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Thank you for the invitation to speak to the Urban Development Institute, Ontario Land & Environment Interest Group on the topic of appeals to the Mining and Lands Commissioner under section 28 of the Conservation Authorities Act. I welcome this opportunity to discuss the substantive underpinnings of the legislation and regulations, the applicability of both Provincial and Conservation Authority-specific policies and to answer any questions you may have. I would also like to tell you about matters which were resolved by our Office without a hearing and provide an overview on what is required to adequately prepare an appeal so that it will be relevant to the issues under determination.

I consider this a welcome opportunity to discuss the type of evidence and expertise which is essential in presenting an effective case on this subject matter. I do not have accurate statistics on this subject, due to the difficulty of going behind a disposition prior to 1992 to see what really happened. However, based on rough estimates after a review by my staff, a telling picture emerges from prior to and after the implementation of applicant-oriented, technical education and the ongoing mediation and settlement initiatives. Prior to 1992, there were 247 appeals heard under section 28, of which 75% were dismissed. Of these, 5% were allowed to reapply, but unfortunately, there is no information as to what took place. Of the remaining 25%, only 7% were allowed, and a further 1% were allowed with conditions, for a total of 8%. The remaining 17% were withdrawn, again with no information on whether a new application was made. From 1992 onward, there have been a total of 114 cases. 10.5% were allowed after a hearing. Of the remaining cases, a nearly 38% were able to go ahead, either through settlement or being allowed to make a second, technically proficient application before the Conservation Authority. Given that there is a demonstrable potential for a successful result in the application and appeals process, I have come to the conclusion that what is lacking on behalf of the appellants is the development of expertise in this area of law and failure to use the appropriate consultant expertise. It is this void which I am hoping to address.

With a few notable exceptions, informed technical evidence has not been addressed by representatives, namely by or on behalf of appellants. Simply stated, the Mining and Lands Commissioner is not the Ontario Municipal Board and planning concerns do not govern the application and appeals process. There are many avenues for developing a potentially successful application and appeal. This area has for the most part remained unexplored.

In an application under section 28 of the Conservation Authorities Act, the issues raised are concerned with the localized management of natural resources, with the primary focus being on the watershed and its inter-related systems. The objects of a Conservation Authority (either "CA" or "an Authority"), found in subsection 20(1) are "to establish and undertake, in the area over which it has jurisdiction, a program to further the conservation, restoration, development and management of natural resources, other than oil, gas, coal and minerals".

Section 28 applications propose potential encroachments on or changes to some of the vital functions carried out within the watershed and thereby may have an impact on the conservation and management of those resources. In turn, decisions may have an impact on the physical safety of individuals and structural integrity of existing development within the watershed. It is the nature of these potential impacts which are being weighed and considered, through a system akin to risk management analysis. In some cases, this has resulted in the setting of acceptable risk thresholds, as well as broad based parameters concerning acceptable activities. It will be upon these thresholds and parameters that the decision maker, be it the CA or on appeal to the Commissioner, may make an informed decision as to whether to grant permission, with or without conditions, or to refuse.

The parameters for allowable encroachment can be found through a number of sources. First, one must be familiar with section 28 of the Conservation Authorities Act. Also relevant will be a current version of any of the 27 CA specific Construction, Fill, and Alteration to Waterway Regulations and their corresponding CA policies, should the CA in question have one. The Provincial Policy Statement and the Implementation Guidelines from 1995 are useful sources as are the earlier individual Planning Policies, and their corresponding Implementation and Technical Guidelines. There is also a current Draft Generic Regulation which will have an impact on the content and powers contained in the individual CA regulations. [At the time of the speech, this Generic Regulation was undergoing revision, some of it substantive. Comments, as of today's date, capture the latest draft, but may be subject to further revision, based on the final version.]

Attention is drawn to the underlying premise of the Conservation Authorities Act. It recognizes that there is an inherent inability in certain lands to withstand encroachment and development. The question in an application or appeal, and based upon the facts of the case, is whether the land in question has any of those characteristics, and to what extent, so as to determine whether the requested permission may be allowed, allowed with conditions or refused. At the most extreme end of the considered risks, certain lands are simply too flood prone, with the attendant potential risk to loss of life and property. For others, the impact on certain types of necessary natural ecosystem resources and their functions is too extreme. In such cases, there are no mitigating measures available to permit the requested activity.

By the provisions of the Conservation Authorities Act, a CA has, over those lands within its jurisdiction, the power to outright prohibit, regulate or grant permission to a private property owner the right to develop his or her land as he or she sees fit. For purposes of an application under section 28, Official Plan designations or zoning are not relevant. Just to be clear, lands having a certain designation for municipal planning purposes such as residential, industrial or commercial, does not mean that permission under section 28 must follow as a foregone conclusion. For purposes of development, which includes most kinds of construction as well as the placement of fill, for purposes of straightening or channeling a watercourse or interfering with a wetland, the overriding considerations which govern are determinations concerning the inherent capacity of that land in that location, in relation to its surroundings, to withstand in a physical sense, the proposed development, alteration or encroachment.

These are questions which can be answered through technical information about the property involved, as well as the watershed systems which may be affected. A properly prepared application and appeal requires the research and presentation of evidence and opinions of specialized technical experts. Not wishing to disparage land use planners, it must be stressed that municipal land use planning is of little or no use in answering the very real and difficult technical questions which section 28 applications give rise to. An appellant, or his counselor agent, needs to rely on experts who can address the issues raised by the provisions of section 28, the particular **Construction, Fill and Alteration to Waterway Regulations**, answer to issues raised by either the **Provincial Policy Statements** or the CA individual policy, or both.

Primarily, one needs an engineer specializing in hydrology, hydraulics and watershed management. Knowledge of the movement of water, both surface and ground water, recharge and discharge capacities and functions, stable slope engineering and soil properties may also be relevant. Knowledge of construction engineering to withstand hydrostatic pressures generated by flood waters, if flood waters are going to be involved, is absolutely necessary.

Then, there may also be involved a coterie of biologists, or one generalist. There are several categories of relevance to the necessary determinations found in the legislation. Your biologist may require knowledge of wetlands ecosystems, hydrophytic plants and soils [that is waterlogged] endangered species, indigenous flora and fauna and ecosystems in general. The ability to critique and assess an existing wetlands evaluation according to either the Southern or Northern Ontario Wetlands Evaluation would be of assistance in cases where a provincially significant wetland designation is being applied.

The areas of expertise involving section 28 applications and appeals currently underutilized or under subscribed by most applicants and appellants is to their detriment. It must be reiterated that an appeal to the Commissioner will involve a neutral assessment of the facts, law and applicable policies. The Commissioner does not have a predisposed view on these matters, other than to perform the adjudicative function provided by legislation. Nor is this Commissioner, or any of her predecessors governed by "anti-planning" sentiments. This fact should be apparent from decisions made under both the **Mining Act** and the **Oil, Gas and Salt Resources Act**, which both advocate resource development.

A Brief Overview of Legislation and Relevant Concepts.

Subsection 28(1) of the **Conservation Authorities Act**, as it now reads, provides for a Conservation Authority to make regulations, subject to the approval of the Minister of Natural Resources, for the area under its jurisdiction. For purposes of applications and appeals, the relevant clauses are (b) and (c).

28.(1) subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,

(b) prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland;

prohibiting, regulating or requiring the permission of the authority for development, if in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development.

Subsections 28(12) and (13) have somewhat unusual provisions for the granting of permission or refusals. Before there can be a refusal or permission granted with conditions, there must be a hearing before the authority or its executive.'

Either the CA or its executive, if so empowered, may refuse permission or grant permission with or without conditions. If there is a refusal or permission with conditions, the applicant is entitled to appeal to the Minister of Natural Resources within 30 days after receiving written reasons for the decision [ss. 28(14)].

By virtue of clause 6(6)(b) of the Ministry of Natural Resources Act, the Lieutenant Governor in Council may, by regulation, assign the authorities, powers and duties of the Minister of Natural Resources to the Mining and Lands Commissioner. This has been done through Ontario Regulation 571/00, which sets out that the Mining and Lands Commissioner is assigned the powers and duties of the Minister of Natural Resources for purposes of hearing and determining appeals under subsection 28(15) of the Conservation Authorities Act.

Pursuant to subsection 6(7) of the Ministry of Natural Resources Act, Part VI of the Mining Act applies to these proceedings with necessary modifications. Of particular relevance is that section 113(b) of the Mining Act sets out that this proceeding will be treated as a new hearing and not a strict appeal hearing. In other words, the parties are to present their case, as if for the first time and the Mining and Lands Commissioner will make his or her decision to allow, allow with conditions or refuse, being the same powers to decide as those at first instance of the conservation authority. This is important, as the hearing will not involve a review of the correctness of the Conservation Authority's decision.

The exact wording of section 28 is recent, dating from 1998. The rest of section 28 has been changed considerably and there are some transitional provisions. The existing Construction, Fill and Alteration to Waterways Regulations [ss28(26)], made under former clauses 28(1)(e) and (f) continue to be in force and effect and are deemed to be validly made under clause 28(1)(c).

There is provision for "development regulations", colloquially referred to as the Generic Regulation [ss. 28(6)], made by Cabinet to govern the content of regulations made by Conservation Authorities under subsection (1). This will include parameters for flood event standards as well as governing what must be either included or excluded in Conservation Authority Regulations. Any Conservation Authority regulation [28(1)] which does not conform with the requirements of the generic regulation will be deemed invalid.

The existing Conservation Authority Construction, Fill and Alteration to Waterways Regulations will not be required to comply with the Generic Regulation until two years after it has been passed. More importantly, it is currently proposed in the draft Generic Regulation that the Conservation Authorities will have two years to prepare new mapping. This two year provision does not, however, apply to further amendments to the Generic Regulation, which will be required to specify the time for compliance.

It is noted that the lands over which the CA's have jurisdiction has been specifically set out in the legislation:

28. (5) The Minister shall not approve a regulation made under clause (1)(c) unless the regulation applies only to areas that are,
- (a) adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beach hazards;
 - (b) river or stream valleys;
 - (c) hazardous lands;
 - (d) wetlands; or
 - (e) other areas where, in the opinion of the Minister, development should be prohibited or regulated or should require the permission of the authority.

Due to the recent change in the legislation, virtually all of the existing decisions coming out of the Office of the Mining and Lands Commissioner were based on the earlier legislation. There are sufficient substantive changes in the legislation itself, the construction of the generic regulation and anticipated new Conservation Authority specific regulations, that there may be some degree of uncertainty as to interpretation and implementation in future cases.

The existing decisions, pursuant to the pre-1998 version of section 28, were based on whether the proposed activity would affect the control of flooding, pollution, or conservation of land. For the most part, decisions centered solely on the question of control of flooding. There were a few decisions involving pollution. The sources of pollution could either be from run off or involving septic systems, but in any case, they were not too numerous. There were also few decisions on the meaning of conservation of land. Two significant decisions were *Hinder v. Metropolitan Toronto and Region Conservation Authority*, (1984), 16 O.M.B.R. 401, which found the phrase to mean "wise use" and 611428 *Ontario Limited v. Metropolitan Toronto and Region Conservation Authority*, (M.L.C.)(February 11th, 1994) (unreported) which found the phrase to comprehend "conservation of an ecosystem". The decision further stands for the

proposition that a precautionary principle would be applied to development involving first order and intermittent streams located within the headwaters of a watercourse, with a threshold of no net impact. This was upheld on appeal by the Divisional Court in an unreported decision (Court File 123/94) released April 22, 1996; leave to appeal was denied.

This seeming expansion of the meaning of "conservation of land" has been embodied in the 1998 version of section 28. It is also reflected in the draft Generic Regulation and can be seen in the principals of the Provincial Policy Statement. The latter document actually dates back to 1996, and some of its provisions can be found in many of the individual Conservation Authority policies used in determining applications.

The following is an overview of the relevant provisions of the newly drafted provisions of subsection 28(1), with commentary.

28(1) provides that Conservation Authorities may make regulations, with the approval of the Minister of Natural Resources, governing land within their jurisdiction [this is circumscribed by (5), to ensure that there is no confusion or excess of jurisdiction].

I'm going to start with the second provision first, for purposes of my own preference.

(c) prohibit, regulating and requiring the permission of the CA for development if, in the opinion of the CA, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development.

Floodline Elevations, Storm Events and Mapping

The concept of flood line elevations has been central to the existing mapping of conservation authorities. A hydrologic model, known as the HEC 2, which was designed by the American Army Core of Engineers, came up with this means of projecting flood level elevations, reaches and velocities for purposes of predicting flood activity during significant storm events. The model can be used for moderate storm event forecasting as well.

There are four storm events currently recognized by the CA's [found in the draft Generic Regulation] and the governing storm will depend on the meteorological probability of that storm occurring over the particular watershed within the CA's jurisdiction. The two major storms are the Hurricane Hazel and Timmins storms, which are plotted, for purposes of modeling, as though centred over the watershed. The model will plot the same rainfall over the same period of hours to do its calculations. The third is called the One In One Hundred Year Storm. While the Timmins and Hazel events have a one in 250 year probability, this means that there is a 1 in 250 chance that the storm may occur in any given year. It is not an indication that the storm occurs more or less once in 250 years. The same holds true with the 1/100 year event.

The fourth is the Historic Flood Event Standard of an authority; this recognizes the naming of a different flood event. This raises the possibility of a standard in relation to snowmelt (freshnet) and ice flow jams. Also, there is recognition that storm events are changing, due to climate change, and there has been an increase in the frequency and profile of storms experienced. They are tending to be more severe, from a rainfall perspective, but of shorter duration.

The CA's have mapped the appropriate flood line elevations on their various maps. Beyond the flood lines, are fill lines, which are the limits for the placement of fill.

The existing depiction of flood and fill lines on mapping appears to be changing to one set of lines, by virtue of subsection (1)(c) and (6) of the Conservation Authorities Act, which consolidates the concept of floodlines and fill lines with any area of jurisdiction. To reiterate, this involves the shorelines of the Great Lakes-St. Lawrence River system or inland lakes which may be affected by flooding erosion or dynamic beaches, to river or stream valleys, to hazardous lands, wetlands and to such other areas as the Lt. Gov. in Council may indicate.

Flooding

The level of flooding is a major overriding consideration in applications and appeals. The technical information found in the Implementation Guidelines² lists various standards which will be applied to the corresponding situation described. Without going into too much detail, I will cover some of the highlights.

Hazard - Flooding as a Threat to Life

Depth - average adults and teenagers remain stable when standing in depths of up to 4.5 feet. The average child, age 6 to 10, will float at about 3.5 feet, although younger children become unstable at 3.2 feet. This is without consideration of the force exerted by moving water.

Velocity - the momentum thrust of the flood, or the lateral force, which can displace objects.

Combination of depth and velocity will create a range of depths and velocities which individuals may remain stable. In the Flood Plain Stability Chart for Humans, found at pages 137 and 138 of the Implementation Guidelines, depth in metres is plotted over velocity (flows of m/s). This gives a range of depths with corresponding velocities which would be safe for a person to walk through without being buoyant or swept away. Maximum allowable depths are about .8 metres or just over 2 feet, where velocity is less than .5 metres per second. Maximum velocity of 1.7 metres per second can be tolerated in depths of no more than about .3 of a metre or one foot. Substantially lower numbers would govern the safety of young children and the infirm.

Hydrostatic Pressure-

The rise and fall of a flood will affect a number of factors, including type of flood proofing measures deemed appropriate, stability of slopes and the like. There are charts for the amount of hydrostatic loading that various type of construction will withstand. The maximum of .8 metres or 2.5 feet after which flood waters will begin to affect structural integrity of normal construction.

There can also be damage to normal construction through the upward force of groundwater through the basement floor, where any hydrostatic head of .2 metres or .7 feet may result to damage to basement floors.

Damage to property will increase with depth of flooding. When buildings are surrounded by flood waters, unbalanced pressures and loadings can be caused on all surfaces, which in turn can lead to structural and sub-structural damage and even collapse.

Vehicular access-

The electrical systems will fail to start and most private vehicles will stall at depths of .4 to .6 metres or 1.5 to 2 feet. Most smaller automobiles will stall in the range of .3 to .4 metres or 1 to 1.5 feet. Velocities will also unseat vehicles at between 4.5 m/s or 15 fls at depths of 1 foot. Smaller cars can become buoyant at lesser depths and velocities.

Emergency vehicles are high and will only be affected by depths of between .9 to 1.2 metres or 3 to 4 feet. Velocities in excess of 4.5 m/s or 15 *fit* would not cause problems.

Impact of activity in the floodway -

The raising of a building envelope, ingress and egress, through the placing of fill material, has the effect of removing some of the existing storage capacity of the floodplain. Water which would have used that storage will have to go elsewhere. Its flow may be impeded by the proposed construction, which means that floodwaters may back up upstream, velocities of flows may increase through a narrows, which will both increase the flood levels downstream and impact on erosion of banks. Therefore, any encroachment into the pre-existing storage capacity may adversely impact on buildings which were previously adequately flood proofed or situated outside of the floodway.

There can be protection to the regulatory flood level, being either wet or dry flood protection, active or passive flood proofing measures in some cases. However, there are points along the floodway or along a portion of the floodplain in general, where the impact reaches well beyond the property in question and cannot be mitigated.

One and Two Zone Approaches and Special Policy Area

Some CA have implemented within certain floodplains what is referred to as the Two Zone approach to the permit process. Essentially, the floodplain is divided into two areas, the floodway and the flood fringe. Development is prohibited in the floodway and certain types of development will be permitted in the flood fringe. This concept is explained and illustrated very well in the Implementation Guidelines.

There are also areas known as Special Policy Areas, which are located within the floodplain proper, but for which certain flood works are in place. Development in the Special Policy areas will still require a permit, but different standards may apply.

The remaining CA's, unless specifically otherwise indicated, apply the One Zone approach. The matter of whether a specific reach would benefit from the Two Zone approach is initially a planning matter. This is not an issue which is considered before the Commissioner. To have a two-zone approach applicable, it is necessary for the municipality to go through the necessary planning process in consultation with the Ministries of Municipal Affairs and Housing, Natural Resources and the local Conservation Authority. Again, this process is described in detail in the Implementation Guidelines.

Erosion

Rapidly moving water causes erosion. Flood waters will also cause erosion of grass covered slopes and around foundations. It can cause erosion of the slopes of river and stream valleys and more particularly, of the exposed portions of the river banks themselves.

Erosion, if not checked or mitigated for, can lead to slope instability and collapse. Not all bedrock is stable. The fine silts in eroded soils, and to a lesser extent bedrock, can become suspended in floodwaters and can effect, water quality, adversely impact on fish habitat, wetlands, and even public works.

Development creates impermeable surfaces, such as roofs and roads, which removes the ability of those lands to absorb flood waters. It also has an impact on the speed with which water is collected and disbursed downstream. Essentially, what happens is more water enters into the flooded watercourse more quickly. During even normal rainy weather, the water may also be warmer, due to the heat retention properties of man-made surfaces receiving rainfall, so that fish habitat may be affected.

Dynamic beaches

Describes the unstable beaches, mostly along the Great Lakes -St Lawrence River system, which are affected by wind, rain, waves and currents. Through the removal, movement and deposit of materials, there is the potential risk of damage to existing development.

Pollution

Occurs largely through run-off in industrial, residential and commercial areas, as well as flooding of septic systems. Animal wastes and motor oil are the main culprits, for the most part. Matters of industrial sources of pollution have not played a large role in appeals to the Commissioner, so that the various sources and means of compromised containment breach are not discussed here.

Conservation of land

There is recognition of this function in the Draft Generic Regulation in which the ecosystem function of river and stream valleys are recognized as integral to conservation of land. Included are apparent valley lands as well as no apparent landform.

The Provincial Policy Statement is more concise, to include a natural area in a valley or other depression that has water flowing through it for some period of the year. The Policy recognizes ecological functions encompassed by valleylands, as well as other features. Found in the Natural Heritage portion of the Provincial Policy Statement, these include groundwater recharge and discharge areas, wildlife corridors, encouragement of biodiversity in indigenous species, communities and landscapes, habitat, movement, refuge, productivity, linkages within the natural heritage system and beyond, buffering between development and ecosystems. The river and stream valleys provide water collection systems for the watershed. They provide flood storage capacity, nutrient and sediment transport, provision of fish and wildlife habitat and migration routes, aide in maintaining the ground and surface water quality and quantity, improve air quality, serve as a noise attenuation mechanism, provide microclimates and house and maintain indigenous flora and fauna.

It must be emphasized that the test in the Policy Statement is that it must be demonstrated that the proposed development will have no negative impact on either the natural features or the ecological functions for which the area is identified.

Development is now a defined term within the body of the legislation.

"development" means,

- (d) construction, reconstruction, erection or placing of a building or structure of any kind,
- (d) any change to a building or structure that would have the effect of altering the use of potential use of the building or structure, increasing the size of the building or structure or increasing the number of dwelling units in the building or structure,
- (d) (c)site grading, or
- (d) the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere., formerly stating the diverting of a watercourse, construction in a pond, swamp, or area susceptible to a regional storm of placing of fill in an area which may affect the control of flooding, pollution or the conservation of land]

This expanded definition deals with the situation raised by the decision in the Supreme Court of Ontario [Div. Ct.] in *Stacy v. the Rideau Valley Conservation Authority*, 678/89, (1989), unreported, Cosgrove, J. where the Court determined that the construction referred to in the statute as it was prior to the 1998 amendments and did not apply to reconstruction. The facts of the case were that a pre-existing building burned to the ground, but its foundations remained. The owners sought to reconstruct their single family dwelling, but wanted to raise the height of the foundation by three feet. The Court found that construction must be limited to initial construction or construction at the outset, but could not encompass reconstruction.

In *Upper Thames River Conservation Authority and City of London & Soufan*, (1989) 67 O.R. 784 (Dist. Ct), Killeen, D.C.J. involved the conversion of a duplex into a fourplex. The case involved the application by the authority to rescind the building permit which had been issued by the City. The court found that, unlike the Building Code Act, the Conservation Authorities Act at the time did not define words like construction, construct or building. The court found that such words were to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, its object, and the intention of the legislature, and could not, even through use of section 10 of the Interpretation Act, be broadened to encompass interior renovations, despite the intensification of use. This decision was affirmed on appeal to the Divisional Court, unreported, [257/89].

Reconstruction and redevelopment within the four walls of an existing structure now are caught by the definition of development. The rationale for this stems from concerns regarding intensification of use within the floodplain.

Returning to clause 28(1)(b) of the Conservation Authorities Act:

(b) prohibit, regulate and require the permission of the CA for straightening, changing, diverting or interfering in any way with the exiting channel of a river, creek, stream or watercourse or for changing or interfering in any way with a wetland.

"wetland" is defined in the Act as being land which is seasonally or permanently covered by shallow water or has a water table close to the surface, directly contributes to the hydrological function of a watershed through connection with a surface watercourse, has hydric soils, formed by the presence of abundant water, and vegetation dominated by hydrotophic plants or water tolerant plants, whose presence is favoured by the presence of abundant water.

"watercourse" is defined in the Act as an identifiable depression in the ground in which a flow of water regularly or continuously occurs

Policy Statements

The old **Wetlands Policy Statement**, dated May 14, 1992, protected all provincially significant wetlands in southern Ontario, being those of class 1, 2 and 3. In general, all such wetlands were to be protected. Other wetlands were also encouraged to be protected.

Development was not permitted within provincially significant wetlands in the Great Lakes-St. Lawrence region. On adjacent lands, development could be permitted if there was no net loss of wetland functions and if there would not be subsequent demand for future development which could negatively impact on wetlands functions. Further, there could be no interference with existing site-specific wetland management practices. Finally, there could be no loss of contiguous wetland area. Any such development activity required an Environmental Impact Study

For the boreal region, development of provincially significant wetlands and adjacent lands was permitted if there was no net loss of wetland functions and if there would not be subsequent demand for future development which could negatively impact on wetlands functions. Further, there could be no interference with existing site-specific wetland management practices. Any such development activity required an Environmental Impact Study

Agricultural uses are permitted on adjacent lands throughout without.

The current Provincial Policy Statement, 1997, section 2.3, Natural Heritage contains the blanket statement:

2.3 Natural Heritage

2.3.1. *Natural heritage features and areas* will be protected from incompatible development.

- a) *Development and site alteration* will not be permitted in:
- *significant wetlands* south and east of the Canadian Shield; and
 - *significant portions of the habitat of endangered and threatened species.*

[Significant means provincially significant wetlands.]

- b) *Development and site alteration* may be permitted in:
- *fish habitat;*
 - *significant wetlands* in the Canadian Shield'
 - *significant woodlands* south and east of the Canadian Shield
 - *significant valleylands* south and east of the Canadian Shield
 - *significant wildlife habitat* and
 - *significant areas of natural and scientific interest*

if it has been demonstrated that there will be no *negative impacts* on natural features or the *ecological functions* for which the area is identified.

2.3.2.1.1 *Development and site alteration* may be permitted on *adjacent lands* to a) and b) if it has been demonstrated that there will be no *negative impacts* on the natural features or on the *ecological functions* for which the area is identified.

2.3.2.1.2 The diversity of natural features in an area, and the natural connections between them should be maintained, and improved where possible.

Agricultural uses are not intended to be limited.

Many of Conservation Authorities have developed their own internal policies which mirror the provisions of the Provincial Policy Statement, or contain some other additional provisions. The prospective applicant or appellant should become familiar with the Authority specific policies as these will likely govern its determinations.

Straightening or Altering a Watercourse

As for alterations, changes, straightening or channeling to streams, rivers, and watercourses, such activities have the potential to impact on flood flows, flood elevation levels, and ultimately fish habitat. There is no activity which can occur in moving water which does not require close examination to ensure that there are no impacts.

Straightening a watercourse will cause water to move through more quickly. In flood prone conditions, this will add to flood elevations experienced downstream, and may ultimately cause additional flooding beyond the reaches of the floodplain mapping already in place.

Channeling water through a culvert will speed up the flow of water downstream but may serve to impede flows from upstream. Further, channeling may cause the water to heat during non-peak flow times, which will have an impact on fish and fish fry habitat.

Regulations

The existing *Fill, Construction and Alteration to Waterway Regulations* of all the 27 CA's are similar. In section 3 an outright prohibition:

In 3, it states, "Subject to section 4, no person shall, [construct or place or dump fill, or straighten a watercourse] period. The wording directly quotes the provisions of the legislation. Then, section 4 gives the CA the authority to permit the activity, so long as it does not affect the control of flooding, pollution or the conservation of land.

Section 3 of the **Draft Generic Regulation**, contains a similar prohibition to the existing Fill, Construction and Alteration to Watercourses regulations. In addition to hazard lands, wetlands, waterfront lands and river and stream valleys, further provision encompasses wave uprush, predicted long term stable slopes, movement of dynamic beaches, and stable top of banks in apparent and non-apparent valley landforms.

Section 4 empowers the CA to permit in writing, with or without conditions, to do any of the activities set out in clauses (b) and (c), where, in the authority's opinion, development will not adversely affect the control of flooding, erosion, dynamic beaches or conservation of land. Section 4 also provides for the creation of schedules, which define areas within an authority's jurisdiction, as well as areas for which permission will not be required. These schedules are the basis for mapping, which will replace the currently existing floodplain mapping.

The most significant change to mapping will be the elimination of flood lines and the governing of what are now fill lines, with the exception of lands set out in the Schedule. I cannot predict whether there will be interpretive changes as a result of these new provisions, but it is safe to say, where legislation changes, often new questions may be raised.

Sections 5 and 6 of the Regulation make similar provisions, i.e. the outright prohibition, and granting of permission with or without conditions, relating to straightening, changing, diverting or interfering with the channels of a creek, stream or watercourse or interfering with a wetland.

HOW ARE POLICIES [PROVINCIAL STATEMENTS OR CA SPECIFIC] APPLIED?

The application of policies by a decision maker is a discretionary determination, whether it be to develop policies or to apply policies of another.

The Supreme Court of Canada endorsed the proposition that a decision-making body can make a valid decision based upon a policy statement and not upon statute or regulation in *Capital Cities Communication Inc. v. Canada (Canadian Radio-television & Telecommunications Commission)* [1978] 2 S.C.R. 141. The decision also recognizes that such a policy does not have the force of law, that it serves to inform the public and prospective applicants and most importantly, that it is not to be rigidly applied, but must have room to mature and develop, through successive applications.

The test with respect to application of policies applied by the Commissioner is found in *Segal v. The General Manager, The Ontario Health Insurance Plan* (Gen Div. Div. Ct.) unreported, 347/94. November 24, 1994, Hartt, Saunders and Moldaver JJ, found at page 3. It can be summarized as follows:

1. The first step is to consider the policy and determine whether generally it will be adopted or rejected by the Commissioner.
2. If it is adopted, it need not be reconsidered unless a party pleads exceptional circumstances.
3. If it is rejected, the Commissioner must give reasons.
4. If it is adopted, the commissioner will consider whether it is reasonable to apply the policy in the circumstances.

As discussed above, two types of policies which come into play in applications and appeals involving Conservation Authorities. The first is the Provincial Policy Statement, which was issued on May 22, 1996, and replaces what are referred to as the Comprehensive Set of Policy Statements, which include, among others, the Provincial Flood Planning Policy Statement and the Wetlands Policy Statement. This Policy Statement, as were its predecessors, was passed pursuant to section 3 of the Planning Act. The relevant provisions of section 3 are found in subsection (5), which states,

- 3(5) In exercising any authority that affects a planning matter, the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, shall have regard to policy statement issued under subsection (1).

Subsection (1) authorizes the Minister of Municipal Affairs and Housing, along with any other Minister of the Crown, to issue policy statements that have been approved by Cabinet on matters relating to municipal planning that in the opinion of the Minister are of provincial interest.

In *Bye v. Ottonabee Region Conservation Authority* (1993), unreported, File CC.1357. the Commissioner found that it would not have regard to all of the provisions of the Policy Statement, particularly with respect to the balancing of social and economic interests with those of safety and security to life and property, that the technical underpinnings were sound and would be applied.

There has been considerable discussion elsewhere on whether "have regard to" can mean that a body is bound to follow the policies. It is quite clear that the former means that consideration must be given, while the latter is the equivalent of being contained in statute or regulation.

The conservation authorities are not bound by the Planning Act, or section 3 provincial policy statements in making their determinations under section 28 of the Conservation Authorities Act. However, the dual role of the authorities cannot be ignored; that of making representations and recommendations to

planning authorities on official plans, plans of subdivision, consents, zoning by-laws, minor variances and the like and that of considering applications for permission for [one of the purposes outlined in the new clauses 28(1)(b) and (c)]

...While a planning body may weigh competing uses in order to arrive at the highest a best use of a tract of land, conservation authorities do not consider, nor do they have the power to consider, the relative merits of competing uses. Their mandate is to determine the impact of a proposal on the very limited capacity of land within their jurisdiction and based upon the degree of severity of the proposed encroachment or hazard, to allow permission, with or without conditions or refuse permission. There is no power in conservation authorities to weigh or consider the relative merits of economic and social implications with those of susceptibility to flooding, risk to loss of property or life, pollution of the surface waters or soils, and general ecosystem concerns within the watershed. The conservation authorities are specifically charged with determining the merits of a proposed encroachment based on risk not only to the applicant, but to affected persons both upstream and downstream of the proposal. In other words, in considering the right of a property owner to use his or her land, a conservation authority will weigh the individual's rights against the public interest, in so far as it concerns flooding, pollution or conservation of land. Once the capacity of a watershed to cope with the encroachment, pollution or the associated ecosystem health is depleted, there is nothing more for the authorities to consider.

Given the wording contained in the 1997 **Provincial Policy Statement**, it is open for this issue to be re-argued. However, whether or not the Commissioner finds that regard must be given to the **Policy Statement**, the result will likely remain the same. It is the technical underpinnings which are relevant to Conservation Authority appeals and the Commissioner has indicated an intention to apply relevant technical considerations.

Precedent and Cumulative Impact

The matters of whether permission for development may create a precedent or cumulative impact on the flood storage capacity within the floodplain are perhaps the most predominant issues in applications, aside from the site-specific evidence. This approach is part of a balancing act undertaken by CA's and endorsed to date by the Commissioner. It is recognized that the absolute storage capacity may not be known. The CA's policies do allow for certain types of construction and renovations, such as additions of moderate size to existing buildings. Each new encroachment affects the available storage.

The balance is achieved through generally not allowing new development within extremely flood prone lands. This runs up against proposed infill development, where there are few or only one vacant lot available in the immediate area. The problem is that the design of the safety net does not include loss of all the vacant lots within a watershed, and it is the impact of building on all of those lots which is of concern.

Unless there is a way to distinguish the characteristics of the building lot, from all the other vacant lots in the watershed or reach, this will continue to be a significant hurdle to overcome in the appeal process.

About the Process

Many applications before CA's and appeals to the Commissioner may have been hampered by the lack of technical expertise and inquiry necessary to meet the rigorous standards set by this legislation. Our office has taken a number of steps to deal with this situation. We are also in the process of developing a Website, which will post all significant decisions. We have not had our decisions published and made available publicly, as frankly there hasn't been a market for them. However, members of the public are welcome to come to the Office and view the decisions. My staff will provide research assistance.

Questions were asked concerning time frames and what to expect when filing an appeal. Generally, the appeal will be acknowledged within days, usually at the same time as an Order to File Documentation is issued. This will require that the Conservation Authority file within three weeks a copy of the original application, its refusal and any maps, correspondence and reports filed with the original application. Within the following month, the appellant is required to file copies of all materials to be used in support of the appeal, with a fairly exhaustive list supplied. Again, within the following month, the Conservation Authority is required to file all of its documentation. From the date the appeal is received, complete filing of materials should be completed within three months.

Steps will be taken immediately by the Registrar, Daniel Pascoe, to meet with the parties, to discuss potential for settlement. This is an excellent opportunity to reiterate the technical requirements necessary to support an application. Countless examples of "I've never seen it flood in 20 years" have been the extent of countering flood line elevations. Site visits have been conducted, with the parties in attendance. I am not privy to these discussions, but we have enjoyed a high rate of success in disposing of cases without requiring a hearing before the Commissioner.

One thing which does happen, is through becoming educated as to what is technically necessary, often the appellant will seek to adjourn the matter sine die, be allowed to file a new, re-crafted application with the Conservation Authority, with more comprehensive technical support. It is understood that if the second application fails, both appeals to the Commissioner will be heard at the same time.

This two step process is necessary, where an applicant seeks to effectively amend the original application. The application which is before the Commissioner must be the same one as before the Conservation Authority - while it is possible to bring better expert evidence and technical reports, they must be in support of the same activity - ie. The same building on the same location or same amount of fill. Any changes and a new application will be required. However, this procedure has resulted in countless cases where the second application is allowed by the Conservation Authority and the first appeal is then dismissed with the consent of all parties.

If the settlement discussions are not successful, the matter will be scheduled for hearing, usually within six months of receipt of the appeal. However, it is possible to ask that a matter go directly to a hearing after filing is complete. The Registrar will work with the parties to determine whether an Agreed Statement of Facts can be prepared. All materials filed will be marked as Exhibits prior to the hearing. The matter of qualifying expert witnesses prior to the hearing may be raised, so that objections are known in advance. The point of all of this is that the hearing itself will proceed on the most expedient basis possible. Only matters which are truly in issue will be emphasized and dealt with at length in the hearing. Routine, formal court-like procedures are generally dealt with in advance of the hearing, on a consent basis. No one is required to agree to the content of the other side's technical reports, for example, but it will be known, in advance of the hearing, what number it will be marked as. There will be no requirement for it to be "proved" through its author, unless one of the parties wishes to put its proof in issue.

Education and mediation

Dan has also, with the parties, come up with some very creative solutions, some of which I would like to share with you.

In *Flores and Lake Simcoe Region Conservation Authority* [CA 016-91], no dry access could be achieved to a building envelope which had sufficient elevation to build a house. The solution was to permit a gravel road to go through the owner's property, within the floodplain without fill. Emergency access was granted over the land of a neighbour, with an easement registered on title. Valuations were done of the property with and without the easement and the loss in value was paid to the neighbour.

In *Allerton v. Lake Simcoe Region Conservation Authority*, [CA 001-95] a cut and fill was allowed, meaning is to take fill from the same elevation and move it to create an acceptable building envelope, consistent with surrounding properties. There were conditions attached, involving flood proofing, setting minimal openings and finished floor elevations, and the requirement that the applicant register an agreement on title indicating that it has accepted all liability for damages from flooding.

In *Piccirlli v. Lake Simcoe Region Conservation Authority*, [CA 003-96] a site visit found the foundation of a previously existing structure, rather than a vacant lot. The new structure was permitted within the policies of the CA for additions to existing structures. I do wonder whether the new definition of development would allow this type of application to be successful today, however.

Decosimo v. Credit Valley Conservation Authority [CA-004-96] involved a dispute of the exact location of the fill line and frankly, the mapping was of poor quality. The width of the line itself was a considerable portion of the property. The location of the building envelope was moved to the agreement and satisfaction of the parties.

In *Thompson v. Nottawasaga Valley Conservation Authority* [CA-004-00], the applicant did more up to date mapping offloodline elevations. The CA's mapping dated back to 1974. The appellants' 1987 mapping was more accurate.

In a mining case, *Minescape v. MNDM, Nickel District CA, and Yenway Golf Inc.* [MA 030-98] an unusual case saw the settlement of mineral exploration activities taking place on a golf course which was located on leased CA lands. The parties negotiated a ten point agreement which was embodied into an Order. Included were times of day and months of the year when drilling restrictions applied, restrictions concerning the laying of grid lines, which involves the blazing of trees along the grid, no access through the golf course proper, size of trees which could be cut and where restrictions on visibility and audibility.

There are avenues open to an applicant to 'explore the extent of restrictions which properly should apply to his or her property. Issues such as the accuracy of mapping, the actual drafting of maps and plotting of features spot elevations, modeling of additional cross sections in the HEC 2 model, all have very real potential. One other successful technique is to re-evaluate the wetlands designation and manner in which the data was collected.

Another avenue which remains unexplored is that of the impact of existing agricultural drainage tiles on a given property. Installation of agricultural drainage tiles may have served to increase flood prone properties, and there may be room for mitigation in consultation with surrounding owners of agricultural land. However, caution is recommended before pursuing this as it may also involve proceedings before the Agricultural Review Tribunal and Drainage Referee.

Consolidated Hearing Act

It is pointed out that provisions of the **Consolidated Hearings Act** apply to section 28 applications and appeals. If an applicant has such other applications which entitles that individual to a hearing before the Joint Board, one need only follow the procedures set out in that legislation. The Joint Board has the authority to make the decision which would otherwise be made by the Conservation Authority or the Commissioner, or it may determine that the matter should properly be determined by the Conservation Authority or the Commissioner.

I am not totally familiar with this process, as frankly our office does not hear of cases which we do not receive. I do know that the Joint Board made the requisite determination in its hearing on the Brickworks site in Toronto. I also point out that there may be an underlying issue as to whether the appeal portion of section 28 can be properly undertaken by the Joint Board. Revised Regulation 172 does prescribe the **Conservation Authorities Act** for purposes of that legislation. However, the empowering provisions of Section 2 indicate that it applies to one or more hearings required to be held by a tribunal, which is further defined. In section 28 of the **Conservation Authority Act** appeals, the Mining and Lands Commissioner sits in place of the Minister. This is not a delegated power, but rather one of assignment. It is not known how this assignment may affect interpretations under the **Consolidated Hearing Act**.

Thank you.