Natural Heritage Planning in Ontario: The Interpretation of the Provincial Policy Statement by the Ontario Municipal Board

By Christopher J. A. Wilkinson and Paul F. J. Eagles

Ever since the current government passed new planning legislation in 1996 that requires planning authorities to “have regard to” the Provincial Policy Statement (PPS) rather than “be consistent with” provincial policy, the actions of the Ontario Municipal Board have been under intense scrutiny. The common assumption is that the new wording is “looser” than the earlier wording, opening the door to a variety of problems that might occur if the PPS was considered to be non-binding. We undertook to test this assumption by examining in detail OMB cases that turned on the OMB’s interpretation of the Planning Act as it applies to the natural heritage section of the PPS. The results of this analysis are a surprise for many observers: we found that the PPS “was generally applied in a thoughtful and effective manner by most Ontario Municipal Board Members.”

Even though the burden of conformity with the policy rests entirely with the developer, the Board ruled for natural heritage protection, indicating in most cases a precautionary and enlightened approach. In the majority of cases, OMB Members interpret that “have regard to” to mean that this obligates the application of and adherence to the Natural Heritage Section of the Provincial Policy Statement.

The facts show the OMB prepared to value natural heritage. One of unique aspects of the OMB is that it has the freedom to make its own rules regarding the admissibility of evidence. Members apply their own weight to evidence, which gives the Board considerable latitude in resolving disputes that involve technical, opinion, and hearsay evidence, such as occurs within land-use planning.

To counter the perception that “have regard to” is weaker than “consistent with,” the Ministry of Municipal Affairs and Housing attempted to clarify this issue. In the annual report of the Environmental Commissioner of Ontario, the Ministry stated:

“Have regard to” means that a decision-maker is obligated to consider the application of a specific policy statement when carrying out its planning responsibility. Failure to conscientiously apply the “shall have regard to” standard could result in the approval authorities, members of the public, or the province intervening to ensure that this that this standard is considered. This involvement could include an appeal to the Ontario Municipal Board on land use planning applications. Land use planning decision-makers are responsible for ensuring that this aspect of the Provincial Policy Statement is adequately considered.

Even so, the interpretation of the Act and the Policy is ultimately the responsibility of the Ontario Municipal Board when it is called to resolve planning conflicts.
In the case of Victoria Point Homes Inc. v. Orillia (City), Board Member S. D. Rogers stated in her ruling that the Board is legally obliged to have regard to the policy.

Section 3 of the Planning Act requires the Board to have regard to provincial policies adopted under the auspices of the Planning Act in exercising any authority that affects planning matters. The Board holds what it considers a practical view of the meaning of "have regard for." Although this direction provides flexibility in the consideration of matters of provincial interest and in the application of provincial policy by the approving authority, it does not mean that the Board should disregard these matters and policies.

This particular case was divided into two phases, design and implementation. The first phase required the applicant to make a prima facie case in its argument for a proposed subdivision. Indeed, the appellants "freely admitted that this proposal did not meet some of the provisions of the Provincial Policy Statement, 1996; in particular the provisions of the Natural Heritage sections of the Policy... Furthermore, counsel for the developer urged that provincial policy is not binding." In ruling in an ecologically precautionary manner, based solely on the evidence presented by the appellants, Board Member S. D. Rogers dismissed the appellants' case in favour of the Natural Heritage section of the PPS. A similar burden of proof was placed on proposed development in Metras Central Properties Ltd. v. Brampton (City), in which Board Members G. J. Daly and S. D. Rogers ruled:

The Board finds that the proponent's interpretation of the Official Plan provisions regarding woodlots, in a municipality for which the identified forest cover is less than 5%, is unacceptable, given the clear provisions of the Provincial Policy Statement... For the owner of a woodlot to abdicate responsibility for the protection of a significant woodlot, because a municipality has not demonstrated an intent to purchase the woodlot, does not constitute due regard to the intent of the Provincial Policy Statement with respect to such woodlots. In any event, the proponent has not demonstrated to the satisfaction of the Board that it is not practicable to retain the whole of the woodlot...

And if the proponent truly intends to protect the woodlot as is, the Board was not presented with any reason why the whole of that woodlot ought not to be conveyed to a government authority for continued preservation and management.

The Natural Heritage Section was seldom disregarded by an Ontario Municipal Board Member in a ruling. The sole exception to this regard for the Natural Heritage section was in cases presided over by Board Member R. J. Emo. Despite the testimony and evidence in support of the Natural Heritage Conservancy Canada, the Board of Commissioners for the Nature Conservancy Canada was the appellant, that "the role of the NCC and its consultant in this hearing is troublesome" in their use of the Natural Heritage section. In both cases, the Board Member established a rigid barrier between conservation and development interests. R. J. Emo stated that he "had regard" to the Provincial Policy Statement in both cases, but ruled against natural heritage protection.

Quality of testimony proves to be key
It is necessary to submit sufficient testimony and evidence to support a ruling that applies the Natural Heritage section. As Board Member G. J. Daly ruled in London (City) Official Plan Amendment No. 131, "the Planning Act and the Provincial Policy Statements further establish that there are areas of land, which for rational, quantifiable reasons should not be developed."

In this case, the Ontario Municipal Board Member ruled against the developer by protecting an area based on Section 2.3.1, while stating that the ecological "sum of the whole could be greater than the parts." Despite this relatively successful application of the Natural Heritage Section, ecological linkages were not generally ruled for in this instance as the City made no apparent argument for them. However, M. A. Rosenberg in Pickering (Town) Official Plan Open Space System—Natural Areas Amendment stated that, "environmental linkages and corridors are legitimate planning considerations that the Board must have regard to in any application."

The Ontario Municipal Board was seldom persuaded by lay testimony, unsupported by expert evidence. However, G. J. Daly in London (City) Official Plan Amendment No. 131 stated "that witnesses with specific knowledge and experience will assist the Board in understanding the complexity of function within the system being studied, explain the inter-connectivity which exists, if any, between the various features, prioritize their importance, and then advise on what action to take as a result." Based in part to this lay testimony, the Board member protected an area because the lay witness enjoying seeing "deer and coyotes come, under the cover of..."
a pine forest, to the water to drink under the protection of these trees.”

In contrast to this use of lay testimony to protect natural heritage, Board Member R. J. Emo in Nature Conservancy Canada v. Norfolk (Township) Committee of Adjustment sympathized with the difficult financial situation of a lay party who routinely cut trees from an ANSI (Area of Natural and Scientific Interest) for firewood. R. J. Emo ruled that this logging constituted an “agricultural activity” as the retired steelworker was acting as a “farmer” and that no Environmental Impact Statement was required. The Member ruled that the wetland complex in question was not a “wet-

Heritage Update from Peter Frood

This short summary is adapted from an article prepared for Plan Canada by Peter Frood. The Ontario Planning Journal thanks Robert Shipley, M.CIP, RPP, formerly a contributing editor for this magazine, for making this material available. For the full text see the current issue of Plan Canada.

The Historic Places Initiative is a partnership between federal and provincial governments that is intended to recognize the country’s historic buildings and sites, set standards for the conservation and facilitate the funding required to maintain them.

All Canadians have experienced the loss of historic places in their communities. According to a recent survey, more than twenty percent of Canada’s historic buildings have disappeared in the last thirty years alone.

Over the last three years, the Speech from the Throne and budget statements have signalled the federal government’s commitment to support the conservation of Canada’s built heritage. The Historic Places Initiative (HPI), a national initiative spearheaded by the Department of Canadian Heritage and Parks Canada, aims to foster a greater appreciation of the buildings, structures and places around us; strengthen our capacity to take appropriate action to protect and conserve them and maintain their historical integrity; and, develop financial incentives that will make preserving, restoring and maintaining historic buildings and places a more economically viable and competitive proposition than abandoning or worse, destroying them. Two discussion papers have been released, and comments are encouraged.

In the spring of 2001, the Prime Minister of Canada and Sheila Copps, the Minister of Canadian Heritage, committed $24 million to develop the first phase of the HPI in partnership with provinces and territories. Parks Canada is working with provinces and territories to put in place three tools to build awareness, educate, and encourage collaborative action to conserve more of our historic places: a register, national conservation standards and guidelines, and a process for certifying that conservation work undertaken meets the standards. Together, they will support the implementation of federal financial incentives for heritage conservation.

Parks Canada has also been working with provinces, territories, municipalities and heritage professionals on a second HPI tool: Standards and Guidelines for the Conservation of Historic Places in Canada. In draft form at present, these standards and guidelines will eventually constitute Canada’s first comprehensive, nation-wide benchmark of conservation principles and practices. They set out a disciplined approach to the assessment of conservation projects and the identification of appropriate interventions in conservation project plans. The Standards are firmly rooted in heritage conservation principles set out in international conventions. They provide practical guidance through the identification of recommended and not recommend approaches.

Peter Frood is the Director of the Historic Places Program Branch, National Historic Sites Directorate, Parks Canada.