] O.R. 532 (C.A.).

(a) *Re Oshawa and 505191 Ont. Ltd.* (1986) 54 O.R. (2d) 632 (C.A.); leave to appeal refused (1987) 58 O.R. (2d) 535 (S.C.C.).

(b) *Cowichan Valley Regional Dist. v. Yole* (1988) 41 M.P.L.R. 78 (B.C. S.C.); *Richmond Hill v. Miller Paving Ltd.* (1978) 22 O.R. (2d) 779, 94 D.L.R. (3d) 145 (H.C.); *Renforth v. Bowes* (1974) 10 N.B.R. (2d) 191 (Q.B.).

(c) *Emily v. Johnson* (1981) 37 O.R. (2d) 623, 135 D.L.R. (3d) 465, affirmed (1983) 143 D.L.R. (3d) 576n (Ont. C.A.); *Toronto v. San Joaquin Invts. Ltd.* (1978) 18 O.R. (2d) 730 at 739, 83 D.L.R. (3d) 584, 5 M.P.L.R. (2d) 113, affirmed 26 O.R. (2d) 775, 11 M.P.L.R. 83, 106 D.L.R. (3d) 546 (C.A.). Motion for leave to appeal to S.C.C. dismissed 26 O.R. (2d) 775n, 106 D.L.R. (3d) 546n, 32 N.R. 442n.

(d) [1926] A.C. 81, [1925] 3 D.L.R. 880, reversing [1924] S.C.R. 368, [1924] 3 D.L.R. 113, which reversed 54 O.L.R. 224 (*sub nom. Re Toronto R.C. School Bd. and Price*), which affirmed 21 O.W.N. 27, and 22 O.W.N. 518. See also *Petro-fina Ltd. v. Martin* [1959] S.C.R. 453, 18 D.L.R. (2d) 761.

(e) As to the effect of restrictive by-laws on executory contracts relating to agreements for the sale of and the construction of buildings, see *Spears v. Walker* (1884) 11 S.C.R. 113; *Milk Farm Products & Supply Co. v. Buist* (1915) 35 O.L.R. 325, 26 D.L.R. 459 (C.A.). *Danforth Heights Ltd. v. McDermid Bros.* 21 O.W.N. 49, affirmed 52 O.L.R. 412, [1923] 4 D.L.R. 757 (C.A.).

(f) *Toronto v. Toronto R.C. Sep. S. Trustees* [1926] A.C. 81, [1925] 3 D.L.R. 880.

acquisition of land for certain purposes does not exclude the operation of a restrictive by-law subsequently passed(g). The effect of s. 34(9) is to protect an owner's rights with respect to a use in existence before the passing of a by-law prohibiting such use(h). The subsection has an overriding effect and a permit issued under the Pits and Quarries Control Act for a gravel pit operating prior to an official plan and by-law restricting its use to residential is valid(i).

Until 1941 the Ontario Municipal Act contained exemptions to the effect that restricted area by-laws passed under the several provisions of the Act were not to apply to buildings erected on a stipulated date. Provisos of this type were enacted in the different revisions of the Act but with dates varying according to the date of enactment. The intention of such provisos was that by-laws passed thereunder could be made retroactive and it could therefore not be validly objected that the by-laws had this effect(j). In 1941 the zoning provisions of the Act of 1937 were repealed and recast as s. 34 of the present Act, but by-laws passed for any of the purposes repealed by the 1941 Act are to remain in full force and effect until amended or repealed(k). Where a provision came into effect in 1904 and expressly stated that by-laws enacted under its authority were not to apply to buildings being so used in 1904, a building erected in 1913 was held not to be exempt from a zoning restriction imposed by a by-law not passed until 1915. As a matter of construction the court held that the proviso in the by-law which was the same as that in the statute, indicated the intention that all buildings not within the exception as defined, should be subject to its prohibition(l).

One requirement for coming within the exemption is that the building must have been lawfully used on the enactment date; "lawfully" was added in 1956 no doubt to overcome the effect of a case holding that a non-conforming use that was prohibited by a by-law subsequently repealed and replaced by a new by-law became legal by virtue of the exemption(m). A by-law repealing earlier by-laws but excepting unlawful non-conforming uses and legal non-conforming uses had the effect of rendering a building infringing the set-back requirement of the earlier by-law legally non-conforming(n). The onus of proving that a non-conforming use was an unlawful use at such date rests on the municipality(o). The word "lawfully" refers to the use to which property is put and not to the right to occupy land on which the occupant has erected a building which con-

(g) *Spiers v. Toronto Twp.* [1956] O.W.N. 134.
(h) *R. v. Neichenbauer* [1956] O.W.N. 134.
(i) *Re Caledon and R.* [1973] 1 O.R. 219, affirmed [1973] 1 O.R. 623, 32 D.L.R. (3d) 25 (C.A.).
(j) *Toronto v. Presswood Bros.* [1944] O.R. 145, [1944] 1 D.L.R. 569 at 581, reversing [1943] O.R. 670, [1944] 1 D.L.R. 569 at 570 (C.A.), but see *Toronto v. Phillips* [1931] 40 O.W.N. 492.
(k) S.O. 1941, c. 35, s. 13.
(l) *Toronto v. Presswood Bros., supra.*
See also *Toronto v. Solway* (1919) 46 O.L.R. 24, 49 D.L.R. 473 (C.A.) in which it was held that it was not obligatory upon the council to make a by-law, passed under similar provisions, retroactive to the date of the enactment of the provision.
(m) *R. v. Neichenbauer* [1956] O.W.N. 134. See *R. v. Wieronski* [1959] O.W.N. 143, 123 C.C.C. 356, 19 D.L.R. (2d) 149 (C.A.).
(n) *Martin v. McTaggart* (1987) 45 R.P.R. 55, 59 O.R. (2d) 535 (H.C.).
(o) *R. v. Bunday* [1960] O.R. 403, 128 C.C.C. 307 (C.A.).

stitutes a non-conforming use antedating a restrictive bylaw(p). Where the owners have established a legal non-conforming use, the fact that they did not comply with the regulations applicable to such use under the pre-existing by-law is immaterial in determining the legality of the non-conforming use. It is the use and not the regulations that are the operative part relating to the exemption under s. 34(9) of the Act(q). A provision in a by-law that changes of use made before its enactment in contravention of a preceding by-law are deemed to be a violation of the later by-law, will prevent such use from being lawful(r). Even apart from statute, it has been held that no acquired rights accrue where the use of the premises is in violation of the law(s).

The omission to obtain a building permit to make alterations to a building does not make the use of the altered building unlawful; the offender is merely subject to a penalty(t). Building without a permit, where it is not clear nor shown that one was required, does not render its use unlawful(u).

Where a by-law prohibiting lodging houses in an area is expressed not to be applicable to any dwelling-house legally used as such on a particular date, the by-law was held not to exempt a particular dwelling house used as a lodging house because it violated not only the licensing by-law requiring a license for lodging houses but also violated the Building Code and was therefore not a legal use(v). An automobile salvage and storage operation in an agricultural zone was not exempted as a prior, lawful, non-conforming use since the use was not lawful due to the absence of a licence. However, the by-law requiring the licensing of salvage operations had been repealed. The zoning by-law itself also had an exemption for any use that existed at the time of the by-law and it was held that this exemption applied even to unlawful uses such as the non-licensed salvage operation. The by-law exemption applied to any use, lawful or otherwise, that existed at the time of its enactment(w).

The crucial date on which the user is to be looked at is the date of the passing of the by-law and not the date the by-law is approved by the Municipal Board(x). The council cannot alter this date to another, such as the date of Municipal Board approval(y). The right of a property owner or user of the property is fixed and limited at such date and is thereafter

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(p) *Teed v. Charbonneau* [1961] O.R. 169, 26 D.L.R. (2d) 517.

(q) *Toronto v. San Joaquin Invts. Ltd.* (1978) 18 O.R. (2d) 730, 5 M.P.L.R. (2d) 113, 83 D.L.R. (3d) 584, affirmed 26 O.R. (2d) 775, 106 D.L.R. (3d) 546, leave to appeal refused 26 O.R. (2d) 775n, 32 N.R. 442n, 106 D.L.R. (3d) 546n (S.C.C.).

(r) *Vancouver v. Kessler* (1964) 48 W.W.R. 622, 45 D.L.R. (2d) 535, affirming 43 W.W.R. 108, 39 D.L.R. (2d) 564 (B.C. C.A.).

(s) *Ouimet v. Montreal* [1970] Que. S.C. 537.

(t) *Bihun v. Long Branch* [1960] O.W.N. 485, 26 D.L.R. (2d) 10, reversing [1960] O.R. 219, 23 D.L.R. (2d) 195 (C.A.).

(u) *Cowichan Valley Regional District v. Yole* (1988) 41 M.P.L.R. 78 (B.C. C.A.).

(v) *Seel Enterprises Ltd. v. Toronto* (1982) 17 M.P.L.R. 315 (Ont. Div. Ct.).

(w) *McLear v. Mason* (1988) 39 M.P.L.R. 145 (Ont. H.C.). The possibility that a property could be in breach of the Controlled Access Highways Act, R.S.B.C. 1960, c. 76 was held not to affect the legal non-conforming use: *Cowichan Valley Reg. Dist. v. Jeffries* (1982) 139 D.L.R. (3d) 211 (B.C. S.C.).

(x) *Central Jewish Institute v. Toronto* [1948] S.C.R. 101, [1948] 2 D.L.R. 1.

(y) *O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie* [1961] O.R. 413, 28 D.L.R. (2d) 1.

subject to the provisions of any by-law passed under s. 34 of the Act(z). Hence a person using his property in a prohibited way after the passing of the by-law but before approval of the Municipal Board is not entitled to claim a lawful nonconforming use. It is within the power of a municipality to pass a by-law prohibiting the erection of a building on land used at the date of the enactment of the by-law for purposes prohibited thereby and that, notwithstanding such use at that time(a). Thus the fact that there is a building on part of the lands which can be used, despite the prohibition of such use, because it is protected as a non-conforming use by the exemption, does not entitle the owner to use the remainder of such lands for such prohibited building purposes(b). Moreover, a by-law passed under s. 34 can also include a prohibition against the alteration, addition to or reconstruction of any existing building or land used for any purpose prohibited by by-law on the date the by-law was passed(c).

The question is: what constitutes use?(d). It means holding or occupying property(e) or the employment of property for enjoyment, revenue or profit without in any way diminishing or impairing the property itself(f). Simply renting land cannot be envisaged within the term "user of land"(g). It is clear that the mere intention to use is not enough to entitle an owner to the protection of s. 34(9) of the Act(h). "Established" and "used" have different meanings and land is not used for a prohibited purpose although a local board has authorized its establishment for that purpose(i). Notwithstanding that the words "use" and "used" are defined in a by-law to mean the purpose for which a building was designed, arranged, intended, occupied or maintained at the date of the passing of the by-law, actual use is essential. The plain meaning of these words cannot be enlarged or abridged by by-law. So, as applied to a building used as a gasoline station prior to the date of a by-law prohibiting such use, but which business was not carried on at that date, the pumps having been removed, the premises were held to be not so used and therefore did not fall within the exemption(j). On the other hand, the Vancouver Charter(k), which provided for continuation of lawful non-conforming uses, read in conjunction with a zoning by-law restricting the use of self-service gas stations, meant that, where a building or land was "equipped to be used for the retail sale of

(z) *Re Wilmot and Kingston* [1946] O.R. 437, [1946] 3 D.L.R. 790 (C.A.).
(a) *Re Braun and Gould* (1982) 132 D.L.R. (3d) 451 (Ont. Div. Ct.).
(b) *Re Scott and Toronto* [1945] O.W.N. 484, [1945] 3 D.L.R. 478.
(c) *Re Wilmot and Kingston, supra*, disapproving of the remarks of Hogg J.A. on this point in *Wilmot v. Kingston*, [1945] O.R. 532, [1945] 4 D.L.R. 291 (C.A.).
(d) The digging down into land for gravel and removal of it for sale has been held not to amount to a user of land for commercial or industrial purposes: *Pickering v. Godfrey*, [1958] O.R. 429, 14 D.L.R. (2d) 520 (C.A.). See *Dexter Const. Co. v. Saint John* (1981) 35 N.B.R. (2d) 217, 126 D.L.R. (3d) 39, 88 A.P.R. 217, reversing 30 N.B.R. (2d) 82, 70 A.P.R. 82 (C.A.).
(e) *Re Davis and Toronto* (1892) 21 O.R. 243 at 247.
(f) *Pickering v. Godfrey, supra*. See definition in by-law referred to in *Sillery v. Sun Oil Co.* [1964] S.C.R. 552 at 558, 45 D.L.R. (2d) 541, reversing [1962] Que. Q.B. 914.
(g) *Haldimand-Norfolk v. Adams* (1984) 25 M.P.L.R. 51 (H.C.).
(h) *Toronto v. Toronto R.C. Sep. S. Trustees* [1926] A.C. 81, [1925] 3 D.L.R. 880, rvg. [1924] S.C.R. 368, [1924] 3 D.L.R. 113, which reversed 54 O.L.R. 224 (*sub nom. Re Toronto R.C. School Bd. and Price*).
(i) *Re Pentecost and Congregation Anshei Libavich* (1927) 33 O.W.N. 232.
(j) *Dennis v. East Flamboro* [1956] O.W.N. 282, 3 D.L.R. (2d) 130, affg. 1 D.L.R. (2d) 190 (C.A.).
(k) S.B.C. 1953, c. 55, s. 568(*b*).

motor fuels and lubricants" at the time of the coming into force of the by-law, a lawful use of the premises had been established(l).

Where premises had been purchased for purposes subsequently prohibited by by-law and the purchaser, after taking partial possession had temporarily vacated in order that the building could be remodelled to make it more suitable for these purposes, it was held that the proviso operated to exempt the buildings from the by-law. It was said that, whether occupied in part only or vacated temporarily while being renovated, such premises were being used for no other purposes and were therefore being used for purposes prohibited by the by-law on the material date and continued to be so used(m). In a similar case where premises were acquired and occupied for a vinegar factory and alterations were made so that the manufacture of vinegar could be carried on after which a restrictive by-law was enacted, the owner was entitled to continue such use under an exemption contained in the Winnipeg zoning by-law similar to the Ontario exemption s. 34(9) since the factory was "used for" the prohibited purpose from the date the owner took possession notwithstanding that vinegar had never actually been made on the premises at the crucial date(n). A non-conforming use was likewise established where land was acquired for the purpose of relocating an existing asphalt plant and there had been site preparation as well as some movement of equipment prior to the enactment of the prohibitory by-law. It was immaterial that there was no actual commercial production until after the date of enactment of the by-law(o). A commitment or dedication to a use is equivalent to and may constitute actual use to establish immunity as a non-conforming use(p).

It seems, then, that possession coupled with an intention to use the building for the intended purposes and actual user so far as it can be carried out at the time is sufficient. The exemption in s. 34(9) is not to the existing use but is to the building. There is no implication that it is the whole of the building that must be so used or that the use must be the sole use. The question is whether a real use, in good faith, was being made of it — a use not merely incidental to some other use but possessing an individuality of its own(q). So the fact that only part of a residence was used as a funeral parlour at the critical date was held to entitle the occupier to maintain the use over the entire premises and to make alterations in connection therewith(r). Likewise, where part of vacant land is being used for the purpose of a legal non-conforming use, the use of

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(l) *Shell Can. Ltd. v. Vancouver* (1982) 20 M.P.L.R. 288 (B.C. S.C.).

(m) *Re Hartley and Toronto* (1924) 55 O.L.R. 275, affirmed 56 O.L.R. 433 (C.A.).

(n) *Manitoba Vinegar Co. v. Winnipeg* [1946] 2 W.W.R. 284, [1946] 3 D.L.R. 243 (Man.). See also *Taback v. Rosenberg* (1948) 56 Man. R. 121.

In *Manitoba Vinegar Co. v. Winnipeg* [1948] 2 W.W.R. 431, 56 Man. R. 195, [1948] 4 D.L.R. 730, affirming [1947] 2 W.W.R. 721 (C.A.), the plaintiff company, which in the meantime had agreed with the city to give up using its factory as a vinegar factory, was not allowed to change the discontinued and terminated use to an active use for a winery.

(o) *Richmond Hill v. Miller Paving Ltd.* (1978) 22 O.R. (2d) 779, 94 D.L.R. (3d) 145 (H.C.).

(p) *Cowichan Valley Regional Dist. v. Yole* (1988) 41 M.P.L.R. 78 (B.C. S.C.).

(q) *Central Jewish Institute v. Toronto* [1948] S.C.R. 101, [1948] 2 D.L.R. 1, reversing [1947] O.R. 425, [1947] 3 D.L.R. 338, which affirmed [1947] O.W.N. 318.

(r) *O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie* [1961] O.R. 413, 28 D.L.R. (2d) 1.

a substantial part of the land is sufficient to exempt the whole of the parcel from the by-law(s). On the other hand, a lawful non-conforming use of one story of a building has been held not to permit the extension or enlargement of the prohibited use to the lower portions of the building(t).

§138.63 *Effect on Authorized Buildings*

In addition to the protection given to non-conforming uses by s. 34(9) of the Planning Act, the immunity afforded by the subsection goes further than the common law and prevents restrictions from being changed so as to prohibit or interfere with the construction of a building a permit for which has been issued(u). A by-law prohibiting the open storage of salt did not prohibit the use of lands for which a building permit had been granted. Such use was protected by s. 34(9)(*b*), there being no such restriction at the time the permit was granted(v). So too, where it is shown that a permit was granted before a by-law was passed prohibiting the purpose for which it is to be erected, the proviso applies and the builder is entitled to proceed with construction in accordance with the plans filed(w). An owner who has been issued a building permit has a vested right under s. 34(9)(*b*) and his proposed use of the land cannot be considered unlawful although it may be in conflict with an official plan(x). To invoke the protection of the proviso, the permit must have been issued prior to the day of the passing of the by-law and not just on the same day(y).

The rights of an intending builder who has been granted a permit are in no way affected merely because the permit taken out has expired before construction has been commenced since his rights depend on the statute and not on the permit(z). However, the granting of permit, after the passing of a by-law but before it came into force, for a use prohibited by such by-law which expired after six months did not give rise to an exemption under what is now s. 34(9)(*b*) of the Act(a). Under that subsection the immunity may be lost if the permit has been revoked under s. 6 of the Building Code Act. Under s. 6(4) of the latter, the chief official may revoke a permit: 1) where it was issued on mistaken or false information; 2) where 6 months after its issuance construction has not in the opinion of such an official been seriously commenced; or 3) where the construction is in his opinion substantially suspended or discontinued for a period of more than one year. Under the 1980 Act(b), in order to retain the exemption, the builder had to commence construction within two years from the date of

(s) *R. v. Barry Humphrey Enterprises Ltd.* (1977) 15 O.R. (2d) 548, 2 M.P.L.R. 54, 76 D.L.R. (3d) 550 (Div. Ct.).

(t) *Vancouver v. Victoria Block Ltd.* (1964) 45 D.L.R. (2d) 118 (B.C. C.A.).

(u) Until 1983 when the present Act was enacted, it was sufficient if the plans were approved prior to the date of enactment of the by-law [R.S.O. 1980, c. 379, s. 39(8)].

(v) *Re Universal Terminals Ltd. and Matilda* (1986), 54 O.R. (2d) 745 (Div. Ct.).

(w) See *Re Aiken and Toronto* [1943] O.W.N. 518; *Re Kensington Indust. Inc. and Toronto* [1955] O.W.N. 652, [1955] 4 D.L.R. 813; *Re Peek-Ron Const. Co. and Orillia* (1974) 2 O.R. (2d) 181, 42 D.L.R. (3d) 321.

(x) *Re Multi-Malls Inc. and Min. of Transportation and Communications* (1976) 14 O.R. (2d) 49, 73 D.L.R. (3d) 18, reversing 9 O.R. (2d) 662, 61 D.L.R. (3d) 430 (C.A.).

(y) See *R. v. Barrie; Ex parte Bernick* [1970] 1 O.R. 200, 8 D.L.R. (3d) 52 (C.A.).

(z) *Re Imperial Oil Ltd. and Etobicoke* [1951] O.W.N. 726.

(a) *R. v. Toronto, Ex parte Lawson* [1971] 1 O.R. 451 (H.C.).

(b) R.S.O. 1980, c. 379, s. 39(8)(*b*). The Court would not make a declaration that the building was exempt simply because the builder had complied with one part of the proviso. If

the passing of the by-law and complete the building within a reasonable time.

If deviations are made from the original plans with respect to which a permit has been issued so that the application for approval is for a building substantially different from the other one, there is no vested right by reason of the original permit and the applicant must comply with the regulations existing at the time the new application is made(c).

A building permit constitutes evidence of approval but lack of it does not mean that they have not been approved(d). Such approval meant approval with respect to zoning requirements and a permit issued for excavation and foundations while the plans for the superstructure were in the hands of the municipality, was held to constitute zoning approval(e). This proviso contemplates approval of plans in relation to zoning questions and protects their zoning status prior to the enactment of a restrictive by-law(f).

The protection afforded to property owners by the proviso goes further than does the common law which did not prevent a by-law from applying to a building not yet in existence, the plans for which have been approved(g). Before the enactment of the exempting provision, a municipality had the right, in some cases, to cancel a permit for the construction of a building at any time prior to the actual commencement of the work on the ground if, in the interval, it had passed a by-law prohibiting the erection of a building of like character within the area in which it was proposed to build(h).

Now the effect of s. 34(9) is that the municipality, once having approved of plans submitted and issued a permit, cannot revoke the permit by passing a subsequent restrictive by-law(i). The completion of a building which was begun under a permit for a garage could not, even before the enactment of s. 34(9), be prevented by a by-law prohibiting the location of structures of that character which was adopted subsequent to the commencement of excavations for the building(j). A saving provision in a statute which excluded the operation of a by-law from "any building lawfully under construction" at the time the by-law was enacted is declaratory of the law decided in the last mentioned case and was applied to a building the excavation for which had already been completed(k). So

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the owner failed to come within the proviso, but nevertheless completed construction, the effect may be that its use of the land would not be a lawful use: *Re Bay Charles Centre and Toronto* (1977) 3 M.P.L.R. 31 (Div. Ct.).

(c) *Re Ryan and McCallum* (1912) 4 O.W.N. 193, 7 D.L.R. 420.

(d) *Re Ucci and Toronto* [1955] O.W.N. 647, [1955] 4 D.L.R. 700.

(e) *Mapa v. North Toronto* [1967] S.C.R. 172, 61 D.L.R. (2d) 1, reversing [1965] 2 O.R. 158, 50 D.L.R. (2d) 31 (*sub nom. R. v. North York); Ample Invts. Ltd. v. North York* [1967] S.C.R. 181; *Re Cadillac Dev. Corp. and Regina City* (1977) 3 M.P.L.R. 88, 74 D.L.R. (3d) 497 (Sask. C.A.).

(f) *Re Triforce Const. Ltd. and Toronto* (1974), 4 O.R. (2d) 729, 49 D.L.R. (3d) 177 (D.C.).

(g) See *Toronto v. Williams* (1912) 27 O.L.R. 186, 8 D.L.R. 299, reversing 5 D.L.R. 659 (C.A.).

(h) *Toronto v. Ford* (1913) 24 O.W.R. 717, 4 O.W.N. 1386, 12 D.L.R. 841 (C.A.); *Toronto v. Garfunkel* (1912) 23 O.W.R. 374.

(i) See *Re Kensington Indust. Inc. and Toronto* [1955] O.W.N. 652.

(j) *Toronto v. Wheeler* (1912) 3 O.W.N. 1424, 4 D.L.R. 352.

(k) *Shaul v. Jasper Place* (1953) 10 W.W.R. (N.S.) 268 (Alta.). Water connections made to the site were held to constitute a sufficient commencement of construction: *Salaberry de Valleyfield v. Hardy* [1958] R.L. 214.

too a building for which a foundation permit had already been granted in respect of which a second stage permit is sought is considered to be lawfully under construction, the foundtaion having been completed. The building was therefore deemed to be legal non-conforming use notwithstanding any intervening by-law(l). A miniature golf course, being under construction prior to the passage of a prohibitory by-law, was held to be a lawful and valid non-conforming use, notwithstanding that construction was done in stages(m).

§138.64 *Extension, Enlargement and Change of Use*

The general powers of s. 34(1) of the Planning Act extend to permit a municipality to prohibit the alteration or reconstruction of an existing building by way of addition, enlargement or extension notwithstanding that such building is used for non-conforming use protected by s. 34(9). It has been held that the words "addition", "enlargement," "alteration", "extension" and "reconstruction" all fall within the language "erection" . . . of buildings" used in s. 34(1) of the Act(n). The municipality can prohibit such changes from being made unless they conform to the by-laws then in force. A non-conforming building could not be enlarged or extended since it was located on a property that was deficient in lot frontage and area and the building itself was deficient as to the side yard setback, even though the proposed structure would comply with the by-law in other respects(o). A provision that all buildings erected on certain sites are to comply with specified height and coverage requirements was held to apply by its terms to existing non-conforming buildings with respect to additions and alterations(p). Therefore, the fact that there is a building on part of certain lands, which can still be used notwithstanding a restrictive by-law by virtue of the exemption, does not override the paramount right of the municipality to pass a by-law prohibiting the use of the remainder of the lands for certain purposes. The owner is not entitled to a permit for an addition to his building on the unused portion of such restricted lands(q). What is now s. 34(9) of the Planning Act was re-enacted in 1955 to make it clear that the exemption from the provisions of a by-law is only to the degree necessary to permit the continuance of the non-conforming use.

A partial use of the premises can be extended throughout the entire premises so if on the date of passing the by-law a part of a building is used for purposes prohibited by a by-law, the building as a whole is exempt(r). The use is not restricted to the status quo existing on the date of the by-law

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(l) *Re Cadillac Devs. Corp. and Regina City, supra.*

(m) *Cowichan Valley Reg. Dist. v. Jeffries* (1982) 139 D.L.R. (3d) 211 (B.C. S.C.).

(n) *Re Wilmot and Kingston* [1946] O.R. 437, [1946] 4 D.L.R. 790 (C.A.). In *Westmount v. Lapierre* [1955] Que. Q.B. 639 (C.A.), it was held that "erection" includes conversion of an existing structure into one of a prohibited class.

(o) *Adams v. Uzumeri* (1983) 23 M.P.L.R. 316 (Ont. Co. Ct.).

(p) *Re David Everett Holdings Ltd. and Red Deer* [1975] 3 W.W.R. 333, 51 D.L.R. (3d) 585 (Alta. C.A.).

(q) *Re Scott and Toronto* [1945] O.W.N. 484, [1945] 3 D.L.R. 478.
This also appears to be the effect of the decision in *Toronto v. Toronto R.C. Sep. S. Trustees* [1926] A.C. 81, [1925] 3 D.L.R. 880. See *Re Wilmot and Kingston, supra.*

(r) *Central Jewish Institute v. Toronto,* [1948] S.C.R. 101, [1948] 2 D.L.R. 1.

but is capable of being intensified and expanded within the confines of the building without contravening the by-law(s). Where a part of a building in an area zoned single family residential is used for one legal non-conforming use and the remainder is used for a different non-conforming use (butcher shop) which is terminated, the remainder may be converted to the first legal non-conforming use (self-contained apartment). The fact that the intention to use the second part of the building for such use had not been formed by the owners at the time of the enactment of the by-law was immaterial(t). Where a house consisted of two self-contained dwelling units under the then existing zoning which was amended to restrict the use of the land to one private detached dwelling house, such house was rendered non-conforming and the rights of the owners crystallized at that time. The existence of the non-conformity did not give rise to a right to increase significantly the extent of the non-conformity by increasing the number of dwelling units to four(u). However, in the case of a non-conforming use of one storey of a building, it has been held that this does not permit its extension to the other storeys of the building(v).

It has now been held that occupation of a substantial part of vacant land for a non-conforming use has been held to be sufficient to exempt the whole of the land from the provisions of the by-law(w). An owner of two parcels of land separated by a highway into northern and southern portions, the latter having been used for commercial purposes prior to its rezoning, could not use the northern portion for the commercial use that was permitted on the southern portion as a non-conforming use under former s. 722 of the British Columbia Municipal Act. The non-conforming use of the southern portion could not be extended to the northern portion(x). On the other hand, it has been held that a wrecking yard where 10 cars were stored could not be expanded to a larger junk yard. The existing non-conformity under the Municipal Act(y) did not give rise to a right to expand operations(z).

A by-law prohibiting the establishment of a gravel pit does not have the effect of restraining the extension of an existing pit(a). An owner of land in an agricultural use district cannot expand or continue a legal non-conforming use of lands from which the previous owners used loose rocks for their own purposes, such as driveway repair, and a rock quarry and crushing operation does not amount to a continuation of the previous non-

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(s) *Borins v. Toronto* (1988) 50 R.P.R. 43 (Ont. Dist. Ct.).

(t) *Re Thorman and Cambridge* (1977) 18 O.R. (2d) 142, 4 M.P.L.R. 220, 81 D.L.R. (3d) 376 (H.C.).

(u) *R. v. Grant* (1983) 23 M.P.L.R. 89 (Ont. C.A.), distinguishing *Re Thorman and Cambridge, supra.*

(v) *Vancouver v. Kessler* (1964) 48 W.W.R. 622, 45 D.L.R. (2d) 535 (B.C. C.A.).

(w) *R. v. Barry Humphrey Enterprises Ltd.* (1977) 15 O.R. 548, 2 M.P.L.R. 54, 76 D.L.R. (3d) 550 (Div. Ct.) (ten acres of a parcel of fifteen acres used for a salvage yard). See also *Kiss v. Phil Dennis Enterprises Ltd.* (1974) 3 O.R. (2d) 576, 46 D.L.R. (3d) (to the same effect); *Emily v. Johnson* (1981) 37 O.R. (2d) 623, 135 D.L.R. (3d) 465, affirmed (1983) 143 D.L.R. (3d) 576n (C.A.) (go-kart track).

(x) *Cowichan Valley Reg. Dist. v. Little* (1987) 12 B.C.L.R. (2d) 103 (C.A.).

(y) S. 970(1) [en. 1985, c. 79, s. 8].

(z) *Ucluelet v. Manuel*, B.C.S.C., May 27, 1988 (unreported). S. 970(6) prohibits extension to a degree greater than at the time of the enactment of the by-law.

(a) *Whitchurch v. McGuffin* [1970] 2 O.R. 181, 10 D.L.R. (3d) 211, affirmed [1971] 2 O.R. 92n, 16 D.L.R. (3d) 480n (C.A.).

conforming use, the land not previously having been used in the manner proposed(b). Section 34(2) of the Planning Act now states that the making, establishment or operation of a pit or quarry is deemed to be a use of land for the purposes of s. 34(1) ¶1. This will allow the owner of a pit or quarry to invoke the protection conferred by s. 34(9). Previously the doctrine of non-conforming use had no application since a pit operation was not a use of land(c). Only new pits can be prohibited, but the regulatory power conferred by s. 210 ¶137 of the Municipal Act extends to existing operations(d). In Quebec, the right of a proprietor to use his land is frozen in its nature and extent as soon as a zoning by-law prohibiting the exercise of any additional rights comes into force. The exercise of the right is limited to that which was exercised at the time the by-law was adopted so that the owner's acquired rights only extended to one lot on which he was working a gravel pit although he owned the two adjoining lots at the time(e).

A distinction is to be drawn between the structure of the building and the use made of it and the use of a non-conforming building cannot be changed to one that is not protected by statute or by-law(f). Acquired rights in Quebec cannot arise where what is contemplated is an entirely new use of the premises(g).

A right to change a use to another non-conforming use may be granted by the committee of adjustment(h). In New Brunswick a non-conforming use may be changed to a similar non-conforming use with the consent of the advisory committee or planning commission(i). The installation of pool tables and pinball machines in a store which was used as a store prior to the enactment of a residential by-law was held to transform the store into an amusement centre contrary to a by-law prohibiting transformation from one non-conforming use to another without consent(j). An Ontario committee likewise has jurisdiction to receive an application for a proposed change from a legal non-conforming use to a permitted use pursuant to s. 44(2)(*a*) of the Act(k).

The Municipal Act formerly contained a provision, omitted from the present Act, which stated that the passing of a restrictive by-law was not to prevent the extension or enlargement of any building used for any of the purposes mentioned at the time of the passing of the by-law(l). It is now provided by s. 34(10) of the Planning Act that, notwithstanding any other

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(b) *Biddington v. Tri-Gil Paving & Construction Ltd.* (1986) 71 N.B.R. (2d) 399, 182 A.P.R. 399 (Q.B.).

(c) *Uxbridge v. Timbers Bros. Sand & Gravel*, 7 O.R. (2d) 484, reversing [1973] 3 O.R. 107, 36 D.L.R. (3d) 42 (C.A.). See also *St. Bruno de Montarville v. Potvin* [1970] Que. C.A. 864. See Pits and Quarries §183.

(d) *Uxbridge v. Timbers Bros. Sand & Gravel, supra.*

(e) *Desrosiers c. St-Anaclet-de-Lessard* (1982) 21 M.P.L.R. 162 (C.S. Que.).

(f) *Vallee v. Sherbrooke* [1966] Que. Q.B. 517.

(g) *Montreal v. Wedel* [1965] R.L. 494.

(h) Planning Act (Ont.), s. 44(2)(*a*)(ii).

(i) Community Planning Act, R.S.N.B. 1973, c. C-12, s. 40(4).

(j) *Lordon v. Pitman* (1980) 33 N.B.R. (2d) 23, 80 A.P.R. 23, 116 D.L.R. (3d) 573 (C.A.).

(k) *Re Kunynetz and City of Toronto* (1980) 28 O.R. (2d) 308, 109 D.L.R. (3d) 390 (Div. Ct.).

(l) The effect of a similar provision in a restrictive by-law was considered in *McCormick v. Toronto* (1923) 54 O.L.R. 603. In *Toronto v. Wm. Unser Ltd.* [1954] 3 D.L.R. 641 (S.C.C.), it was held that an owner was entitled to erect an addition to his building because of the peculiar wording of a proviso in the restrictive by-law.

provision of the section, any by-law may be amended so as to permit the extension or enlargement of any land or structure used for any purpose prohibited by the by-law if such land or structure continues to be used in the same manner and for the same purpose as it was used on the day such by-law was passed(m). Section 34(10) was designed to permit the enlargement or extension of a non-conforming use of land or a building, but such use remains prohibited under the by-law both before and after the amendment. However, where an exception was created in respect of the general prohibition by a by-law which declared that land may be used and buildings may be erected and used for the existing non-conforming use, new non-conforming buildings may be authorized(n).

It is doubtful whether s. 34(1) authorizes a council to prohibit alterations to a building in respect of which there is a non-conforming use unless such repairs conform to the zoning by-laws then in force. There is a clear distinction between "alteration" and "erection". A power to regulate the erection or construction of buildings will not support a by-law requiring a permit for the alteration of a building(o), and a by-law prohibiting the erection of wooden buildings is not effective to prevent the alteration of existing wooden buildings(p). There is no doubt that reasonable repairs and improvements can be made to exempted buildings if they comply with existing building construction regulations(q) inasmuch as the power to regulate the erection or placing of buildings does not prevent ordinary repairs not amounting to an erection or addition thereto(r).

A committee of adjustment has power to allow the extension or enlargement of an existing non-conforming use but it has no power to permit the replacement of such use where it is intended totally to demolish the building to be added to(s).

Some statutes prohibit structural alterations to a non-conforming building. The question of whether alterations are "structural alterations" is primarily one of fact and depends on the degree of change. For this purpose the structure includes at least the foundation, the floors, the exterior walls and the roof(t). Where a by-law required additions or extensions to comply with existing rezoning regulations it was held that a British Columbia board of variance could not grant permission to add a dormer roof where the roof would extend over that portion of the house which infringed on the existing sideyard setback. There was no appeal to the County Court judge

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(m) See *Pain v. McColl Frontenac Oil Co.* (1948) 56 Man. R. 262 (Mun. and Pub. Utility Bd.).

(n) *Re Sault Dock Ltd. and Sault Ste. Marie* [1972] 3 O.R. 793, 29 D.L.R. (3d) 529. Leave to appeal refused [1973] 2 O.R. 479 (C.A.).

(o) *Duhamel v. Laverty* [1954] Que. S.C. 282. It was held that, so long as the changes did not alter the general plans, dimensions and appearance of the structure, no permit could be required. *Cf. Re Wilmot and Kingston* [1946] O.R. 437, [1946] 4 D.L.R. 790 (C.A.), where the court thought that the word "erection" included "alteration". See also *Loo Gee Wing v. Amor* (1909) 10 W.L.R. 383 (B.C.).

(p) *R. v. On Hing* (1884) 1 B.C.R. 148.

(q) *Semble, Re Wilmot and Kingston, supra.*

(r) *R. v. Howard* (1884) 4 O.R. 377 at 380; *R. v. Nunn* (1905) 15 Man. R. 288, 1 W.L.R. 559 (C.A.).

(s) *Budman v. Gravenhurst* (1983) 44 O.R. (2d) 696, 24 M.P.L.R. 195, 1 O.A.C. 267 (Div. Ct.).

(t) *Re David Everett Holdings Ltd. and Red Deer* [1975] 3 W.W.R. 333, 51 D.L.R. (3d) 585 (Alta. C.A.).

from the Board's refusal in finding under s. 727(1)(*c*) that there was no hardship(u).

It may be that s. 34 is wide enough to authorize a by-law directing that a building damaged more than 50% must be restored in conformity with the regulations respecting the use zone in which it is located(v) although similar by-laws have been held to be *ultra vires* without express statutory authority(w). The situation in the case of a damaged building is not clear. It has been held, however, that where enough of the building remained after the fire to renovate and restore to complete use the building existing before the fire, even though the new structure is not precisely the same as the old, the owner can do so without having to conform with existing zoning(x). A building partially destroyed by fire after which repairs also involving reroofing were carried out did not lose the exemption since there was a continuing intention to use it for its intended purpose(y).

§138.65 *Loss of Statutory Protection*

By virtue of the exemption conferred upon a property owner by s. 34(9) of the Planning Act, the use of any building in existence at the time a by-law is enacted prohibiting such use, may continue as a non-conforming use "so long as it continues to be used for the purpose". So if the use for that purpose ceases, the by-law thereupon becomes applicable and the land cannot thereafter be used for such purpose or any other purpose(z). The onus is on the person asserting discontinuance to prove it(a). Once the right to use premises has been terminated by agreement or otherwise, there is no way in which it can be viewed in the face of a restrictive by-law prohibiting such use(b). Once it is established by an owner that he has a lawful non-conforming use, the burden is on the municipality to show that the use has been terminated or interrupted(c). Hence the onus of proving discontinuance of a legal non-conforming use is on the municipality(d).

What change will render the exemption no longer applicable? There are two classes of property covered by s. 34(9), namely, land and structures which must meet the two specifications so as to make the proviso operate. Firstly, in the case of land, it must be in use on the date of the enactment of the by-law and, in the case of a structure, it must be erected on that day for such a purpose. Secondly, such use of the land or structure for this purpose

(u) *Inglis v. Qualicum Beach* (1981) 30 B.C.L.R. 270 (Co. Ct.).
(v) *Semble, Re Wilmot and Kingston, supra.*
(w) *Re Homfray and Bldg. Inspector of Kamploops* (1933) 46 B.C.R. 475.
(x) *Fejer v. Wellwood Ont.* C.A. unreported, judgment set out in J.B. Milner's case book on Community Planning, University of Toronto Press, 1963. The Court in effect ignored the clause in the Building By-Law that "repairs and alterations to any building to the extent of over 50% of the value of such building, as it was before such repairs and alterations were necessary, shall be considered a re-erection of such building and subject to the provisions of this By-law."
(y) *Kiss v. Phil Dennis Enterprises Ltd.* (1974) 3 O.R. (2d) 576, 46 D.L.R. (3d) 196.
(z) *Sillery v. Sun Oil Co.* [1964] S.C.R. 552, 45 D.L.R. (2d) 541, reversing [1962] Que. Q.B. 914; *Re Wilmot and Kingston* [1946] O.R. 437, [1946] 3 D.L.R. 790 (C.A.).
(a) *Re Thorman and Cambridge* (1977) 18 O.R. (2d) 142 (H.C.); *MacNutt v. R.* [1972] 5 W.W.R. 402 (B.C.).
(b) *Sillery v. Sun Oil Co., supra, Man. Vinegar Co. v. Winnipeg* 56 Man. R. 195, [1948] 2 W.W.R. 431, [1948] 4 D.L.R. 730, affirming [1947] 2 W.W.R. 721 (C.A.).
(c) *Jacques-Cartier v. Billett* [1961] Que. Q.B. 593; *McNutt v. R.* (B.C.); *Montreal v. DiStaulo* [1965] R.L. 208.
(d) *Kamploops v. Southern Sand & Gravel Co.* (1987) 43 D.L.R. (4th) 369 (B.C.S.C.).

must continue. Therefore, if the user has commenced either before or after the date of the by-law and has then discontinued, the property thereupon ceases to meet the specifications contained in the clause and the by-law then applies to it(e).

In Ontario, cessation of use may show that the owner intended to discontinue the use but his intention is also an important factor in determining continuance of the con-conforming use. Hence, a decision to discontinue the use to avoid confrontation with the municipality and also because of mistake of law on both the owners and the municipality part, cannot be said to result in a loss of the exemption(f). So too, the use of other entertainment on a trial basis in view of a notice of intention to ban strip shows did not prevent the club owner from resuming the strip shows prior to the enactment of the by-law(g).

The discontinuance of a non-conforming use under the Alberta Act requires an intention to end the use, coupled with actual non-use. Therefore, when a residential property is vacant for more than 6 months, despite the owner's efforts to find tenants, there is no intention to abandon the residential use of the premises and the protection of s. 74(2) of the Planning Act is not lost(h).

Under s. 970 of the British Columbia Act, once there is a discontinuance of actual use for a period of six months there is no need to show intention of abandonment(i). Although under the Municipal Act, s. 970 a continuing intention to use land for non-conforming use does not prevent the 6-month period of discontinuance from running, the general use of land as a gravel pit operation which included a rock crusher and an asphalt plant, was protected, together with such uses, even though their operation depended on seasonal and economic need resulting in periodical cessation(j). Non-user of a property for the protected use has been held sufficient without regard to the intention of the owner(k).

So long as continuity of the same use can be shown, changes in ownership or occupancy do not affect the exemption(l). A mere temporary interruption of the use has been held not to defeat the owner's right to continue such use(m). Where the land is used intermittently or on a

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(e) *R. v. Cappy* [1952] O.W.N. 481 (C.A.). See also *Dennis v. East Flamboro* [1956] O.W.N. 282, 3 D.L.R. (2d) 130, affirming 1 D.L.R. (2d) 190 (C.A.). See *R. v. Grandview Holdings Co.* (1965) 53 W.W.R. 308, 53 D.L.R. (2d) 276 (B.C.) (conversion of storage space into bedroom not a "development" under the Vancouver Charter).

(f) *Toronto v. San Joaquin Invts. Ltd.* (1978) 18 O.R. (2d) 730 at 739, 83 D.L.R. (3d) 584, 5 M.P.L.R. (2d) 113 (H.C.), affirmed 26 O.R. (2d) 775, 106 D.L.R. (3d) 546, leave to appeal refused 26 O.R. (2d) 775n, 32 N.R. 442n, 106 D.L.R. (3d) 546n (S.C.C.).

(g) *Dartmouth v. Portland Landing Beverage Room Ltd.* (1989) 42 M.P.L.R. 93 (N.S.T.D.).

(h) *Stavely v. Fern Brothers* (1987) 56 Alta. L.R. (2d) 359, 84 A.R. 266 (C.A.).

(i) *Re Ponteix Properties Ltd. and Victoria* (1977) 75 D.L.R. (3d) 155, 2 M.P.L.R. 242. Despite the continuing intention of a restaurant owner to re-open a restaurant after it had closed, it was held that the use ceased at the time of closing; the owner's efforts to find a sub lessee did not constitute an actual use of the premises.

(j) *Kamloops v. Southern Sand & Gravel Co.* (1987) 43 D.L.R. (4th) 369 (B.C.S.C.). S. 970 [en. 1985, c. 79, s. 78; am. 1987, c. 14, s. 33].

(k) *Saint John v. Killam* (1973) 6 N.B.R. (2d) 642, affirming 6 N.B.R. (2d) at 647 (C.A.) (former owner selling contents of building and electricity disconnected).

(l) *R. v. Fulton* [1968] 1 O.R. 342, [1968] 3 C.C.C. 115, 66 D.L.R. (2d) 405 (C.A.).

(m) *Uxbridge v. Timbers Bros. Sand & Gravel Ltd.* [1973] 3 O.R. 107, 36 D.L.R. (3d) 42, reversed on other grounds 7 O.R. (2d) 484 (C.A.); *Jacques-Cartier v. Billette* [1961] Que. Q.B.

seasonal basis, such as for the operation of a go-cart track, its ceasing to be used or operated during the off-season is not a sufficient interruption to terminate the use(n). The exemption is not lost by the fact that funerals were not held for almost a year in a residence partly used as a funeral home when the premises remained equipped for funerals and were not used for any other purpose(o). But the discontinuance of a lodge or tourist home catering to the public during the major part of the summer season and its use as a private summer residence was held to be tantamount to a discontinuance for the whole year and to remove it from the exemption(p). So too where the property has not been used for the non-conforming use for a period in excess of 20 months, loss of protection ensues(q). The lapse of acquired rights may result from a permanent or quasi-permanent change or interruption in the use of the premises(r).

In the case of land and a structure used for many years before the passing of a by-law prohibiting such use, the question arose whether the non-conforming use had discontinued after the date of its passing. On the facts it was found that the purpose was a general one devoted to public amusement and that such use had not at any time terminated. It was said that the purpose is to be collectively regarded as a whole and cannot properly be divided into parts. So the fact that the entertainment fare was varied did not alter the fact that it was still within the general class nor did it have the effect of changing the purpose for which the property was used(s). The words "so long as it continues to be used for that purpose" do not mean that a building must always be used for the identical purposes for which it was used on the material date. So if a building is used as a factory on such date and is still used as a factory, regardless of the type of manufacturing being carried on, it seems that the exemption is not lost(t). The character of the user may be different but unless it is shown that there was an abandonment of the general user in connection with the business the land may be put to some other use relating thereto(u). The construction of a driveway over landscaped lands appurtenant to an industrial building is not a change of use but it is one of degree(v). So the parking of cars of the general public, after a car dealer had previously used the land for parking its own and customers' cars, has been held to constitute a continuation of a use(w).

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593. The right to continue the operation and use of land for a gravel pit which had been operated from 1946 until 1980 when only intermittent use by others was shown until 1985, was lost: *Aylmer v. Quesnel* (1988) 11 A.C.W.S. (3d) 237 (Que. C.A.).

(n) *Emily v. Johnson* (1981) 37 O.R. (2d) 623, 135 D.L.R. (3d) 465, 15 O.M.B.R. 371 at 377, affirmed (1983) 143 D.L.R. (3d) 576n, 15 O.M.B.R. 371 (C.A.).

(o) *O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie* [1961] O.R. 413, 28 D.L.R. (2d) 1. Repairs may constitute a use: *Taback v. Rosenberg* (1948) 54 Man. R. 121.

(p) *Gayford v. Kolodziej* [1959] O.W.N. 341, 19 D.L.R. (2d) 777 (C.A.).

(q) *Re Thorman and Cambridge* (1977) 18 O.R. (2d) 142 (H.C.).

(r) *Ouimet v. Montreal* [1970] Que. S.C. 537.

(s) *R. v. Cappy* [1952] O.W.N. 481 (C.A.).

(t) *Toronto v. Potts Pattern Works Ltd.* [1943] O.W.N. 615.
Cf. Montreal v. Bibeau [1964] Que. Q.B. 107.

(u) *R. v. Rutherford's Diary Ltd.* [1961] O.W.N. 274, affirming [1961] O.W.N. 146 (C.A.).

(v) *Kiss v. Phil Dennis Enterprises Ltd.* (1974) 3 O.R. (2d) 576, 46 D.L.R. (3d) 196.

(w) *R. v. Nimak Invt. Ltd.* [1965] 1 O.R. 96, 46 D.L.R. (2d) 712, affirmed [1965] 2 O.R. 182n, 50 D.L.R. (2d) 130n (C.A.).

PRINCIPLES OF ADMINISTRATIVE LAW

by

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1985

CARSWELL

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quite strict limitations on the ability to make delegated legislation retroactive.[54]

A problem does sometimes arise, however, in determining whether a decision has a retroactive effect. In the first place, a complaint about retroactivity can only arise where rights have already vested so as to be affected by the impugned retroactive decision.[55] Secondly, not every change in a rule is truly retroactive. For example, the implementation of a rule prohibiting an articling student from writing the bar admission examination more than three times is not necessarily retroactive if applied to students who have not yet written the examination three times (but, for example, only once and failed). In all likelihood, the student does not have a vested right to sit the examination an unlimited number of times, and therefore his rights have not been affected by the imposition of a three-time rule. By contrast, if the three-time rule is subsequently amended to a two-time rule, it is conceivable that the application of that rule to anyone registered in the bar course who had not yet written three examinations might be a retroactive amendment to his right to write the examinations three times.

(d) Uncertainty

Administrative actions whose results are uncertain have also been held to be void on review by the superior courts. Again, most examples of this ground for judicial review relate to the content of delegated legislation. In *McEldowney v. Forde*,[56] a regulation was attacked for being uncertain. The legislation granted the government of Northern Ireland wide powers to preserve peace and maintain order, and a regulation was passed making it a criminal offence to belong to a "republican club" or "any like organization however described". Serious doubt was expressed by the courts about whether these phrases were so vague as to be incapable of enforcement. Of course, mere ambiguity is not sufficient to constitute uncertainty. On the contrary, the court's task is to resolve the ambiguity, to choose the one correct meaning — which in most cases would not itself be uncertain. Accordingly, the ambit within which uncertainty will be a useful ground for reviewing delegated legislation is likely to be narrow.

In principle, uncertainty should also be a ground for attacking the exercise of other discretionary administrative powers which are not legislative in nature; however, it is difficult to find a good example of this.

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54 See the discussion on this point in chapter 4, *supra*.

55 See *Wilkin v. White*, (1980) 11 M.P.L.R. 275 (B.C.S.C.), where the rules relating to subdivision were changed after an application had been made but no right had vested; *Hunter v. Surrey*, (1980) 108 D.L.R. (3d) 557 (B.C.S.C.), where the applicants were charged higher development cost charges under a new by-law passed after an application for subdivision had been made.

56 [1971] A.C. 632 (H.L.). See also *Tpt. Min. v. Alexander*, [1978] 1 N.Z.L.R. 306; *Hotel & Catering Indust. Training Bd. v. Automobile Pty. Ltd.*, [1969] 1 W.L.R. 697 (H.L.).

HUNTER et al. v. CORPORATION OF DISTRICT OF SURREY and TAN

Supreme Court, Wallace J. [In Chambers]

Heard — December 21, 1979.
Judgment — December 28, 1979.

Municipal corporations — Zoning by-laws — Subdivision control — Municipal officer's discretion in approving or rejecting subdivision application — Sixty-day time limit for official's decision — Official may consider by-laws not in effect at time of application which take effect during the sixty days — The Interpretation Act, s. 8 — The Land Registry Act, s. 96 — The Municipal Act, ss. 71(4), 94.

Municipal corporations — Zoning by-laws — Subdivision control — By-law imposing development-cost charges on all subdivisions — Municipal official not required to assess cost charges of each subdivision application — May apply formula applicable to all subdivisions of certain size — The Municipal Act, s. 702C.

The petitioners sought approval of a subdivision plan whereby they would sell a one-acre lot from their ten acres of farm land. The petitioners had been denied preliminary approval by an officer of the municipality but, as of 16th July 1979, they had not applied formally to have their plan approved. On that date the municipal council passed a by-law pursuant to s. 702C of the Municipal Act to impose development-cost charges in all subdivisions save for those which created three or less lots. On 31st July 1979 an amendment was passed to s. 702C removing the limitation upon municipalities to impose development-cost charges with respect to subdivisions of three or less residential lots. On 7th September 1979 the petitioners applied formally for approval of the subdivision. The municipal officer considering the application did not make a decision immediately but instead relied on his statutory right to wait 60 days as he suspected that the municipality would amend its by-law so as to impose development-cost charges against subdivisions creating three or less lots. This in fact happened during the 60 days. As a result the municipal officer ruled that the petitioners had to pay development-cost charges of $2,840 as a condition precedent to his granting approval. This figure was arrived at through the use of a formula, and not on the basis of an examination of what the actual development costs would be in these circumstances. The petitioners stated a special case to the court pursuant to R. 33.

Held — Application dismissed.

In determining whether to approve or reject a subdivision plan, a municipal officer is given a broad discretion and that discretion is not limited to considering only those events which occurred prior to the date of the application. The municipal officer is entitled to consider all relevant matters which come to his attention up to the time he rules upon the application and within the 60-day statutory time limit. Accordingly, he may take into account the fact that a by-law is likely to be amended within the 60 days.

Section 702C of the Municipal Act is not consistent with the idea that a municipal officer must determine the specific development-cost charges of each specific

subdivision being approved. The municipal officer was entitled, in determining what costs would be imposed by the petitioner's subdivision, to apply a formula applicable to all subdivisions of a certain size.

Cases considered

Proposed Subdivision, Re (1954), 15 W.W.R. 143 (B.C.S.C.) — applied.

Statutes considered

Interpretation Act, 1974 (B.C.), c. 42 [now R.S.B.C. 1979, c. 206], s. 8.

Land Registry Act, R.S.B.C. 1960, c. 208 [repealed and substituted by the Land Titles Act, 1978 (B.C.), c. 25, effective 31st October 1979; now the Land Title Act, R.S.B.C. 1979, c. 219], ss. 91 [am. 1961, c. 33, s. 11; 1963, c. 22, s. 3; 1973, c. 48, s. 10; 1977, c. 75, s. 54(*a*)], 94 [re-en. 1970, c. 19, s. 6; now s. 87(*b*)], 96 [now s. 86].

Municipal Act, R.S.B.C. 1960, c. 255 [now R.S.B.C. 1979, c. 290], ss. 702C [en. 1977, c. 57, s. 15; am. 1978, c. 25, s. 332; 1979, c. 22, s. 35; now s. 719], 711(4) [renumbered 1961, c. 43, s. 45(*a*); now s. 729(4)].

Rules considered

Supreme Court Rules, 1976, R. 33.

[Note up with 16 C.E.D. (West. 2nd) *Municipal Corporations*, s. 42; 28 Can. Abr. (2d) *Municipal Corporations*, XVII, 2, c.]

APPLICATION by way of stated case.

J. S. Sigurdson, for petitioners.
M. C. Soronow, for respondents.

(Vancouver No. A792350)

28th December 1979. WALLACE J.:—

FACTS

1. The petitioners are the owners of a ten-acre tract of land in the municipality of Surrey, upon which they operated a dairy farm for some 20 years.

2. In 1978 they constructed a new house on an adjacent property and, in order to pay for the new house, decided to sell an acre of the original farm upon which their former house was situate and retain for their own use the balance of the farm acreage. They sought approval of a subdivision designed to accomplish this objective.

3. The original acreage was serviced as far as roads, streets and drainage were concerned. Electricity, water and telephone were in place to the old home.

4. The property was in a zoning area which allowed subdivision of lots of no less than one acre in size.

5. The petitioners sought preliminary approval of the municipality to the subdivision. The approving officer, Mr. Tan, refused such approval on the ground that the municipality was in the course of calculating a development-cost-charge formula and, accordingly, it was premature to consider the preliminary application.

6. After two years of study, on 16th July 1979, the municipal council of Surrey passed a by-law pursuant to s. 702C [en. 1977, c. 57, s. 15; am. 1978, c. 25, s. 332; 1979, c. 22, s. 35; now s. 719] of the Municipal Act, R.S.B.C. 1960, c. 255 [now R.S.B.C. 1979, c. 290], to impose development-cost charges in all subdivisions created within the municipality save for those which created three or less residential lots. The by-law was approved by the inspector of municipalities on 14th August 1979 and finally adopted by Surrey council on 10th September 1979.

7. On 31st July 1979 an amendment was passed to s. 702C of the Municipal Act removing the limitation upon the municipality to impose development-cost charges with respect to subdivisions of three or less residential lots.

8. On 7th September 1979 the petitioners had delivered a formal application for approval of the subdivision. Section 91 [am. 1961, c. 33, s. 11; 1963, c. 22, s. 3; 1973, c. 48, s. 10; 1977, c. 75, s. 54(*a*)] of the Land Registry Act, R.S.B.C. 1960, c. 208 [repealed and substituted by the Land Titles Act, 1978 (B.C.), c. 25, effective 31st October 1979; now the Land Title Act, R.S.B.C. 1979, c. 219] provided that the approving officer had a limited period of 60 days within which to examine and approve or reject the application.

9. By 22nd October 1979 Surrey council had amended their development-cost-charges by-law adopting the amendment to s. 702C of the Municipal Act, which deleted the former exclusion referable to three lots or less.

10. The approving officer exercised his discretion by refusing to approve the application until the development-cost-charges by-law had been amended to delete the former exclusion of subdivisions of three lots or less. He held the firm view that *all* subdivisions imposed a cost burden on the municipality, and he ruled that the payment of cost charges of $2,840, fixed pursuant to the amended development-cost-charges by-law, was a proper condition precedent to his granting approval.

11. Page 4 of the petitioners' special case reads as follows:

"It is agreed that the Approving Officer in considering the application did not direct his mind to the possible cost to the Municipality arising specifically out of this application for subdivision, but rather applied the terms of the proposed, and subsequently adopted, development cost charge by-law, and the studies done prior thereto, to this particular subdivision application."

Counsel have invoked R. 33 and stated a special case for decision by the court in the following terms:

"1. The Petitioner's [sic] formal application for subdivision was complete in all respects and filed with the Municipality and Approving Officer as required by law on September 7, 1979. Under Section 91(1) of the Land Registry Act, R.S.B.C. 1960 and amendments thereto, the Approving Officer has 60 days in which to reject or approve the subdivision plan. Does the right to subdivision approval of the Petitioners vest as at the date of their formal application, September 7, 1979, or was the Approving Officer wrong in law to form the opinion that the right is subject to changes which do or may occur with respect to the by-laws of the Municipality affecting the subdivision of land during the said 60 day period; in particular, in the case where on September 7, 1979 the Municipality was proceeding to amend its subdivision by-law pursuant to the recent amendment to the Municipal Act so as to allow the imposition of development cost charges on subdivisions of three or less lots, but had not done so at the date of the formal application, but in fact, did so during the said 60 day period.

"2. If the Petitioners' rights vest as at September 7, 1979, the date of the formal application, is the Approving Officer making an error in law in forming his opinion pursuant to Section 711(4) of the Municipal Act and Section 96 of the Land Registry Act as to the possible cost of the particular subdivision to the Municipality by not giving individual examination to the possible costs that may be imposed on the Municipality by the particular application for subdivision, but rather forming his opinion solely upon the costs recoverable under the proposed development cost charge by-law and the studies conducted by the Municipality in support thereof pertaining to subdivisions generally.

"3. If, alternatively, the Petitioner's [sic] rights vest only during the said 60 day period, or are subject to changes in Municipal by-laws affecting subdivision during that time, rather than on September

7, 1979, did the Approving Officer make an error in law when he did not give individual examination to the possible costs imposed on the Municipality by the Petitioner's application for subdivision, but rather rejected this particular application for excessive costs, being against public interest and contrary to the existing by-laws unless development cost charges were paid as provided for in the then existing development cost charge by-law adopted pursuant to the studies conducted by the Municipality in support thereof relating to the subdivision of all land generally in the Municipality."

QUESTION 1

This question raises the extent of the approving officer's discretion in approving or rejecting an application. Is he confined to the municipal by-laws as they existed on the date of the application, 7th September 1979, or may he consider legislation and by-laws which were being considered and were passed within the 60-day time limit for his approval provided by s. 91 of the Land Registry Act?

Section 96 [now s. 86] of the Land Registry Act provides in part:

"96. In considering an application before him for subdivision approval, the approving officer may hear objections from any interested persons, and may refuse to approve the subdivision if in his opinion the anticipated development of the subdivision . . . would be against the public interest."

In addition to his right to hold hearings of interested parties, he may refuse to approve the subdivision if it does not conform to the respective by-laws of the municipality — regulating the subdivision of land (s. 94 [re-en. 1970, c. 19, s. 6; now s. 87(*b*)]).

The Municipal Act provides in s. 711(4) [renumbered 1961, c. 43, s. 45(*a*); now s. 729(4)] that the approving officer may refuse to approve a subdivision plan if he is of the opinion that the costs to the municipality of providing public utilities or other municipal works or services would be excessive.

It is apparent that the approving officer is given a very broad discretion and in my opinion the 60-day period, available for investigations and hearings, is to enable him to consider any factual information brought to his attention relevant to the issues of public interest, excessive costs or non-conformity with the applicable by-laws of the municipality.

Section 8 of the Interpretation Act, 1974 (B.C.), c. 42 [now R.S.B.C. 1979, c. 206], provides:

"8. Every enactment shall be construed as being remedial, and shall be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects."

I cannot conceive it was the object of the legislature in passing the relevant sections of the Land Registry Act and the Municipal Act to restrict the approving officer's considerations to only those incidents which occurred prior to the date of the application. If this were so the object of the legislation, i.e., the refusal of applications contrary to the public interest, would be frustrated and one would have to read the section as referring to "public interest as of the date of the application".

It is my view that the registrar is entitled to consider all relevant matters which come to his attention up to the time he rules upon the application and within the 60-day time limit imposed by the Land Registry Act.

QUESTION 2

This question is premised on the assumption the applicants have rights which vest as at the date of their application. I have already expressed the view that the applicants' rights are limited to having their application fairly considered by the approving officer for a period not exceeding 60 days and that, in reaching a conclusion, he consider only those matters which are relevant to the issues he is required to decide. I reach this conclusion because I am of the opinion that only in this way will the object of the legislation respecting the requirements of approved applications be accomplished.

QUESTION 3

I perceive this question as raising this issue: In determining what costs a proposed subdivision will impose on a municipality, can the approving officer apply a formula applicable to all subdivisions of a certain size and type or must he ascertain the specific costs created by each specific subdivision?

The approving officer, by affidavit, related how the municipality had conducted an analysis into the costs created by various subdivisions, that the studies had revealed that all subdivisions impose a cost burden on the municipalities and that this type of subdivision created costs in the following categories of services:

Municipal Utility	
Water	$ 110
Drainage	290
Arterial Roads	960
Public Open Space	780
Non-Arterial Roads	700
TOTAL	$2,840

The studies were accepted by the municipal council and the inspector of municipalities, pursuant to s. 702C(9) of the Municipal Act, as an accurate reflection of the cost to the municipality of this type of development, and as a result the amending development-cost-charges by-law was passed.

It is to be noted that s. 702C(5) requires that a by-law imposing development-cost charges shall be "similar for all developments that impose similar capital cost burdens on the municipality" subject to certain permitted variations that are not applicable in this case. The legislation therefore envisages the working out of similar charges for categories of subdivisions. This objective would be inconsistent with an obligation to determine the specific development-cost charges of each specific subdivision being approved before a development-cost charge could be imposed as a condition of approval.

As I view the legislation, if a subdivision imposes any new capital-cost burdens on the municipality, the approving officer is entitled to reject an application unless the costs required by the by-law for that type of subdivision are paid. The only exceptions to the by-law are those subdivisions where *no* development costs are imposed on the municipalities. This may arise where all such costs are assumed and paid for by the developers under other agreements with the municipality or under other circumstances.

The evidence before me is that the approving officer considered that all single subdivisions imposed a cost burden on the municipality and that, in applying the costs required by the municipal by-law, he was imposing a condition of his approval which accurately reflected the costs to the municipality of this type of development — accordingly, I do not consider he exceeded the broad discretion granted the approving officer by the Land Registry Act or the Municipal Act.

In this respect, I accept the principle enunciated by Coady J. (as he then was) in *Re Proposed Subdivision* (1954), 15 W.W.R. 143 (B.C.S.C.) [pp. 143-44]:

"There are many reasons why municipal corporations should have and are given a measure of control over proposed subdivisions and the court should not on appeal lightly interfere with the decision of the approving officer."

Counsel for the municipality has indicated he considers this application a test case respecting the powers of the approving officer and, since its legal effect is of much greater significance to the municipality than the amount involved is to the petitioners, who unhappily are caught in this problem of statutory interpretation, I do not award costs to either party.

Application dismissed.

WILKIN et al. v. WHITE

British Columbia Supreme Court,
Bouck J.

Heard—November 30 and December 4, 1979.
Judgment—December 13, 1979.

Subdivision approval — Application for — Subdivision by-law prohibiting approval subsequently passed — Application for mandamus to order approval denied.

An approving officer refused to approve a subdivision plan tendered to him by the petitioners. Subsequent to the tendering of the plan the municipal council amended the subdivision by-law in a way which prohibited the approval of the plan. On an application from an order in the nature of mandamus to compel the approving officer to approve the subdivision application, *held*, the application should be denied. Just as a municipality may zone and re-zone property so also may it change its subdivision by-laws from time to time. At the time a subdivision by-law is altered, the rights of affected property owners may be curtailed. The right to subdivide may disappear; s. 30(*c*) of the Interpretation Act does not provide a perpetual right to apply for a subdivision approval under an old by-law now repealed merely because that by-law was once in existence. Nor does the right to subdivide achieve higher status if the owner has made application to an approving officer under the old by-law.

The application was not to be granted merely because an application to subdivide was on file with the approving officer when the old subdivision by-law was still in existence. The new by-law defeated the request for approval. If the applicant were to have succeeded he should have gone to the Court and obtained an order allowing subdivision under the old by-law before the new one came into effect.

Cases considered

Monarch Holdings Ltd. v. Oak Bay (1977), 4 B.C.L.R. 67, 4 M.P.L.R. 147, 79 D.L.R. (3d) 59 (*sub nom. Re Monarch Holdings Ltd. and Oak Bay*)(C.A.) — applied.

Upper Can. Estates Ltd. and MacNicol, Re, [1931] O.R. 465, [1931] 4 D.L.R. 459, affirmed 41 O.W.N. 92, [1932] 2 D.L.R. 528 (C.A.) — referred to.

Statutes considered

Interpretation Act, 1974 (B.C.), c. 42, ss. 2(1), 30(*c*).
Land Registry Act, R.S.B.C. 1960, c. 208 [repealed 1978, c. 25, s. 32], s. 96.

APPLICATION for an order in the nature of mandamus compelling the approval of a plan of subdivision.

F.J. Hansen, for petitioners.
Julian Greenwood, for respondent.

(Victoria Registry Nos. 001618/79, 950/79)

December 13, 1979. BOUCK J.:—An application for an order in the nature of mandamus directed to the respondent as the approving officer for the Corporation of the District of Oak Bay is the subject-matter of this petition. It involves his refusal to approve a subdivision plan tendered him by the petitioners. There are two separate proceedings as shown in the above cause numbers, but all parties agree the order if made should fall under No. 001618/79.

On 5th January 1979 the Wilkins applied to subdivide a large lot on which they had an option to purchase from the owners by the name of Cameron. Four separate lots were to be carved out of the one piece of property. Following a number of meetings with municipal officials, the respondent rejected the application pursuant to s. 96 of the Land Registry Act, R.S.B.C. 1960, c. 208 [repealed 1978, c. 25, s. 321] [now Land Title Act, R.S.B.C. 1979, c. 219] and amendments thereto. His reasons are contained in a letter dated 23 March 1979 and read in part:

> "While I do not say that any subdivision of the Cameron property would, of necessity, injuriously affect the established amenities of adjoining or adjacent properties simply by reason that the property was being subdivided, I do say and have come to the conclusion that the subdivision plan proposed by your clients would injuriously affect the established amenities in the neighbourhood. My reason is simply that the proposed lot on the southeast corner of the property would permit a development which would, of necessity, interfere with the established amenities in the neighbourhood by:
>
> (a) seriously interfering with the view of the existing home which is of such significant size and proportions as to be a cornerstone in the neighbourhood. The stately Cameron home so predominates its surroundings that the proposed development cannot help but seriously interfere with the amenities which the house itself has for years created in the area.
>
> (b) would create an additional traffic hazard on Runnymede Avenue at a location which is both on a curve and on a hill. I think in those circumstances it can be fairly said that such additional hazard would be against the public interest. As you know, this is one of the major complaints of the adjoining residents.
>
> I say this despite the compelling submissions made by you in your letter on behalf of your clients on February 28, 1979,

which submissions I have carefully considered before coming to the conclusions outlined in this letter."

Negotiations continued notwithstanding the form of the letter and on 5th April 1979, consent was finally given to a three-lot subdivision instead of four.

Persisting in their endeavours to gain approval for the fourth lot, the petitioners applied again to the respondent on 26th April 1979 attaching a new plan in accordance with the relevant rules and by-laws. On 23rd May 1979, the respondent refused the application "on the same grounds set out in my letter of March 23, 1979". He also advised the petitioners:

> "... that Council has given three Readings to By-law 3298, which amends the present Size of Lots By-law, and will be finally adopting the By-law on May 28, 1979. Therefore it is my view that your suggested subdivision is now further against the public interest as that interest is defined in the amending By-law."

Finally, on 25th June 1979 the council of the municipality adopted and passed By-law No. 3298. It limits the size of lots in the circumstances to no less than 15,000 sq. feet. Both sides concede the square footage on the proposed Lot 4 contains less than 15,000 sq. feet and so does not comply with the new by-law.

No motion has been brought to quash By-law No. 3298. However, affidavits were filed on behalf of the petitioners by an engineer and an architect. They were designed to counter the conclusions as to view and traffic density expressed in the respondent's rejection letter of 23rd March 1979.

By-law No. 3298 had its first reading on 30th April 1979. Second and third readings were given to it by the council on 14th May 1979. As mentioned, it was ultimately enacted on 25th June 1979.

Counsel for the petitioners based his submissions on two major points:

1) The decision of the approving officer was not made in good faith and therefore, can be set aside.

2) By-law No. 3298 repealed an earlier subdivision by-law which did not contain the 15,000 sq. foot restriction. On 26th April, 1979 the petitioners applied for subdivision approval with respect to Lot 4 under the old by-law. At that time first reading had not been given to By-law No. 3298 nor had it been adopted. Therefore, as of

26th April 1979 the petitioners had acquired a right to subdivide the property under the earlier by-law. The repeal of the by-law by subdivision By-law No. 3298 did not affect the accrued or accruing rights of the petitioner.

In this respect, he relied on the Interpretation Act, 1974 (B.C.), c. 42 and amendments thereto. Section 30(*c*) reads:

> "30. Where an enactment is repealed in whole or in part, the repeal does not
>
> ...
>
> (*c*) effect any right, privilege, obligation, or liability acquired, accrued, accruing, or incurred under the enactment so repealed; ..."

In his equally persuasive argument, counsel for the respondent submitted the Court could not now order the approving officer to approve a subdivision plan which is contrary to its own by-law — No. 3298. He relied on a decision of our Court of Appeal: *Monarch Holdings Ltd. v. Oak Bay* (1977), 4 B.C.L.R. 67, 4 M.P.L.R. 147, 79 D.L.R. (3d) 59 (*sub nom. Re Monarch Holdings Ltd. and Oak Bay*). In my view, this submission must prevail for the reasons which follow. Thus, it is not necessary to go into the issue of bad faith.

In *Monarch Holdings Ltd.*, supra McIntyre J.A. speaking for the majority had this to say at p. 86 [B.C.L.R.]:

> "The weight of authority supports the view that the prima facie right of a landowner to do what he will with his land can be defeated by a by-law passed in good faith by a municipal council. The courts have long recognized that inherent in the power to zone and re-zone properties is the power to affect rights adversely and to make differing regulations in differing districts or areas within a municipality. It is inevitable that proprietary rights will suffer from time to time and that restrictions will be imposed which fetter the ordinary use of land. This alone, however, will not justify the quashing of a by-law and much less the issue of a mandamus directing municipal officers to act in direct contradiction of a by-law."

There are two distinctions between that decision and the facts now under discussion. Here we are dealing with a ruling of an approving officer. There, the Court was concerned with the requirement of a municipal building inspector to issue a building permit. Here, we are looking at a subdivision by-law, while there,

the Court was examining the principles relating to a re-zoning by-law. Notwithstanding these differences I see no distinction in substance. Just as a municipality may zone and re-zone property, so also may it change its subdivision by-laws from time to time. Providing it does so in good faith, its actions are not subject to attack.

At the time a subdivision by-law is altered, affected property owners rights may be curtailed. Where they once had a right to subdivide, that right may disappear. But I cannot read s. 30(*c*) of the Interpretation Act as allowing them a perpetual right of applying for a subdivision under an old by-law now repealed just because that by-law was once in existence. Nor does that right achieve any higher status if the owner has made application to an approving officer under the old by-law.

Section 2(1) of the Interpretation Act says that statute applies to every enactment "unless a contrary intention appears ... in the enactment". By-law No. 3298 is an "enactment". Its intention is to change the right of property owners who may have wished to subdivide property so that no new lot may be subdivided into a parcel of less than 15,000 sq. feet. This is contrary to the right of a property owner to subdivide his property into a lot size of less than 15,000 sq. feet. Consequently, s. 30(*c*) of the Interpretation Act does not apply.

Paraphrasing Orde J.A. in *Re Upper Can. Estates Ltd. and MacNicol*, [1931] O.R. 465, [1931] 4 D.L.R. 459 at 469, affirmed 41 O.W.N. 92, [1932] 2 D.L.R. 528 (C.A.):

The race will go to the swift, and the goal is not reached merely because an application to subdivide is on file with the approving officer when the old subdivision by-law is still in existence. Passage of a new subdivision by-law inconsistent with the application presented to the approving officer by the owner has the effect of defeating his request. If he is to succeed, he must get to the Court and obtain an order allowing subdivision under the old by-law before the new by-law comes into effect.

Because By-law No. 3298 was passed on 25th June 1979, it is now too late for this Court to make any order compelling the approving officer to grant his approval to the subdivision application. The petition must therefore be dismissed. Costs follow the event.

Petition dismissed.