

Niagara Escarpment Hearing Office
Bureau des audiences sur
l'escarpement du Niagara



ISSUE DATE: May 18, 2016

CASE NO.:

15-176

PROCEEDING COMMENCED UNDER section 25(8) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2, as amended

Appellant:	See Appendix 1 – Appellant List
Respondent:	Niagara Escarpment Commission
Subject of appeal:	Refusal of a Development Permit Application to reconstruct 26/27 Sideroad from seasonal to year round open road
Reference No.:	S/T/2013-2014/9152
Property Address/Description:	Lots 25 to 31, Concession 10 & 11
Municipality:	Township of Clearview
Upper Tier:	County of Simcoe
NEHO Case No.:	15-176
NEHO Case Name:	Urbaniak v. Ontario (Niagara Escarpment Commission)

Heard: In writing

APPEARANCES:

Parties

Counsel/Representative⁺

Harry and Eleonore Urbaniak

Self-represented

Marilyn Young

Self-represented

Melksham Holdings Ltd.

Richard Young⁺

Walker Aggregates Inc.

Wayne Fairbrother and Mary Bull

Township of Clearview

Harold Elston and Aynsley Anderson

Niagara Escarpment Commission	Demetrius Kappos
Blue Mountain Watershed Trust Foundation	Sarah Powell
Wendy Franks and David Stevenson	David R. Donnelly and Anne Sabourin

Participants

Municipality of Grey Highlands	Dan Best ⁺
Janet Gillham on behalf of the Clearview Community Coalition	Self-represented
Mark Bell	Self-represented
Raymond Mueller	Self-represented
Doug Dingeldein	Self-represented

Presenters

Allan Fisher	Self-represented
Emelia Franks	Self-represented
Brewster Lake Homeowner's Association	Gary Fohr ⁺
Victoria Selby	Self-represented

ORDER DELIVERED BY MARLENE CASHIN AND HEATHER I. GIBBS

BACKGROUND

[1] This order relates to a number of procedural matters that were resolved by the parties on consent in writing.

ORDER

[2] The Hearing Officers direct the following:

Organization of the Hearing

[3] The parties shall reconvene for a continuation of the pre-hearing conference (“PHC”) on **June 10, 2016** at 10 a.m. at the Township of Clearview Administrative Building, 217 Gideon Street, Stayner, Ontario or as otherwise ordered by the Niagara Escarpment Hearing Office (the “NEHO”).

[4] The parties shall hold **October 12, 13 and 14, 2016** as available dates for the hearing of motions, as required.

[5] The hearing will begin on **November 29, 2016** at 10 a.m. at the Township of Clearview Administrative Building, 217 Gideon Street, Stayner, Ontario. All parties, participants and presenters shall attend the first day of the hearing.

[6] The length of the hearing will be fifteen days. The length of the hearing may be shortened as issues are resolved or settlement is achieved.

[7] The parties, participants and presenters identified at the PHC are listed above (see: “APPEARANCES”).

[8] The issues raised by the parties are set out in the Parties’ Proposed Issues List attached at Appendix 2. There will be no additions to this list unless the Hearing Officer(s) permit. The list is subject to refinement by the Hearing Officer(s).

[9] The order of evidence shall be as listed in Appendix 3 to this Order. The Hearing Officer(s) may limit the amount of time allocated for opening statements, evidence in chief (including the qualification of witnesses), cross-examination, evidence in reply and

final argument. The length of written argument, if any, may be limited either on consent or by order of the NEHO.

Requirements Before the Hearing

[10] All parties, participants and presenters (or their representatives) shall provide a mailing address, email address, and telephone number to the NEHO. Any such person who retains a representative (legal counsel or agent) subsequent to the PHC must advise the other parties and the NEHO of the representative's name, mailing address, email address and phone number.

[11] A party who intends to call witnesses, whether by summons or not, shall provide to the NEHO and to the other parties, a list of the witnesses and the order in which they will be called. This list must be delivered on or before **May 27, 2016**. For expert witnesses, a party is to include a copy of the curriculum vitae and the area of expertise in which the witness is proposed to be qualified.

[12] Expert witnesses in the same field shall have a meeting after the exchange of witness statements and before the hearing to try to resolve or reduce the issues for the hearing. These meetings will occur during the weeks **July 11-22, 2016**, unless otherwise agreed to by the experts. The experts must prepare a list of agreed facts and the remaining issues to be addressed at the hearing, and provide this list to all of the parties.

[13] An expert witness shall prepare an expert witness statement, which shall include: an Acknowledgement of Expert's Duty Form, the area(s) of expertise, any reports prepared by the expert, and any other reports or documents to be relied on at the hearing. Copies of the expert witness statements must be provided as in Appendix 4 of this Order. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Hearing Officer(s) may refuse to hear the expert's testimony.

[14] A witness, participant or presenter who is not a professional in the subject matter to be addressed must provide to the NEHO and the parties a witness, participant or presenter statement as provided in Appendix 4 of this Order or the witness or participant may not give oral evidence at the hearing.

[15] Expert witnesses who are under summons but not paid to produce a report are not required to file an expert witness statement; but the party calling them must file a detailed outline of the expert's evidence, opinions and his or her area of expertise as in Appendix 4 of this Order.

[16] On or before **August 22, 2016** the appellants shall provide copies of their presenter, participant, witness and expert witness statements and visual evidence (if any) to the other parties. A paper copy of any document proposed to be entered into evidence or relied upon shall be provided at the hearing unless ordered otherwise by the presiding Hearing Officer(s).

[17] On or before **September 20, 2016** the respondents shall provide copies of their presenter, participant, witness and expert witness statements and visual evidence (if any) to the other parties. A paper copy of any document proposed to be entered into evidence or relied upon shall be provided at the hearing unless ordered otherwise by the presiding Hearing Officer(s).

[18] On or before **October 14, 2016** the appellants shall provide a written response, if required, to any written evidence. The failure of a party to provide a written response, in whole or in part, shall not be considered by the NEHO as being an agreement by that party to the written evidence of another party or participant.

[19] A person wishing to change written evidence, including witness statements, must make a written motion to the NEHO in accordance with the Environmental Review Tribunal's *Rules of Practice* ("Rules") 93 to 103.

[20] A party who provides the written evidence of a witness to the other parties must have that witness attend the hearing to give oral evidence, unless the NEHO and the parties are notified at least seven days before the hearing that the written evidence is not part of their record.

[21] Documents may be delivered in person, by courier, by email, facsimile or registered or certified mail, or otherwise as the NEHO may direct. The delivery of documents by fax and email shall be governed by the Tribunal's Rules 86 to 92 on this subject. Material delivered by mail shall be deemed to have been received five business days after the date of registration or certification.

[22] No adjournments will be granted except in accordance with the Tribunal's Rules 104 to 107.

Procedural Directions Ordered

"Marlene Cashin"

MARLENE CASHIN
HEARING OFFICER

"Heather I. Gibbs"

HEATHER I. GIBBS
HEARING OFFICER

Appendix 1 – Appellant List
Appendix 2 – Parties' Proposed Issues List
Appendix 3 – Order of Evidence
Appendix 4 – Meaning of Terms Used in the Order

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Niagara Escarpment Hearing Office

A constituent tribunal of Environment and Land Tribunals Ontario

Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Appendix 1**Appellant List**

Appellant Name	File No.
Eleonore Urbaniak	15-176
Harry Urbaniak	15-177
Marilyn Young	15-179
Melksham Holdings Ltd.	15-181
Allan Fisher (now presenter)	15-182
Walker Aggregates Inc.	15-183
Township of Clearview	15-184

Parties' Proposed Issues List

The identification of an issue does not mean that all Parties agree that such issue, or the manner in which the issue is expressed, is appropriate or relevant to the determination of the Niagara Escarpment Hearing Officers at the hearing. The extent to which these issues are appropriate or relevant to the determination of the Niagara Escarpment Hearing Officers at the hearing will be a matter of evidence and argument at the hearing. The attribution of each issue to a particular party does not preclude any other party from presenting evidence or offering argument at the hearing with respect to any of the issues, provided appropriate witness statement identification with respect to the presenting of evidence.

ISSUES OF THE APPELLANTS

1. Are the road works ("Township Road Works") designed to address operational and safety matters, as proposed by the Township of Clearview's ("Township") development permit application ("Development Permit Application") consistent with the purpose and objectives of the Niagara Escarpment Planning and Development Act ("NEPDA") and Niagara Escarpment Plan ("NEP"), the objectives of the *Escarpment Natural Area*, the *Escarpment Protection Area* and the *Escarpment Rural Area* and the Development Criteria?
2. Is Sideroad 26/27 an "Existing Use" and a "Transportation Facility" as defined in the NEP?
3. Is Sideroad 26/27, as improved by the Township Road Works, an "Existing Use" and a "Transportation Facility" as defined in the NEP?
4. In the alternative, is the portion of Sideroad 26/27 which is designated *Escarpment Natural Area*, as improved by the Township Road Works, an "Essential Transportation Facility" as defined in the NEP?
5. Did the Niagara Escarpment Commission ("NEC") improperly consider matters beyond its jurisdiction in its refusal of the Township's Development Permit Application?
6. Are the reasons given by the NEC for refusal of the Development Permit Application based on the proper tests set out in the NEPDA and the NEP or are they based on irrelevant or improper considerations?
7. Did the NEC consider and give proper weight to the analysis and recommendations of its own planning staff to support the issuance of a development permit to the Township for the Township Road Works?
8. Is the NEC's refusal of the Township's Development Permit Application in the public interest and does it deny benefits to the public and environment?

ISSUES OF RICHARD YOUNG

9. Will the proposed development provide an all season safe road with respect to the gradient and the intersection at the 10th Line?

ISSUES OF THE BLUE MOUNTAIN WATERSHED TRUST FOUNDATION

10. Would the Township Road Works cause significant adverse environmental effects on the Blue Mountain watershed ecosystem, including impact to fish habitat and amphibians?

ISSUES OF THE NIAGARA ESCARPMENT COMMISSION

11. Does the proposed development offend the objectives of the Niagara Escarpment Plan's land use designations: Escarpment Natural Area and Escarpment Protection Area?
12. Would the proposed development cause environmental harm, in particular to cold water streams and would it damage steep Escarpment slopes?

ISSUES OF WENDY FRANKS AND DAVID STEPHENSON

13. Does the Township Road Works meet the purpose of the NEP?
14. Does the Township Road Works meet the requirements of the applicable designations and policies of the NEP?
15. Does the Township Road Works meet the requirements of the applicable development criteria of the NEP?
16. Does the Township Road Works meet the test of being "essential" in the NEP?
17. What is the purpose of the Township Road Works, where the test of "essential" is to be applied?
18. What are the alternatives to the proposed Township Road Works?
19. Is the Side Road 26/27 road bed an existing use?

20. What is the feasibility of the proposed Township Road Works and network changes?
21. Are there alternatives to the proposed development that meet the purpose of the Township Road Works that avoid the NEP Escarpment Natural Area designation?
22. Is the road network made safer by the Township Road Works and underlying undertaking, being the closure of County Road 91?
23. Did the Commission staff report properly consider the NEP policies in making their recommendations to the NEC to support the issuance of a development permit with conditions for the Township Road Works to the Township of Clearview?
24. Is the Township Road Works mandated by the 2012 Joint Board decision on the Walker Quarry?
25. Are the Township Road Works consistent with the 2014 Provincial Policy statement, and in particular policies 1.1.1 (c) and (h); 1.1.4.1 (h); 1.2.1 (c); 1.7.1 (j); 2.1.1; 2.1.2; 2.1.3; 2.1.5 (b), (d), (e); and 2.1.8?
26. Does the Township Road Works conform with the Simcoe County Official Plan, in particular policies 3.3.15 (ii), (iii), and (iv); 3.3.16; 3.8.11; 3.8.10; and 3.9.19?
27. Does the Township Road Works conform to the Township of Clearview Official Plan, in particular policies 2.2.3 consistency; 4.0 land use policy and compatibility; 4.1.1.3 boundary delineation; and 4.2.2.13 legally existing use?
28. Are the application of the Ministry of Natural Resources and Forestry Natural Heritage Reference Guidelines appropriate?
29. Will the Township Road Works impact the viability of the functions performed by the Nottawasaga Lookout Provincial Nature Reserve?

Order of Evidence

The order in which evidence shall be called by the parties shall be as follows:

1. Township of Clearview.
2. Those of like interest with the Township of Clearview.
3. Niagara Escarpment Commission.
4. Those of like interest with the Niagara Escarpment Commission.
5. Township of Clearview (Reply).

Meaning of Terms Used in the Order

Party is an individual or corporation permitted by the NEHO to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. If an unincorporated group wishes to become a party, it must appoint one person to speak for it, and that person will become the party and assume the responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer, and may have an agent speak for them. The agent must have written authorization from the party.

A Participant is a person named under Rule 66 and a Presenter is a person named under Rule 69. A Participant or Presenter is an individual, group or corporation, whether represented by a lawyer or not, who may attend all or only part of the proceeding but who makes a statement to the NEHO on all or some of the issues in the hearing. At the hearing, a Participant or Presenter may be asked questions by the parties about their statements. In addition, Participants may make opening and closing statements. Participants and Presenters do not normally receive notice of a mediation or conference calls on procedural issues and cannot ask for costs, or review of a decision as parties can.

Written and Visual Evidence: Written evidence includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material. Visual evidence includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing. If a model forms part of the evidence, photographs of the model shall also be filed.

Witness Statements

A witness statement, participant statement or presenter statement is a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which he or she will discuss and the witness', Participant's or Presenter's position on those issues; and a list of reports that the witness, Participant or Presenter will rely on at the hearing.

An expert witness statement should include his or her (1) name and address, (2) qualifications, acknowledgement of the expert's duty, and specific area(s) of expertise, (3) a list of the issues to be addressed, (4) the witness' opinions on those issues and the complete reasons for the opinions and (5) a list of reports that the witness will rely on at the hearing.

This Order sets out when and how witness statements are to be exchanged.

Additional Information

Summons: A party may ask the NEHO to issue a summons. This request must be made before the time that the list of witnesses is provided to the NEHO and the parties. (See Rules 191 to 196 on the summons procedure.)

Role of Participants and Presenters: Participants and Presenters are identified at the pre-hearing conference or at the start of a hearing. Participant or Presenter statements should be filed with the NEHO and the parties in accordance with the direction set out in this Order.