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

Ontario

**ISSUE DATE:** March 24, 2021 **CASE NO.:** 20-030

**PROCEEDING COMMENCED UNDER** sections 25(5.1) and 25(8) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2

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|---|---|
| Appellant: | Kenneth Robert Campbell |
| Respondent: | Niagara Escarpment Commission |
| Subject of appeal: | Refusal of a Development Permit Application to undertake the construction of a 2-storey dwelling, the installation of solar collectors, a private sewage disposal system, construction of a cantilevered deck, an accessory building, install above ground hydro, construct a private driveway and install a gated entrance |
| Reference No.: | B/R/2017-2018/9228 |
| Property Address/Description: | Part Lot 9, Concession 14 EBR |
| Municipality: | Northern Bruce Peninsula (Eastnor) |
| Upper Tier: | County of Bruce |
| NEHO Case No.: | 20-030 |
| NEHO Case Name: | Campbell v. Ontario (Niagara Escarpment Commission) |

**APPEARANCES:**

| **Parties** | **Counsel/Representative[+]** |
|---|---|
| Kenneth Robert Campbell | Leroy Dirckx[+] |
| Niagara Escarpment Commission | Demetrius Kappos |
| Chippewas of Nawash Unceded First Nation | Roger Townshend and Julia Brown |
| **Participant** | |
| Ontario Heritage Trust | Anthony Scane |

**HEARD:** January 26, 2021 by video hearing
**ADJUDICATOR(S):** Hugh S. Wilkins, Hearing Officer
Helen Jackson, Hearing Officer

# REPORT

## Background

[1] Kenneth Robert Campbell ("Applicant") applied to the Niagara Escarpment Commission ("NEC") for a development permit. He seeks to build a single detached two-storey dwelling, a detached garage, a cantilevered deck, roof-mounted solar collectors, and a septic system on the property located at Parts 1 and 2, Lot 9, Concession 14 EBR ("subject property") in the Municipality of Northern Bruce Peninsula. It is located in the County of Bruce ("County").

[2] The subject property does not have frontage on an opened and maintained municipal right-of-way. As part of his application, the Applicant seeks permission to install a private driveway 6.1 metres ("m") wide by approximately 450 m long from the terminus of Georgian Drive to the subject property. The proposed driveway would cross lands owned by Warren Stewart ("Stewart property") and lands owned by Molly Smith (also known as Molly Shouldice) ("Smith property").

[3] The subject property is presently owned by Janet Stewart, who is Mr. Stewart's spouse. The Applicant has a conditional Agreement of Purchase and Sale with Ms. Stewart to purchase the subject property from her. He also reached an agreement with Mr. Stewart to purchase a small interest in the Stewart property.

[4] The subject property consists of vacant land located along the shoreline of Georgian Bay below the Niagara Escarpment. It is designated as "Escarpment Natural Area" both under the Niagara Escarpment Plan ("Plan") and the County's Official Plan. It is located within the Cape Dundas Life Science Area of Natural and Scientific Interest

("ANSI") and includes a significant woodland (recognised as a Key Natural Heritage Feature under the Plan). It also includes at least part of an unevaluated wetland. The Stewart and Smith properties also are recognized as part of the Cape Dundas ANSI and include significant woodlands.

[5] On June 29, 2020, the NEC refused the issuance of a development permit to the Applicant on the grounds that the application:

- conflicts with the purpose of the Plan;
- conflicts with Objectives 1, 5 and 7 of the Plan;
- conflicts with Objective 3 of the Escarpment Natural Area designation;
- provides insufficient information to properly assess Objective 2 of the Plan;
- provides insufficient information to properly assess Objective 2 of the Escarpment Natural Area designation;
- conflicts with the County's Official Plan;
- was objected to by multiple agencies; and,
- conflicts with Part 2.6.5 of the Provincial Policy Statement, 2020 ("PPS"). The proposal is opposed by the Ontario Heritage Trust and Chippewas of Nawash Unceded First Nation ("Chippewas of Nawash") due to the high significance of the subject property and surrounding area in terms of Indigenous cultural heritage.

[6] On July 6, 2020, the Applicant appealed the NEC's decision.

[7] At a pre-hearing conference ("PHC") held on September 30, 2020, the Niagara Escarpment Hearing Office ("NEHO") directed on consent that the hearing be conducted in phases. The first phase is to address "issues associated with the construction of the driveway", specifically regarding legal access to the subject property by means of the proposed driveway. The Parties agreed that if legal access is not attainable along the proposed driveway, there is no value in continuing with a second phase of the hearing on the remainder of the application.

[8] At the PHC, the NEHO granted Party status to the Chippewas of Nawash and Participant status to the Ontario Heritage Trust. The Chippewas of Nawash have identified the subject property and surrounding area as within the Nationally Significant Cultural Heritage Landscape known as Nochemowenaing. The Ontario Heritage Trust owns several properties in the area.

**ISSUES**

[9] Under s. 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), the NEHO is required to report to the Minister of Natural Resources and Forestry ("MNRF") with a summary of the representations that were made at a development permit appeal hearing along with the NEHO's opinion on the merits of the NEC's decision on the permit application. The NEC's decision is deemed to be confirmed if, in the NEHO's opinion, the NEC's decision was correct and should not be changed, and the NEC's decision was not appealed by a municipality. If, in the NEHO's opinion, the NEC's decision is not correct or it should be changed, the NEC's decision will not be deemed to be confirmed, and the Minister, after considering the NEHO's report, will determine whether to confirm the NEC's decision, vary it, or make any other decision that in the Minister's opinion ought to have been made.

[10] As noted above, the NEC determined in its decision to refuse the Applicant's development permit application that, among other things, the application:

- conflicts with the County's Official Plan and its policy 4.6.3.2 prohibiting the creation of new private roads; and
- conflicts with Objective 7 of the Plan which is "to support municipalities within the Niagara Escarpment Plan Area in their exercise of the planning functions conferred upon them by the *Planning Act*".

[11] Taking into account the NEHO's role, as set out in s. 25 of the *NEPDA*, the issues to be addressed at the Phase 1 hearing are:

- whether the NEC's decision was correct in finding that the Applicant's development permit application:
  - conflicts with the County's Official Plan; and
  - conflicts with Objective 7 of the Plan.

  in terms of the requested access to the subject property by means of the proposed driveway; and
- whether the decision should not be changed.

[12] The Applicant focused his arguments on two main areas:

- whether he holds a prescriptive easement running through the Stewart and Smith properties which allows for the granting of the requested development permit; and
- whether the *Road Access Act* provides him with legal access to the subject property and allows for the granting of the requested development permit.

[13] These issues will be addressed below.

**EVIDENCE, SUBMISSIONS AND FINDINGS**

[14] The Phase 1 hearing was held by video hearing on January 26, 2021. Prior to the hearing, the Applicant and NEC filed affidavits and a witness statement. Following the hearing, the Parties and the Participant filed written submissions. The final Reply submissions were received on February 22, 2021.

[15] At the hearing, the NEHO heard fact evidence on behalf of the Applicant from Mr. Stewart, Ms. Stewart, and the Applicant.

[16] The NEHO heard opinion evidence from John Stuart, who is a land use planner employed by the NEC. Based on Mr. Stuart's education and experience, the NEHO qualified him to provide opinion evidence in the area of land use planning.

[17] The Chippewas of Nawash did not provide evidence at the hearing.

**(a) Whether the Applicant holds a prescriptive easement running through the Stewart and Smith properties**

*The Applicant's Position*

[18] The Applicant stated that he holds a prescriptive easement running through the Stewart and Smith properties. He stated that the proposed driveway would commence at the terminus of Georgian Drive, which is an open and seasonally maintained municipal road, cross the Stewart and Smith properties, and then end at the subject property. He stated that the route of the proposed driveway is regularly used to access the subject property by motor vehicles, including all-terrain vehicles ("ATVs") and trucks, and has been used in this manner for years without prior permission of the owner of the Smith property. He stated that at no time has any person stopped, hindered or prevented him or Ms. Stewart from using this route to the subject property. He said he plans to pave and widen it to facilitate access.

[19] Mr. Stewart stated the owner of the Smith property is aware of the use of the route across the Stewart and Smith properties to access the subject property and has never challenged that use. He supports the proposed use of the route as a driveway or condominium road. He and Ms. Stewart own properties in a "checkerboard subdivision" in the area, which he stated they wish to develop for residential uses in the future. The subject property lies within that subdivision. In his affidavit, dated December 10, 2020, he stated that the Applicant would purchase an interest in the Stewart property and he

described how the proposed driveway would be used. He stated at paragraph 10 of his affidavit:

> I have entered into a binding agreement with Mr. Kenneth Campbell to either create a "condominium road" … or a driveway which includes a portioned ownership. From there I rely on the Road Access Act and the Municipal Road allowance … to access properties my wife and/or I own singly or jointly to the north.

Under cross-examination, Mr. Stewart presented a video of an ATV travelling along the proposed route.

[20] Ms. Stewart stated that the route has been used since the 1970s. She stated that neither she nor Mr. Stewart, have ever done any clearing of bush along the route. She also stated that her use of the route has never been challenged. She stated that the intent behind the driveway proposal is “to make the route passable for a vehicle or two”.

[21] The Applicant submits that the Plan does not provide guidelines for driveway access to existing lots of record such as the subject property. He submits that in the absence of a standard for access in the Plan, the test to be applied is whether the subject property has a legal or equitable route to a municipal road. He argues that he satisfies this test in that he holds a prescriptive easement over the Stewart and Smith properties. He submits that, under s. 31 of the *Real Property Limitations Act*, to establish a prescriptive easement:

- there must be a dominant and servient tenement;
- the dominant and servient owners must be different persons;
- the easement must be capable of forming the subject matter of a grant; and
- the easement must accommodate (be reasonably necessary to the better enjoyment of) the dominant tenement.

The Applicant submits that the dominant tenement in the present case is the subject property and the servient tenements are the Stewart and Smith properties. He submits that the dominant and servient landowners are separate persons and the proposed easement can be defined to form the subject matter of a deed. He submits that the proposed easement provides access to the subject property and thereby is reasonably necessary for the better enjoyment of the subject property. He submits that it is not for his personal enjoyment as it is required for access. He submits that a road to the subject property from the north is no longer passable and the only way to access the subject property is over the Stewart and Smith properties. He acknowledges that the subject property is accessible by water, but argues that this is not relevant.

[22] The Applicant also acknowledges that the subject property became subject to the *Land Titles Act* in 2007 and that the creation of prescriptive easements is prohibited under that legislation. However, he submits that prescriptive easements may still be recognized on lands that are subject to *Land Titles Act* if one can demonstrate "uninterrupted and unchallenged use" for 20 years before the property was transferred into the land titles system. In the present case, this would require evidence of uninterrupted and unchallenged use of the proposed route to the subject property from 1987 to 2007. The Applicant submits that he can establish this. He submits that access along the route of the proposed driveway has existed and has been used since at least the 1970s. He asserts that the use is as-of-right and not by permission. He submits that Ms. Stewart's use of the route to access the subject property has been "open for the world to see" and that the owner of the Smith property never granted Ms. Stewart permission to cross her land nor challenged Ms. Stewart's use of it.

*The NEC's Position*

[23] On behalf of the NEC, Mr. Stuart opined that the subject property does not have access or frontage on an open and maintained public road. He said the proposed development requires the establishment of a private road and does not conform with the County's Official Plan policy 4.6.3.2 or the Plan's Objective 7. He stated that the

proposed driveway would be a private road since it would cross properties owned by third parties. He stated that based on the NEHO's findings in *Stewart v. Niagara Escarpment Commission*, [2010] O.E.R.T.D. No. 3, private roads may not be permitted in Escarpment Natural Areas unless they are essential, which he asserted the proposed driveway is not. He also stated that the proposed driveway would constitute a "development" under s. 1 of the *NEPDA*, the proposed development would create an urban use, which would require a Plan Amendment, and, if the development permit were granted, it would set a precedent of concern and not conform with s. 2.2.1 of the Plan. He also stated that the subject property lies within an existing 78 lot "checkerboard subdivision" that was approved prior to the implementation of subdivision control under the *Planning Act* and *NEPDA*.

*The Chippewas of Nawash's Position*

[24] The Chippewas of Nawash submit that the Applicant cannot rely on an asserted prescriptive easement because there has not been a judicial declaration that one exists. They argue that neither the NEC nor the NEHO has the jurisdiction to grant such a declaration. In any event, they argue that the past use of the proposed driveway route would not satisfy the test for a prescriptive easement. They submit that the Applicant has failed to demonstrate that the use of the proposed driveway route has been continuous and as-of-right. They submit that the use must have been uninterrupted, open, peaceful and without permission over the 20 years immediately prior to the registration of the property in the land titles system. They submit that the evidence before the NEHO is that Ms. Stewart used the route intermittently from 1999 onward, but did not own the subject property (the dominant tenement) until 2003. They submit that the Applicant failed to provide evidence that the route was used to access the subject property before that time. They argue that evidence of others using the route for recreational purposes or to access other properties is not relevant. The Chippewas of Nawash further argue that the asserted easement would not give the Applicant any right to develop the route as proposed. They submit that the use of a prescriptive easement is limited to the purposes for which it was used during the period of its acquisition and

the nature and burden on the servient tenement must not be changed or increased by reason of a change in the character of the dominant tenement.

*The Ontario Heritage Trust's Position*

[25] Like the Chippewas of Nawash, the Ontario Heritage Trust also submits that neither the NEC nor the NEHO has jurisdiction to make findings on the Applicant's claim for a prescriptive easement and, in any event, the Applicant's evidence is insufficient to establish such an easement. It submits that to make such a declaration, the owner of the Smith property, as the servient tenement, would need to be a party to the proceeding. It submits that there is insufficient evidence that Ms. Stewart never had consent from the owner of the Smith property to cross that land and there is no direct evidence that the previous owners of the subject property (before Ms. Stewart bought it in 2003) used the route to access the subject property. Also, like the Chippewas of Nawash, the Ontario Heritage Trust submits that a finding of a prescriptive easement would not permit improvements to the route to accommodate development on the subject property. It submits that owners of dominant tenements are not entitled as-of-right to improve the servient tenement. They only have rights not to be denied the form and quality of access that they enjoyed previously.

*Findings*

[26] The Applicant submits that he holds a prescriptive easement running through the Stewart and Smith properties from Georgian Drive to the subject property. The argument is that this constitutes an existing route that provides the Applicant with legal access to the subject property. The NEHO must determine whether the Applicant holds the alleged easement and, if so, whether it constitutes existing legal access to the subject property in a manner so that the Applicant's development permit application conforms with the County's Official Plan and *NEPDA*.

[27] The first question is whether the NEHO has the authority to determine whether the Applicant holds an easement. Neither *NEPDA* nor any other statute provides the NEC or NEHO with the authority to make declaratory orders. Section 25(4) of the *NEPDA* sets out the NEC's role and powers in considering a development permit application. It states:

> 25(4) Where the Minister has delegated his or her authority under subsection (1), the delegate, on receiving an application for a development permit and, after giving consideration to the merits of the application, may make a decision in accordance with the Niagara Escarpment Plan to issue the development permit or to refuse to issue the permit or to issue the permit subject to such terms and conditions as the delegate considers desirable.

Based on these provisions, the NEC is required to consider the merits of an application and make a decision in accordance with the Plan to issue or refuse a development permit, or to issue it subject to terms and conditions. Its powers do not extend to making declarations.

[28] Subsections 25(11) and (12) of the *NEPDA* set out the NEHO's role and powers at a hearing. They state:

> 25 (11) Within 30 days after the conclusion of the hearing or within such longer period as the Minister may permit, the officer appointed shall report to the Minister a summary of the representations made, together with his or her opinion on the merits of the decision.
>
> (12) The decision of the delegate shall be deemed to be confirmed if,
>
> (a) the opinion of the officer expressed in his or her report under subsection (11) is that the decision of the delegate was correct and should not be changed; and
>
> (b) the decision of the delegate was not appealed by a municipality.

[29] The NEHO's powers are limited to those set out in the *NEPDA* and the *Statutory Powers Procedure Act* ("*SPPA*"). None of the provisions in *NEPDA* and none of the provisions in the *SPPA* (which are limited to procedural powers) grant the NEHO with the power to make declarations regarding property rights or easements. Given its

specific statutory powers, the NEHO finds that it does not have the statutory authority to declare that the Applicant holds a prescriptive easement over the Stewart and Smith properties.

[30] In any event, the NEHO finds that even if it had the authority to declare that the Applicant holds a prescriptive easement, the Applicant has not satisfied the common law or statutory tests for obtaining or holding one. Prescriptive easements may be created by the operation of the common law doctrine of lost modern grant or through the application of the *Real Property Limitations Act*. The test is virtually the same under each. It requires that there must be a dominant and servient tenement, the dominant and servient owners must be different persons, the easement must be capable of forming the subject matter of a grant, and the easement must accommodate the dominant tenement. The use of the alleged right also must be shown to be have been continuous and as of right (see *Kaminskas v. Storm*, 2009 ONCA 318, at paras. 27-28). This requires that the use of the lands in question must have been uninterrupted, open, peaceful and without permission for the relevant time period. Under s. 51(1) of the *Land Titles Act*, acquiring a prescriptive easement is not possible for properties registered in the land titles system, subject to the "grandfathering" of previously established claims. To be valid, an easement would need to have crystallized by the date that the subject property became subject to the land titles system. The relevant time period for establishing the Applicant's claim under the doctrine of modern grant is 20 years prior to the registration of the property in the land titles system (not necessarily immediately prior to registration). Under the *Real Property Limitations Act*, the time period is 20 years immediately prior to the registration of the property in the land titles system.

[31] Based on the Applicant's evidence, the subject property has been subject to the *Land Titles Act* since 2007. To establish that he holds a prescriptive easement, the Applicant would need to demonstrate use of the route to access the subject property in an unchallenged and uninterrupted manner for 20 years prior to 2007. The Applicant has not established this. The current owner of the subject property is Ms. Stewart. She has owned the property since 2003 and stated that she has accessed the property by

using the route since that time. No direct evidence was produced regarding the identity of the owner of the subject property prior to 2003 or whether that person used the route to access the property. There also is insufficient evidence that the use of the route was without the permission of the owners of the servient tenements during the relevant time period. Ms. Stewart appears to have had Mr. Stewart's consent to cross the Stewart property. Evidence regarding the permission to cross the Smith property is less clear. Also, as noted above, the tests for creating a prescriptive easement require that the dominant and servient owners must be different persons. If the owner of the subject property prior to 2003 was Ms. Smith, then this requirement was not satisfied prior to 2003 in regard to the Smith property.

[32] Even if the Applicant were to hold a prescriptive easement over the Stewart and Smith properties, the NEHO finds that he would not have the right to improve the route so that it provides residential access to the subject property. As determined by the Ontario Court of Appeal in *Henderson v. Volk et al.*, [1982] O.J. No. 3138 (C.A.), at para 15, a dominant tenant is not permitted to substantially increase or alter the burden on the servient tenant. This reasoning was supported in *Bell v. Marsh*, [1951] O.J. No. 116 (C.A.), at paras 8-12, where the Court stated "the scale of the right of way use is limited to the scale of the use at the time of the creation of the easement". In *Barbour v. Bailey* 2016 ONCA 98, at para 60, the Court of Appeal further clarified that the nature of the use cannot be changed by the owner of the dominant tenement, the user is not entitled to substantially increase or alter the burden on the servient tenant, and the user may not increase the intensity of the use. Based on this, the NEHO finds that even if the Applicant were to hold a prescriptive easement, which the Applicant has not established and which the NEHO lacks the authority to make a declaration on, he would not be entitled to use the route in any different manner or intensity than it was used prior to 2007. The Applicant would not be permitted to upgrade, maintain, improve or widen the route into a paved driveway as proposed. Making improvements to provide for regular vehicle use (including emergency vehicles) and access to residential uses would not be permitted even if the Applicant held a prescriptive easement.

[33] Policy 4.6.3.3 of the County's Official Plan defines "private road". It states:

> 4.6.3.3 Private roads are those roads not maintained by a municipality, located either on a municipal or private right-of-way providing access to a cluster of residential uses.

To satisfy this definition a road must:

- not be maintained by a municipality;
- be on a municipal or private right-of-way; and
- provide access to a cluster of residential uses.

In the present case, the route satisfies the first requirement, but fails to meet the other two. It is not on a municipal or private right of way (unless the Applicant held a prescriptive easement). It also does not provide access to a cluster of residential uses. There is no dwelling on the subject property and, therefore, there are no residential uses there. Also given the condition of the route, it does not provide for the level of access needed for residential uses. Based on the video evidence presented by Mr. Stewart, the route consists of two uneven tire tracks in the bush. Ms. Stewart stated that the intent is "to make the route passable for a vehicle or two" and the Applicant stated that he would need to make improvements, including paving and widening, to facilitate residential access. This does not satisfy the requirements in policy 4.6.3.3.

[34] If the proposed development permit application were approved and a driveway was constructed, it would be a "new" private road facilitating access to the subject property and the subdivision, which the Stewarts indicated they wish to develop for residential uses in the future. This, however, is prohibited under the County's Official Plan's policy 4.6.3.2. It states:

> 4.6.3.2 New development on existing private roads may be considered by the local municipality provided that such development occurs on lots which existed on the date of adoption of this Plan and which could legally be conveyed on that date, provided that all other policies of this Plan are

> met and subject to appropriate zoning. No new private roads shall be permitted.

[35] *NEPDA* Objective 7 is to support municipalities within the Niagara Escarpment Plan Area in their exercise of the planning functions conferred upon them by the *Planning Act*. The NEHO finds that carrying out the policies of an applicable official plan is such a function. In other words, conformity with applicable official plan policies must be determined when considering a development permit application. In the present case, this includes conformity with the County's Official Plan policies 4.6.3.3 and 4.6.3.2. As an aside, the Tribunal notes that the exercise of the planning functions conferred by the *Planning Act* also requires consistency with the PPS's natural heritage and other policies, which are not addressed here.

[36] The NEHO finds that the proposed driveway would constitute a "new private road", which is prohibited under the County's policy 4.6.3.2. The NEC was correct in finding that the proposed development does not conform with the County's Official Plan or the Plan. Based on the evidence before it, the NEHO finds that the NEC's decision in this regard is correct and should not be changed.

**(b) Whether the *Road Access Act* applies to provide the Applicant with legal access to the subject property**

*The Applicant's Position*

[37] The Applicant submits that the *Road Access Act* prevents the closing or blocking of existing access roads that cross private lands. He submits that the *Road Access Act* defines a '"road" to mean land used or intended for use for the passage of motor vehicles. He submits that the definition of "motor vehicle" in the *Highway Traffic Act* applies to the *Road Access Act*. The *Highway Traffic Act* defines a "motor vehicle" to include a wide range of vehicles "propelled or driven otherwise than by muscular power", including dirt bikes, ATVs, and trucks. He stated that the route of the proposed driveway has been used by ATVs and trucks in the past and that the route, therefore, is

a “road”. Based on this reasoning, the Applicant submits that the *Road Access Act* prevents any attempts to block his use of the route to access the subject property. He stated that he would pave the route of the proposed driveway such that it is permanently repaired and maintained.

*The NEC’s Position*

[38] The NEC submits that the *Road Access Act* is intended to address disputes between the users of private roads and the people who own the land on which those roads lie. It submits that the *Act* confers on access road users only a limited and temporary right to use the road to and from their properties. It submits that the *Road Access Act* does not assist or facilitate the Applicant in improving or developing the route of the proposed driveway so as to obtain access to the subject property and does not convey land ownership rights to users.

*The Chippewas of Nawash’s Position*

[39] The Chippewas of Nawash submit that the *Road Access Act* does not apply. They submit that the *Road Access Act* only provides protection against the obstruction of an access road without an order of the court. They submit that there are no alleged obstructions on the route in the present case. They submit that the *Road Access Act* is aimed to prevent unilateral actions that upset the *status quo* and to provide fair processes to resolve disputes. They submit that the *Road Access Act* simply allows users to use a motor vehicle on a private access road without trespassing. It does not confer any right of ownership to access road users or create development rights. They argue that the *Road Access Act* is intended to be used a shield against obstruction of access roads, not as a sword authorizing road improvements. Moreover, they submit that the *Road Access Act* does not provide the Applicant with the right to develop the route into a driveway without the consent of the owners of the intermediary lands.

*The Ontario Heritage Trust's Position*

[40] The Ontario Heritage Trust also submits that the *Road Access Act* provides a limited and temporary right to use a private road in order to go to and from a property and does not create a proprietary right or interest in land. It submits that the *Road Access Act* only prevents the closure of private access roads. It does not permit the user to improve or develop the access road.

*Findings*

[41] The Applicant argues that the route for the proposed driveway constitutes an access road to the subject property and thereby provides legal access to the subject property. Section 1 of the *Road Access Act* defines "access road". It states:

> "access road" means a road located on land not owned by a municipality and not dedicated and accepted as, or otherwise deemed at law to be, a public highway, that serves as a motor vehicle access route to one or more parcels of land.

[42] The evidence before the NEHO, including the video of the route, is that the route is an unpaved and uneven track narrower than 20 feet in width. It essentially consists of two tire marks running through the bush. In *Blais v. Belanger*, 2007 ONCA 310 ("*Blais*"), at para. 34, the Court of Appeal addressed a similar route that was alleged to be an access road. The Court then stated at para. 38:

> 38. Mr. Chevrier and the respondents' testimony that they used small 4x4 vehicles to reach their land, and Mr. Bishop's testimony of how the route was occasionally used by persons in ATVs, provided only weak evidence of the contemporary existence of an access road. Such vehicles are by their nature capable of off-road travel. Landlocked landowners cannot by acts of trespass, bring into being an access road across the land of another.

[43] Similar to the present case, the route in *Blais* was only wide enough for an ATV or a small truck and the applicant sought to improve and maintain the route. As stated in *2008795 Ontario Inc. v. Kilpatrick,* 2007 ONCA 586 ("*Kilpatrick*"), at para. 1, the

purpose of the *Road Access Act* is "to resolve disputes between neighbours that occur when the property of one neighbour is landlocked, and the only motor vehicle access to it is over a road on property owned by another neighbour". It is not to create new roads or to turn tracks in the bush into access roads. Moreover, the subject property has water access and is not a landlocked parcel of land. It thereby does not fit within the objectives of the *Road Access Act* as they have been defined by the Court of Appeal in *Blais* and *Kilpatrick*. Based on the evidence before the NEHO, it finds that the route across the Stewart and Smith properties does not constitute an access road as defined in the *Road Access Act* and the *Road Access Act* does not apply in the present case.

[44] The NEHO further finds that even if the route of the proposed driveway were an access road, the *Road Access Act* still would not provide the Applicant with legal access to the subject property. Section 6(1) of the *Road Access Act* states:

> 6(1) Nothing in this Act shall be construed to confer any right in respect of the ownership of land where the right does not otherwise exist at law and nothing in this Act shall affect any alternative remedy at law available to any applicant or other person.

This clarifies that the *Act* does not create proprietary rights.

[45] In *Blais*, at paras. 29-32, the Court of Appeal stated:

> … those who use an access road on the land of another do not have the right to repair or maintain the road … There are simply no words in the Act that are capable of being construed, in their grammatical and ordinary sense, of bestowing a right to enter upon the land of another to repair or maintain an access road …

The *Road Access Act* does not give users a right to repair or maintain the access road. In the present case, the Applicant seeks to make improvements to the route in order to achieve legal access to the subject property. Based on his development permit application, he would widen the route to 20 feet, undertake grading, and pave the route with asphalt or concrete. The NEHO finds that such improvements are not permitted

under the *Road Access Act* and the application of the *Act* would not assist the Applicant in obtaining proper access to the subject property.

[46] The NEHO finds that the proposed route is not an access road and the *Road Access Act* does not apply. As determined above, the NEHO finds that the proposed driveway would constitute a new private road, which is prohibited under the County's Official Plan. The NEHO finds that the NEC's decision was correct that the Applicant's proposed development does not conform with the County's Official Plan or *NEPDA* and it finds that the NEC's decision should not be changed.

**Conclusions**

[47] The Applicant's proposed driveway would constitute the creation of a new private road, which is prohibited under the County's Official Plan. Objective 7 of the Plan is to support municipalities within the Niagara Escarpment Plan Area in their exercise of the planning functions conferred upon them by the *Planning Act*, including the application of official plan policies such as the County's Official Plan policy 4.6.3.2. The NEHO finds that it does not have the authority to declare whether the Applicant holds a prescriptive easement, but that, in any event, the Applicant has not satisfied the legal tests to demonstrate that he holds such an easement running through the Stewart and Smith properties to provide him with legal access to the subject property. The NEHO also finds that the proposed route does not constitute an "access road" and the *Road Access Act* does not apply. The NEHO finds that the proposed driveway is prohibited under the County's Official Plan and does not conform with it or Objective 7 of the Plan.

[48] The NEHO finds that the NEC was correct in finding that the Applicant's development permit application conflicts with the County's Official Plan and conflicts with Objective 7 of the Plan in terms of the requested access to the subject property by means of the proposed driveway.

[49] The NEHO finds that the NEC's decision is correct and should not be changed.

[50] The NEC's decision was not appealed by a municipality.

[51] Given these findings, and as agreed between the Parties, the NEHO directs that the second phase of the hearing is not required since legal access is not attainable along the proposed driveway and there is no value in continuing to a hearing of the appeal on the remaining aspects of the application. The appeal is dismissed.

**ORDER**

[52] The NEHO orders that the appeal is dismissed and the NEC's decision, dated June 29, 2020, is correct and should not be changed. The NEC's decision is confirmed pursuant to s. 25(12) of the *NEPDA*.

*Niagara Escarpment Commission Decision Confirmed*
*Appeal Dismissed*

*"Hugh S. Wilkins"*

HUGH S. WILKINS
HEARING OFFICER

*"Helen Jackson"*

HELEN JACKSON
HEARING OFFICER

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