



NIAGARA ESCARPMENT HEARING OFFICE

A Guide to Development Permit Appeal Hearings
and Niagara Escarpment Plan Amendment
Hearings under the *Niagara Escarpment Planning
and Development Act*

www.ert.gov.on.ca

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This Guide provides a general overview of Hearings before Hearing Officers appointed under the *Niagara Escarpment Planning and Development Act* and should not be relied upon as an authoritative text. The statutes, regulations, and Rules of Practice and Practice Directions of the Environmental Review Tribunal that apply to Hearings under the *Niagara Escarpment Planning and Development Act* prevail.

Information about specific Hearings is available from:

The Niagara Escarpment Hearing Office
655 Bay Street, Suite 1500
Toronto, Ontario M5G 1E5

Telephone: (416) 314-4600
Facsimile: (416) 314-4506
E-mail: ERTTribunalSecretary@ontario.ca
Website: www.ert.gov.on.ca

The Niagara Escarpment Hearing Office accepts collect calls.

What is the Niagara Escarpment Hearing Office?

The Niagara Escarpment Hearing Office administers Hearings under the *Niagara Escarpment Planning and Development Act* involving the Niagara Escarpment Plan. A Hearing may be held to hear an appeal of a Niagara Escarpment Commission decision on a development permit application. A Hearing may also be held to evaluate the merit of an application to amend the Niagara Escarpment Plan.

What is the purpose of the *Niagara Escarpment Planning and Development Act*?

The purpose of the *Niagara Escarpment Planning and Development 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.”

What is the Niagara Escarpment?

The Niagara Escarpment is a massive ridge of fossil rich sedimentary rock that stretches 725 km from Queenston on the Niagara River to the islands off Tobermory. It contains more than 300 bird, 53 mammal, 36 reptile and amphibian, and 90 fish species, and 100 varieties of special-interest flora, including 37 types of wild orchids. The Niagara Escarpment was named a World Biosphere Reserve by the United Nations Educational, Scientific and Cultural Organization in 1990.

What is the Niagara Escarpment Plan?

Established under the authority of the *Niagara Escarpment Planning and Development Act*, the Niagara Escarpment Plan is Canada’s first large scale environmental land use plan and covers 183,000 hectares. The Plan includes policies for seven land use designations (Natural, Protection, Rural, Recreation, Urban, Minor Urban and Mineral Resource Extraction); provides development criteria; and sets objectives for the Niagara Escarpment Parks and Open Space System that has over 130 parks, open spaces and protected areas.

The Niagara Escarpment Plan was originally approved on June 12, 1985 and was updated as a result of revisions that were initiated in 1990 and 1999. The current Niagara Escarpment Plan was approved on June 1, 2005.

What is the Niagara Escarpment Commission?

The Niagara Escarpment Commission was established in June 1973 under the authority of the *Niagara Escarpment Planning and Development Act*. The Commission holds regular public meetings to make decisions on development permit applications, consider recommendations on Plan Amendment applications, and comment on other requests for land use changes being proposed within and adjoining the Plan area. The Commission

reports to the Government of Ontario through the Minister of Natural Resources. The Commission is supported by a professional planning staff.

Part 1: Development Permit Appeals

Most developments or changes to land use within the Niagara Escarpment Plan Area require a development permit from the Niagara Escarpment Commission. Applications for development permits typically include proposals for new single dwellings, road construction, quarries, sand and gravel pits, establishment of wineries, irrigation or recreational ponds, altering the grade of land, and changes in the use of any land, building or structure.

An application for a development permit is submitted to the Niagara Escarpment Commission and is then reviewed by one of its land use planners or its Director. The planner then prepares a staff report with a recommendation to the Commission that may either grant, modify or refuse the proposal.

Who can appeal a Development Permit decision?

The following persons may, if they choose, appeal the Commission's decision regarding a development permit to the Minister of Natural Resources who will then appoint a Hearing Officer to conduct a public Hearing.

- the person making the application;
- those persons who have requested to receive notification of the decision;
- those persons whom the Commission considers may have an interest in the decision; and
- all assessed property owners within 120 metres of the subject property.

What is the deadline for filing an Appeal?

A person who wants to appeal the Niagara Escarpment Commission's decision regarding a development permit must file a Notice of Appeal by mail, fax, or electronically to either the Niagara Escarpment Hearing Office or the Niagara Escarpment Commission indicating that he or she wishes to appeal the decision, along with the reasons for filing the appeal, within 14 days from the date of the mailing of the Niagara Escarpment Commission's decision.

The person who has applied to the Niagara Escarpment Commission for the development permit is referred to as the Applicant. The Applicant may appeal an approval, the conditions of approval or a refusal of a development permit, in which case he or she becomes the Appellant. Any other person who appeals an approval, the conditions of approval or a refusal of the development permit is also referred to as the Appellant.

What information must a Notice of Appeal contain?

There is no required form for a Notice of Appeal nor is there a fee for filing. Most people send their Notice of Appeal in a letter format.

The Notice of Appeal must state:

- the name of the Appellant and his or her address along with the name and address of anyone representing him or her;
- the telephone number and/or facsimile number or e-mail address where he or she can be reached during business hours;
- the Commission's file number for the decision being appealed;
- the grounds for the appeal (i.e. the reasons why the Appellant is appealing); and
- a description of the relief requested (i.e. the recommendation or decision sought from the Hearing Officer).

The reasons for the appeal should be as specific as possible and the Notice should state that an appeal of the approval, the conditions of approval or the refusal of the development permit is sought. A reason such as "the Commission was wrong to make this decision" is too vague and may result in the dismissal of the appeal.

Is a lawyer, planner or other expert needed?

An Appellant may represent himself or herself or hire a lawyer, planner or other representative to act on his or her behalf.

How are special needs accommodated?

A person with a disability should inform the assigned Case Manager in advance of the Hearing of any special needs that must be accommodated.

What language services are available?

A person should inform the assigned Case Manager in advance of the Pre-Hearing Conference or Hearing and, in any event, at least 14 days before the Pre-Hearing Conference or Hearing if he or she requires the Pre-Hearing Conference or Hearing to be translated into French

How can neighbours and other concerned people participate?

Neighbours and other people who feel that they are affected by an application for a development permit may apply to the Hearing Officer for permission to participate in the Hearing - either to support or oppose the application or to advance a different position.

What is the difference between a Party, Participant, and Presenter?

The Niagara Escarpment Hearing Office has established various levels of participation to ensure that all those interested in the Hearing can be involved. The Niagara Escarpment Hearing Office encourages participation in its Hearings. A choice of participation levels addresses different needs and interests.

Who can be a Party?

Those persons specified as Parties by the *Niagara Escarpment Planning and Development Act* are automatically Parties to the proceeding. Additionally, if a person requests Party status, the Hearing Officer may name that person to be a Party after considering relevant matters including: whether the person's interests may be directly and substantially affected by the Hearing or its result; whether the person has a genuine interest, whether public or private, in the subject matter of the proceeding; and whether the person is likely to make a relevant contribution to the Hearing Officer's understanding of the issues in the proceeding.

What is the role of a Party?

Those who request and receive Party status from the Hearing Officer assume the fullest range of rights and responsibilities. Most Parties are represented by either a lawyer or an agent, but a Party may act on its own behalf. A Party can be either an individual or a group. A Party may:

- be a witness at the Hearing;
- be questioned by the Hearing Officer and the Parties;
- bring motions;
- call witnesses at the Hearing;
- cross-examine witnesses called by other Parties;
- make submissions to the Hearing Officer including final argument;
- receive copies of all documents exchanged or filed by the Parties;
- attend site visits; and
- claim costs and be liable for costs, where permitted by law.

Who can be a Participant?

A person who has an interest in the subject matter of the Hearing may be named as a Participant. In deciding whether to name a person as a Participant rather than as a Party, the Hearing Officer may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's would be. A person who may otherwise qualify as a Party may request Participant status.

What is the role of a Participant?

In addition to the right to observe and present his or her views at a Hearing, a Participant may:

- be questioned by the Hearing Officer and the Parties;
- make submissions to the Hearing Officer at the commencement and end of the Hearing;
- upon request, receive a copy of the documents exchanged by the Parties that are relevant to the Participant's interests; and
- attend site visits.

However, someone with Participant status cannot:

- raise grounds of appeal not already raised by a Party;
- call witnesses;
- cross-examine witnesses;
- bring motions; and
- claim costs or be liable for costs.

Who can be a Presenter?

A person who has an interest in the subject matter of the Hearing may be named as a Presenter. In deciding whether to name a person as a Presenter rather than as a Party or Participant, the Hearing Officer may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's or Participant's would be. A person who may otherwise qualify as a Party or Participant may request Presenter status.

What is the role of a Presenter?

A Presenter need only attend at the Hearing when he or she is presenting his or her evidence. In addition to the right to observe and present his or her views at a Hearing, a Presenter may:

- be a witness and present his or her views either during the regular daytime sessions or, where there is a large public interest, at a special evening session;
- be questioned by the Hearing Officer and the Parties;
- provide the Hearing Officer with a written statement as a supplement to oral testimony; and
- upon request, receive a copy of documents exchanged by the Parties that are relevant to the Presenter's interests.

However, someone with Presenter status cannot:

- raise grounds of appeal not already raised by a Party;

- call witnesses;
- cross-examine witnesses;
- bring motions;
- make oral and written submissions to the Hearing Officer at the commencement and at the end of the Hearing;
- claim costs or be liable for costs; and
- attend site visits unless a request to attend is made to the Hearing Officer and the Hearing Officer grants the request.

What happens after the appeal is filed?

Everyone who was sent a copy of the Commission's decision is informed of the time and place of the appeal Hearing and the Pre-Hearing Conference. Approximately 30 days before the Hearing is to take place the Niagara Escarpment Hearing Office will schedule a Pre-Hearing Conference between the Niagara Escarpment Commission, the Appellant, and the Applicant, if he or she is not the one appealing the Development Permit. The Pre-Hearing Conference is conducted by teleconference.

A person may contact the Niagara Escarpment Hearing Office, in writing, at least seven days before the date of the Pre-Hearing Conference and request to be included in the Pre-Hearing Conference. At that time, he or she can request the Hearing Officer to add him or her as either a Party, Participant or Presenter at the Hearing. A person may also attend at the Hearing and request to be added as a Party, Participant or Presenter. However, if the matter settles at the Pre-Hearing Conference, a Hearing will not take place and the person will have missed his or her opportunity to offer input in the matter.

What happens at the Pre-Hearing Conference?

The purpose of the Pre-Hearing Conference is to prepare for the Hearing by:

- identifying Parties, Presenters and Participants and the scope of their participation at the Hearing;
- hearing preliminary motions;
- identifying, defining, scoping and simplifying the issues;
- establishing dates for the exchange among Parties and with the Niagara Escarpment Hearing Office of all documents relevant to the proceeding, witness lists, witness statements, and resumes of any expert witnesses;
- establishing facts or evidence that may be agreed on;
- estimating the duration of the Hearing;
- canvassing the possibility of the settlement or withdrawal of any or all the issues; and
- considering any other matter that may assist in the just and expeditious disposition of the proceeding.

The member who conducts the Pre-Hearing Conference may preside at the main Hearing unless he or she considers it inappropriate to do so. A member who conducts a Pre-

Hearing Conference at which the Parties attempt to settle issues will not conduct the main Hearing, unless all Parties consent.

After the Pre-Hearing Conference is completed, a Hearing Officer will conduct the main Hearing. Most Hearings regarding development permits take less than a day to complete.

What is the role of the Hearing Officer?

The Hearing Officer will conduct a public Hearing to hear evidence from all Parties, Participants, and Presenters concerning the development permit being appealed. Under the *Niagara Escarpment Planning and Development Act*, the Hearing Officer, after the Hearing, can decide to do one of the following:

1. The Hearing Officer may decide that the Niagara Escarpment Commission made the correct decision and that it should not be changed. In this case, the Hearing Officer will issue a report that is deemed to be the final decision. (This option is not available if the Niagara Escarpment Commission's decision was appealed by a municipality.)
2. The Hearing Officer may issue a report which amends the terms and conditions of the development permit that is deemed to be a final decision if:
 - a) the decision of the Niagara Escarpment Commission was to issue a development permit;
 - b) the Parties who appeared at the Hearing have agreed on all of the terms and conditions that should be included in the development permit and all of these terms and conditions are set out in the report of the Hearing Officer; and
 - c) the Hearing Officer expresses the opinion in his or her report that if the decision of the Niagara Escarpment Commission included the terms and conditions as agreed to, the decision would be correct and should not be changed.In this case, the Hearing Officer will issue a report that is deemed to be the final decision.
3. In all other cases, the Hearing Officer will report to the Minister, with a summary of the evidence and his or her recommendations. The Minister will consider the report and issue a final decision.

How does one prepare for a Hearing?

The key to effective participation in a Hearing is to be well informed and prepared to provide one's views and evidence at the Hearing. The Hearing Officer can only consider the information provided at the Hearing.

Parties, Participants and Presenters are strongly encouraged to review the *Niagara Escarpment Planning and Development Act*, the Niagara Escarpment Plan, and the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

The evidence intended to be relied upon should be relevant to the issues before the Hearing Officer. It must be demonstrated that the proposal either satisfies or does not satisfy the permitted uses and development criteria stated in the Niagara Escarpment Plan.

What are the disclosure requirements?

All Parties must provide, without charge, to all other Parties a copy of every relevant document that is in their possession, control or power, no later than the disclosure date set at the Pre-Hearing Conference. Participants and Presenters may request to receive a copy of all documents relevant to their interests. Privileged documents are excepted.

All documents intended to be relied upon at the Hearing must be filed with the Niagara Escarpment Hearing Office. Two copies of each document must be provided if the document is filed prior to the commencement of the Hearing. If the document is filed during the course of the Hearing, a sufficient number of copies must be provided so that there is a copy for each Hearing Officer and for the record file.

The obligation to disclose is continuing. That is, all relevant documents discovered during the course of the Hearing must be provided to the other Parties and, if the document is to be relied upon at the Hearing, the Niagara Escarpment Hearing Office.

What principles govern the Hearing and the Hearing Officer's Report?

A Hearing Officer is required to prepare a summary of all the representations received at the Hearing and to provide the Minister of Natural Resources with his or her report on the merits of the application. The Hearing Officer is required to take into account the objectives of the *Niagara Escarpment Planning and Development Act* and the requirements of the Niagara Escarpment Plan.

Development permit appeals are also governed by the *Statutory Powers Procedure Act* and the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

What is a Witness Statement?

Witnesses may be trained professionals, members of the community, academic specialists, or individuals with specific knowledge who can give a Hearing Officer relevant information.

A witness statement is a concise, but complete, written statement of the evidence a witness intends to present.

A witness statement should be direct and to the point. It is intended that the statement be complete in the sense that the witness should not have to add anything new to the evidence at the Hearing. However, the witness is entitled to explain more fully anything contained in the statement.

A witness statement should contain the following information:

- the name, address and telephone number of the witness;
- whether the evidence will be factual evidence or, if the witness is a qualified expert, opinion evidence;
- the qualifications of the witness, where the witness is to give opinion evidence;
- whether or not the witness has an interest in the application and, if so, the nature of the interest;
- a summary of the opinions, conclusions and recommendations of the witness;
- reference to those portions of other documents which form an important part of the opinions, conclusions and recommendations of the witness;
- where applicable, a discussion of proposed conditions of approval that are in controversy among the Parties or agreed upon conditions that may be related to issues in dispute;
- the date of the statement; and
- the signature of the witness.

If the witness statement does not contain all of the above information, Parties may jeopardize their right to have the evidence admitted or may delay the Hearing.

Witnesses will normally attend in person to give oral evidence and be subject to cross-examination.

Witness statements should be exchanged between the Parties and filed with the Niagara Escarpment Hearing Officer within the time directed by the Hearing Officer at the Pre-Hearing Conference, which is usually no later than 15 days prior to the commencement of the Hearing.

Summons to Witness

The Hearing Officer has the power to summon a witness to attend a Hearing to give evidence and to bring relevant documents and material. A summons can be issued because the Hearing Officer wants to hear from the witness or because a Party has requested that the Hearing Officer require the person to act as a witness. The person calling a witness is responsible for paying for the witness' attendance costs at the same rate as is paid to a person summoned to appear before the Superior Court. It is the responsibility of a person calling a witness to obtain and serve the summons as soon as possible before the commencement of the Hearing.

Can a Hearing be postponed or adjourned?

All Hearing dates are considered peremptory; that is, once a date has been set for a Hearing, the Hearing will proceed on that date except in exceptional circumstances, such as the sudden illness of a Party. If a person has been notified of the time, date and place of a Hearing and fails to attend, the Niagara Escarpment Hearing Office may proceed with the Hearing and make its decision/recommendation in the absence of that person.

For information on adjournments, please refer to the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

What is the order of presentation at a Hearing?

Evidence is usually presented orally, although it may be supplemented by written submissions and the use of visual aids. Witnesses give evidence under oath or by affirmation. While the Niagara Escarpment Hearing Office can direct the order of the presentation of evidence, a representative of the Niagara Escarpment Commission usually first presents the staff report and the justification for the Commission's position regarding the development permit.

Subject to the direction of the Hearing Officer, generally the Appellant and those persons in support of the appeal next present their case and call their witnesses. Where the Applicant is not the Appellant, the Applicant and persons opposed to the appeal will then present their evidence and witnesses. All witnesses are subject to cross-examination.

Reply evidence may be permitted at the discretion of the Hearing Officer.

When all the evidence has been heard, each Party and Participant will be entitled to make a final submission. This submission gives the Parties and Participants a chance to summarize the important facts on which they are relying, to summarize any points of law or policy which they think are relevant for the Hearing Officer's consideration, and to persuade the Hearing Officer to accept their argument or position on what they want the Hearing Officer's recommendation to be.

When will the Hearing Officer's Report be released?

The Hearing Officer will make a report to the Minister within 30 days after the conclusion of the Hearing or within such longer period as the Minister may permit. If the Hearing Officer's report is deemed to be a final decision then a copy of the report is sent to all Parties when it is sent to the Minister. If, however, the Hearing Officer makes a recommendation to the Minister, then the Minister will release a final report to the Parties advising of his or her decision and the recommendation that was made by the Hearing Officer. The Minister is not bound by the Hearing Officer's recommendation and the Minister's decision is final.

Can the Hearing Officer award costs?

Participating in a Hearing invariably entails some costs. Typically these costs might include:

- fees for lawyers, representatives or agents;
- fees for expert assistance and witnesses;
- travel and accommodation expenses;
- costs for materials used for presentations (such as photographs, graphics, etc.).

In rare circumstances, costs may be awarded in a development permit appeal Hearing but only where there has been unreasonable conduct by a Party. Rules 204 to 212 and Rules 217 to 223 of the Rules of Practice should be consulted.

Can the report of the Hearing Officer be appealed?

The *Niagara Escarpment Planning and Development Act* does not provide for a right of appeal, however, the opportunity exists for judicial review of the decision by Divisional Court.

Part 2: Plan Amendment Hearings

What is a Plan Amendment?

Any person, ministry or municipality may propose an amendment to the Niagara Escarpment Plan. For example, this could include a proposed development that is not a permitted use under the Plan. To authorize the development, the Applicant must bring an application for an amendment to the Plan either to change the Plan's permitted uses or development criteria, to change the land use designation of the subject property, or to remove the subject property from the Plan Area entirely. A proposal to permit urban uses or to redesignate lands to the designation of Minor Urban Centre, Urban Area or Escarpment Recreation Area in lands designated as Escarpment Natural Area, Escarpment Rural Area, Escarpment Protection Area or Mineral Resource Extraction Area can only be made at the ten year review of the Niagara Escarpment Plan and only if the proposal is included in the terms of reference for the review.

How is a Plan Amendment processed?

Once an application for a Plan Amendment is submitted, the Commission seeks comments by publishing a notice in local newspapers notifying the public of the proposed Plan Amendment and by circulating a copy of the application to the local municipalities, ministries, agencies and advisory committees.

After a comment period of usually three to four months has passed, if there are written concerns or objections to the proposed amendment, the Commission appoints one or

more Hearing Officers from the Niagara Escarpment Hearing Office for the purpose of receiving representations regarding the proposed Plan Amendment by holding a public Hearing. Within 60 days, or such longer time as the Commission allows, the Hearing Officer then provides a report to the Commission and the Minister of Natural Resources of the summary of the representations, together with his or her recommendation regarding whether the Plan Amendment should be accepted, rejected or modified. After giving consideration to the report and comments received, the Commission then submits its recommendation to the Minister of Natural Resources. Under certain circumstances set out in the *Niagara Escarpment Planning and Development Act*, the Minister of Natural Resources may approve, modify or refuse the amendment or may be required to submit the Plan Amendment with his or her recommendations to the Lieutenant Governor in Council (the Ontario Cabinet). The Lieutenant Governor in Council may refuse or approve the Plan Amendment with such modifications as are considered desirable.

How is the Hearing conducted?

The Hearing is conducted under the same basic principles as noted above in the development permit appeals. As Hearings conducted for Plan Amendment applications are not subject to the *Statutory Powers Procedure Act*, the Rules of Practice and Practice Directions of the Environmental Review Tribunal are employed with necessary modifications.

Can the Hearing Officer award costs?

Costs awards are not permitted in plan amendment Hearings.

For more information:

For further information, please refer to the *Niagara Escarpment Planning and Development Act*, the Niagara Escarpment Plan, the *Statutory Powers Procedure Act*, and the Rules of Practice and Practice Directions of the Environmental Review Tribunal. All of these documents are available on the website www.ert.gov.on.ca.

Information on the Niagara Escarpment Commission's process for filing and processing of development permit applications and Plan Amendments is available from the Niagara Escarpment Commission's website at www.escarpment.org.