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"SPEAKING THROUGH POLICY" AND ENSURING POLICY IMPLEMENTATION

Response to:
"A New Approach to Land Use Planning"
A Consultation Paper, released December 1993,
Ministry of Municipal Affairs

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EXECUTIVE SUMMARY

In response to the consultation paper, "A New Approach to Land Use Planning", this paper addresses the existing approach or "model" for the content and implementation of provincial land use planning policy and compares it to the new approach or "model" contained in the consultation paper. Both approaches or "models" are deficient. The "existing model" has suffered from ambiguity as to whether Policy Statements issued under the Planning Act are meant to be binding or not. It has also suffered from lack of clarity and consistency among policies (both in terms of their content and implementation), and from major gaps in policy development.

The Policy Statement "model" proposed in the consultation paper responds to these problems by strengthening the language of the Planning Act to clarify the original intent of the Legislature; that Policy Statements are binding on decision-makers in the land use planning process. It also recommends "comprehensive policy statements" to fill in policy gaps. This new set of policies also will eventually include revised versions of existing Policy Statements. An extremely abbreviated Interpretation and Implementation Policy will then govern the comprehensive set.

While it is an improvement to fill in policy gaps and be more consistent across all policy areas, the proposed policies are significantly changed, both in their format and content, from the existing Policy Statement "model". This change is not justified, either explicitly in the consultation paper or for the many reasons set out in this paper. In particular, the new format removes two key areas from Policy Statements that are essential to ensure clarity of policy direction and effective and consistent policy implementation. First, a background section is necessary to justify the setting of Provincial policy in each area and to provide necessary guidance for decision-making. Second, there must be accountability with respect to implementation. The new "model" for Policy Statements excludes critical detail as to who will be responsible for policy implementation and how.

Under the new "framework", to use the Province's words, "the provincial government will set policy, municipal governments will make development decisions and the Ontario Municipal Board will resolve disputes."[1] Two key issues regarding policy implementation are not resolved with this new "framework". The first is the historical problem of provincial ministries lacking any clear responsibility to ensure their policies are applied properly, if at all. In response, the new "framework" sidesteps this problem completely. Implementation is handed over almost entirely to municipalities and disputes are to be resolved by the Ontario Municipal Board.

A large gap exists in this approach with respect to provincial accountability and responsibility for ensuring provincial policies are enforced. Environmental and citizens

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1 "Ontario Launches Reform of Planning and Development System", Ministry of Municipal Affairs Press Release, December 14, 1993.

groups have many good reasons for being concerned about this gap. They have experienced first hand the fact that many municipalities do not have the resources, the expertise or the inclination to apply anything but the loosest possible interpretation to Provincial Policy Statements, particularly policies as general as those proposed in the consultation paper.

Without a much clearer mechanism for policy implementation, including clear lines of provincial responsibility, this framework is flawed. It will very likely amount to an offloading of policy enforcement by the province to those few environmental and citizens groups able to mount OMB challenges of land use decisions. This approach is wasteful since, as environmental and citizens groups stated repeatedly to the Sewell Commission, the overall intention of land use reforms should be to resolve disputes early in the process; to recommend changes that would help to avoid costly, adversarial battles at the OMB. It is also fundamentally unfair since intervenor funding is not currently available for OMB hearings. It is doubly unfair, even if intervenor funding were available, to propose a framework in which citizens groups will be in the position of doing the government's job of enforcing provincial policy.

A critique of the existing and proposed "models" (and policy proposals) is provided to recommend a different model for Provincial Policy Statements that will effectively ensure consistent policy implementation. The model proposed herein includes a background section to each policy area and recommendations for more detail in the policies themselves particularly the inclusion of a declaration of provincial interest in the protection and restoration of biological diversity and a much broader requirement for the assessment of cumulative effects in planning decisions. Each policy area needs its own implementation section as well as associated implementation guidelines that are directly referenced in the Policy Statements. Clear interpretation direction is essential regarding those policy provisions which impose prohibitions and thereby override other policies if or when conflicts arise between policies. In addition, the policies must be accompanied by critical amendments to the Planning Act to establish content requirements for municipal plans and Environmental Impact Statements, and environmental and watershed planning requirements for the plan development process.

1. INTRODUCTION

The need to reform the land use planning system in Ontario is urgently felt by all stakeholders in the process. The Order in Council that established the Commission on Planning and Development Reform, the Sewell Commission, set out the broad areas of the land use planning system that required the Commission's attention. These needs were summarized in the Commission's mandate to: recommend changes both to the Planning Act and related policy that would restore integrity to the planning process, would make that process more timely and efficient, and would focus more closely on protecting the natural environment[1].

The Sewell Commission undertook a dynamic consultation process that resulted in a final set of 98 recommendations. Broad consensus was achieved in many areas. In particular, there was consensus that the province should clearly "speak through policy" when expressing provincial interest in matters which are the subject of decisions throughout the land use planning process.

The Government's partial response to the Sewell Commission recommendations is the consultation paper entitled "A New Approach to Land Use Planning" released in December of 1993[2]. Referred to as the "first steps" in undertaking reform, the proposals in the Government's paper focus on policy statements, the interpretation and implementation of which relies primarily upon an amendment to Section 3(5) of the Planning Act.

The consultation paper poses two main questions: 1) "What do you think of the details of the proposed Provincial Policy Statements in this paper?" and 2) "What do you think of "shall be consistent with" as the new standard for implementing policy statements, instead of the existing "shall have regard to" standard in the Planning Act"?[3] These two questions are closely related since the level of detail in the proposed policies raises many concerns around policy implementation. As well, it is incorrect to state that the language of Section 3(5) provides the "standard for implementing the policy statements". Rather, a broader range of measures exist and/or are necessary to ensure policy implementation.

The focus on policy statements in this first round of consultation involves the introduction of new "comprehensive policy statements", proposals to integrate existing policy statements into this "comprehensive set", and a new approach to policy implementation. Implicit in these proposals is a new "model" for Provincial Policy

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1 New Planning for Ontario, Final Report of the Commission on Planning and Development Reform in Ontario, June 1993.

2 A New Approach to Planning, A Consultation Paper. Ministry of Municipal Affairs, December, 1993.

3 ibid, p. 1.

Statements and their implementation. This "model" is distinct from that which already exists for Policy Statements. These models are referred to herein as the "Existing Model" and the "Commission-Government" model. Both models have strengths and important weaknesses.

This paper provides a comparative critique of the two models. A new "model" is proposed which incorporates elements of both the Existing and Commission-Government models as well as additional guidelines, legislative amendments and other reforms that are required to ensure the effective interpretation and implementation of provincial policies. This paper then responds to the details of the proposed Comprehensive Policy Statements.

An additional section is included that debunks a number of land use planning "myths". It responds to some stakeholders in this process who have expressed what environmental organizations consider to be "myths" about the effects of introducing reforms to the planning process to ensure environmental protection and public accountability in land use decisions.

2. "SPEAKING THROUGH POLICY"

2. a) The Planning Act, 1983

The agreement among land use planning stakeholders that the province should "speak through policy" is not new. It was also a major conclusion arising from the last reform effort which resulted in the new Planning Act of 1983. The 1983 Act established a mechanism for the Province to provide policy direction on matters of provincial interest. The Province promulgated, between the early 1980s and the early 1990s, four Policy Statements[4] that loosely followed the "model" for Policy Statements contained in a guideline issued by the Ministry of Municipal Affairs in the early 1980s.[5]

The 1983 model for Policy Statements was not adopted by the Sewell Commission or the Government in this consultation. The Government proposes instead to integrate existing Policy Statements into the new comprehensive set presumably using the new format. In so doing, significant sections of the existing Policy Statements will be

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4 Mineral Aggregate Resources Policy Statement, May, 1986, Flood Plain Planning Policy Statement, August, 1988, Land Use Planning For Housing Policy Statement, July, 1989, and Wetlands Policy Statement, May, 1992.

5 Policy Statements Issued Under Section 3 of the Planning Act, 1983. Ministry of Municipal Affairs. 5 pp. no date.

removed.

2. b) The 1983 Policy Statement "Model" - the "Existing Model"

The Existing Model arises from Section 3 of the Act which provides for the establishment of Provincial Policy Statements on matters of provincial interest. Section 3(5) states that decision makers are to "have regard to" Policy Statements in making their planning decisions.

The process for promulgating Policy Statements under the 1983 or "Existing Model" for policy statements could be summed up as tentative and tortuously slow[6]. Since 1983, policy has been formulated very slowly through the introduction of successive drafts of policies or guidelines. The intention was to test the policies first so that the Policy Statement itself could be introduced smoothly[7]. The opposite situation arose however since stakeholders in the process were confronted with a plethora of "policy", guidelines, "policy guidelines", etc. all of uncertain legal status. In addition, the language of Section 3(5) is ambiguous and places no meaningful onus on decision-makers; with the result that following provincial policy has been more or less optional.

The model for Policy Statements set out in the Ministry of Municipal Affairs guideline[8] established a format for Policy Statements so that each would contain the following sections:

Purpose
Interpretation
Background
Definitions
Basis of Policy
Policy
Implementation

Associated Implementation Guidelines (supplementary to the Policy Statement)

A distinction exists between the "implementation" section contained within the Policy

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6 The one exception to this tentativeness is the Mineral Aggregate Resources Policy which has been heavily criticized by environmental and citizens' groups for protecting high potential aggregate resource areas regardless of other land use values and other natural resources such as mature forests, areas of natural and scientific interest, environmentally sensitive areas, wetlands, etc.

7 MMA Guideline, undated. op. cit. p.2.

8 ibid.

Statement and "implementation guidelines" which accompany but are not part of the Policy Statement. Implementation in the Policy Statement generally has to do with who will implement various tasks whereas the associated implementation guidelines have to do with the details of how implementation can occur.

Even with direction provided in the MMA Policy Statement guideline as to what each section should contain, the format and level of detail in existing Policy Statements is inconsistent.

2. c) The Commission-Government Policy Statement "Model"

In response to the inconsistencies (in format, level of detail, legal status) and gaps in government "policy" regarding land use, the Sewell Commission and now the Government have proposed a different model. The first change is to Section 3(5) of the Act. The current language requiring decision-makers to "have regard to" policies promulgated under that section will be replaced. The new language will state that decisions "shall be consistent with" provincial policy statements issued under Section 3 of the Act. This change is strongly supported subject to the minor changes suggested in Section 3 d) below.

The second change is a significant alteration in the format and content of Policy Statements. Using this new format, the Commission-Government model proposed a set of "comprehensive policy statements" and the integration of existing statements into the new comprehensive set. The new model includes the following sections in each policy area within the comprehensive set:

Goal
Policies

Associated Implementation Guidelines (?)

Whether or not implementation guidelines will also be prepared for each policy area is unclear[9] and therefore a contentious issue (see Sections 3 b) v) and vi) below). Instead of an interpretation and implementation section in each policy statement, the Sewell/Government model proposes very general "interpretation and implementation policies" as part of the comprehensive set. The following sections are consolidated for all policies within the set:

Interpretation and Implementation Policies
Definitions

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9 see page 6 of "A New Approach to Land Use Planning", op. cit.

There are important benefits and serious flaws in this new model, elaborated upon in greater detail in Section 3 below. To summarize, benefits of the Commission-Government model include: removing the ambiguity of Section 3(5); consistency across all policies; and the filling in of gaps in policy (e.g., natural heritage protection and preservation of agricultural lands). However, in comparison to the existing model, the "comprehensive" policy statements are comprehensive in only one area - the policy section of the Policy Statement and even there, improvements are necessary (see Section 4 below). As well, the proposals for implementation of the Commission-Government model are extremely problematic.

3. POLICY STATEMENTS: NECESSARY ELEMENTS

3. a) Introduction

This paper proposes a new model for the format, content and implementation of Policy Statements that will more systematically ensure the effective interpretation and implementation of policies than is provided by the existing system or the Commission-Government proposals.

3. a) i) Comprehensive Policies

There is a clear and urgent need for strong, effective policies to ensure the protection of natural and cultural heritage including agricultural lands. Environmental and citizens groups recognize and strongly support the choice made by the Sewell Commission and in the Government consultation paper, to focus on the need for a full complement of policies in areas of provincial interest. Enormous progress has been made with the development of the comprehensive set of Policy Statements and the commitment to putting them in place under a strengthened Section 3 of the Act. Most importantly, the clear prohibition of development in areas of environmental significance afforded by policy A 1.2 is a courageous commitment as is the prohibition of development on specialty crop lands afforded by policies B.9 f) and B.10 f). This commitment is consistent with and complementary to the approach taken in the existing Wetlands Policy Statement for the protection of provincially significant wetlands.

It is important to note that the province is setting policy in areas where basic background data and analytical expertise may still be developing or accumulating. Nevertheless, the Province must set this policy direction in the face of these difficulties and make a corresponding commitment to the reallocation of resources for their implementation including resources for staff training.

3. a) ii) Ensuring Policy Implementation

More detail is necessary in Provincial Policy Statements than is proposed in the Commission-Government model in order to build in accountability and consistency during policy interpretation and implementation. By ensuring effective interpretation and implementation of policies early in the process, there will be far less need to rely on the OMB to resolve disputes at the end of the process.

The Commission-Government model depends upon the change to Section 3(5) to provide (in the Province's words) a "stronger implementation mechanism". However, this "mechanism" amounts to a change in wording to Section 3(5) and the removal or omission of significant details from Policy Statements. MMA staff have stated that the existing language of Section 3(5) is suited to the existing Policy Statement format and contents whereas the proposed language change requires a new format and contents.[10] This argument is not logical nor is it justified anywhere in the consultation paper. The "have regard to" language of Section 3(5) is too ambiguous and needs to be changed but such a change does not then justify dramatic changes to the format and contents of Provincial Policy Statements. Less ambiguous language for Section 3(5) will clarify what was always intended by the Legislature - that Provincial policies are meant to be binding.

The challenge posed by gaps in data and analytical expertise means that the change to Section 3(5) must be accompanied by appropriate detail in the Policy Statements. These details include a rationale or justification for setting policy in each area of provincial interest and clear lines of responsibility as to who will be responsible for implementation and how, i.e, the "mechanism" of policy implementation. The Province must also ensure a related process occurs that specifies how the Province expects implementation to be done.

When land use matters are considered by decision makers in the planning process, provincial intent needs to be very clear. By definition under the Planning Act, the matters included in Provincial Policy Statements are of provincial concern. Hence, while each land use application deals with a specific piece of property, a specific development plan, or even an entire municipal plan, when a Provincial Policy Statement also applies, issues concerning the whole of the province are also implicated. In order to assess the wider provincial interest in the site-specific matter before it, decision makers must have as much information as possible to understand properly why there has been a provincial interest identified, what circumstances led to the establishment of the interest, and how that interest is to be interpreted and implemented. Without the context provided by this information, fully informed decisions will not be possible.

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10 personal communication, Ministry of Municipal Affairs staff, February 16th, 1994.

It is clear from numerous excerpts from OMB decisions, (discussed further below), that the OMB has looked to all of the information in the existing policy statements in order to make its rulings. The Board has considered this examination to be necessary under the directive to "have regard to" the Policy Statements. It seems clear that, once the OMB must make decisions "consistent with" the Policy Statements, this information will be more not less, important.

To address the concerns raised above, the balance of Section 3 of this paper discusses the necessary content requirements for each policy area, the matter of associated implementation guidelines, the usefulness of generic elements for all policy areas, and necessary legislative amendments to accompany the policy reforms including the need for intervenor funding at the OMB.

3. b) Contents of Policy Statements

Each Policy Statement should contain the following sections:

Goal/Purpose
Background
Policy

Associated Implementation Guidelines (how to implement each policy)

The following sections should be consolidated for all policy areas to apply to the entire comprehensive set:

Interpretation
Implementation (sections specific to each policy area)
(elements applicable to all policy areas)
Definitions

Each of these policy elements is discussed below.

3.b) i) Goal/Purpose

The Purpose statement in the existing Policy Statement model simply states that the document is prepared under the authority of Section 3 of the Act and represents the policy of the Province of Ontario on the particular concern. Such a statement provides little information and is largely redundant.

The Commission-Government model attempts to use a single goal statement to embody the broad objectives and principles underlying the policy. While this approach is certainly an improvement as a goal statement over the existing approach, it is a far too abbreviated version of what had been two sections of the Existing Model: the purpose

and objectives (also called "principles" or "basis of the policy" in existing Policy Statements). It would be easier to support such an abbreviated version of the objectives or principles underlying the policy if the policy was accompanied by a background section which provided the rationale for setting policy on the matter. It would better serve the purposes of the new approach to planning if these sections were preserved in the Commission-Government model. Several OMB decisions illustrate how useful decision makers find this information.[11]

3. b) ii) Background

The Background section in the existing Policy Statement model provides the rationale or justification for establishing the provincial interest about the matter as well as critical contextual information. In the Province's words, it provides "an explanation of why the statement is needed and what it is generally intended to accomplish".[12] Again, the OMB uses this section to support its decisions.[13]

The background section also contains critical information for municipal staff, councils and the public to understand provincial policy intent. It will be particularly useful to municipalities with little or no staff. Including a rationale for each policy area recognizes that municipal and Ministry staff will not always be aware of the context of the provincial interest expressed. It will save time and money for municipalities and the public if they can refer to a document that has public legitimacy rather than having to gather such information themselves (or hire experts to do so) on a case-by-case basis. Such time and money can be better spent focusing on the details of the local situation while relying upon the contextual information provided by the Provincial Policy Statement.

As noted above, implementation of the new policy areas included in the comprehensive policy statements, will involve an extremely challenging amount of work in terms of

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11 see for example: Jenkins v. Ernestown (Township) Committee of Adjustment, [unreported] [1992] Ontario Municipal Board Decisions: [1992] O.M.B.D. No. 2207 File Nos. C900858, R910269, M.E. Johnson, J.E. Magee, December 2, 1992 (22 pp.); Re Burleigh and Anstruther (Township) Zoning By-law 114 - 1991); Ontario Municipal Board Decisions: [unreported] [1993] O.M.B.D. No. 1231 File Nos. Z900257, Z910141, Z910142, Z910173, O910158, M900101, M890125, M920003, M920004. M.E. Johnson, N.M. Katary, July 23, 199 (143 pp.); Standard Aggregate Inc. v. Grey (County) Planning Approval Committee, Ontario Municipal Board Decisions: [unreported] [1992] O.M.B.D. No. 648 File Nos. C900260, R900599, G.A. Harron, April 10, 1992 (6 pp.).

12 MMA Guideline, op. cit. no date. p. 2.

13 Kelly v. Leeds and Grenville (United Counties) Land Division Committee. Ontario Municipal Board Decisions: [unreported] [1993] O.M.B.D. No. 441 File Nos. C 990032, E.F. Crossland, March 15, 1993. (10 pp.).

gathering and evaluating new data.

This challenge is especially true for the natural heritage policies. The context for this work is the historical reality of the cumulative effects of development in Ontario. A background section to this Policy Statement should provide a concise summary that outlines the historical changes which have taken place on the land, including the cumulative environmental effects of development patterns and trends. It should describe, in an historical context, the loss, degradation, and fragmentation of the province's natural heritage, including the loss of biodiversity. The native biodiversity of Ontario should be described including statistics as to extinct, rare, threatened and endangered species, and overall declines in ecotype diversity. It should include a description of the systems approach to natural heritage protection including the major ecological planning principles that can be used to integrate development into a protected and continually restored natural heritage system. Background information on ecological planning principles is especially important because these principles have yet to be fully recognized by the planning profession which is dominated by urban planners with a different set of skills and expertise.

This preamble or background should include a statement of why the protection of biodiversity is so important. It should note that Canada has signed the Convention of Biological Diversity, that the Convention is now in force, and that work is now underway in Ontario towards provincial strategies on biodiversity and natural heritage areas. Within the context of the Planning Act and this Policy Statement, the province should be declaring a provincial interest in the preservation and restoration of biodiversity. The background section to this Policy Statement provides the needed explanation and rationale for this declaration and the policy itself provides a means of reflecting this commitment at the local level.

With such a background section, additional improvements to the proposed policies (suggested in Section 4 below) regarding the need to assess the cumulative impacts of development and the carrying capacity of land will be supported by critical contextual information.

Similarly, a background section for the Policy Statement regarding Community Development and Infrastructure should outline historical patterns of development and the impact these patterns have had on social, economic and environmental issues including the cumulative nature of these impacts. It should describe the damaging consequences of sprawl and splatter development to the environment including surface and groundwater contamination, ever-increasing automobile dependence and related environmental effects, etc., as well as refer to the impacts on natural heritage documented in the rationale for that policy. It should discuss servicing issues related to the provision of both hard and soft infrastructure, including the high cost of urban sprawl that is reflected in both municipal and provincial financing. It should carefully describe what is meant by mixed-used intensification in existing communities and

include the notion of "human-scale" which simply means planning streets, transportation systems and buildings according to the needs of the people who use and inhabit them instead of giving paramountcy to machines or architectural ambitions. In addition, the proposed conservation policies are more appropriately part of the Community Development and Infrastructure policies rather than as a separate grouping. It follows that the rationale for the conservation policies should be included in this background section as well.

For the Agricultural Land Policy Statement, contextual information is also necessary regarding the extent of agricultural land in Ontario, the variety and characteristics of agricultural districts, the degree of, and reasons for, pressures or losses of agricultural land in each area and the rationale for protection. It should show that in the context of urban development pressure, quality agricultural land in Southern Ontario is a non-renewable resource deserving of definitive, long-term protection.

The work of the Sewell Commission provides a good start. However, the Commission did not address this issue until, to a very limited degree, it appeared in the final report. Statements of provincial interest require detailed justification which should be included with the policy as background information to it.

3. b) iii) Policy

The existing model for Policy Statements has been criticized as including too much prescriptive detail. In fact, this criticism is really only a factor in the Housing Policy Statement. The policy sections of other existing Policy Statements are not much different in level of detail from the Commission-Government proposals. One feature of the Existing Model - which is not consistently followed in all existing Policy Statements - is the option of indicating, where appropriate, the application of the policies to official plans, zoning by-laws or other instruments where appropriate. This notion has merit and is appropriately included in the proposed implementation policies in the consultation paper.

The abbreviated nature of the new policies contained in the Commission-Government model is cause for concern. It is important that provincial intent be clear. This concern is especially valid with the removal and/or abbreviation of critical supporting sections which are used by decision-makers to interpret policy intent. As environmental organizations stated many times to the Commission, the brevity of the Commission's goals and policies (adopted in the similar approach of the Commission-Government model) is misguided and counter-productive. If the province is to "speak through policy", then the policies must contain sufficient particulars to provide meaningful direction to municipalities. Detailed Policy Statements (containing adequate rationale and implementation direction) should be the quid pro quo for subsequent devolution of any provincial approval authority.

Moreover, the Commission stated that the detail associated with Policy Statements can be addressed by accompanying implementation guidelines which have no legal status and can be changed and/or ignored fairly easily. Worse still, the Commission-Government model is very unclear as to whether implementation guidelines will be prepared at all for the new policies. And, the proposed "implementation policy" portion of the comprehensive policy statements is exceptionally vague and weak (see below).

Comments on the proposed contents of the Comprehensive Policy Statements are contained in Section 4 below.

3 b) iv) Interpretation

The Existing Model directs each Policy Statement to contain a section regarding interpretation which is to include "a clear statement setting out which ministries are responsible for the policy and indicating that no single policy statement takes precedence over other policy statements issued under the Act".[14] The interpretation sections of existing Policy Statements generally follow this direction. In line with recommendations made below, an appropriately detailed implementation section for each policy area would provide this interpretation direction as to which Ministries are responsible for the policies.

More important, the statement that no single policy statement takes precedence over other policy statements is not appropriate within the context of the new comprehensive set of policies. The Commission-Government model sets out a clear prohibition of development in Policy A 1.2 with respect to environmentally sensitive areas and in Policies B.9 f) and B. 10 f) with respect to specialty crop lands. Similarly, the Wetlands Policy Statement establishes a clear prohibition of development in provincially significant wetlands. These prohibitions essentially mean that these policies do take precedence over less prescriptive or non-prohibitive policies. It is therefore confusing and unnecessary for the Commission-Government proposal to include the same statement in its interpretation policy. The proposal states that:

> This comprehensive set of policy statements does not supercede or take priority over any other policy statement. Conflicts between policy statements will be resolved by the clear meaning of words. For example, if one policy prohibits development in provincially significant wetlands and other policies encourage aggregate extraction or affordable housing, the prohibition should rule out both extraction and housing in that wetland. Where conflicts still remain, those conflicts will be resolved in municipal plans as the province and municipalities

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14 MMA Guideline, op. cit. no date, p.2.

make best efforts to make decisions consistent with provincial policy. [15]

This passage is confusing and, depending on what meaning is intended, may undermine the clear prohibition contained in the policies mentioned above. First, it refers to the comprehensive set of Policy Statements in relation to other Policy Statements. However, the overall proposal or model, as discussed above, is to integrate these "other Policy Statements" into the new comprehensive set. The question arises, to what other Policy Statements is the passage referring? Assuming these other Policy Statements are to be integrated into the comprehensive set, it is not helpful to discuss this matter of whether or not this set of policies takes priority over others or not. The conflicts will arise within the comprehensive set of policies itself. Nor is it clear, in the context of the statement regarding no policy taking priority over another, to simply state that conflicts will be resolved "by the clear meaning of words" and that a prohibition in one policy "should" rule out other policy intentions. A prohibition should be interpreted as a prohibition.

Ironically, the statement that the "clear meaning of words" will assist decision-making is followed by extremely vague language that "[remaining] conflicts" will be resolved "in municipal plans" using "best efforts". It is unclear what "remaining conflicts" are being referred to here. Does the paper mean conflicts remaining as a result of refusal to accept that there are clear prohibitions in certain policies? Or, does it refer to remaining conflicts between other, non-prohibitive policies? If the former is the case, then this language should not be in an implementation policy because it undermines the clear prohibition contained in certain policies.

Any attempt to merge the prohibitions contained in A 1.2, B.9 f), B.10 f) or 1.1 of the Wetlands Policy Statement with other policies allowing development that is deemed compatible with the feature in question will effectively undermine the prohibitions and protective policies. There is a clear and compelling need for an upfront provincial declaration that certain features are simply off-limits to development. The advantage of this approach is that it avoids the "hit-or-miss" uncertainty of leaving "no development/compatible development" questions to municipalities. It also reduces the need for provincial ministries and interest groups to expend tremendous resources appealing matters to the OMB on issues of land use compatibility or EIS adequacy. Viewed in this light, the prohibition approach sets out a clear "no means no" rule which provides an effective and cost-efficient means of protecting the resources in question.

An overall interpretation section for the comprehensive set of policies should therefore specifically state (i.e., using the "clear meaning of words") that where a prohibition occurs in one policy, the prohibition supercedes other policies where there is a conflict.

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15 MMA consultation paper, December, 1993, op. cit. p. 15.

3 b) v) Implementation

The Existing Model directs each Policy Statement to contain an implementation section which is intended to provide "a statement of how the province and its agencies and municipalities should apply and use the statement"[16]. In fact, the implementation sections of existing Policy Statements refer less to the "how" of implementation and more to who is responsible for various tasks associated with making it happen. The details regarding how these tasks should be done are relegated to implementation guidelines associated with each Policy Statement.

The implementation sections of existing Policy Statements became less prescriptive as successive Statements were issued. For example, the first Policy Statement, the Mineral Aggregate Resources Policy Statement (MARPS), contains a very detailed list of tasks for various provincial Ministries to implement the policy. For example, the MARPS states that:

> The Ministry of Natural Resources, within the context of its mandate to manage aggregate resources at the provincial level, will:
>
> a) provide all pertinent geological information, including mineral aggregate resource mapping and technical assistance, to any government body or planning authority, in particular municipalities, and assist municipalities to define and protect mineral aggregate resource areas.[17]

The above excerpt from the implementation section deals only with gathering and providing information necessary for decision-makers in the planning process. It is followed by a long list of other tasks that the MNR will do, "within the context of its mandate to manage mineral aggregate resources".

In contrast, the most recent Policy Statement, Wetlands, contains a much less prescriptive approach. It certainly does not set out an MNR mandate to protect wetlands, which would be a good start. As for providing similar kinds of mapping and technical assistance, statements are made throughout the section that assistance will be provided as information becomes available. While a comparison of these two policies becomes a comparison of the MNR's conflicting mandate generally[18], it also illustrates

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16 MMA Guideline, op. cit., no date. p. 2.

17 Mineral Aggregate Resources Policy Statement, p.5.

18 Concern is often expressed by environmental groups that the Ministry of Natural Resources on the one hand has a mandate to ensure the protection and conservation of the resources of Ontario while on the other hand it also has the often conflicting mandate of overseeing the management of resource development.

the need to clearly set out what tasks are necessary for policy implementation and who will be responsible for ensuring they are done.

Environmental and citizens groups considered it a serious shortcoming of the Sewell Commission's work that the Commission did not address these kinds of implementation details. It is now the government's task to do the work of setting out the list of tasks that are required to implement the new policies and specify who will be responsible for doing them. These lists of tasks and responsibilities should comprise the implementation sections for each of the policy areas in the comprehensive set.

It is therefore particularly discouraging to see the Commission-Government model include an exceptionally abbreviated statement regarding the role of provincial ministries in implementation. The fifth "principle" listed in the proposed "implementation policy"[19] refers very generally to ministries providing "available" information on matters of provincial significance outlined in policy statements and that they "may" assist with mapping and developing policies.

The Commission-Government model proposes an overall implementation section for the comprehensive policy statements. This approach is useful but the implementation policies proposed in the consultation paper are inadequate.

First, the opening statement describes the eight items listed in the policy as "principles" which they are not. Even if they were all "principles", a set of principles alone to ensure effective implementation of the entire comprehensive set of policies is inadequate. Nor are the eight items listed adequate to do so.

Second, as already discussed, the implementation policy replaces, with an inappropriately abbreviated statement, the detailed lists needed in each policy area as to who will be responsible for what tasks to ensure the policies are implemented. Although these policies are to apply to all policy areas in the comprehensive set, it is essential that more detail be included as to implementation responsibilities in each policy area. The implementation policy for the comprehensive set should include specific sub-sections for each policy area listing who will be responsible for specific tasks.

The implementation section of the Mineral Aggregate Resources Policy Statement is a good model to use in developing these policy-specific sections. For example, the Natural Heritage policies require a sub-section containing the following minimum requirements specifying that the Ministry of Natural Resources, in the context of the Provincial commitment to protect and restore the biological diversity of Ontario will:

a) provide all pertinent ecological information including ecological mapping and

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19 MMA consultation paper, December 1993, op. cit. p.16.

technical assistance to any government body or planning authority, in particular municipalities, and assist municipalities to define and protect ecologically significant areas of the province.

b) provide comments to planning review and approval agencies on proposed planning actions that may have implications for the protection and conservation of biological diversity and natural heritage protection and restoration.

c) provide advice on ecological planning principles to planning review and approval agencies in order to assist with the implementation of this Policy Statement.

d) prepare implementation guidelines for the Ministry, municipalities and other agencies responsible for natural heritage planning and protection, to assist in implementing this Policy Statement. In addition to guidelines for the overall Policy Statement, guidelines shall be prepared to assist with the preparation of Environmental Impact Statements for development in lands adjacent to the different natural features listed in the policies, as appropriate. The preparation of these guidelines shall include adequate public consultation.

e) undertake research programs to investigate a wide array of natural heritage preservation topics, including the investigation of means of restoring degraded or fragmented natural heritage areas to achieve a natural heritage system comprised of protected areas, other core areas, adjacent lands, links and corridors.

f) make representation or provide technical expertise to the Ontario Municipal Board or other appeal body, where a planning matter related to this Policy Statement may be an issue.

Similar implementation sections need to be prepared for each of the policy areas. It remains a significant problem that this detailed consideration of provincial policy implementation was not done by the Sewell Commission. In recalling that the Commission completed its work $1 million under budget, it is fair to say that a fraction of this money could have been spent coordinating and compiling the research necessary to do this work. In the limited time available and with limited resources, this paper can only touch on the work that is urgently required.

The proposed implementation policy is similarly inadequate with respect to implementation guidelines for Policy Statements. The statement that ministries "may prepare guidelines to assist planning jurisdictions in implementing policy statements (emphasis added)"[20] further qualifies the Government's commitment to ensuring

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20 ibid. p. 16.

appropriate implementation guidelines accompany Provincial Policy Statements. Implementation guidelines are discussed further in the next section.

A third problem with the proposed implementation policies is the fact that the two items concerning municipal plans and environmental impact statements (EIS) should be contained in amendments to the Act. The Sewell Commission made several detailed recommendations for amending the Planning Act to establish content requirements for municipal plans and EISs. Ministry of Municipal Affairs staff state that the implementation policy regarding these matters is not meant to replace the Sewell Commission recommendations for amending the Act.[21] However, the two items in question summarize the Sewell Commission recommendations. It would be easier to believe such a statement if the implementation policy were more detailed than the Sewell Commission recommendations thereby providing the implementation guidance that would accompany amendments to the Act. Instead, in the case of municipal plans, the recommendations for the policy are even more abbreviated than what the Sewell Commission recommended should go in the Act. These policy proposals are not an acceptable substitute for legislative reforms.

This criticism is a recurring one that environmental groups made throughout the Sewell Commission process. That is, like the Sewell Commission did before it, the government has chosen to largely separate the discussion of policy change from the many other, often closely related, proposals for change including additional amendments to the Act and other administrative measures. The second stage of the government's reform effort is not public yet. However, with the release of the consultation paper, the government indicated that the "second step" will be to address the balance of the Commission's recommendations. As well, with the release of the consultation paper, the Government enthusiastically publicized its intention to streamline the process. This separation of policy reform from the bulk of proposals for legislative amendments is of concern to environmental organizations. Key elements of the second stage of reform are critical to policy implementation including additional amendments to the Act and public participation reforms notably the need for intervenor funding at the Ontario Municipal Board.

A further problem with the implementation policies is the manner in which they deal with the overlap between the municipal infrastructure approvals processes under the Environmental Assessment Act and the Planning Act. Item six provides self-evident and largely superfluous information. It includes a brief description of the environmental assessment process and notes that proponents need to consider Planning Act policies as part of the environmental assessment authorization process, i.e., they are to obey the requirements of the law, in this case the Environmental Assessment Act. As for the final paragraph in item 8 regarding EISs, the distinction made between infrastructure subject

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21 personal communication, Norma Forrest, Ministry of Municipal Affairs, February 16, 1994.

to the two Acts, should also be contained in the EIS portion of Planning Act amendments and not in an implementation policy.

Implementation policies 1, 2 and 6 in the consultation paper are important and helpful elements to apply to all policy areas. It should be clear from policy 2 and the first sentence of policy 3 that proposals for changes to zoning by-laws or plans of sub-division should apply the new policies regardless of whether the related official plan has been amended in accordance with the new policies.

With respect to Policy 3, there are serious concerns about the adequacy and appropriateness of the second paragraph. The first sentence properly states that "the new Policy Statements apply to applications made but not approved when the policy takes effect".[22] This is an important principle of statutory interpretation which has been relied upon by the courts.[23] However, the remainder of the paragraph goes on to indicate that the application of the new policies to "in the mill" proposals must be "tempered" by factors such as fairness and previous agreements. This further qualification unnecessarily dilutes the strength and impact of the first sentence, and it injects considerable uncertainty and inconsistency in the decision-making process. Accordingly, the first sentence should remain intact because it is correct in law and is necessary to ensure consistent and immediate application of the new policies. However, the remainder of the paragraph should be deleted for the foregoing reasons.

3 b) vi) Associated Implementation Guidelines

Under the Existing Model, implementation guidelines have been prepared for each Policy Statement. The implementation sections of each of these Policy Statements direct relevant Ministries to prepare implementation guidelines to assist in their implementation. This practice should continue.

The consultation paper asks whether further implementation details are appropriate, and if so, what the priorities should be for developing such details.[24] This question is posed in the context of a discussion that describes the proposed comprehensive policy statements as sufficiently detailed to clearly set out provincial policy direction. Under

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22 MMA consultation paper, December, 1993, op. cit. p. 15.

23 see: Wilkin et. al. v. White [1979] 11 M.P.L.R. 275; Re Upper Canada Estates Ltd. and MacNicol [1931] O.R. 465; Hammond and Hammond v. The City of Hamilton [1954] O.R. 209 (CA); The City of Toronto v. Central Jewish Institute [1947] O.R. 425 (CA); Re Wilmot et. al and the City of Kingston [1946] O.R. 437 (CA); Worthington v. Village of Forest Hill [1934] O.R. 17 (CA); Monarch Holding Ltd. v. Oak Bay (1977) B.C.L.R. 67; Hunter et. al. v. Corporation of District of Surrey and Tan [1979] 18 B.C.L.R. 84.

24 MMA consultation paper, December, 1993. p. 6.

this approach, the paper states, there may not be the need for detailed implementation guidance for all policies.

As discussed at length throughout this paper, the statement that the proposed comprehensive policy statements provide sufficient detail is not the case. Even if the proposed policies are amended to include the supporting sections (purpose, background, implementation) suggested herein, they would still require supporting implementation guidelines. There should be clear direction in the implementation policies that each policy area requires supporting guidelines, the Ministry responsible for preparing them should be specified, and, as noted in implementation policy #4 in the consultation paper, they will interpret but not derogate from policy. In addition, the Policy Statements should directly reference their associated implementation guidelines to ensure that they are taken seriously and to indicate that Policy Statements should be read in conjunction with the implementation guidelines.[25]

3 b) vii) Definitions

The Commission-Government proposal for a common, detailed set of definitions for all policies is an improvement over the existing model (which contains definitions within each Policy Statement). It is more efficient and can ensure consistency across policy areas. Comments with respect to specific definition proposals in the consultation paper are contained in Section 4 below.

3 d) Legislative Amendments

Several amendments to the Planning Act are essential complements to the new policy environment. First is the change to Section 3(5). With the introduction of a new set of policies, municipal plans will need to be revised to adhere to the new policies. It is therefore critical that during this process of plan revision the other proposed amendments to the Act having to do with revising municipal plans are in place to be part of that plan review process. These other amendments, as recommended by the Sewell Commission (recommendations 32, 35, 44, 45, 46, 47, 50 and 52), have to do with new content requirements for municipal plans and procedures for building watershed and environmental planning principles into the plan development process.

In addition, since the policies will rely upon the use of Environmental Impact Statements, the content requirements of EISs should be the subject of immediate Planning Act amendments. As well, these content requirements (as proposed in the

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25 see Re township of Front of Yonge By-law 7-88 (1989), 23 O.M.B.R. 235 (OMB).

implementation policies in the consultation paper[26]) need to be expanded to require the assessment of cumulative effects and that proponents include in the EIS document the results of public consultation including how public concerns were addressed. Another critical legislative amendment is the need to include the OMB under the Intervenor Funding Project Act.

With respect to the proposal to change the language of Section 3(5), the proposed change to "shall be consistent with" is strongly supported. It could be improved by the following changes: to be consistent at the municipal and provincial levels, the list of decision makers should refer to "every municipality" which would implicitly include both municipal councils and municipal staff. As well, decisions should be consistent with policies and with the Purpose of the Act. Accordingly, we recommend that Section 3 be amended as follows (changes are underlined):

> In exercising any authority that affects any planning matter, a decision of every municipality, every local board or planning authority, every minister of the Crown and every ministry, board, commission or agency of the government, including the Municipal Board and Ontario Hydro, shall be consistent with policy statements issued under subsection (1) and with the purposes of this Act."

3. e) Conclusions

In summary, the new model proposed herein for Policy Statement contents and implementation combines elements of the existing and Commission-Government model with additional legislative amendments and supporting guidelines. The overall aim is clarity with respect to policy intent and accountability in policy implementation.

The package of reforms is interdependent. For the province to effectively "speak through policy" it must promulgate, under a strengthened Section 3(5), a set of clear, comprehensive Policy Statements that contain both policies and appropriate supporting information (goal/purpose and background). To ensure effective implementation, clear direction is necessary in each policy area as to who is responsible for what tasks in addition to overall implementation direction for all policies. A clear statement of interpretation is required stating that the prohibitions in certain policies supercede other policies. Each policy area also requires associated implementation guidelines or, to begin, the commitment to ensure they are developed.

The package also requires additional legislative amendments. The revision of municipal plans in light of new policies must occur under a new set of Planning Act amendments governing municipal plans including their content requirements and the incorporation of watershed and environmental planning principles in their development. Since the new

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26 MMA consultation paper, December 1993, op. cit. p. 17.

policies require the use of environmental impact statements, Planning Act amendments specifying the content requirements of these documents also must be part of the overall package. Similarly, detailed guidance regarding the preparation and evaluation of EISs is urgently required and could take the form of supporting guidelines and manuals. Finally, to inject critically needed fairness to the process, intervenor funding is necessary at the OMB.

For the policy reforms to be effective, the province must not abdicate its responsibility to ensure policy is implemented. While the Sewell Commission did a monumental job, its work did not adequately consider the details of ensuring provincial policy implementation. It is the Government's task to overcome this shortcoming of the Commission's work and establish a meaningful implementation mechanism for the new policies. The model proposed in this paper provides the means of doing this work.

4. PROPOSED COMPREHENSIVE POLICY STATEMENTS

4. a) Introduction

The proposed "comprehensive policy statements" are a revised, sometimes abbreviated, version of what the Sewell Commission recommended. In addition to the necessary supporting sections discussed above, the policy proposals often require greater detail. Policy Statements must provide clear and concise direction to municipalities and developers. They must be sufficiently worded so as to constrain unsustainable development and provide meaningful benchmarks to assess non-compliance.

It is abundantly clear to environmental and citizens groups that many municipalities do not have the resources, the expertise or the inclination to apply anything but the loosest possible interpretation of a set of policies as general as those proposed. Undoubtedly, there are some notable exceptions to this generalization; however, all municipalities and developers and the public should be told very clearly and in detail what is expected to be consistent with Policy Statements regarding matters of provincial interest.

The following sections comment upon various aspects of the proposed policies. Overall and/or specific comments are made for various sections with the exception of G. - Interpretation and Implementation Policies, which are already dealt with at length in Section 3 above.

A. Natural Heritage, Environmental Protection and Hazard Policies

Goal 1.
Overall Comment:

In addition to the supporting sections for each policy area recommended in various

sections above, this list of policies could be improved overall in the following ways:

1. The policy should embrace a declaration of provincial interest in the preservation and restoration of biodiversity. This declaration should be part of an amended Purpose section to the Planning Act and be incorporated into the overall goal statement for this policy area[27]. Building upon the contextual information in the necessary background section to this policy area, the policies need to embrace a systems approach to natural heritage protection with the overall goal of a protected and restored network of natural heritage areas, links, corridors and buffer zones. The individual policies also need to ensure that land use decisions consider the cumulative impacts of development and the carrying capacity of land for new development.

The Goal could be restated as follows (changes are underlined):

> To protect, conserve and where possible, restore biological diversity and the quality and integrity of ecosystems and ecosystem function, including air, water and land; and, where quality and integrity have been diminished, to promote restoration or remediation to healthy conditions.

2. Wherever the word "development" is used in the six proposed policies, it should be substituted with "development and infrastructure". There is no reason to suggest that adding infrastructure in this way will subject infrastructure projects to two approval processes (as was suggested by Ministry of Municipal Affairs staff when objecting to this change[28]). Rather, as the consultation paper states on page 16, it is the responsibility of proponents to consider all applicable policies in evaluating effects on the environment under the Environmental Assessment Act process. (This matter of duplication of process was dealt with in Sewell Commission recommendation #73 to which the Government has not yet adequately responded). The final statement in Policy A 1.2 regarding infrastructure should be deleted or qualified so that it applies only to infrastructure which receives a full environmental assessment under the Environmental Assessment Act. This latter recommendation is made conditional upon the inclusion of "and infrastructure" as noted above.

3. Wherever the words "significant" and "adversely effect" are used in the policies, the definitions of these words that are provided in the accompanying definitions section of the comprehensive policy set raise serious concerns. While the proposed definitions are acceptable, definitions of such terms are not enough. First, the cumulative effects of development must be considered throughout the policies. Second, how will the province ensure appropriate quality control over this work? This question is one of overall policy

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27 The protection and conservation of biological, ecological and genetic diversity has been expressed as one of the principles underlying the Environmental Bill of Rights (section 2(2)). It is therefore appropriate to bring the Planning Act into consistency with this new legislation.

28 personal communication, Norma Forrest, Ministry of Municipal Affairs, February, 16, 1994.

implementation that the consultation paper does not adequately address. At a minimum the policy should state that adverse and cumulative effects are to be assessed using an Environmental Impact Statement, (the content requirements of which need to be included in amendments to the Planning Act supported by associated guidelines to address the details of their preparation). Inclusion of this implementation direction in the policies themselves is appropriate and is actually the approach taken in even greater detail in the second Goal regarding "hazard" policies (where quite prescriptive implementation direction is given under Policy 2.1 and to a lesser extent under Policy 2.3 and 2.4) and in the second policy area - Community Development and Infrastructure Policies (see policies 9, 10, 11 and 17 in that section).

Specific improvements to the policies listed under Goal 1 include the following:

Policy 1.1: It is conceivable that ground and surface water systems (especially groundwater) can only be protected from adverse effects if development (and infrastructure) are disallowed in groundwater recharge areas. This assessment will be hampered by basic lack of information and/or understanding of groundwater systems. As well, hydrology studies that are done (intentionally or haphazardly) during times of intermittent high water levels or that do not account for surrounding development (existing, planned, approved or reasonably expected to occur) will provide misleading information which may lead to unsustainable development which in turn could very well only be rectified at great public expense, if at all (e.g., widespread degradation of ground water reserves). Supporting measures (implementation direction in the policy, guidelines, manuals) are necessary to provide adequate evaluation and quality control of this kind of supporting documentation.

Policy 1.2: The prohibition of development in certain areas provided by this policy is critically important and should not be undermined by qualifying language in related interpretation policies (as occurs on page 15 of the consultation paper) or by the final sentence in the policy regarding infrastructure. It was mentioned by Ministry of Municipal Affairs staff that this final sentence was intended to refer only to large infrastructure for which alternative routes are unavailable.[29] If this is the case, the improvement suggested above in the second overall comment for this policy would clarify intent.

Policy 1.3: Again, clear criteria to guide the decision-making implicit in this policy are required including the assessment of adverse effects and the classification of areas into "no development" or "compatible development". The policies in A1.2 and A1.3 regarding development in lands adjacent to environmentally sensitive areas also should be explicitly applied to lands adjacent to protected areas such as parks, wildlife refuges,

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29 ibid.

etc. This policy would be in keeping with Article 8E of the Convention on Biological Diversity "to promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas".[30]

Policy 1.5: This policy is internally inconsistent. The first sentence clearly disallows development that harms fish habitat. The second sentence qualifies this prohibition by stating that there will be no net loss of fish habitat within the same watercourse. The "no net loss" concept is inadequate to protect all fish habitat (as the first sentence would ensure) particularly rare or sensitive species. It is especially contradictory of the first sentence in the policy since the definition of no net loss recommended in the consultation paper includes the notion of "appropriate compensation" to replace lost habitat. To be protective of fish habitat, the second sentence of the policy should be deleted.

Policy 1.6: The concepts of environmental improvement and restoration have been either removed or considerably weakened in this policy compared to the similar proposal made by the Sewell Commission. We suggest the following rewrite (suggested changes are underlined and the final sentence is deleted):

> In decisions regarding development, every opportunity shall be taken to: maintain and improve, the quality of air, land, water, and biota; preserve and restore, biodiversity compatible with indigenous natural systems; and protect, restore and establish natural links and corridors and associated buffer zones.

Goal 2.
Overall Comments:

The Sewell Commission recommendations for "natural heritage and ecosystem protection and restoration policies" did not separate natural heritage protection from "hazard" policies, as is proposed in the consultation paper. As noted above, the natural heritage protection policies contained under Goal One are weaker than those proposed by the Sewell Commission. They need to incorporate the notion of protecting and restoring biodiversity under a broad "systems approach" to ecosystem planning and protection. This ecosystem approach needs to be applied to hazardous situations as well such as development on shorelines or otherwise hazardous or contaminated sites.

The proposal in the consultation paper for two "goals" that separate natural heritage policies from "hazard" policies further dilutes the holistic approach that the Sewell Commission recommendations were approaching. Goal Two (and its policies) focuses on reacting to hazards as they affect people. Although the reference is to disallowing

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30 United Nations Environment Program. Convention on Biological Diversity. 5 June 1992.

development to avoid hazards, the goal and the policies do not appear to account for the fact that most of the "development" to which the policies would apply will in fact be "redevelopment". For example, development would often include proposals for the expansion and/or redevelopment of already built-up areas on the Great Lakes and connecting channel shorelines and proposals to develop and/or remediate contaminated sites. Controls on such "redevelopment" need to allow for a broader ecosystem approach to the avoidance of hazards and/or site remediation than the narrower engineering approach to avoiding human hazards that is implied by the policy proposals.

In the case of shoreline redevelopment, the approach in policy 2.1 of "no development" subject to certain conditions refers to avoiding hazards and adverse environmental effects. It does not appear capable of incorporating innovative approaches to shoreline development that restores habitat at the same time that hazards are being avoided because such approaches might otherwise not meet the three Regulatory Standards referred to in policy 2.1. In addition, the Great Lakes and connecting channels include a highly diverse range of shoreline types. The policies appear to be far too general to account for this diversity.

As well, the notion of remediation needs to be more broadly defined to include the restoration of biodiversity through various techniques including "naturalization" of landscapes using native plant species and/or species capable of pollutant uptake and sequestering. More generally, the policies regarding site remediation ought to refer directly to the requirements of the Ministry of Environment and Energy with respect to the decommissioning and redevelopment of contaminated lands.

B. and E. Community Development and Infrastructure Policies and Conservation Policies

Overall Comments:

1. The quality and detail of the proposals in Section B is impressive. As noted above, the level of detail in these policies, particularly direct reference to matters of implementation, is approaching what is necessary to ensure accountability of policy implementation (so long as it is accompanied by the supporting sections noted in Section 3 above). The level of detail in the Section B policies can be contrasted to the brevity of the natural heritage policies. To begin to address the need to make the overall package of policies truly "comprehensive", the notion of cumulative impacts assessment needs to be incorporated more broadly across all policies. While Policy B.11 c) considers the matter of cumulative impacts it is only with respect to development in recreational and rural areas that are not extensions to built-up areas. While it is important to consider cumulative effects under these circumstances, they are not referred to anywhere else in the comprehensive set. As noted above, cumulative effects assessment needs to be incorporated in several areas in the natural heritage policies, it needs to be incorporated throughout Section B, specifically in policies B.8, B.9, B.10

and B.17. For example, under B.10 d) and B.11 d), the cumulative impacts of development on aquifers (including groundwater recharge areas and related areas drawing on the same aquifer) need to be considered. As well, cumulative effects assessment needs to be part of the requirements for Environmental Impact Statements and in the new content requirements for new municipal plans and watershed planning generally.

2. It has never made sense to environmental groups that the Sewell Commission (and now the Government) proposals separated conservation policies from those having to do with settlement patterns and transportation. The proposed Conservation Policies ought to be integrated into the Community Development and Infrastructure Policies. The conservation policies are essential requirements for achieving the policies contained in Section B specifically policies 4, 5, 6, 7, 8, 9, 10 and 11.

C. Housing Policies

Overall Comment:

The growth-oriented nature of this policy sets up a conflict with other policies within the overall set. As noted above in Section 3, this conflict between development oriented policies and those that establish prohibitions on development can be most cost effectively managed by clearly stating in an overall interpretation policy that those provisions that prohibit development override all other policies where conflicts arise between policies.

D. Agricultural Land Policies

Overall Comment:

Clear, strong and effective provincial policies to protect agricultural lands is long overdue in Ontario. These policy proposals are a major step forward. However, the notion of protecting agricultural areas or districts could have been more inclusive to account for the importance of protecting agricultural activities in areas of the province not considered to be "prime" agricultural land according to the Canada Land Inventory. Such areas are indeed "prime" agricultural farmland in terms of the importance of agricultural to the local economy. Due to the shortcomings of the inventory, they are not included under the new policies.

E. Conservation Policies

Overall Comment:

As noted above, these policies need to be incorporated into the Community Development and Infrastructure policies in Section B.

F. Mineral and Petroleum Resources Policies

Overall Comment:

As environmental organizations have often stated, the resource protection provided by these policy proposals should not provide a guarantee of future access to these resources for exploitation. The same criticism has often been made about the existing Mineral Aggregate Resources Policy Statement. In providing protection for these resources from incompatible development, the policy provisions do not adequately consider the option of permanent non-development, (on or adjacent to these resources), as a land use that would effectively deny future access to these resources.

5. DEBUNKING THE MYTHS

The following section concludes this submission by responding to some of the land use planning "myths" that have been raised in response to proposals for reform.

MYTH No 1

New Provincial policies will lead to a development freeze.

* Ontario residents can only hope that new policies will amount to a freeze on the kind of environmentally destructive or just plain inappropriate development that initiated this entire reform effort in the first place.

* Development needs to be channelled in a direction that is healthy for communities and the environment.

* Builders, developers and municipalities (planners and politicians) can and will come up with innovative ways of developing communities within the new policy reality.

MYTH No 2

We can't afford to make costly changes to the planning process when the economy is in such a slump.

* We simply can't afford not to make changes in the planning process.

* The continuation of urban sprawl, splatter and strip development means ever-increasing infrastructure costs; roads, sewers, school buses, etc. which the tax revenues from these developments often do not cover.

* More sprawl also means further carving up of the landscape, further erosion of already fragile or degraded ecosystems including widespread, essentially irreversible contamination of groundwater supplies leading to more expensive, even prohibitively expensive, sewage and water servicing requirements to spread out communities.

* It makes sense to change the rules when the industry is in a slow period. Fewer ongoing projects are affected and it gives the industry and municipalities a better opportunity to adapt to the new rules. Municipal planning staff should, in theory, have more time to spend on updating plans when they are under less pressure to process development applications.

MYTH No 3

Large lot, large house, low density suburbs are what people want - and the consumer deserves choice.

* While the market may provide this suburban "dream" as the most affordable home ownership option, it is not sustainable. The new policy set should provide the leadership required to resolve this conflict between the narrow focus apparent in "market forces" and overall societal goals.

* People's concerns about environmental protection for the present and for future generations include the desire to preserve natural heritage, to preserve livable communities, to reduce infrastructure costs, to protect agricultural land, to reduce automobile dependency, etc. These desires are reflected in the new policies.

* We know from experience in the United States and in this country that neo-traditional compact development is extremely popular and growing more so.

* Single family homes will still be available. They are a part of the mix envisaged in compact development.

MYTH No 4

The policies are an unwarranted intrusion into the affairs of municipalities.

* The Province has always had a responsibility to ensure that the public interest and the environment are protected. The Planning Act specifically directs the province to set policy on matters of provincial interest. The new policy set and related reforms simply address long-neglected responsibilities.

* Municipalities will still have considerable power and responsibility for implementing policies and tailoring them to local circumstances. The province will not be writing the new plans but finally providing the policy direction on matters of provincial interest which municipalities need to incorporate into their plan development and decision-making.

* The experience of citizens groups has shown that some local municipalities are simply unable, or cannot be trusted, to put the concerns of the environment and future generations ahead of short term economic interests. In some instances the influence of real estate and development interests on local councils has been a concern. The Provincial responsibility to protect the broader public interest is a necessary counterbalance to the vagaries of local politics.

MYTH No 5

Toronto "solutions" are being imposed on the rest of the Province.

* The Sewell Commission consulted with people all over the province to develop their policies, which were supported, in large measure, by citizens groups from across the province.

* Policies to protect natural heritage and stop sprawl are needed in municipalities across the province. Natural areas are threatened and/or require restoration everywhere and research has shown that non-GTA centres consume more land per person than those within the GTA.

MYTH No 6

The planning system will become more cumbersome and bureaucratic

* The new policies are intended to make the rules clearer for everyone.

* Municipalities will be able to proceed with development planning knowing what the Provincial interest is.

* Developers will also know the rules before they make plans thus reducing uncertainty and eliminating the tendency of municipal staff and councils to make decisions on the basis of political reasons.

* The new policies should much of the present inconsistency of implementation, and plain ad-hockery, found at the local level.

* The new requirement for Environmental Impact Statements will involve more up-front work. However, this work enables better decisions to be made. The

intention of any prior environmental assessment is to ensure the right decision is made at the outset to avoid costly clean-ups and/or degradation or irreversible loss of scarce resources later.

MYTH No 7

Limiting septic tank use will place unreasonable limits on rural development.

* The planning system currently encourages unserviced development and does not adequately account for the cumulative effect of septic systems on groundwater.

* Nitrates and fecal coliform are problems with poorly functioning systems. Toxic cleaners and phosphorous are problems which septic systems are not designed, or able, to handle.

* A 1989 MOE study found 30% of inspected systems to be a health nuisance and 30% to be designed below standard.

* The problems with septic systems are already at crisis proportions and more than 33,000 approvals per year are being granted by municipalities.

* It is crucial that the Province tighten the rules for approvals and monitoring of septic systems.

MYTH No 8

Intervenor funding is not necessary for citizens groups and will lead to more cases at the OMB.

* Intervenor funding for citizens groups at the OMB is absolutely essential to bring fairness to the process and ensure the public interest is heard.

* It is unclear how the province will be able to ensure that the new policies are enforced. Even with a new set of policies and amendments to the Planning Act to give the policies some teeth, local citizen groups will undoubtedly have to continue monitoring planning decisions and appealing bad decisions to the OMB.

* The proposal to require project proponents to provide intervenor funding will provide an important incentive for proponents to engage in meaningful public consultation early in the planning process in order to resolve disputes and avoid the necessity of an OMB hearing entirely.

Myth No. 9

Laws, regulations and policies intended to protect natural features and functions amount to expropriation without compensation.

* It is well established in Canadian law that planning authorities may impose restrictions on a landowner's ability to use or develop his or her property.

* Although the law provides for a certain range of private "property rights", there are numerous common law and statutory limitations on these rights including the fact that there is no explicit guarantee of "property rights" in the Canadian Constitution or the Canadian Charter of Rights and Freedoms.

* Canadian courts have long recognized that land use regulation is not "expropriation", nor does it entitle the landowner to any form of "compensation". The principle that emerges from the case law on these matters is that planning authorities may regulate or restrict land use or development without triggering the remedy of compensation for affected landowners, provided that such measures are undertaken in good faith for a proper planning purpose.

* For a more detailed discussion of this "myth", see Appendix A to this paper.

APPENDIX A:

PROPERTY RIGHTS vs. LAND USE REGULATION:

DEBUNKING THE MYTH OF "EXPROPRIATION WITHOUT COMPENSATION"

NOTES FOR AN ADDRESS TO THE OAK RIDGES MORAINE TECHNICAL WORKING COMMITTEE (FEBRUARY 3, 1994)

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Property Rights vs. Land Use Regulation:

Debunking the Myth of "Expropriation Without Compensation"[1]

By

Richard D. Lindgren and Karen Clark

PART I - INTRODUCTION

The Ontario government has established a Technical Working Committee to develop a strategy for safeguarding the provincial interest in the Oak Ridges Moraine. The provincial significance of the Moraine's biological diversity and ecosystem integrity has been described by the Ontario government as follows:

> The Moraine, in general, serves as a large recharge area supplying water to a system of aquifers. Many communities and farm operations within the Oak Ridges Moraine depend upon these aquifers for their water needs. The disruption of the quantity and/or quality of the groundwater resource could have major ramifications.
>
> The Moraine also contains a large number of significant natural areas (e.g. wetlands, fish, and wildlife habitat) and large healthy forested tracts. In addition, soil type and topography render many areas of the Moraine sensitive to the forces of wind or water erosion.
>
> The significance and sensitivity of such areas must be taken into account in considering any land use change to ensure the environmental and social benefits of the Moraine are not destroyed or degraded. Therefore, site-specific and cumulative impacts of planning and development must address the sensitivity and significance of the Moraine.[2]

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[1] This article is intended to provide general legal information about property rights, expropriation and land use regulation in Ontario, and it does not represent a legal opinion on specific development applications or particular land use conflicts on the Oak Ridges Moraine or elsewhere in the province.

[2] Ministry of Natural Resources et al., Implementation Guidelines: Provincial Interest on the Oak Ridges Moraine Area of the Greater Toronto Area (1991), pp.3-4.

The Technical Working Committee has recently indicated that the strategy for protecting the Oak Ridges Moraine may include restrictions on land use and development within significant natural areas:

> We strongly suspect that the Oak Ridges Moraine Strategy will identify a large percentage of land surface in the study area (i.e. 25% or greater) that should be maintained in a natural state.[3]

This proposal has met with considerable opposition by some development interests, who have suggested that such restrictions contravene the rights of landowners on the Oak Ridges Moraine:

> In our view, a freeze of development rights amounts to no more than expropriation without any form of compensation for affected landowners contrary to principles of land ownership which have long been entrenched in law in Ontario and other provinces....
>
> We again advise the Committee that property rights should not be underestimated and must be taken into account as a constitutional right of all residents of the Province.[4]

This debate over the nature and extent of "property rights" is not limited to the Oak Ridges Moraine. In fact, this debate is becoming increasingly intense as planning authorities attempt to strengthen laws, regulations and policies intended to protect significant natural areas and ecosystem functions throughout Ontario.[5]

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[3] R.M. Christie to A. MacKenzie, October 25, 1993.

[4] Lloyd D. Cherniak to R.M. Christie, July 7, 1993.

[5] For example, "property rights" and "expropriation without compensation" have been used as arguments against land use planning reforms proposed by the Niagara Escarpment Commission, the Commission on Planning and Development Reform in Ontario, and various ministries and agencies, including the Ministry of Natural Resources.

However, it is well-established in Canadian law that planning authorities may impose restrictions on a landowner's ability to use or develop his or her property. The law is also clear that a landowner is not entitled to compensation if he or she is subject to such restrictions, provided that the planning authority is attempting to meet a legitimate planning purpose and has not acted in bad faith.

The legal ability of planning authorities to enact land use restrictions without paying compensation has been summarized as follows:

> The law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing in return... It is well-settled that owners may be compelled to surrender some value or future value of their land to the local authority and no price has to be paid.[6]

The purpose of this paper is threefold: first, to review the nature and extent of "property rights" in relation to land; second, to analyze the concept of "expropriation without compensation"; and third, to examine a public authority's jurisdiction to prohibit or regulate harmful land uses in Ontario.

PART II - PROPERTY RIGHTS: AN OVERVIEW

Under the Anglo-Canadian system of land tenure, a landowner generally enjoys a number of rights, interests, and privileges in relation to his or her land. This is often referred to as a "bundle of rights", and it includes, inter alia, the ability to:

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[6] Rogers, The Canadian Law of Planning and Zoning, p.124.

- possess the land to the exclusion of others;
- sell, transfer or bequeath the land;
- mortgage or charge the land; and
- use or manage the land or derive income from it.

It is important to note, however, that there numerous common law and statutory limitations on these rights. For example, common law causes of action (i.e. nuisance, trespass, or Rylands v. Fletcher) and environmental statutes (i.e. the Environmental Protection Act or Ontario Water Resources Act)[7] prevent landowners from using their property in a manner which causes harm to other persons or the environment at large. Thus, a landowner's rights are not absolute since they are subject to a variety of statutory and common law constraints.

Similarly, it should also be noted that there is no explicit guarantee of "property rights" in the Canadian Constitution or the Canadian Charter of Rights and Freedoms.[8] In recent constitutional discussions, there were proposals to amend the Charter by expressly entrenching property rights; however, these proposals were never enacted.[9] The Canadian Bill of Rights does refer to the right to not be deprived of the "enjoyment of property"

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[7] Environmental Protection Act, R.S.O. 1990, c.E.19 and Ontario Water Resources Act, R.S.O. 1990, c.0.40.

[8] Constitution Act, 1867, and Constitution Act, 1982 as amended.

[9] See Mary Pickering, "Environmentally-related Aspects of the Recent Constitutional Proposals", Alternatives (18:4), p.18.

except in accordance with due process of law; however, the Canadian Bill of Rights is not part of the Canadian Constitution, and it only provides a procedural guarantee of due process rather than a substantive "property right". Moreover, the Canadian Bill of Rights only applies to federal statutes, and not to provincial activity.[10]

PART III - THE MYTH OF "EXPROPRIATION WITHOUT COMPENSATION"

It is beyond the scope of this paper to review the practice and procedure under Ontario's Expropriations Act.[11] It is important, however, to recall that the term "expropriation" traditionally refers to a landowner's loss of use, title or benefit of property and a transfer of the value of use, title or benefit to a public authority.[12] Thus, an aggrieved landowner must be able to demonstrate that not only has property been taken, but that the taking has also benefitted the expropriating authority.

However, Canadian courts have long recognized that land use regulation is not "expropriation", primarily because zoning by-laws or other planning instruments do not generally involve a taking or transfer of the full use, title or benefit of property. Therefore, if a landowner's ability to use or develop his or her property is constrained by a properly

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[10] Hogg, Constitutional Law of Canada (2nd ed.), p.640.

[11] Expropriations Act, R.S.O. 1990, c.E.26. For an overview of expropriation law, see Eric Todd, The Law of Expropriation and Compensation in Canada (Carswell, 1992).

[12] Manitoba Fisheries Limited v. R. (1978), 6 W.W.R. 496 (S.C.C.); The Queen in Right of British Columbia v. Tener et al. (1985), 17 D.L.R. (4th) 1 (S.C.C.).

enacted zoning by-law, the landowner is not entitled to compensation, even if the zoning by-law causes a diminution in property value.

The distinction between expropriation and land use regulation has been noted by the Supreme Court of Canada on several occasions. For example, in Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie,[13] the Supreme Court of Canada rejected arguments that a municipal by-law was invalid because its effect was to prohibit any practical use of the appellant's land. In this case, Chief Justice Laskin went on to state that it is open to a municipality to freeze development in accordance with the purposes of official plans and zoning by-laws, provided the municipality has not acted in bad faith.[14] This principle was also expressed by Chief Justice Laskin in Sanbay Developments Ltd. v. City of London,[15] where a municipal development freeze was again upheld by the court.

Similarly, in Hartel Holdings Co. Ltd. v. Council of the City of Calgary,[16] the Supreme Court of Canada refused to grant an order directing a municipality to expropriate land which had been designated as a proposed park:

> The appellant's case in a nutshell is that by freezing its land with a view to its subsequent acquisition as a park, the respondent has deprived the appellant of the potential value of its land for residential development. No doubt, this true. The

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[13] (1975), 47 D.L.R. (3d) 1.

[14] Ibid., p.6.

[15] (1975), 45 D.L.R. (3d) 403.

[16] (1984), 8 D.L.R. (4th) 321.

> difficulty the appellant faces, however, is that in the absence of bad faith on the part of the respondent, this seems to be exactly what the statute contemplates. The crucial rider is that the City's actions must have been taken pursuant to a legitimate and valid planning purpose. If they were, then the resulting detriment to the appellant is one that must be endured in the public interest (emphasis added).[17]

In addition, the Supreme Court of Canada has clearly rejected the suggestion that municipalities must compensate landowners who are subject to land use restrictions such as "downzoning":

> Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down.[18]

These Supreme Court of Canada decisions have been followed by the Ontario courts. For example, in Salvation Army, Canada East v. Ontario (Minister of Government Services),[19] the Ontario Court of Appeal cited these decisions and rejected arguments that land use restrictions trigger compensation:

> In law, there can be no compensation for "downzoning" such as resulted from the Parkway Plan...
>
> The real complaint of the Salvation Army relates to the Parkway Belt West Plan and its effect on land values, but it is well accepted that such a plan does not give rise to compensation provided the planning authority acts in good faith. I rely for this statement, as did my brother Grange, upon the statement of Estey J. in The Queen in right of British Columbia v. Tener....

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[17] Ibid., pp.334-45.

[18] The Queen in Right of British Columbia v. Tener (1985), 17 D.L.R. (4th) 1, at p.7.

[19] (1986), 53 O.R. (2d) 704 (Ont. C.A.) at p.708 and p.717. See also Toronto Transit Commission v. Toronto (City) (1990), 2 M.P.L.R. 42 (Ont. Div.Ct.).

> That this has been the law for some time is clear from an examination of decisions of the Supreme Court of Canada starting with Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie... (emphasis added).[20]

The important principle which emerges from these cases may be stated as follows: planning authorities may regulate, restrict or prohibit land use or development without triggering the remedy of compensation for affected landowners, provided that such measures are undertaken in good faith for a proper planning purpose.

It should also be noted that the courts have developed a number of other principles in relation to expropriation. For example, the courts have long held that the power to expropriate must be clearly authorized in law (i.e. a statute), and that such power will be construed narrowly by the courts. Similarly, the courts have stipulated that expropriation procedures must be followed exactly, and any defects or ambiguity will be resolved in favour of the landowner. In addition, the courts have determined that there is a presumption that compensation will be payable if expropriation occurs. However, the courts have also recognized that this presumption may be rebutted by clear statutory language which denies compensation.[21] Thus, it is open to a Legislature to enact a law which expropriates private property without compensation, although this would likely be a rare (and unpopular) occurrence.

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[20] Ibid., p.717.

[21] Manitoba Fisheries Limited v. R. (1978), 6 W.W.R. 496 (S.C.C.).

The foregoing principles of expropriation law have been summarized as follows:

> ... where a statutory enactment does in fact result in an expropriation or an actual taking of property, the responsible authority must pay compensation unless a contrary intention is expressed in the legislation or regulation by clear, unequivocal language which is capable of no other interpretation.[22]

However, the Canadian courts have long-recognized that properly enacted land use restrictions do not constitute expropriation, as described above.

PART IV - JURISDICTION TO PROHIBIT HARMFUL LAND USES IN ONTARIO

As noted above, the Ontario government has expressed a provincial interest in protecting the special environmental features and ecosystem functions of the Oak Ridges Moraine. Therefore, the provincial interest is not focused on creating parks or public open space; instead, the paramount provincial concern is the protection and maintenance of the ecological integrity of the Oak Ridges Moraine.

This expression of provincial interest, in turn, raises two related legal questions:

(a) Is it within the jurisdiction of the province and/or municipalities to restrict or prohibit land use or development which would result in the destruction or degradation of groundwater recharge areas, significant habitat, or other environmentally sensitive areas within the Moraine? and

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[22] Steer Holdings Ltd. v. Manitoba (1992), 8 M.P.L.R. (2d) 235 (Man. Q.B.).

(b) If the province and/or municipalities have the jurisdiction to restrict or prohibit harmful land use or development, are these authorities legally required to compensate landowners who would otherwise wish to undertake activities which would result in the destruction or degradation of groundwater recharge areas, significant habitat, or other environmentally sensitive areas within the Moraine?

(a) Jurisdiction to Prohibit Harmful Land Use or Development?

As a matter of constitutional law, it is open to the province to pass laws in relation to: municipal institutions; property and civil rights; local works and undertakings; and generally all matters of a merely local or private nature in the province. Accordingly, it is within the Ontario government's legislative competence to enact statutes which regulate land use,[23] create or regulate municipalities,[24] or regulate environmentally harmful activities.[25]

In the land use planning context, the primary statute is the Planning Act.[26] Significantly, the Ontario government has specifically empowered municipalities to pass zoning by-laws

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[23] See, for example, the Niagara Escarpment Planning and Development Act, R.S.O. 1990, c.N.2; and the Ontario Planning and Development Act, R.S.O. 1990, c.O.35.

[24] See, for example, the Municipal Act, R.S.O. 1990, c.M.45 or the various statutes creating regional municipalities (i.e. the Municipality of Metropolitan Toronto Act, R.S.O. 1990, c.M.62.

[25] See note 7, supra.

[26] Planning Act, R.S.O. 1990, c.P.13.

"prohibiting the use of land" under the Planning Act.[27] The Ontario government also provided itself with planning tools under the Planning Act (i.e. s.3 policy statements, Ministerial zoning orders, or declarations of provincial interest) which can be used to affect land use and development within the province.[28] It should be noted that the Minister of Municipal Affairs has been specifically directed by the Planning Act to have regard for matters of provincial interest (i.e. the protection of the natural environment; the management of natural resources; and the protection of features of significant natural interest) when carrying out his or her responsibilities under the Act.[29]

Accordingly, there can be no doubt that the Ontario government and municipalities have clear statutory jurisdiction to enact laws, regulations or other instruments which prohibit environmentally harmful land use or development within Ontario. Indeed, there appears to a legislative trend towards further restrictions on land use and development within the province.[30]

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[27] See, for example, section 34(1) of the Planning Act, which also permits municipalities to pass zoning by-laws which prohibit buildings, or which regulate the construction of buildings or structures. See also MacFarlane, Land Use Planning: Practice, Procedures and Policy (Carswell, 1992), p.6-15.

[28] See, for example, the "Wetlands Policy Statement", which prohibits development within provincially significant wetlands within southern Ontario, and which restricts development in provincially significant wetlands in northern Ontario.

[29] Planning Act, s.2.

[30] See, for example, the legislative and policy reforms recommended by the Commission on Planning and Development Reform in Ontario, Final Report (1993).

(b) Compensation for Prohibited Land Use or Development?

It is not the law of Canada that a landowner must be compensated for being denied the opportunity to undertake an environmentally harmful use of his or her property. When a Legislature determines that a particular land use is harmful and should therefore be prohibited, the resulting restriction does not trigger the remedy of compensation for affected landowners. This principle has been long-recognized by the courts:

> A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not... carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the state.[31]

Hence, it is within the legislative competence of the Ontario government or municipalities to define and prohibit environmentally harmful land use or development. Moreover, the implementation of such prohibitions does not place any legal obligation on the province or municipalities to compensate landowners for the loss of the prohibited use. This principle has been established in a number of Supreme Court of Canada decisions, as described above.

This principle has also been recognized by the Ontario Municipal Board, which has held that development restrictions do not represent "takings" which trigger compensation. For example, in Doughty Farms Limited v. Smith (Township),[32] the Board ruled that a by-

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[31] France Fenwick and Co. Ltd. v. The King, [1927] 1 K.B. 458 (???), per Wright J. at p.467.

[32] OMB File No. L 910042, March 25, 1992 (unreported). It is noteworthy that the Board found the landowner's compensation claim "frivolous and without foundation" and the Board made a $500 cost award against the landowner.

law's prohibition of development within provincially significant wetlands did not represent "injurious affection" which triggered compensation under the Expropriations Act. Similarly, in McGee v. Mississippi Valley Conservation Authority,[33] the Board refused to hear a landowner's claim for compensation under the Expropriations Act where development within floodplains had been restricted by the promulgation of "flood and fill" regulations by the local conservation authority.

PART V - CONCLUSIONS

It is clear that the provincial interest in the Oak Ridges Moraine is substantial and legitimate. Moreover, it is readily apparent that protecting the ecological integrity of the Moraine is a proper and worthy planning objective which should vigorously pursued by the Ontario government and municipalities within the Oak Ridges Moraine study area. Accordingly, it is lawful and appropriate for the province and municipalities to regulate, restrict or prohibit specified land uses or development in specified areas on the Oak Ridges Moraine. If carefully implemented through properly enacted land use controls, such restrictions do not amount to "expropriation", nor do they trigger compensation obligations, provided that the province and municipalities do not act in bad faith.

It is unfortunate that the ambiguous language of "property rights" and "expropriation without compensation" has threatened to obscure the real purpose of the Oak Ridges Moraine strategic planning exercise, viz. to protect the Moraine's environmental features,

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[33] OMB File No. L 910010, June 1, 1993 (unreported).

functions and values through the most effective and efficient means possible. The debate on the best means to achieve this purpose (i.e. passage of a Moraine-specific statute, a special land use plan, or a detailed policy statement) will likely continue as the Oak Ridges Moraine strategy is finalized. However, this policy discussion should not be hampered by further debate about the applicable law, for the law of Canada is clear: it is lawful for planning authorities to enact restrictions on landowners' ability to use or develop land, and such landowners are not entitled to compensation merely because they are subject to such restrictions.

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