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SUPPLEMENTARY SUBMISSION TO THE ENVIRONMENTAL ASSESSMENT ADVISORY COMMITTEE REGARDING THE EAGLE CREEK GOLF COURSE/SUBDIVISION AND THE CLASS I CONSTANCE CREEK WETLAND

November 20, 1990

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1. INTRODUCTION

In the instant case, the Canadian Environmental Law Association ("CELA") has been retained by the Wetlands Preservation Group ("WPG") of West Carleton. On behalf of the WPG, CELA submitted a brief in March 1990 to the Environmental Assessment Advisory Committee ("the Committee") with respect to the Eagle Creek Golf Course/Subdivision and the Class I (provincially significant) Constance Creek Wetland. This previous brief reached three main conclusions:

- that the Eagle Creek development must be designated under the Environmental Assessment Act, and that an individual environmental assessment must be prepared and submitted to the Minister of the Environment;
- that the province must immediately enact wetlands protection legislation, and must develop regulatory and non-regulatory programs that secure the protection and preservation of Ontario's remaining wetlands; and
- that the province must revise the land use planning and approvals process to ensure that wetlands and other significant natural areas are properly identified, evaluated and protected against the immediate and cumulative impacts of development.

Subsequent to the submission of this brief, the Ontario Municipal Board ("OMB") completed its hearing of the appeals against By-law 36-89 and By-law 73-89 of the Township of West Carleton. Significantly, the OMB dismissed the appeal against By-law 36-89, but allowed the appeals against By-law 73-89 and repealed by-law. In the result, golfing is not a permitted use within the wetlands covered by the repealed by-law, as will be

discussed below.

Nevertheless, there are a number of outstanding environmental issues that have not been resolved by the OMB or the land use planning process. Accordingly, the WPG adopts and repeats the three conclusions made in the previous brief to the Committee, and in particular, the WPG maintains that the Eagle Creek development should be designated under the EAA.

This supplementary submission by CELA on behalf of the WPG will focus on the legal and policy issues arising from the matters identified in the Committee's notice dated October 22, 1990. A separate submission has been filed by WPG representatives at the Committee's public meeting on November 14, 1990.

At the outset, it must be noted that the WPG is pleased that the OMB repealed By-law 73-89 on the grounds that it was not a proper exercise in land use planning. While the Board may hear and rely upon environmental evidence in reaching its decision on this issue, it is important to recall that the OMB does not conduct an environmental assessment of proposed developments. For example, the Board does not inquire whether there has been an adequate analysis of the alternatives, or their environmental impacts, as would occur under the EAA. Accordingly, designation of the undertaking would <u>not</u> result in duplication of decision-

making authority, primarily because the environmental assessment process considers different issues within considerably wider parameters than the existing land use planning process.

Therefore, the WPG is not attempting to use the Committee as means to "appeal" the OMB decision, as has been suggested by counsel for the developer in his letter of November 2, 1990. Firstly, as noted above, the WPG is satisfied that the OMB properly granted the appeals against By-Law 73-89. Secondly, the WPG's designation request was sent to the Minister of the Environment before By-law 73-89 was enacted, and before the OMB hearing was initiated. Thirdly, the WPG is urging the application of the EAA in the instant case to ensure that the numerous environmental issues which have not been adequately addressed in the land use planning process are, in fact, considered and resolved in a comprehensive and public manner, viz through the environmental assessment process. Thus, this submission does not purport to "second-guess" the OMB; instead, it represents a bona fide attempt by the WPG to invoke a separate and broader decision-making process in the instant case.

2. IMPLICATIONS OF THE OMB DECISION

In its notice dated October 22, 1990, the Committee posed the following question:

What are the implications of the OMB decision for:

- future use of the lower portion, adjacent to the wetland?
- rehabilitation of the portion of the wetland that has been filled in?; and
- the Drainage and Turf Management Plans?

i) Future Use of the Wetlands

Firstly, the WPG would point out that the lower portion of the Eagle Creek Golf Course has been built within the wetland, and is not merely "adjacent" to it. It is also important to note that the developer constructed the golf course before any rezoning approvals were secured, and the developer continued to construct the golf course during and after the OMB hearing. At the present time, it appears that the golf course has been essentially completed, including the portion within the wetland. In fact, WPG members have observed and photographed individuals playing golf within the wetland portion in the fall of 1990.

In our submission, it is abundantly clear that golfing is not a permitted use within the wetland portion of the golf course. Indeed, this is precisely why it was necessary for the developer to seek the passage of By-law 73-89 in the first place.

In particular, under the municipality's comprehensive Zoning By-law 266/81, the wetland portion is zoned "Special Hazard Land" (HL-1) pursuant to s.21. This zoning restricts permitted uses to existing uses only. Golfing was not an existing use on the subject lands, nor was it a permitted use

under the general Hazard Land zoning. Accordingly, By-law 73-89 was enacted by the municipality in order to change the zoning from HL-1 to "Open Space - special zone 6" (OS-6), which would have authorized the construction and use of the golf course within the wetland. However, By-law 73-89 was repealed by the OMB, and the original HL-1 zoning continues to govern the wetland portion.

It is our understanding that the counsel for the developer has now claimed that golfing is a legal non-conforming use within the wetlands. With respect, the WPG strongly disagrees with this suggestion, and submits that the golf course does not enjoy legal non-conforming status under the Planning Act. Section 34(9) of the Act provides that zoning by-laws cannot "prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law..." (emphasis added). It is clear on the facts of this case that a golfing use had not been established in the wetlands when By-law 266/81 was passed by the local municipality. Regardless of whether the developer is now calling the golf course a private or public facility, the irrefutable fact is that golfing had not been established within the wetland by the developer (or his predecessors in title) at the relevant date, and the recent golfing activity on the land does not confer any "lawful" status upon a use that was commenced after the

passage of By-law 266/81.

Furthermore, if counsel for the developer is correct in his submission, then there was no need to seek the passage of By-law 73-89 in the first place. However, this by-law was, in fact, sought and supported by the developer, and it was passed by the municipality in the recognition that rezoning was necessary in order to permit the construction and use of a golf course within the wetlands. In light of this chronology, it now appears that the developer is taking a position that is entirely inconsistent with its earlier conduct. In any event, the onus of proving that a legal non-conforming use has been established rests with the party claiming such status, and the WPG looks forward to observing whether or not the developer can succeed in proving legal non-conforming use in a court of law.

As a result, it is the WPG's submission that golfing is not presently a permitted use within the wetland portion, and that any golfing activity that occurs on or within the wetlands represents a contravention of By-law 266/81; however, it appears to be the developer's intention to permit golfing within the wetland in 1991: see Appendix A. Therefore, should golfing occur in the future within the wetlands, the WPG will request the municipality to prosecute the matter to the fullest extent of the law in order to restrain such illegal activity.

ii) Rehabilitation of the Wetland

Notwithstanding the repeal of By-law 73-89, the OMB held that it was without jurisdiction to order restoration of the damaged wetland (p.49). At the hearing, the WPG submitted that it was open to the Board to directly or indirectly require the restoration of the wetland. However, these submissions were not accepted by the Board, and the Board's holding on this jurisdictional point must be considered as final and binding, particularly since no appeals were taken to the Divisional Court. It is to be noted that pursuant to s.95 of the OMB Act, appeals are not automatic, and leave of the Divisional Court is required. In addition, appeals are limited only to questions of law.

Both the WPG and the Ministry of Natural Resources ("MNR") had argued in favour of restoration. The WPG's argument was premised on the referral to the Board of Conditions 14 and 15 of the draft approved plan of subdivision. In particular, the WPG submitted that the Board should leave both conditions intact, and further, that if these conditions were left intact, then the only way the developer could comply with Condition 14 (and obtain a clearance letter from the MNR) would be through the restoration of the wetland that had been dredged, infilled and altered in contravention of the condition. In the alternative, the WPG submitted that the Board could modify the Condition 14 so as to expressly require the restoration of the wetland to the satisfaction of the MNR.

However, the Board declined to make such order, and instead amended the Condition 14 to allow the developer to alter the wetland in accordance with a Drainage Plan to be approved by the Regional Municipality of Ottawa-Carleton. Apparently, the Board selected the Region as the approving authority under condition 14 because the Board understood the MNR's role to be "advisory" in relation to conditions of draft approval. However, a perusal of the other conditions of draft approval reveals that a number of agencies were listed as approving authorities (see Appendix B). For example, the local Conservation Authority was the approving authority under Condition 7, while the Carleton Board of Education was the approving authority under condition 17, and the Ministry of the Environment was the approving authority under Conditions 12 and 13.

In the result, the OMB decision does not require the restoration of the damaged wetlands. If the development is not designated under the EAA, then the only other possible chance of restoration depends on the outcome of the ongoing trial involving Fisheries Act charges against the developer. In fact, the possibility of a restoration order from this trial seems to be contingent on three factors: whether a conviction against the developer is obtained; whether the prosecutor, in speaking to sentence, will seek a restoration order in addition to a fine; and whether the court, in its discretion, will order restoration. In light of the environmental importance of the Constance Creek

Wetland, and assuming that the development is not designated, it is unfortunate that restoration now depends on the vagaries of a quasi-criminal proceeding.

iii) The Drainage and Turf Management Plans

The OMB decision, in effect, required the developer to submit a drainage plan to the Regional Municipality of Ottawa-Carleton for its approval pursuant to Conditions 14 and 15, as amended by the Board. It is to be noted that the drainage and irrigation systems were, in fact, constructed and completed within the wetland prior to approval of the final Drainage Plan. Similarly, it is the WPG's position that the Drainage Plan which was ultimately approved by the Region did not materially differ from the plan presented by the developer to the OMB. In fact, the approved Drainage Plan still depicts golf holes, tees, and greens within the Class I wetland. Accordingly, the net effect of the OMB decision was to allow the Region to rubberstamp a plan that had already resulted in considerable environmental damage (i.e. the extensive infilling, excavation, and grading that has occurred within the wetland).

It is our understanding that at the Committee's meeting of November 14, 1990, counsel for both the municipality and the developer indicated that the OMB essentially ordered the Region to approve the Drainage Plan submitted by the developer. If this understanding is correct, then we respectfully suggest that

counsel have misinterpreted the Board's order. The OMB did not approve any Drainage Plans, and its order was very clear: there were to be no alterations within the wetland "except in accordance with a Drainage Plan to be approved by the Regional Municipality of Ottawa-Carleton" (emphasis added). There was no requirement that the submitted Drainage Plan had to be identical or similar to the plan presented to the OMB; moreover, if the submitted Drainage Plan was unacceptable to the Region, there were no constraints on the Region's discretion to withhold approval until a more suitable plan was submitted. The WPG therefore submits that the Region cannot invoke the OMB decision as the reason why it approved the plan even in the face of continuing MNR objections.

Furthermore, it is the WPG's submission that this ex post facto approval process is highly unacceptable for several reasons. Firstly, the Region appeared at the OMB in support of the application, and hence could not be reasonably expected to serve as an independent or disinterested evaluator of the Drainage Plan submitted to it. It is also questionable whether the Region possesses the technical expertise or staff to adequately review this particular drainage plan. The WPG also objects to the fact that the public was excluded from the drainage plan approval process. This plan involves matters of considerable public interest, and public review and comment should have been required or solicited.

More fundamentally, the WPG is concerned that the Region and the local municipality neither required nor considered the alternative drainage plans that might have resulted in wetlands rehabilitation and mitigation of off-site environmental impacts. The OMB noted that the developer's drainage plan was intended to operate as a closed system, but the OMB was unable to accept the developer's submission that with the drainage system in place, there would be no adverse environmental impacts on the wetlands (p.47). The Board also noted that alternate plans were available, but the OMB held that it "can only speculate as to whether or not there is a suitable alternative to the plan." This lack of consideration of alternatives is not attributable to the OMB; instead, it is one of the basic weaknesses in the current land use planning and approvals process. As the WPG noted in its previous submission:

> Sound environmental decision-making is premised on the rational and rigorous analysis of alternatives, and unless a comprehensive analysis [of alternatives] is required of the developer, the WPG and the community at large cannot be assured that an acceptable or optimal alternative has been selected. No other legislation, including the Planning Act, requires the analysis of alternatives, and thus, the developer has not identified or assessed any alternatives in a comprehensive manner (p.20).

Similar concerns exist with respect to the so-called "Turf Management Plan". This "plan" was described in Mr. Niblett's second report (PDNA, 1990; Exhibit #92), and was spoken to by both Mr. Niblett and Mr. Gourlay, the golf course superintendent. It is to be noted, however, that much of this

evidence consisted of promises that the developer would, for example, use only certain fertilizers on certain parts of the golf course during certain parts of the year. It was also indicated that the developer would implement an "Integrated Pest Management" (IPM) approach with respect to the use of pesticides. However, the WPG points out that IPM does not rule out the use of chemicals, nor does it even necessarily mean that smaller quantities of chemicals would be used upon the golf course. Once a pest infestation is detected, the developer may still choose to use the same chemicals in the same quantity, regardless of whether the IPM philosophy is adopted or not.

More importantly, there is nothing in law that requires the developer to actually carry out these promises, nor do these promises appear to be legally enforceable by the OMB, the Region, or the local municipality. For example, condition 29 of the draft plan approval merely required the developer to complete and submit a report on fertilizer and pesticide use prior to final approval of the subdivision. This report was completed, but it is clear that nothing in Condition 29 requires the developer to actually implement the recommendations in the second Niblett report. Similarly, it is to be noted that Recommendation #2 in the first Niblett report (PDNA, 1989) was <u>not</u> implemented by the developer. This is significant since Condition 28 required the developer to implement the recommendations of this report; however, the developer did not implement this recommendation, and

presumably the local municipality provided a clearance letter respecting this condition. We also note that Condition 24 was not amended by the OMB, and therefore a clearance letter from MNR was technically required prior to final approval by the Region; however, it is our understanding that no such letter was issued by the MNR, and in fact, the MNR has continued to object to the Drainage Plan. In the WPG's view, the foregoing discussion raises serious questions about the adequacy or efficacy of compliance monitoring in the instant case.

Moreover, as of November 16, 1990, a copy of the executed subdivision agreement was not available for public review at the offices of the local municipality. Accordingly, the WPG is not in a position to comment on the terms of the subdivision agreement. However, the WPG has reviewed the Covenant Agreement which has been signed by the local municipality and the developer, and which has been filed on title: see Appendix C. If the terms of this document are representative of those found within subdivision agreement, then the WPG submits that they offer little substantive protection to the environment for the reasons outlined above.

In addition, the WPG does not understand why this matter was so urgent that the MNR could only be given three days to review and comment upon the Drainage Plan. A search at the local Land Registry Office reveals that no transactions or

conveyances related to the subdivision lots had occurred as of November 15, 1990. Accordingly, there would appear to be no closing deadline to meet in the instant case. However, a substantial demand debenture had been registered on title by a financial institution, leading one to conclude that the "urgency" was of a financial nature: see Appendix D.

In summary, the WPG submits that with respect to future drainage and turf management, the OMB decision offers little substantive protection to the environment. The drainage plan which was approved by the Region merely recognizes the status quo, and leaves intact the new surface grading, the lower retention pond, the overflow culverts, the drainage ditches, the irrigation piping, and so on. Similarly, the turf management plan consists of vague and unenforceable promises which do little to eliminate or reduce chemical input on the golf course. As described below, the WPG therefore submits that an environmental assessment is still necessary to address these critically important issues.

3. LONG-TERM IMPLICATIONS FOR THE CONSTANCE CREEK WETLAND

In its October 22, 1990 notice, the Committee posed the following question:

> Given the OMB decision, what are the potential long-term implications for the quality of the Constance Creek Wetland?

In the WPG's view, the long-term quality of the

Constance Creek Wetland is at considerable risk, notwithstanding the OMB decision. The principle reason is that the OMB decision does not purport to ameliorate the factors (i.e. the establishment and management of the golf course) that will cause these environmental impacts.

As described above, the present HL-1 zoning prohibits golfing within the wetlands. The OMB's decision to repeal By-law 73-89 leaves this prohibition intact. In the result, the activity of golfing is not permitted within the wetland.

Generally speaking, however, the adverse environmental impacts of this development do not arise from golfing per se. Instead, the impacts are caused, directly and indirectly, by the construction and maintenance of the golf course itself. In other words, it is the impact of the facility, not the activity, that gives rise to the WPG's environmental concerns.

In particular, it is the extensive physical alteration and chemical manipulation of the natural environment that will cause or contribute to the long-term environmental impacts upon the wetland. Yet the OMB decision effectively only addresses the future uses of the land, and the existing physical condition of the land (i.e. a golf course) will remain in place, and chemical use can still occur.

As discussed above, the OMB decision does not require the removal of the golf course or its physical infrastructure within the wetland, nor does it purport to prohibit or regulate the physical and/or chemical maintenance of the subject lands. Thus, the net effect of the Board's decision may prevent golfers from playing on the wetland portion of the golf course, but the activities causing the most serious environmental harm (i.e. the dredging and infilling of the wetland; the excavation and operation of the lower retention pond; and the application of pesticides and fertilizers) have not been prohibited or regulated by the OMB. In fact, these activities and their resultant environmental impacts have already occurred and will continue to occur as long as the facility remains intact within the wetland, and as long as the upper golf course is managed in the manner described by the developer.

The numerous adverse environmental impacts associated with the Eagle Creek development were addressed in CELA's previous submission on behalf of the WPG (pp.12-18), and may be summarized as follows:

- the loss, degradation, and fragmentation of habitat for a variety of wildlife species, including mammals, birds, herpetiles, fish and botanicals;
- the impairment of the various hydrological functions of the wetland, particularly within the area of disturbance;
- the erosion and sedimentation problems caused by extensive shoreline alteration and infilling;

- the pesticide contamination of wildlife, particularly waterfowl attracted to the golf course;
- the groundwater and surface water contamination by pesticides, and consequential impacts upon wetland water quality and wildlife;
- the runoff of fertilizers into the wetland, and consequential water quality and ecosystem impacts, including eutrophication and reduction of biological diversity; and
- the loss or degradation of the socio-economic values of the wetland.

In summary, the WPG and its consultants have concluded that the Eagle Creek development will adversely affect the ecological, hydrological and socio-economic values of the Constance Creek wetland. These impacts have been caused by the construction and maintenance of the golf course in its present form, and in this sense, the OMB decision is irrelevant to these impacts since the golf course now exists despite the OMB decision. Accordingly, in light of these adverse environmental impacts, the WPG submits that it is both necessary and desirable for the development to be designated under the EAA. Indeed, if there was a case in favour of designation prior to the OMB decision, that case has been strengthened in the aftermath of the OMB decision since significant environmental impacts remain unresolved.

There are, of course, media-specific environmental statutes that may apply if certain types of environmental damage occur within the wetland. For example, the Fisheries Act is

currently being used with respect to possible fish habitat damage, while the Environmental Protection Act or the Ontario Water Resources Act could be used to launch prosecutions against the developer if water quality is adversely affected by the development. However, in the context of this development, these statutes do little to mitigate or prevent this environmental harm from occurring in the first place. Instead, these statutes, if used at all, would likely be used ex post facto, and they may or may not result in restoration or remediation orders upon conviction. This is why the WPG is seeking to invoke the EAA in the instant case: it is an environmental planning statute, as opposed to an environmental protection statute, that attempts to take an anticipatory and comprehensive approach to potential environmental problems. Accordingly, the WPG submits that the public interest clearly demands designation of this development under the EAA, rather than waiting for further environmental harm to occur.

It is further submitted that in the long run, designation will result in an equitable and efficient allocation of resources, in that taking a preventative approach now (i.e. designation) will avoid the larger economic and environmental costs that will be incurred later if an ex post facto approach is taken. Moreover, designation will squarely place the onus where it properly belongs: on the proponent to demonstrate that the development is consistent with the "protection, conservation and wise

management" of the environment. In addition, designation will guarantee a public review and input into the environmental decision-making process.

4. THE NEED FOR ENVIRONMENTAL ASSESSMENT

In its October 22, 1990 notice, the Committee posed the following question:

> Is environmental assessment needed, and if so, how would it enhance decision-making with respect to the following:
>
> - independent, critical review of the Drainage and Turf Management Plans;
> - rehabilitation of the lower section adjacent to the Wetland; including the portion of the Wetland that has been filled; and
> - long term preservation of the Wetland, including the monitoring of impacts and remediation and mitigation plans?

Before By-law 73-89 was enacted, and well in advance of the OMB hearing, the WPG requested that the Minister of the Environment require the proponent to prepare an individual environmental assessment of the development. This request was based on a two-fold concern; firstly, that there were significant environmental impacts associated with the undertaking; and secondly, that the existing land use planning process was inadequate to identify, analyze, and mitigate the environmental impacts. While the WPG is pleased that the OMB repealed By-law

73-89, the WPG's above-noted concern remains unaffected by the OMB's decision. As a result, the WPG submits that an environmental assessment of the development must still be required in the instant case.

In CELA's previous submission on behalf of the WPG, reference was made to the "project screening criteria" promulgated by the Environmental Assessment Branch (pp. 18-19). It is the WPG's submission that even in the wake of the OMB decision, the screening criteria can still be answered in the affirmative, thereby indicating that the development has environmental effects of sufficient significance to require the preparation of an environmental assessment.

More importantly, designation of the development under the EAA will improve and enhance decision-making with respect to the three critically important areas identified by the Committee. In this sense, designation would not add a redundant layer of environmental decision-making; instead, designation will lead to a comprehensive environmental impact analysis that has simply not occurred within the land use planning process in the instant case.

i) Independent Review of Drainage/Turf Management Plans

In CELA's previous submission, it was indicated that there were a number of factual, technical and analytical

deficiencies within the various reports and studies commissioned by the developer. Furthermore, these documents uniformly fail to identify and analyze the full range of alternative means of carrying out the undertaking. It therefore cannot be seriously suggested that the developer has already carried out an environmental assessment for this development.

This is particularly true of the Drainage Plan, which has been submitted to the Region for its approval. As noted above, this report lacks an adequate description of the environment affected by the undertaking, and it fails to adequately analyze alternative methods of surface and subsurface water management. Despite these problems, the plan has been approved by the Region, an agency which may lack the expertise and independence to properly evaluate this aspect of the undertaking. Indeed, the Region now apparently views the golf course as a "sod farm" which provides further evidence about the inability of the land use planning process to properly identify and protect environmentally significant areas. The WPG also notes that the Drainage Plan has not been registered against title in the local Land Registry Office.

The WPG is concerned about this apparent lack of a rigorous and independent review of the Drainage Plan, and is also concerned about the lack of public participation in the Region's approval process. Considering that the matters of grading,

drainage and irrigation all have a profound impact on the wetland ecosystem (particularly if the present plan is not amended), the WPG submits that the absence of critical analysis and public review must be rectified by designation under the EAA.

Similar concerns exist with respect to the Turf Management Plan. While this plan was briefly described to the OMB by the developer, it was not specifically submitted to the OMB, Region or the local municipality for approval. Indeed, no special statutory approvals appear to be required for the fertilizer component of the Turf Management Plan. With respect to pesticides, the developer has indicated that licensed applicators will be used to apply only those products which are federally registered and provincially licensed for use on golf courses. However, some 82 active ingredients are registered for turf use in Canada, and there is nothing to prevent the developer from using products other than the seven pesticides mentioned in the second Niblett report. More importantly, several of the products proposed for use on the golf course are quite water-soluble and/or have high leaching potential. This includes the insecticide Diazinon, which has been banned from American golf courses, but which is still available for use in Canada.

Designation of the undertaking would ensure that the full range of the environmental and toxicological impacts of these products will be adequately documented and analyzed. It

should be noted that in the second Niblett report, only three pages of text have been used to describe the potential impacts of these products (pp. 17-19). In the WPG's view, this hardly amounts to an adequate assessment of the environmental impacts of each pesticide.

It should also be noted that the Environmental Assessment Board recently held that it has the jurisdiction to scrutinize and, where appropriate, prohibit the use of pesticides within particular undertakings, even if the products are federally registered and provincially licenced for use.[1] This decision, in essence, adds an important third tier of decision-making authority in the context of pesticides, and it is submitted that such authority should be invoked in the instant case. Products such as Diazinon or mercuric fungicides may be generally available for turf use in Canada, but a site-specific evaluation of the potential impacts of these pesticides must be carried out before one can conclude that they may be safely used on the Eagle Creek golf course. To date, such an evaluation has not been carried out within the land use planning process, and it can only be secured through designation of this undertaking.

ii) Rehabilitation of the Wetlands

One of the important advantages of designation is that

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[1] Re Proposed Class Environmental Assessment by the MNR for Timber Management on Crown Lands in Ontario (1990), 4 C.E.L.R. (N.S.) 50.

it would permit the Minister of the Environment to exercise certain powers under the EAA that otherwise would be inapplicable in the instant case. As noted above, the OMB held that it was without jurisdiction to order restoration of the wetland, and the issue of whether the Board was correct in law is now moot since the decision has been made, the appeal period has expired, and the golf course still exists within the wetland. However, the Minister of the Environment clearly has the jurisdiction to order restoration under the EAA, and the WPG submits that designation must occur to allow the Minister to exercise this jurisdiction.

For example, under s.14(1) of the EAA, the Minister may, upon acceptance of the environmental assessment, give approval to proceed "subject to such terms and conditions as the Minister considers necessary to carry out the purpose of this Act" [i.e. the protection, conservation and wise management of the environment]. This is a broad and unqualified grant of statutory authority; thus, if the Minister believed that the destruction of a Class I wetland is not consistent with the purpose of the Act, then it is open to her to order restoration of the wetland as a condition to her approval of the remainder of the undertaking (i.e. the subdivision and the upland portion of the golf course).

Section 14(1)(b) of the EAA goes on to provide an illustrative list of the types of terms and conditions that the

Minister may impose on a particular undertaking. Several of these provisions (i.e. subsec.14(1)(b)(i),(ii),(iv),(v) and (vii) could individually or collectively be invoked by the Minister in the instant case to require the immediate restoration of the wetlands to the satisfaction of the MNR. Faced with such a condition, the proponent would then have a choice: either abandon the development, or accept the conditional approval from the Minister and comply with the restoration order.

iii) Long-Term Preservation of the Wetlands

If the valuable functions and features of the Constance Creek ecosystem are to be preserved in the long-term, then the wetland must be protected against the environmental impacts of the Eagle Creek development as well as the long-term synergistic and cumulative impacts of other developments that may occur within the watershed. As noted in CELA's previous submission, the Constance Creek Wetland is essentially undisturbed and undeveloped, and there is considerable pressure to intensify land use in the area. Accordingly, the Eagle Creek development is viewed by the WPG as a precedential case, and it is unlikely that the OMB decision will serve to deter further development within the wetland.

If the public is to be assured that upland portion of the Eagle Creek golf course/subdivision is not going to create adverse environmental impacts, then a comprehensive effects

monitoring program must be implemented to identify potential problems before they arise. In addition, a detailed contingency plan must be developed in order to identify remedial or mitigative measures to be undertaken should environmental problems be detected by the developer. At present, however, it appears as if the developer is not legally obliged to carry any form of environmental monitoring of the impacts on the wetlands, although a rudimentary chemical monitoring program is briefly discussed in one paragraph in the second Niblett report (p.24). It should be noted that this monitoring program will only test the pond water rather than Constance Creek, and that such monitoring, if it occurs at all, will only last two years. In addition, the developer has not provided any particulars on any remedial or mitigative actions that will be undertaken should problems arise in the future with respect to the impacts of golf course chemicals on the wetland.

In the 1990s, however, the public expects and deserves a greater level of certainty with respect to the protection of the natural environment. In particular, the WPG submits that a comprehensive effects monitoring and mitigation program, with meaningful and legally enforceable provisions, must be required of the developer in the instant case. To date, such a program has not been required of the developer under the land use planning process, and it is the WPG's view that designation is the only means of imposing and enforcing such a requirement. For

example, designation will permit the Minister to exercise her power to order research and monitoring under s.11 and s.14(1)(b)(iii) of the EAA.

With respect to the impacts of other development within the Constance Creek Wetland, it may be necessary to consider designating all such developments within the entire wetland watershed. This ecosystem-based approach to planning has been advocated by many public interest groups within Ontario, and it should ensure that the wetland is protected against the cumulative impacts of development. Otherwise, the WPG is concerned that the sustainability of the wetland's functions will be incrementally affected by individual developments which will likely be considered (and approved) on a case-by-case basis.

5. THE DEFINITION OF THE UNDERTAKING

In its October 22, 1990 notice, the Committee posed the following question:

> If an environmental assessment is needed, how should the undertaking be defined under the Environmental Assessment Act?

It is the submission of the WPG that the Eagle Creek development must be designated under the EAA, and that an individual environmental assessment must be prepared and submitted to the Minister of the Environment. As noted in CELA's

previous submission to the Committee, the Eagle Creek development falls within the s.1(o) definition of "undertaking" in that it is both a "major commercial or business enterprise or activity", and a "proposal, plan or program in respect of a major commercial or business enterprise or activity" (emphasis added).

It is necessary, however, to define the undertaking with particularity for the purposes of designation. As the Committee is aware, the proponent in the instant case attempted to bifurcate the development into two phases: the first phase consisted of the subdivision and upland portion of the golf course, which was the subject matter of By-law 36-89. The second phase consisted of the wetland portion of the golf course, which was the subject matter of By-law 73-89. In the WPG's view, this phased approach should not have been countenanced by the local municipality in the first place, particularly in light of the clear interrelationship between the two phases. This is why the WPG was successful in bringing a preliminary motion before the OMB to have the two matters consolidated and heard together.

It remains the WPG's position that the environmental impacts discussed above must be assessed in relation to the development in its entirety. In other words, the designation order must encompass both the upland and wetland portions of the development, largely because both phases have significant environmental impacts that have not been adequately identified,

analyzed and mitigated under the land use planning process. It is also important that the designation order catch all of the primary and ancillary activities on the subject lands that are likely to result in significant environmental impacts.

For these reasons, the WPG submits that the undertaking may be defined in the following manner:

DESIGNATION - EAGLE CREEK GOLF COURSE AND SUBDIVISION

1. In this Regulation, "proponent" means R.J. Nicol Construction (1975) Limited and R.J. Nicol Homes Limited or any corporation or person related to R.J. Nicol Construction (1975) Limited or R.J. Nicol Homes Limited by ownership or in a contractual relationship in respect of the undertaking described in section 2.

2. The enterprise or activity by the proponent of planning, designing, constructing, operating and maintaining the Eagle Creek Golf Course and Subdivision, located at Lot 8, Concession V and part of Lot 8, Concession IV, Torbolton Ward in the Township of West Carleton in the Regional Municipality of Ottawa Carleton is defined as a major commercial or business enterprise or activity and is designated as an undertaking to which the Act applies.

The above-noted definition is the WPG's preferred definition of the undertaking. However, it would now appear as if the planning, designing and construction phases of the golf course have been essentially completed. In light of this fact, it may be necessary to revise the above-noted definition to limit it to the operation and maintenance of the development.

In the alternative, it is submitted that the plan of subdivision could itself be designated under the EAA since it is

a plan "in respect of a major commercial or business enterprise or activity." This alternative definition may be problematic due to the fact that the subdivision plan has now been registered, although the WPG submits that registration per se has no legal bearing on the issue of whether a plan of subdivision can or should be designated under the EAA. In other words, even after the land use planning process has played itself out, the WPG submits that it is still open to the Minister of the Environment to designate a plan of subdivision if significant environmental issues remain unresolved. If this were not the case, then developers would have an incentive to seek the final registration of a plan as quickly and quietly as possible so as to evade the potential application of the EAA to urban development.

For this reason, the developer cannot claim that the golf course is now a "done deal" that is immune to designation. In particular, the developer knew, or ought to have known, that the designation request was made by the WPG; that both the Minister of the Environment and the Committee would be considering this request; and that designation was possible. Despite this knowledge, the developer forged ahead with the development. The WPG therefore submits that the developer cannot now be permitted to hide behind the registration of the plan of subdivision, and in any event, registration per se does not affect the Minister's ability to designate this undertaking. This development was an undertaking before the OMB decision and

it remains an undertaking after the OMB decision, and therefore, it can still be designated under the EAA.

It may be argued by the developer and/or municipality that designation of an ongoing undertaking cannot occur by virtue of s.4(1) of O.Reg. 205/87. In effect, this section exempts undertakings that have been commenced where no approval from the Minister of the Environment was necessary. However, it is not clear whether this section was intended to protect proponents that knowingly commence undertakings that are being considered for designation by the Minister. Secondly, and more importantly, the regulation designating the Eagle Creek development can simply indicate that notwithstanding s.4(1) of O.Reg. 205/87, the development is designated as an undertaking to which the Act applies. It is our understanding that this approach may be implemented with respect to the Morton Terminal undertaking, which was an activity that was commenced before the designation regulation (O.Reg. 244/90) was made effective by publication in the Ontario Gazette.

6. OTHER MEANS TO PROTECT THE CONSTANCE CREEK WETLANDS

In its notice dated October 22, 1990, the Committee posed the following question:

> Are there other means to protect and preserve the Constance Creek Wetland?

Aside from the designation of the Eagle Creek

development (and possibly other developments within the watershed), there appear to be no other practical means to protect the Constance Creek Wetland. For example, public acquisition has been ruled out by the MNR, and successful negotiation or mediation seems extremely unlikely in the instant case. More importantly, the land use planning process has demonstrated itself to be incapable of preventing the destruction of the wetland ecosystem in a piecemeal fashion.

In the WPG's submission, there is something fundamentally wrong with a planning process that has permitted both the local and regional authorities to authorize the destruction and conversion of a portion of a Class I wetland. Even a successful appeal of By-law 73-89 to the OMB has failed to prevent the construction and use of the golf course within the wetland, and has failed to result in the rehabilitation of the damaged wetlands. Given that this wetland and other wetlands in the area are inadequately protected under local and regional official plans (i.e. even if the most restrictive category of "Natural Environment" is to be used), the WPG is unconvinced that the existing land use process will result in the proper identification, evaluation, and protection of these environmentally significant natural areas in both the short- and long-term.

These concerns have been substantiated in the instant

case and in the Leitrim Wetland case, where local environmental groups were recently denied an opportunity to have an Official Plan Amendment (OPA) referred to the OMB for a hearing. In particular, this OPA will permit the largescale destruction of a Class I wetland near Gloucester, but the RMOC, exercising the powers of the Minister of Municipal Affairs under s.17(11) of the Planning Act, decided that the referral requests were frivolous and vexatious. The Regional Council made this decision despite a Regional planning report that had recommended that the referral requests be granted. In light of these experiences, the WPG has no confidence that the existing land use planning process will secure the long-term protection of wetlands within the Region or across the province.

7. OTHER RELEVANT ISSUES

In its notice dated October 22, 1990, the Committee posed the following question:

Are there other matters that you believe are relevant?

In CELA's previous submission, the deficiencies of the existing land use planning process were identified and discussed, and it was concluded that the land use planning process must be substantially revised to ensure that environmental concerns, including those involving cumulative impacts, are addressed in an effective and comprehensive manner (i.e. through integrated

ecosystem-based planning). It was also concluded, inter alia, that Ontario must immediately enact comprehensive wetlands protection legislation. Notwithstanding the OMB decision, the WPG still adopts these earlier positions, and submits that statutory protection of wetlands is necessary to secure the protection and preservation of significant wetlands within the province. Policy statements, guidelines and other planning instruments are generally ineffective in preventing the continued loss and degradation of Ontario's remaining wetlands.

The WPG is not alone in urging the province to enact wetlands protection legislation. For example, the Federation of Ontario Naturalists and the Ontario Federation of Anglers and Hunters have repeatedly called for wetlands legislation. Similarly, the province's recently revised Strategic Plan for Ontario Fisheries (SPOF II), spearheaded by the MNR, has recommended that Ontario "ensure that legislation is in place to support the Provincial Wetland Policy and amend legislation to make rehabilitation mandatory for unlawful alteration of wetlands; consideration should be given to development of a 'Wetland Act'". In addition, the 1990 Sustaining Wetlands conference has recommended that "governments should use legislation or regulation in preference to weaker instruments such as policies or guidelines to control wetland use." It should also be noted that numerous other jurisdictions have passed or introduced wetland protection legislation.

It is beyond the scope of this supplementary submission to describe the particulars of the wetlands statute that is required in Ontario. However, two matters must be emphasized: firstly, the statute must clearly prohibit the alteration, degradation or destruction of significant wetlands; and secondly, where wetlands have been unlawfully altered, degraded or destroyed, the statute must expressly require the restoration and rehabilitation of the wetlands at the expense of the party responsible for the damage. It is anticipated that these and other statutory provisions should go a long way in preventing a repetition of the Eagle Creek situation, and should result in fewer designation requests concerning proposed wetland development. As was pointed out in CELA's previous brief, "wetlands in general are better protected through a comprehensive statute rather than ad hoc designations under the EAA" (p.28).

8. CONCLUSIONS

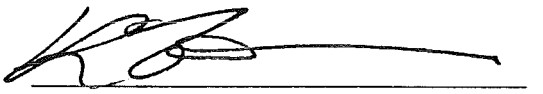
In CELA's previous brief to the Committee, it was submitted that the Class I Constance Creek Wetland contains important ecological, hydrological and socio-economic values that are at risk from the Eagle Creek Golf Course and Subdivision. Nothing in the OMB decision changes that assessment, and the WPG therefore submits that the development must be designated under the EAA in order to secure the long-term "protection, conservation and wise management" of the wetland. Designation would not duplicate decision-making found within the planning

process, largely because issues of critical importance (i.e. drainage and turf management plans; identification and consideration of alternatives; wetland rehabilitation; monitoring and mitigation, and so on) have not been adequately addressed within the land use planning process.

In the result, the WPG respectfully requests that the Committee recommend to the Minister of the Environment that the Eagle Creek Golf Course/Subdivision be designated under the EAA.

All of which is respectfully submitted.

November 20, 1990



Richard D. Lindgren
Counsel

Canadian Environmental
Law Association
517 College Street
Suite 401
Toronto, Ontario
M6G 4A2

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

October 12, 1990 **BY FAX**

Mr. Alan K. Cohen
Soloway, Wright
Barrister & Solicitors
99 Metcalfe Street
Ottawa, Ontario
K1P 6L7

Dear Mr. Cohen:

Re: Eagle Creek Golf Course - West Carleton Township

We are writing to you on behalf of our clients, the Wetlands Preservation Group (WPG) of West Carleton.

As you know, the Ontario Municipal Board's order in the above-noted matter granted the appeals against By-law 73-89 and repealed said by-law. In the result, golfing is not a permitted use within the wetlands covered by the repealed by-law.

It is our understanding that a golf tournament has been scheduled on the Eagle Creek Golf Course for the weekend of October 13, 1990. As our clients have recently observed and photographed persons playing golf within the wetland, we have reason to believe that golfing is likely to occur within the wetlands during the tournament, contrary to the Board's order and in contravention of the present zoning by-law.

Accordingly, we are writing to request that your client, the Township of West Carleton, investigate this matter and take all necessary steps to ensure that golfing will not occur within the wetland. In addition, we would request that you kindly advise us of the investigation and enforcement actions your client intends to undertake in relation to this

matter. We note that our clients have written directly to the Township Clerk about this situation under separate cover.

We look forward to your reply.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

RDL/sf

c.c. Mr. Phil Reilly, WPG
Mr. David Vickers

The Corporation of the

TOWNSHIP OF
WEST CARLETON

MUNICIPAL OFFICES
3096 CARP ROAD
P.O. BOX 410, CARP, ONTARIO K0A 1L0
TELEPHONE: (613) 839-5644
1-800-267-6234
Toll free within exchange 613
FAX: (613) 839-3291

October 12, 1990

Mr. G.P. Reilly
Chairman, Wetlands Preservation Group
R.R. #2
Kinburn, Ontario
K0A 2H0

Dear Mr. Reilly:

I wish to acknowledge receipt of your letter dated October 11, 1990, regarding a possible zoning infraction in the Constance Creek Wetlands.

In your letter you refer to a golf tournament to be held on October 13, 1990; I have instructed our solicitor to advise the property owners' solicitor that this tournament would result in an infraction to our Zoning By-Law.

I have been advised by our solicitor that the solicitor for the landowners has confirmed that the tournament has been cancelled.

Yours truly,

Bruce Leclaire
Clerk

BL:dl

c.c. --Terry MacHardy, Zoning Administrator
--Carp Valley Press
--Kanata Kourier-Standard
--Mr. Tom Spear, Ottawa Citizen
--Mr. Andrew Haydon, RMOC
--Mr. John Sellars, MNR, Carleton Place
--Hon. Norm Sterling, MPP, Carleton
--Hon. Ruth Grier, MPP, Minister of Environment, Ont.
--Hon. Evelyn Gigantes, MPP, Minister of Health, Ont.
--Mr. Rick Lindgren, Can. Environmental Law Association
--Mr. John Kruger, Ontario Municipal Board
--Hon. Dave Cooke, MPP, Minister of Municipal Affairs, Ont.
--Dr. Philip Byer, Environmental Assessment Advisory Cttee.

November 6, 1990

Dear Member:

I am writing to you at this time to inform you of some of the processes which have been undertaken both prior to and post Ontario Municipal Board decision regarding the Eagle Creek Golf Club development in order to give you comfort, and to dispel any fears or rumours which may be circulating with respect to our ability to golf on the course in 1991.

Firstly I would like to advise you that the subdivision has been registered and that the grading and drainage plans which incorporate all constructed golf holes and drainage ponds are complete. This is of particular importance when one realizes that the four holes and associated pond on the lower section constitute the stormwater management and drainage works for the actual plan of subdivision, which has never been the focus of objection by the main opponents of the development.

It is also of note, that the Ontario Municipal Board decision recognized that the stormwater grading and drainage plans completed by us were appropriate, subject to approval by the Region. Which approval we have obtained by virtue of the registration of the plan of subdivision.

With the registration of the plan by the Minister, we have acquired statutory and legal rights.

Secondly, the effect of the Ontario Municipal Board decision is to repeal By-law 73-1989. The Ontario Municipal Board made no order to prohibit any use. This being said, it is our position that we have acquired legal non-conforming use of the lands which relate to the repealed by-law. This position is supported by our legal counsel and is further supported by Mr. Grant, the planning consultant for the Township of West Carleton, who gave evidence before the Ontario Municipal Board on this subject.

1755 Courtwood Cr.
Ottawa, Ontario K2C 3J2
Office: (613) 225-9041
Site: Office: (613) 832-3804

Section 3(6)(a)(ii) of By-law 266/81 expressly permitted a golf course (excluding a building) on a flood plain when we commenced construction of the golf course. According to our engineers the Constance Creek flood plain extends into the lower four holes and the lower drainage lake.

Thirdly, the forthcoming public meeting before the Environmental Assessment Advisory Committee is not a new development. Instead it is a continuation of a process commenced by objectors to the matter before the Ontario Municipal Board and which already has been the subject of a public meeting earlier this year. The authority of the Committee is simply to make a recommendation to the Minister of the Environment on whether a proposed major commercial or business enterprise or activity should be designated an undertaking under the Environmental Assessment Act and therefore subject to an environmental assessment. Our solicitors have written to the Committee indicating their opinion that the Committee and the Minister of the Environment have no jurisdiction to designate a constructed golf course that forms part of a registered plan of subdivision as such an undertaking, or to review or to change any aspect of the Ontario Municipal Board decision or the decision of the Region to approve final registration of the plan of subdivision.

Finally, in the unlikely event of a challenge and loss whereby we are prevented from using the four holes on the wetlands, R.J. Nicol will undertake to substitute the subject four holes with four holes on contiguous land owned by R.J. Nicol personally. The associated costs of construction will be bourn by R.J. Nicol. Given that the construction of the current four holes and pond has been approved and registered, and given the perception that further environmental damage could occur if we were to exercise our rights to undertake further construction on the contiguous land which is appropriately zoned, we feel confident that sound reason will prevail, and that no further actions will be taken in this matter.

Should you have further questions or concerns please do not hesitate to contact the undersigned.

Yours truly,

Marc Valois
General Manager

DRAFT APPROVED BY THE REGION ON MARCH 3, 1989
REVISED BY THE REGION ON SEPTEMBER 23, 1989

REGIONAL CONDITIONS FOR FINAL APPROVAL
R.J. NICOL CONSTRUCTION LIMITED SUBDIVISION

The Regional Municipality's conditions applying to the approval of the final plan for registration of the R.J. Nicol Construction Limited Subdivision (06T-88018) are as follows:

1. That this approval applies to the attached plan of subdivision prepared by Surrie, Row and Kaserzak, OLS, dated 26 Jan 89, showing a total of 39 lots and one block. A copy of the draft approved plan is on file in the Regional Planning Department for reference purposes.

   The final plan intended for registration shall include as Part of Block 40, the wetland area located in Lot 8, Conc. 5, adjacent to the lot line between Lots 7 and 8. The final plan shall illustrate as its southern boundary, the lot line between Lots 7 and 8, Conc. 5.

2. That the owner shall agree, in writing, to satisfy all the requirements, financial or otherwise, of the Township of West Carleton, including the provision of roads, installation of services and drainage.

3. That, cash-in-lieu of the 5% Parkland conveyance is to be provided to the satisfaction of the Township of West Carleton, pursuant to Section 50 (8) of the Planning Act. Cash-in-lieu shall be paid at the market value of the land immediately prior to draft approval of the Plan, pursuant to Section 50 (9) of the Planning Act.

4. That the owner shall prepare a Hydrogeological study and terrain analysis report to the satisfaction of the Township of West Carleton.

5. That, all streets shall be named to the satisfaction of the Township of West Carleton and the Regional Planning Commissioner.

6. That, prior to the approval of the final Plan, the Regional Municipality is to be advised that the proposed plan of subdivision conforms to a zoning by-law approved under the requirements of the Planning Act.

7. That a grade and drainage report be submitted to the Township of West Carleton and to the Mississippi Valley Conservation Authority for their review and approval.

8. That the owner make a suitable contribution towards the upgrading of the road between Concessions 5 and 6, Torbolton, as determined by the Township of West Carleton. This shall be to the satisfaction of the Township of West Carleton.

9. That, the owner, his successors, and assigns in title, shall agree that the approval of the country lot subdivision is on the basis of the approved number of lots and that the creation of additional lots is not in keeping with the nature of the development.

10. That, such easements and maintenance agreements as may be required for electrical, gas, water, sewer, telephone and cablevision facilities, shall be provided and agreed to by the

owner to the satisfaction of the appropriate authorities; and that the owner shall ensure that these easement documents are registered on title prior to the registration of the final plan and the affected agencies are duly notified.

11. That, the owner shall be required, in the subdivision agreement with the Township of West Carleton, to coordinate the preparation of an overall utility distribution plan showing the location (shared or otherwise) and installation, timing and phasing of all required utilities (on grade, below-grade or above-grade) through liaison with the appropriate electrical, gas, water, sewer, telephone and cablevision authorities and including on-site drainage facilities; such location plan being to the satisfaction of all affected authorities.

12. That, prior to the final approval of the subdivision plan, a site drainage plan shall be submitted for review by the Ministry of the Environment. Provision shall be made in the subdivision agreement with the Township of West Carleton for implementation of a acceptable drainage plan.

13. That, the owner shall include statements in the subdivision agreement with the Township of West Carleton and in the Offer of Purchase and Sale Agreements with prospective lot purchasers, in wording acceptable to the Ministry of the Environment, advising:

    a. That raised tile beds may be required and that lots shall be made suitable for the installation of sewage systems prior to or at the building permit stage to the satisfaction of the Ministry of the Environment in accordance with Ontario Regulation 374/81 made under the Environmental Protection Act;

    b. That the report prepared by Oliver, Mangione, McCalla and associates entitled "Hydrogeology and Terrain Analysis Report" dated June 1988, will be made available to lot purchasers as a guide to development;

    c. That wells shall be located and constructed in accordance with the recommendations of the hydrogeological report;

    d. That there is a potential for encountering poor quality water in wells with increased depth.

14. That, no dredging, infilling or any other alterations occur within the boundary of the Class 1, Constance Creek Wetland, as established by the Ministry of Natural Resources. This shall be to the satisfaction of the MNR.

15. That, the final grading of any golf course development shall direct surface water drainage away from Constance Creek and the Class 1 Wetland area as defined by the MNR. This shall be to the satisfaction of the MNR.

16. That, the owner shall include statements in the subdivision agreement with the Township of West Carleton and in all Offer of Purchase and Sale Agreements with prospective lot purchasers, in wording acceptable to the MNR advising that a sandpit operation may be established nearby in Lot 7, Con. 5.

17. That, the owner shall include a statement in all offer of purchase of sale agreements that school accommodation problems exist in the Carleton Board of Education Elementary School

designated to serve this area. This shall be to the satisfaction of the CBE.

18. That, if the Regional Municipality has not given final approval of this plan within three years following the date of the Regional Municipality's draft approval, the draft approval shall lapse.

19. That, prior to the signing of the final plan by the Region, the Regional Planning Department shall be assured that the Processing Fee, as prescribed in RMOC By-law 32 of 1985, has been paid in full to the satisfaction of the Region.

20. That, the Regional Subdivision Agreement shall contain a requirement that the owner, his heirs, successors, and assigns agree to pay to the Regional Municipality, the Regional Development Charges (lot levies) following registration of the plan and prior to the issuance of building permits in accordance with the Regional Development Charges policy approved by Regional Council on 14 Aug 85. The effective RDC rate shall be those in existence at the time of application to pay the Regional Development Charge.

21. That, the subdivision agreement with the Township of West Carleton shall contain a requirement that the owner, his heirs, successors and assigns agree to pay to the Region, the Regional Development Charges (lot levies) following registration of the plan and prior to the issuance of any building permits; and that the Township of West Carleton will not issue any building permits until such development charges are paid; all in accordance with the Regional Development Charges Policy approved by Regional Council on 14 Aug 85.

22. That, prior to the signing of the final plan by the Region, the Regional Planning Department shall be advised by the Township of West Carleton that Conditions 2 through 11 and Conditions 28 and 29, have been carried out to its satisfaction. The clearance letter from the Township shall include a brief but complete statement indicating how each condition has been satisfied.

23. That, prior to the signing of the final plan by the Region, the Regional Planning Department shall be advised by the MOE that Conditions 12 and 13 have been met to its satisfaction.

24. That, prior to the signing of the final plan by the Region, the Regional Planning Department shall be advised by the MNR that Conditions 14 through 16 inclusive have been met to its satisfaction.

25. That, prior to the signing of the final plan by the Region, the Regional Planning Department shall be advised by the CBE that Condition 17 has been met to its satisfaction.

26. That, prior to the signing of the final plan by the Region, the Regional Planning Department shall be advised by the MVCA that Condition 7 has been met to its satisfaction.

27. That, prior to the signing of the final plan, the Region shall be ensured that Conditions 5, and 19 through 21 have been carried out to its satisfaction.

28. That the owner agrees, by way of the subdivision agreement, to implement the recommendations contained in the Environmental Appraisal report prepared by P.D. Niblett & Assoc., dated July 1989.

29. That the Study referred to in Recommendation No. 3 of the said Environmental Appraisal report be completed and submitted to the Township of West Carleton for approval prior to implementation and final approval of the subdivision.

APPENDIX C

Province of Ontario

Document General

Form 4 — Land Registration Reform Act, 1984

D

FOR OFFICE USE ONLY

69754

CERTIFICATE OF RECEIPT

'90 10 23 14 35

GAIL BOWESS
ASSISTANT DEPUTY LAND REGISTRAR

(1) Registry ☐ Land Titles ☒ (2) Page 1 of 8 pages

(3) Property Identifier(s) Block Property Additional See Schedule ☐

(4) Nature of Document APPLICATION TO REGISTER NOTICE OF AN UNREGISTERED ESTATE, RIGHT, INTEREST OR EQUITY (Section 74 of the Act)

(5) Consideration

Dollars $

(6) Description

Firstly and 48-1 and 49-1 and Blocks 48 and 49,

Parcels 1-1 to 39-1, both inclusive, Section 4M-770, being Lots 1 to 39, both inclusive, Plan 4M-770, formerly in the Township of Torbolton, now in the Township of West Carleton in the Regional Municipality of Ottawa-Carleton.

CON'T ON SCHEDULE

New Property Identifiers Additional See Schedule ☐

Executions Additional See Schedule ☐

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch ☐ (b) Schedule for: Description ☒ Additional Parties ☐ Other ☒

(8) This Document provides as follows:

THE CORPORATION OF THE TOWNSHIP OF WEST CARLETON has an unregistered estate, right, interest or equity in the land registered in the name of R. J. Nicol Homes Limited as Parcels 1-1 to 39-1, both inclusive in the register for Section 4M-770 and Parcel 1-1 in the register for Section 4M-769, hereby applies under Section 74 of the Land Titles Act for the entry of a Notice of a Covenant Agreement in the register for the said parcels.

Copy of Covenant Agreement is attached.

Continued on Schedule ☐

(9) This Document relates to Instrument number(s)

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y M D
R. J. NICOL HOMES LIMITED	R. J. NICOL, PRESIDENT	1990 10 10

(11) Address for Service 1775 Courtwood Avenue, Ottawa, Ontario K2C 3J2

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y M D
THE CORPORATION OF THE TOWNSHIP OF WEST CARLETON	Per: Eric K. Craig - Mayor	90 10 16
	Per: Monica Ceschia - Deputy Clerk	90 10 16

(13) Address for Service P.O. Box 410, Carp, Ontario K0A 1L0

(14) Municipal Address of Property: Multiple

(15) Document Prepared by:

Janet E. Bradley
c/o Soloway, Wright
99 Metcalfe Street
Ottawa, Ontario
K1P 6L7
JEB/km 1254-1260

FOR OFFICE USE ONLY

Fees and Tax	
Registration Fee	25 00
8 x parcels	
Total	

10174 (12/84)

Province of Ontario

Schedule

Form 5 — Land Registration Reform Act, 1984

47. S

Page 2

Additional Property Identifier(s) and/or Other Information

Secondly, Parcel 1-1, Section 4M-769 being Block 1, Plan 4M-769 formerly in the Township of Torbolton, now in the Township of West Carleton in the Regional Municipality of Ottawa-Carleton.

FOR OFFICE USE ONLY

10178 (12/84)

COVENANT AGREEMENT

THIS AGREEMENT made in triplicate this ~~25th~~ 10th day of ~~September~~ OCTOBER, 1990.

BETWEEN:

R.J. NICOL HOMES LIMITED

hereinafter called the "Owner"

OF THE FIRST PART

AND:

THE CORPORATION OF THE TOWNSHIP OF WEST CARLETON

hereinafter called the "Township"

OF THE SECOND PART

WHEREAS the Owner and the Township have entered into a Subdivision Agreement dated September 25, 1990 and registered in the Land Registry Office No. 4 for the Land Titles Division of Ottawa-Carleton as Instrument No. 697553 with respect to the development of certain land by way of Plans of Subdivision registered as No. 4M-769 and 4M-770 including the land more particularly described in Schedule "A" hereto annexed;

AND WHEREAS to assure that certain covenants and restrictions contained in the Subdivision Agreement come to the attention of all future owners of the land described in the attached Schedule "A" so that they will be aware of the restrictions and covenants of the Subdivision Agreement, which are binding on them, the parties have agreed to enter into this Agreement.

NOW THEREFORE this Agreement witnesseth that in consideration of the sum of $1.00 of lawful money of Canada and the mutual covenants hereinafter expressed, the Owner and the Township covenant and agree as follows:

1. The Township shall not be under any obligation to issue a building permit and the Owner acknowledges that it is not entitled to a building permit until the road in front of the lots has been brought to top of base course asphalt, the road has been connected by roads of a similar state of completion to the Township road and such drainage work as is required by the Township Engineer has been completed.

2. The Owner agrees that if any damage is caused to any of the works located on land within the Plans as the result of any act or omission on the part of the Owner, the Owner shall repair

such damage or be proceeding diligently to repair such damage within a period of seven (7) days after notice from the Township and the Owner agrees that in default thereof the Township may enter upon the land for the purpose of so doing and may recover the cost thereof together with an amount equal to fifteen percent (15%) of that cost as a fee for supervision and an amount equal to ten percent (10%) of that cost as a fee for administration, all as municipal taxes under Section 325 of the Municipal Act.

3. The Owner agrees that he will not alter the slope of the lands described herein or interfere with any drains established on the said lands except in accordance with the established Grade Control Plan, without the written consent of the Township Engineer. In addition, the Owner agrees to maintain that part of its land subject to a specific drainage easement free of buildings or other structures or new shade or ornamental trees.

4. The Township shall not be under any obligation to issue a building permit and the Owner acknowledges that it is not entitled to a building permit until a $500.00 deposit has been delivered to the Township to be held by the Township until such time as a lawn lamp is installed to the satisfaction of the Township at which time the deposit will be returned. In the event that the lawn lamp is not installed within one (1) year from the issuance of a Certificate of Occupancy, the Township shall have the right to enter upon the land to install a lawn lamp and deduct the cost from such deposit.

5. The Owner acknowledges that he has been made aware that raised tile beds may be required and that lots must be made suitable for the installation of sewage systems prior to or at the building permit stage to the satisfaction of the Ministry of the Environment or its agents in accordance with Ontario Regulation 374/81 made under the Environmental Protection Act.

6. The Owner acknowledges that he has been made aware that wells must be constructed and located in accordance with recommendations in the Hydrogeological Report attached as Schedule "U" to the Subdivision Agreement and that there is a potential for encountering poor quality water in wells with increased depth.

7. The Owner acknowledges that the planned nature of the subdivision is based on the approved number of lots and covenants and agrees that there will be no division of the lots by

severance.

8. The Owner acknowledges and agrees to advise subsequent purchasers that a sandpit operation may be established nearby in Lot 7, Concession 5.

9. The Owner acknowledges and agrees to advise subsequent purchasers that school accommodation problems exist in the Carleton Board of Education's Elementary School designated to serve this area. At the present time, the problem is being addressed by the utilization of portable classrooms. This problem will not be resolved until such time as additional pupil places can be made available.

10. The Township shall not be under any obligation to issue a building permit and the Owner acknowledges that he is not entitled to a building permit until subdivision development charges have been paid to the Township and Regional Development Charges have been paid to the Regional Municipality of Ottawa-Carleton.

11. The Owner acknowledges that he has been made aware that driveway culverts shall be supplied and installed by the Township if required, at the expense of the Owner and that the Owner shall be required to apply for and pay for an entrance permit prior to being issued a building permit.

12. The Owner acknowledges that he must provide and place in a conspicuous position on the lot and on one (1) building or structure on each lot in the subdivision, a street number as designated by the Township Engineer that is visible from the street in front of the said building or structure. It is further acknowledged that prior to the issuance of a Certificate of Occupancy the Owner shall provide and place such number as designated on the buildings or structures.

13. The Owner acknowledges that all trees and shrubs existing on the lots shall be saved from destruction during construction, where possible.

14. The Owner acknowledges that ground source heat pumps and air conditioners are not allowed in this Subdivision.

15. The Owner acknowledges that each prospective purchaser of any lot within the subdivision shall receive a copy of this

agreement, prior to the execution of the Agreement of Purchase and Sale.

16. The Owner agrees to implement the recommendations contained in the Environmental Appraisal Report prepared by P.D. Niblett and Associates dated July, 1989 which is attached to the Subdivision Agreement as Schedule "V".

17. The Owner of Block 1, Plan M-769 shall landscape Blocks 48 and 49, Plan 4M-~~788~~769 and shall be fully responsible for their maintenance and upkeep.

18. The Owner agrees to convey Blocks 48 and 49, Plan 4M-770 with Block 1 on Plan 4M-769 and Parts 1 and 2 on Plan 4R-754, the intent being that these parcels shall always remain in the same ownership.

19. The Owner acknowledges that covenants not referred to herein or in the Subdivision Agreement, by-laws of the Township or the Ontario Building Code shall not be enforced by the Township.

20. If there is more than one (1) owner or the Owner is a male or female person or a corporation this Agreement shall be read with all grammatical changes appropriate by reason thereof and all covenants and liabilities and obligations shall be joint and several.

21. The Owner shall not call into question directly or indirectly in any proceeding whatsoever, in law or in equity, or before any administrative tribunal, the right of the Township to enter into this Agreement and to enforce each and every term, covenant and condition herein contained.

22 In all respects, if there is any conflict between the provisions of this Agreement and the said Subdivision Agreement, the provisions of the Subdivision Agreement shall be deemed to prevail.

23. This indenture and everything herein contained shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF the Owner has hereunto affixed its

corporate seal as attested to by its authorized signing officer and the Corporation of the Township of West Carleton has hereunto affixed its corporate seal duly attested to by its Mayor and Clerk.

SIGNED, SEALED AND DELIVERED)
in the presence of)
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PER: _____
R.J. NICOL HOMES LIMITED

R. J. NICOL, PRESIDENT

THE CORPORATION OF THE TOWNSHIP OF WEST CARLETON

PER: _____
Eric K. Craig - Mayor

PER: _____
Monica Ceschia - Deputy Clerk

00733-90.313

SCHEDULE "A"

DESCRIPTION TO WHICH THIS AGREEMENT APPLIES

FIRSTLY:

Lots 1 to 39 both inclusive, on Plan 4M-770 registered in the Land Registry Office (No. 4) for the Land Titles Division of Ottawa-Carleton at Ottawa.

Being the whole of Parcels 1-1 to 39-1 inclusive in the Register for Section 4M- 770 .

SECONDLY:

Blocks 48 and 49 on Plan 4M-770 registered in the Land Registry Office (No. 4) for the Land Titles Division of Ottawa-Carleton at Ottawa.

Being the whole of Parcels 48-1 and 49-1 in the Register for Section 4M-770 .

THIRDLY:

Block 1, Plan 4M-769 registered in the Land Registry Office (No. 4) for the Land Titles Division of Ottawa-Carleton at Ottawa.

Being the whole of Parcels 1-1 in the Register for Section 4M- 769 .

ORIGINALLY:

PARCEL REGISTER

RECENTLY:

LAND TITLES DIVISION OF OTTAWA-CARLETON (No. 4)

ESTATE: FEE SIMPLE TITLE: ABSOLUTE

SUBJECT TO, THE RESERVATIONS, LIMITATIONS, PROVISOES AND CONDITIONS EXPRESSED IN THE GRANT FROM THE CROWN, AS VARIED BY STATUTE. THE OVERRIDING PROVISIONS OF THE LAND TITLES ACT AND OF ANY OTHER ACT, AND THE ENCUMBRANCES RECORDED BELOW.

PAGE 1

PARCEL 8-1

SECTION WEST - CARLETON-4 (TORBOLTON)

54.

SUBJECT TO SUBSEQUENT ENTRIES THIS PARCEL COMPRISES THE FOLLOWING LAND

LEGAL DESCRIPTION: In the Township of West Carleton, in The Regional Municipality of Ottawa-Carleton, being composed of:

Firstly: Lot 8 in Concession 5 of the Geographic Township of Torbolton, designated as PARTS 1, 4 and 5 on Reference Plan 4R-7026 .

Secondly: part of Lot 8 in Concession 4 of the Geographic Township of Torbolton designated as PARTS 2 and 3 on Reference Plan 4R-7026 .

REGISTRATION NUMBER	INSTRUMENT	REGISTRATION DATE DAY MONTH YEAR	GRANTOR	GRANTEE APPLICANT CAUTIONER CLAIMANT ETC	CONSIDERATION ETC	LAND - REMARKS - SIGNATURE
#486837 See 637997 L.T.	Demand Debenture	04 05 ~~90~~ 89 Amended 17/10/90		THE ROYAL BANK OF CANADA	$12,500,000	
D5213-4-588	Application	29 Sep 1989		R.J. NICOL HOMES LIMITED (OWNER)		LAND REGISTRAR

APPROVED FOR FIRST REGISTRATION UNDER THE LAND TITLES ACT

DEPUTY DIRECTOR OF LAND REGISTRATION

DATE Sept 25, 1989

~~690036~~ ~~LIEN~~ ~~18 Sep 1990~~ ~~GREENLAWN LANDSCAPING~~ ~~$37,508.20~~

Deleted under 695718 ~~LIMITED~~ L.R.

L.R.

RE-ENTRY 12 Oct 1990 Part of the above parcel being part of Lot 8, Concession 5, designated as Parts 1 and 5 on Plan 4R-7026, laid out by Plan 4M-769, now parcel Plan-1, Section 4M-769. L.R.

APPENDIX D

FORM LT-4-M

	INSTRUMENT	REGISTRATION DATE DAY MONTH YEAR	GRANTOR	GRANTEE APPLICANT(S) AUTHORIZED CLAIMANT ETC.	CONSIDERATION ETC.	LAND - REMARKS - SIGNATURE
	RE-ENTRY	90 10 12	Part of the above parcel being part of Lot 8, Concession 5, Designated as Part of Parts 1 and 5 on Plan 4R-7026, laid out by Plan 4M-770, now parcel Plan-1, Section 4M-770.			L.R.
4R-7514		18 Oct 1990				Lays out part of the above parcel as Parts 1 and 2 thereon. L.R.
697558	EASEMENT	23 Oct 1990		THE CORPORATION OF THE TOWNSHIP OF WEST CARLETON	$1.00	Over Parts 2 and 3 on Plan 4R-7026 and Parts 1 and 2 on Plan 4R-7514. L.R.

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