

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: April 16, 2018

CASE NO(S): PL141006

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Ellen Boyce
Appellant:	Suzanne Boyce
Appellant:	Carefree RV Resorts (Hidden Valley Park)
Appellant:	Gerry Livingston; and others
Subject:	By-law No. 1-Z-2014
Municipality:	Norfolk County
OMB Case No.:	PL141006
OMB File No.:	PL141006
OMB Case Name:	Boyce v. Norfolk (County)

Heard: January 8 - 12, 2018 in Simcoe, Ontario

APPEARANCES:

Parties

Counsel

Ellen and Suzanne Boyce

B. Duxbury

County of Norfolk (“County”)

P. Tice

Ministry of Municipal Affairs (“MMA”)

K. Hare
J. Davidson (student-at-law)

Mary Weber

N. Smith

Howard Jerome, Laura Jerome,

T. Richardson

Richard Hamel, Jean Hamel,
Chris Waite, Michael Neely and
Stephen Corke

DECISION DELIVERED BY BLAIR S. TAYLOR AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The interface between existing development and (newer) public policy is fraught with conflict.

[2] On one hand there is reliance on old approvals previously given, and on the other hand, the expectation of the implementation of newer public policy designed to advance land use planning and mitigate against personal and property loss.

[3] This is one such case.

BACKGROUND

[4] In 2014, the County passed a new Comprehensive Zoning By-law No. 1-Z-2014 (“CZB”) and there were a number of appeals. The Tribunal is now dealing with one of the last outstanding appeals which relates to the zoning of Hastings Drive.

[5] Hastings Drive is located on the shore of Lake Erie. If one were to drive south on Highway 59 and come to Lake Erie, one would turn right to access Hastings Drive or continue to the left onto the 40 kilometer spit of land extending into Lake Erie known as Long Point and upon which there is a Long Point community.

[6] This appeal deals with Lots 66 and 67 on Registered Plan 206 (dating from 1938) and Lots 1 to 149 on Registered Plan 251 (dating from 1954) (“Subject Lands”) all on the western portion of Hastings Drive.

[7] The Official Plan designates the Subject Lands as Hazard Lands and Provincially Significant Wetland (“PSW”). The CZB retained the 1985 zoning for the Subject Lands as Hazard Land where no residential development is permitted. The purpose of retaining the 1985 zoning was to enable the County to undertake a zoning study for Hastings Drive.

[8] The Hastings Drive Zoning Study area included all of the Subject Lands.

CONTEXT

[9] Starting at Highway 59 and moving westerly along Hastings Drive, on that eastern portion of Registered Plan 206, there are lakefront cottages: about 14 or so on the south side of Hastings Drive, and about 5 on the north side of Hastings Drive, (not part of the Subject Lands).

[10] Commencing at Lots 66 and 67 on Registered Plan 206, the lots appear to be entirely water lots, as do Lots 1 and 2 on Registered Plan 251.

[11] Lots 3 to 17 are partial water lots, vacant and owned by the County. One encounters the first cottage owned by Ellen Boyce at Lots 18 and 19, then at Lots 29 and 30 there is the cottage owned by Suzanne Boyce, and then it is at or about Lots 79 and 80 where there are a number of cottages in a row. Commencing at about Lot 94 through to Lot 120, the lots are vacant and owned by the County. At Lot 121, there appears to be a cottage, and at Lot 125 there appears to be another cottage, with the last cottage being at Lot 143. In total, the Tribunal is advised that there are 24 private cottages, all of which are on the south side of Hastings Drive, 47 vacant lots owned by Norfolk County, and the remaining vacant lots (about 75) are in private ownership.

LEAD-UP TO THE HEARING

[12] In the lead-up to the hearing, there is a proposed Draft Order agreed upon by MMA, the County and Ms. E. Boyce and Ms. S. Boyce, (Exhibit 17, Tab 15) which put briefly, would allow two uses for the Subject Lands:

- a) public park as defined for the purpose of this special provision as lands owned and/or operated by the County of Norfolk, Long Point Region conservation Authority or other government agency provided there are no *buildings* or *structures* located thereon;
- b) day use, which is defined as being personal use and enjoyment of a vacant lot for a day, which may include launching boats.

[13] This proposed Draft Order is opposed by the clients of Mr. Richardson and Ms. Smith on the grounds *inter alia* that it constitutes down zoning for which compensation should be made available, that it is premature to finalize the zoning at this time as the County is in the process of doing its current Five Year Official Plan Review, and in the alternative, that the concept of day use should explicitly permit trailers and tents as a component of day use. Additionally a number of the participants would seek either full development rights or the seasonal use of a trailer.

[14] At its essence this case revolves around what development and site alteration is appropriate for Hastings Drive.

LEGAL NON-CONFORMING USES

[15] Nothing in this Decision should be read as directly or indirectly relating to any specific site or specific use that may be legal non-conforming. Legal non-conforming uses are dealt with on a site by site basis. This Decision does not deal with individual sites and does not make any decision on their status.

DECISION

[16] For the reasons set out below, the Tribunal will allow the appeal in part and the Tribunal will modify the zoning as set out in the Draft Order at Exhibit 17, Tab 15.

ENVIRONMENTAL CONTEXT

[17] The Subject Lands are located in the Long Point area of Ontario.

[18] This area is agreed upon by all the parties as being one of the most unique environmental areas in Ontario.

[19] The Long Point National Wild Life Area was designated as a World Biosphere Reserve by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) in 1986. The Long Point Biosphere Reserve has been recognized as a globally significant bird area by Bird Life International.

[20] Hastings Drive itself is adjacent to the Big Creek National Wild Life Area which is identified by Ministry of Natural Resources and Forestry (“MNR”) as a Provincially Significant Coastal Wetland and the Big Creek National Wild Life Area shelters a number of species at risk including endangered species.

[21] Hastings Drive and the Subject Lands are within the Big Creek floodplain. A number of storms have caused significant flooding, erosion and property damage over the years: notably Hurricane Hazel in 1954, and the “big storm” of 1985.

[22] Portions of Long Point have been identified as PSW. As well, Long Point and the Subject Lands are identified as an area of natural and scientific interest (“ANSI”).

[23] At Hastings Drive and more specifically at the Subject Lands, is a beach front area at the base of Long Point along the Lake Erie shore line. It is elevated a few feet above the water level located between the PSW to the north and Lake Erie to the south.

[24] The Subject Lands are a dynamic beach within the definition of the Provincial Policy Statement (“PPS”).

[25] No expert opinion evidence was called with regard to any of the natural or environmental features or classifications for the Subject Lands, as all the environmental and natural heritage matters were agreed upon.

LAND USE PLANNING CONTEXT

[26] The Tribunal heard expert land use planning evidence from four land use planners: Mary Elder on behalf of the County, Erick Boyd on behalf of MMA, Pierre Chauvin from MHBC Planning Urban Design & Landscape Architecture (“MHBC Planning”) who had prepared the County’s Hastings Drive Zoning Study, and Mike Crough on behalf of Mary Weber.

[27] As required by the Tribunal, the land use planning experts had met and prepared an Agreed Statement of Fact which is set out below:

Matters in Agreement with Expert Planners:

1. Main map exhibits – agreement on all PPS Natural Heritage and Natural Hazard layers in the draft mapping, subject to fine-tuning the Hazard Land layer, and Dynamic Beach Hazard layer (updated information has been provided by Long Point Region Conservation Authority).
2. Relevant PPS policies – Natural Heritage policies in section 2.1, and Natural Heritage policies in section 3.1 in the Draft Order.
3. PPS – No site alteration or development permitted on Hastings Drive.
4. Norfolk Official Plan policies and designations – No development is permitted on Hastings Drive.
5. Existing Norfolk Zoning By-law – Does not permit trailers on Hastings Drive.

6. Status of legal nonconforming uses on Hastings Drive – Beyond the scope of the OMB hearing, would need to be addressed on a site by site basis.

Matters in Dispute with Expert Planners:

7. Mary Elder (County), Pierre Chauvin (County Planning Consultant), Kevin Eby (Planner), Erick Boyd (Ministry Planner) – No site alteration or development on Hastings Drive means buildings, structures and trailers are not permitted.
8. Mike Crough (Planner) – no site alteration or development on Hastings Drive means buildings and structures are not permitted but trailers could be permitted.

OFFICIAL PLAN

[28] The County's Official Plan in the land use schedule B-12 designates the Subject Lands as Hazard Lands, but with a specific notation to s. 4.3.3.1.

[29] Under the Hazard Lands designation, s. 4.3.2 deals with land use policies which states in part:

- (a) Development on Hazard Lands which would aggravate or contribute to the hazard shall not be permitted.
- (b) There are areas of extensive development located on hazard lands. In these areas, a reasonable compromise shall be made between the extent of the hazard and the continued use and future development of the area...

[30] Section 4.3.2.2 deals with shoreline policies which states in part that:

- (a) The shoreline of Lake Erie is subject to naturally fluctuating lake levels, seiche episodes, regular wave action and storms. Development will generally be directed to areas outside the furthest landward of the dynamic beach hazard limit, the flood hazard limit and the erosion hazard limit.
- (b) Development and site alteration shall not be permitted within:
 - (i) the dynamic beach hazard; and

- (ii) areas that would be rendered inaccessible to people and vehicles during times of flooding hazard, erosion hazard, dynamic beach hazards, and/or other water related hazards, unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard.

[31] Finally, there is s. 4.3.3.1—Hastings Drive Site Specific Policy Area. It states that:

On lands designated Hazard Lands – Site Specific Policy Area 4.3.3.1 on Schedule “B” to this plan, no new development shall be permitted.

ZONING BACKGROUND

[32] As noted above, the County undertook a Comprehensive Zoning By-law Review which led to the adoption of its new CZB. The CZB replaced the four former zoning by-laws with one new County-wide CZB.

[33] The 1985 zoning for Hastings Drive (By-law 1-NO-85) was retained in order to undertake the Hastings Drive Zoning Study (including the Subject Lands).

[34] The Hastings Drive Zoning Study was carried out by MHBC Planning and Mr. Chauvin was the lead planner.

[35] The Hastings Drive Zoning Study is found at Exhibit 17, Tab 21. The study considered a complete range of options from: no development to full development with single detached residences. The study recommended a draft zoning by-law which is partially set out below:

14.911 In lieu of the uses *permitted* in the HL *Zone*, only the following uses shall be permitted:

- a) legally *existing uses* which for the purposes of this Special Provision means an *existing vacation home*, in accordance with Section 3.24, Non-Conforming Uses, of this By-law;
- b) as an accessory use to an *existing vacation home* listed in subparagraph a) above, overnight parking and storage of

vehicles, which for the purposes of this Special Provision does not include a farm implement, *mobile home* or *recreational vehicle*, but may include watercraft, boats, and marine craft;

- c) public *park*, provided there are no *buildings* or *structures* located thereon;
- d) day use, which is defined as being personal use and enjoyment of a vacant lot for a day, which may include a private boat launch, and does not include any *buildings* or *structures* located thereon or any site alteration and shall not include any overnight storage or parking. "*Day*" shall be defined for the purposes of this subsection as being from 0500 hours (5:00 a.m.) until 2300 hours (11:00 p.m.) as part of each calendar day.

The following uses shall be prohibited and are listed for the purposes of clarity and to avoid any confusion, and such prohibited uses are in addition to all other uses that are not *permitted* uses listed above:

- i. overnight parking and storage of all types of *vehicles* except as accessory to a legally *existing* use as set out in subparagraph b) above;
- ii. Overnight accommodation in all types of *vehicles*, trailers, and tents;
- iii. *tent* and *trailer* park.

[36] The Hastings Drive Zoning Study (with its recommended draft by-law) was taken to County Council. The minutes of the May 10, 2016 County Council meeting note that staff were directed by County Council to bring back a report outlining options for development on Hastings Drive that included Option 5 (permit recreational vehicles/trailers seasonally) and Option 7 (permit single detached residences).

[37] On May 26, 2016, County Council received legal advice and Option 7 was not pursued.

[38] County Council did pass By-law No. 47-Z-2016 at the July 12, 2016 Council meeting, which repealed By-law No. 1-NO-85 for the Subject Lands and enacted new zoning provisions for the Subject Lands permitting legally existing uses, a public park,

and seasonal camping in a travel trailer for personal use only (seasonal being April 1 to October 31) and also permitting a dock, pier, or wharf (Exhibit 4).

[39] With appeals to the Tribunal filed against By-law No. 47-Z-2016, County Council on December 13, 2016 repealed By-law No. 47-Z-2016 by By-law No. 2016-132.

[40] The Tribunal notes that during the agency circulation process concerning the Hastings Drive Zoning Study, comments were received from Emergency Medical Services stating: “as always we continually struggle with access and egress problems to remote areas such as Hastings Drive especially during the winter months”. And the Fire and Rescue Services stated: “Fire would not go down road if flooded due to the concern of the road being washed out. Would wait for roads and a front end loader to make sure road is passable and to remove any obstacles”.

[41] In the lead up to the hearing, the Draft Order as found at Exhibit 17, Tab 15 was agreed to by Ms. E. Boyce, Ms. S. Boyce, MMA and the County.

POLICY REGIME

[42] Land use planning in the Province of Ontario is a policy-led system established through the provisions of the *Planning Act*, the PPS, and various Provincial plans.

[43] It is a “top-down” system as the Province of Ontario sets out by statute and by provincial policy, the planning direction for Ontario and its municipalities.

Planning Act

[44] Section 1.1—Purposes of the *Planning Act* include:

(b) to provide for a land use planning system led by provincial policy.

[45] Section 2 outlines the matters of provincial interest which include:

(a) the protection of ecological systems including natural areas, features and functions;

...

(h) the orderly development of safe and healthy communities;

...

(o) the protection of public health and safety; and

(p) the appropriate location of growth and development.

[46] Section 3 provides that the Minister may from time to time issue policy statements and s. 3.5 states that:

a decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission, or agency of the government, including the Municipal Board in respect of the exercise of any authority that affects a planning matter, (a) shall be consistent with the policy statements issued under subsection 1...

[47] A municipality's zoning authority comes pursuant to s. 34(1) of the *Planning Act* which states in part:

Zoning By-laws may be passed by the councils of municipalities:

1. Restricting the use of land;

For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality...;

3. Marshy lands etc.;

For prohibiting the erection of any class or classes of buildings or structures on land that is subject to flooding or on land with steep slopes or that is rocky, low-lying, marshy, unstable, hazardous, subject to erosion or natural or artificial perils.

3.2 Natural features and areas;

For prohibiting any use of land and the erecting, locating or using of all or any class or classes of buildings or structures within any defined area or areas,

- (i) that is a significant wild life habitat, wetland, woodland, ravine, valley or area of natural or scientific interest;
- (ii) that is a significant corridor or shoreline of a lake, river or stream;
- (iii) that is a significant natural corridor, feature or area.

[48] Subsection 34(4) provides this definition for purposes of interpretation:

A trailer is defined in subsection 164(4) of the *Municipal Act 2001* or subsection 3(1) of the *City of Toronto Act, 2006*, as the case may be, and a mobile home as defined in section 46(1) of this Act are deemed to be buildings or structures for the purpose of this section.

[49] In s. 46(1):

mobile home means any dwelling that is designed to be made mobile, and constructed or manufactured to provide a permanent residence for one or more persons, but does not include a travel trailer or tent trailer or trailer otherwise designed.

[50] Section 164(4) of the *Municipal Act 2001* defines trailer as:

Trailer means any vehicle constructed to be attached and propelled by a motor vehicle and that is capable of being used by persons for living, sleeping or eating, even if the vehicle is jacked-up or its running gear is removed.

PROVINCIAL POLICY STATEMENT (PPS)

[51] The PPS (2014) came into effect on April 30, 2014. Its Preamble states that the PPS provides policy direction on matters of provincial interest relating to land use planning and development as a key part of Ontario's policy-led planning system. The PPS sets the policy foundation for regulating the development and use of land.

[52] It further states that the PPS provides for appropriate development while protecting resources of provincial interests, public health and safety, and the quality of the natural and built environment.

[53] Moving to the Vision for Ontario's land use planning system, Part 4 of the PPS provides this:

The Province must ensure that its resources are managed in a sustainable way to conserve bio-diversity, protect essential ecological processes and public health and safety, provide for the production of food and fiber, minimize environmental and social impacts, and meet its long term needs.

It is equally important to protect the overall health and safety of the population. The Provincial Policy Statement directs development away from areas of natural and human made hazards. This preventive approach supports provincial and municipal financial well-being over the long term, protects public health and safety, and minimizes costs, risk and social disruption.

Taking action to conserve land and resources avoids the need for costly remedial measures to correct problems and support economic and environmental principles.

[54] Section 3.0 of the PPS is entitled Protecting Public Health and Safety and it states in part that development shall be directed away from areas of natural or human made hazards where there is an unacceptable risk to public health or safety or of property damage and not create new or aggravate existing hazards. More specifically s. 3.1.2 states:

Development and site alteration shall not be permitted within:

- (a) the dynamic beach hazard;
- (b) areas that would be rendered inaccessible to people and vehicles during times of flooding hazards, erosion hazards, and/or dynamic beach hazards, unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard.

[55] Section 4.7 states that the official plan is the most important vehicle for the implementation of the PPS.

[56] Finally with regard to the PPS there are two definitions important for this decision: Development and Site Alteration.

Development is defined in the PPS as: means the creation of a new lot, a change in land use, or the construction of buildings or structures requiring approval under the *Planning Act* ...

Site Alteration is defined as: means activities such as grading, excavation and placement of fill that would change the land form and natural vegetative characteristics of a site.

SHORELINE MANAGEMENT PLAN

[57] In April 1986, a Provincial Shoreline Management Review Committee was appointed to study the long term management of the Great Lakes Shoreline and its report was submitted to the then Ministers of Municipal Affairs and Natural Resources. In response, the provincial government designated conservation authorities as the agents responsible for implementing the provincial shoreline policies and overseeing the preparation of shoreline management plans. These plans were to be developed in accordance with provincial guidelines which identified the two major goals as firstly to minimize the injury to life and property damage from flooding, erosion and associated hazards along the shore land and secondly to ensure that shoreline development adequately addresses flooding and erosion hazards through accommodation of public and private management and development alternatives.

[58] In December 1989, the Long Point Region Conservation Authority's Shoreline Management Plan ("SMP") was published (see extracts at Exhibit 17 Tab 8).

[59] It covered the entire Lake Erie shoreline that the conservation authority had under its jurisdiction. That included a number of Townships and a study area of over

170 kilometers long. Within the various detailed study zones, more specific sectors were identified as “reaches”.

[60] The SMP identified Long Point Village as a detailed study zone and Hastings Drive as a reach, and said this about Hastings Drive:

Reach 1, Hastings Drive, is the area which has suffered the most intensive damage in recent years. This was particularly evident in the December 2, 1985 storm. The spit in this reach is extremely narrow, many of the cottages are reported to be located on the road right-of-way because the actual properties are partly or completely submerged. The access road and the existing properties are protected from wave attack by various types of structures. The roadway is primarily protected by concrete rubble whereas most cottages are protected by some forms of concrete wall. In many cases these walls are high enough to obstruct the view of Lake Erie. At present approximately 26 cottages are located within this reach.

The top elevation of the road varies, but in all locations it is well below the design uprush level. Much of it is also below the design flood level. It is therefore not a safe access and egress route.

Based on our overall understanding of the recent evolutionary process of Long Point, the part of the formation within this reach is gradually translating in the northerly direction under the influence of the coastal environment. Being at the most westerly end of the clockwise “rotation” of Long Point, the impact of these changes on the existing development is the most notable within this reach.

[61] The SMP developed some “Preferred Concepts” and with regard to Hastings Drive it stated:

The specific aspects of the preferred SMP concept applicable to the Hastings Drive reach were developed on the severity of the damage to which those areas are subject, and the imminent danger that exists. An important aspect in developing the preferred concept for the Hastings Drive reach is the difficulty (or better described as the impossibility) of maintaining reasonable access and egress to this area. The specific aspects of the preferred concepts of the SMP for Hastings Drive reach of DSZ 1 include:

- That the municipality adapts a “No Re-build” policy for existing development;
- That public ownership of shoreline properties be encouraged and that the municipality and conservation authority approach senior

levels of government and other organizations including private organizations for financial assistance. The conservation authority should take a lead role in this effort.

- That when properties are transferred to public ownership, the remains of the shore protection structures and cottages be removed. This process is to be completed under the guidance of a professional engineer to ensure acceptable local impact where other private developments still exist.
- The removal of the shore protection structures and cottages is intended to minimize the potential for littering of downdrift shores and to minimize reflection and therefore nearshore scouring. The latter step will likely result in greater beach build up.
- That no reinforcement of existing shoreline protection structures be allowed because these structures worsen the erosion problems and because they cannot be relied upon to provide effective protection during severe storms. Existing dwellings located on private lands be allowed to be raised above the design wave crest level where an owner wishes to continue personal use with a reduced potential for wave damage. Such modifications must only be allowed only with support piles designed by a professional engineer.

ZONING FOR HASTINGS DRIVE

[62] Exhibit 10 is a Chronology of Planning Documents from Ms. Elder. Her chronology provides that in 1974 that the Township of South Walsingham approved Zoning By-law No. 74-2014 wherein Hastings Drive was zoned Seasonal Residential Zone, but no Minister of Housing approval was obtained.

[63] With the creation of the Regional Municipality of Haldimand-Norfolk, the Province of Ontario issued a Minister's Zoning Order dated September 6, 1977, for the Township of Norfolk, (formerly the Township of South Walsingham) including the Subject Lands. No new single family cottages were permitted.

[64] In 1978, the Regional Municipality of Haldimand-Norfolk passed By-law No. 10000-26-N which was a zoning by-law to amend the former By-law No. 74-2014, in anticipation of the Province removing its Minister's Zoning Order. The effect of this By-

law was *inter alia* change the zoning for Hastings Drive from “Seasonal Residential Zone (RS)” to “Environmental Protection Zone (EP)”.

[65] The explanatory note that accompanied By-law No. 10000-26-N stated that the By-law would restrict replacement of cottages in hazardous areas, and rezone Hastings Drive from seasonal residential zone to environmental protection zone.

[66] In 1985, the Township of Norfolk’s Comprehensive Zoning By-law No. 1-NO-85 zoned the Subject Lands as Hazard Lands (“HL”) in section 30:

In an HL Zone no land shall be used and no building or structure shall be used, altered or erected except in accordance with the following provisions:

30.1 Permitted Uses

- (a) park provided there are no buildings located thereon except buildings used for sanitary facilities, change houses for bathers, and accessory maintenance and storage buildings;
- (b) open pavilion.

[67] In July 2014, the (new) Norfolk County passed Zoning By-law No. 1-Z-2014 its new CZB which *inter alia* repealed all of By-law No. 1-NO-85 and all amendments save and except for Hastings Drive and the Subject Lands. The By-law states in part:

Repeal of By-law 1-NO-85 and All Amendments

By-law 1-NO-85 (the Township of Norfolk Zoning By-law) and all amendments thereto, passed pursuant to the Ontario *Planning Act* as amended, and which were approved by the Ontario Municipal Board, the Region of Haldimand-Norfolk or the Township of Norfolk, are hereby repealed except in so far as it affects the area known as Hastings Drive (South Walsingham, Plan 206, Lots 66 and 67 and South Walsingham, Plan 251, Lots 1 to 148.). The Hazard Land Zone (HL) as set out in 1-NO-85 remains in effect.

NEIGHBOURHOOD EVIDENCE

[68] In addition to the expert land use planning evidence, the Tribunal heard from a number of property owners on the Subject Lands: Ms. E. Boyce, Christopher Bradley, Mr. S. Corke, and Ms. Jerome.

[69] Further on January 9, 2018, the Tribunal heard from seven participants, Brenda Baker, Debra Tulpin, Larry van Severn, Debra Mawhiney, Randy Mawhiney, Peter Scrubby, and Gary Mussel, all owners of lots located within the Subject Lands.

[70] Ms. E. Boyce is one of the Appellants to this matter and she supports the proposed Draft Order. She is the owner of 87 Hastings Drive which she purchased in 2003 and has a cottage on that site. Her sister, Ms. S. Boyce purchased her cottage at 107 and 109 Hastings Drive in 1999. In support of her evidence Ms. S. Boyce produced a photo brief being Exhibit 13.

[71] Ms. E. Boyce gave evidence on behalf of herself and her sister Ms. S. Boyce and she described the weather related events along the shore line, and referred the Tribunal to the photographs in Exhibit 13 which include *inter alia* the photo at Exhibit 13, Tab 2 depicting the beach erosion, the depth of the erosion, with her sister's cottage at the rear. A number of photographs show trailers on various lots along Hastings Drive with weather related events depicting the advancement of Lake Erie resulting in some trailers that had to be moved back from the lakeshore. Additionally there were photographs of Hastings Drive being flooded, recent construction (Mr. Waite's dock and change house) along Hastings Drive and photos of the placement of large trailers on the lots and the installation of new hydro poles.

[72] The Tribunal heard from Mr. Bradley in support of the proposed Draft Order. He has the cottage at the very westerly end of Hastings Drive on the *cul-de-sac*. He acquired his cottage in or about 2011. He testified to the Tribunal with regard to a wide range of weather events as demonstrated in his photographs and videos found in Exhibit 14 which include a video of a pickup truck slowly driving along Hastings Drive in

flood conditions. The still photographs in Exhibit 14 include photographs *circa* the 1954 post Hurricane Hazel damage. Exhibit 14, Tab 35 is a photo of the result of a storm where the steps up to his cottage were demolished by a fall storm. Tab 43 contains an article from the Weather Network dated as of November 12, 2015 where Mr. Bradley's cottage is noted as "barely hanging on; waves are getting bigger, winds gusting to near hurricane strength". Tab 50 showing the post-storm damage in 2015 with the bank erosion being approximately 6 to 8 feet high and a number of photographs showing new large trailers being located on various lots and new construction with hydro poles. After showing the storm video affecting his property to the hearing, he candidly told the Tribunal that if he had known in 2011 what he knew now, he would not have purchased the property. He indicated that he has come to regret the purchase and that he fears that the cottage may not be there in the spring of 2018.

[73] The Tribunal heard from Mr. S. Corke in opposition to the proposed Draft Order. Mr. Corke referenced Exhibit 24, where at Tab 22A is a building permit dated June 24, 1959 issued to Howard and Edward Corke for the construction of a cottage on Lot 58. Exhibit 24, Tab 21C at page 111 shows another photograph of the cottage off its foundations and partially flooded in December 1985. The notation indicates that the cottage was later burned down and has not been replaced. What has been constructed on the lot is an elevated dock on pilings with a boat lift, an elevated patio with barbeque (BBQ), and a change house (Exhibit 24, page 118.)

[74] Mr. Corke testified that he always felt safe on his property, so safety is not an issue for him. He said that he supported initially the "re-build" option and would now support a reasonable use including campers and trailers.

[75] The Tribunal heard from Ms. Jerome also in opposition to the proposed Draft Order. She has Lots 54 and 55 which she purchased in 2004, but her family has used the property since 1944.

[76] Her witness statement at Exhibit 27 notes in or about 1972 or 1973, the cottage (along with many other cottages along Long Point Road) was moved by the owners back on the property and away from the shore. Further her witness statement notes that the December 1985 storm demolished their garage, their pump house, the mud room, and knocked the cottage off its foundations. Exhibit 24, Tab 20 at page 105, shows a picture of the cottage after the 1985 storm where about one half of the cottage appears to have been pushed off its footings by the storm. She advised that her cottage as well as the Corke's was subsequently burned. At the present time Ms. Jerome has a large trailer parked on her lot. Ms. Jerome's request is that the Tribunal implement the zoning by-law passed by the County Council in 2016 (Exhibit 4).

[77] With regard to the participants, Ms. Baker's family owns the property at 121 Hastings Drive which they have been using since the 1990's for boat launching, family days and camping. She relied on s. 41 of the *Planning Act*, (Site Plan Control section) where the definition of development means that the site is for the location of three or more trailers. She stated in her participant statement at Exhibit 35 that:

I'm sure we all look at things in terms of what others are allowed to do ... It always seemed ironic to me that the MNR will let me park an ice hut on Long Point Bay, a mere kilometer away from my private lot for months every winter and I can sleep, eat, drive, park my vehicles overnight and do whatever what the Queen does herself does out there without a care ... So to be clear the MNR supports ice huts on hazardous ice and gets paid to do so through fees, but apparently do not support camping on our privately owned Hastings properties in the summer time?

[78] Ms. Tulpin appeared representing the Estate of Mary Mae Betty Keen with regard to 111 and 113 Hastings Drive. Her father purchased the lot on Hastings Drive to build a cottage. Her participant statement at Exhibit 37 states that from 1961 to 1971 they had about 200 feet of beach in front of the cottage. There was so much sand that a second road was proposed south of Hastings Drive. In or about 1972 to 1973, some cottage owners moved their cottages further to the north to be further from the water's edge. She would like to be able to use the land in accordance with the zoning by-law passed by the Council in July 2016 which would allow trailers and camping use (Exhibit 4).

[79] Mr. van Severn owns the lots at the very end of Hastings Drive. He stated in his participant statement, Exhibit 38, that: “It’s a sad day when my grandchildren ask why they cannot go camping on property that I own. I have no answer for them.” His statement indicates that ... “Along comes SAR (Species at Risk) ANSI (Areas of Natural and Scientific Interest) PSW (Provincially Significant Wetlands) so that special interest groups could pave the way for a sneaky form of expropriation without compensation of private property.” With regard to the issue of safety, he states: “The nanny state is concerned for us during a storm—well I’m sorry but I’d rather be on Hastings Drive during a storm than on Highway 401 on a sunny day.”

[80] Ms. Mawhiney testified that between her and her husband, they have six lots on Hastings Drive. There used to be four cottages on the lots prior to 1985. The big storm of 1985 damaged all the cottages and the Township demanded the removal of the cottages. They currently use the lots with their trailers. Under cross-examination, she advised that they have improved the lots, they have a lawn area that is grassed and have leveled and seeded the property and installed a hydro post.

[81] Mr. Mawhiney testified that his family owns eight adjacent lots on Hastings Drive, that over the years he has applied for and received permits from Conservation Authority to refill and remove hazards, to replace the shoreline protection from MNRF, to install a cement ramp from MNRF, to install the dock, to install a hydro pole and to remove sand from his ramp, to build a change house, to replace the dock posts, add topsoil and install a berm, and replace and add rubble for a shoreline protection. He testified that he has had a trailer on the site every summer since purchasing the property in 2009 and in 2016 he received a permit from the Conservation Authority to build a 108 square foot change house. His participant statement indicates that parking a vehicle on a lot during the day has little or no impact on the environment so leaving it there overnight makes no difference. He stated that there is no section in the PPS which indicates that vehicles or trailers are not allowed to park on hazard land. He further states that overnight storage of a boat trailer or recreational vehicle (RV) or any type of trailer which is just a vehicle

is not hazardous to the environment or the surrounding properties and a trailer is simply a vehicle.

[82] Under cross-examination, he confirmed that with regard to Lot 8 on Registered Plan 251 (which he produced) that about 55% of the lot has now been submerged by Lake Erie since 1954.

[83] Mr. Scrubby testified that he's owned a lot since 1967, originally with a cottage. It washed away in 1985. He's had a trailer for the past 3½ years. It's been parked there overnight and it has not moved or shifted at all he testified. He stated that there's nothing in the PPS which prevents you from having vehicles on your property. In his view, the best outcome would be that he would be able to be given the opportunity to rebuild with full development rights.

[84] Mr. Mussel bought his lot in 2011 and put a motorhome on it in 2012. His participant statement, Exhibit 44, states that:

So if my motorhome is a problem, change the zoning on Hastings Drive back to the same as the rest of Long Point which it was before 1985 and let us build a cottage to today's standards.

ISSUES

[85] In the Procedural Order issued by the Tribunal November 22, 2017, there are four issues set out.

[86] Ms. E. and Ms. S. Boyce, Norfolk County, and the Ministry of Municipal Affairs raised two issues:

1. Are the issues and limitations in paragraph 4 of the Draft Order consistent with the PPS as required by s. 3(5)(a) of the *Planning Act* and in particular with the following policies that prohibit development and site alteration, or direct development away from natural heritage and hazard features:

- (a) Areas of Natural and Scientific Interest (Policy 2.1.5(e));
 - (b) Habitat of endangered species and threatened species (Policy 2.1.7);
 - (c) Provincially significant wetlands (Policy 2.1.4(a));
 - (d) Provincially significant coastal wetlands (Policy 2.4.1(b));
 - (e) The dynamic beach hazard (Policy 3.1.2(a));
 - (f) Areas of flooding hazards, erosion hazards, and/or dynamic beach hazards (Policy 3.1.2);
 - (g) Adjacent lands to natural heritage features (Policy 2.1.8); and
 - (h) Hazardous lands adjacent to the shorelines of the Great Lakes-St. Lawrence River System which are impacted by flooding hazards, erosion hazards, and/or dynamic beach hazards (Policy 3.1.1(a))?
2. Do the uses and limitations in paragraph 4 of the Draft Order conform with Norfolk County Official Plan 4.3.3.1 (prohibiting new development on Hastings Drive) as required by s. 24(1) of the *Planning Act*?

[87] Issue 3 is from Mary Weber:

Does the definition of “site alteration” and “development” in the PPS permit more uses than are listed in paragraph 4 of the Draft Order? Should paragraph 4 be amended to include existing vacation home, public park, seasonal camping in a travel trailer and dock, pier, or wharf?

[88] Issue 4 is from Ms. Jerome, et al:

Should the uses in paragraph 4 of the Draft Order be amended to include recreational vehicles, overnight storage or overnight parking of tents, trailers and vehicles, decks, change houses and docks, all for personal use only?

PROPOSED DRAFT ORDER

[89] As noted above, the Draft Order is found at Exhibit 17, Tab 15. For the purposes of this portion of the Decision, the Tribunal will recite paragraph 4 from the Draft Order:

Section 14.0 Special Provisions is modified by adding the following:

14.911¹ In lieu of the uses *permitted* in the HL zone, only the following uses shall be permitted:

- a) public park as defined for the purpose of this special provision as lands owned and/or operated by the County of Norfolk, Long Point Region Conservation Authority or other government agency provided there are no *buildings* or *structures* located thereon;
- b) day use, which is defined as being personal use and enjoyment of a vacant lot for a day which may include launching boats.

The following uses shall be prohibited and are listed for the purposes of clarity and to avoid any confusion, and such prohibited uses are in addition to all other uses that are not *permitted* uses listed above:

- a) *tent and trailer park*;
- b) *recreational vehicles*;
- c) overnight storage or overnight parking of trailers, tents and *vehicles*;
- d) *buildings* or *structures* of any type including *decks*, change houses and sanitary facilities; and
- e) *dock, pier or wharf*².

Site alteration and new development shall not be *permitted*.

¹NTD: Administrative – Confirm this special Provision number is available to be used.

² Subject to approval of definition in subsequent County by-law

SUBMISSIONS

[90] There is no evidence before the Tribunal contrary to the positions advanced by MMA, the County and the appellants that all of the listed items of natural heritage features and areas and natural hazards apply with regard to the Subject Lands. The thrust of the case by Ms. Weber, Ms. Jerome, *et al* related to the uses and limitations that are found within paragraph 4 of the Draft Order.

[91] Mr. Richardson, on behalf of the five families that he represents submitted that his clients have all owned lots for a substantial period of time, pre-dating the zoning by-law of 1985. None of his clients currently have cottages on their lots and the evidence of Mr. Corke and Ms. Jerome was that their ultimate wish was to be able to re-build. In that regard they rely on Official Plan Policy 4.3.2 under the Land Use Policies for Hazard Lands which states in part that:

There are areas of extensive development located on hazard lands and in these areas a reasonable compromise shall be made between the extent of the hazard and the continued use and future development of the area.

The Subject Lands they say is one such area where a reasonable compromise should be made.

[92] Mr. Richardson submits that the Tribunal ought not to approve the Draft Order as found in Exhibit 17, Tab 15, but that the Draft Order should be amended to incorporate the provisions of the By-law previously passed by County Council found at Exhibit 4 (which would have made legal existing uses permitted uses) and also allowed for seasonal camping in a travel trailer for personal use only (and not a tent and trailer park).

[93] In the alternative, Mr. Richardson's clients asked the Tribunal not to approve any By-law until the County, Province or the Conservation Authority move to acquire the

Hastings Drive lands in accordance with the recommendation from the Shoreline Management Plan in December 1989.

[94] Addressing the Draft Order, Mr. Richardson submitted that the use of a public park is by definition a use that a private property owner cannot avail oneself of. The second use is a day use and it is submitted that there is little one can do with one's own property except picnic on it which he argued effectively results in the "private use of the lands on Hastings Drive" being reduced to a token use of a day use.

[95] Mr. Richardson argued that the use as a public park is not a use that is available to his clients and the reduction of the private use to effectively day use only, is in effect a contravention of long standing Ontario Municipal Board principle of *Nepean (Township) (Re)*, [1978] O.M.B.D. No. 1, 9 O.M.B.R. 36,:

This Board has always maintained that if lands and private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved. We do not wish or intend to depart from that general principle and we hope the solution suggested will allow the township to achieve its goals and at the same time be fair to the land-owner.

[96] This principle, Mr. Richardson, submitted has been followed in *Russell v. Toronto (City)*, [1998] O.M.B.D No. 1267 ("*Dickenson et al*") where the Tribunal stated the following:

This oft-quoted dicta of Mr. A. J. L. Chapman, Q.C., is the best enunciation of the Board's long standing tendency to ensure that privately owned lands will not be transformed to public purposes such as open-space or park by zoning instruments unless there is a concomitant commitment on behalf of the municipality to expropriate or to acquire the lands in question. This rule, like many traditional rules of the Board, must be subject to a number of exceptions. We will deal with the exceptions later.

It is important to reiterate that this principle stems is from a strongly held belief of the Board that planning decisions must not allow neither the concerns of the public good nor the private interests to become the exclusive and singular goal. It is motivated by a time honoured experience of the Board that planning is often a delicate balancing act between [their] two noble and sometimes competing objectives. Both

are important and none should become the sole pampered darling of the decision makers. Above all these words are a sober reminder that planning decisions, regardless of how benevolent their intent, how far sighted their vision, and how friendly to the public interest, can easily become an unwitting and unquestioning tool to extinguish or debilitate the proprietary interest of an owner. No decision-maker should gloss over this obvious but awesome power in planning.

[97] On this basis Mr. Richardson submits that the proprietary interests of his clients have not been met, as no level of government has made any attempt to acquire any of the vacant lands on Hastings Drive. In such circumstances his clients are of the view that if appropriate zoning is not forthcoming compensation is appropriate.

[98] Alternatively, he argues that it would be appropriate and a “reasonable compromise” (in the words of the Official Plan policy) to revert to the By-law passed by County Council in Exhibit 4, allowing for existing uses and for seasonal camping in travel trailers.

[99] Ms. Smith on behalf of her client first submitted that the Tribunal is dealing with a unique area where development has occurred: where there are 24 existing cottages, 75 private lots, and 47 County owned lots, and where there is a public road and hydro.

[100] Secondly, she submitted with regard to the Tribunal’s decision in this matter, it is not appropriate to simply accept the opinion of the experts before it without providing reasons for so doing, and that the proper interpretation of an official plan (and PPS and zoning by-law) is not a factual question to be decided based on opinion evidence but rather a question of law. And that the Tribunal must exercise its own independent judgement after due consideration of the evidence and the submissions of counsel.

[101] Ms. Smith took the Tribunal back to the County Official Plan Policy 4.3.2 (cited above) and argued that that policy directs that a reasonable compromise shall be made for Hastings Drive between the extent of the hazards and the continued use and future development of the area.

[102] Ms. Smith submitted that the zoning study carried out by the County was effectively predetermined (as Mr. Crough had testified) because of all the policy constraints on it. Ms. Smith submitted that the terms of reference for the Hastings Drive Zoning Study (Exhibit 33B) at page 5 references the County staff recommendation that Council direct further review of the ecological functions and the natural environment in partnership with the Long Point Region Conservation Authority (LPRCA) and MNRF and that this work should be pursued as part of the 2015 Capital Budget. And under cross-examination, Ms. Elder on behalf of the County indicated that County Council did not fund that update.

[103] Thus, Ms. Smith argued that at the present time there is a dated, inadequate policy context, that is effectively based on the 1989 SMP and that a Dynamic Beach Study needs to be done by a coastal engineer to delineate the dynamic beach hazard and to update the SMP, and until that time decisions on a reasonable compromise between hazards and the continued use of Hastings Drive cannot be made.

[104] Ms. Smith argued that recreational uses such as sleeping overnight in a tent or motorhome and docks and boat ramp were legal uses under the 1985 By-law.

[105] In that regard she directed the Tribunal to Exhibit 50, Section 6, General Provisions at 6.1 Uses Permitted in All Zones (g) docks and boat ramps.

[106] Ms. Smith's argument hinges on a number of definitions found within the 1985 By-law including "dwelling house" (which excludes a motorhome and mobile home), "mobile home" which means:

any dwelling that is designed to be made mobile and constructed or manufactured to provide a permanent residence but excludes a motorhome, tent trailer or trailer otherwise designed.

Motorhome shall mean a recreational vehicle either self-propelled or designed to be towed by a motor vehicle, and capable of being used for temporary living, sleeping or eating accommodation of persons whether or not such vehicle is jacked-up or has its running gear removed, but excludes a mobile home as defined herein.

[107] The definition for park, tent and trailer shall mean “an area of land used for camping facilities or for the temporary parking of tent trailers, motorhomes or truck campers.”

[108] Finally, Ms. Smith took the Tribunal to the definition of “vehicle” which shall mean “an automobile or vehicle used for carrying passengers or for transporting goods including a mobile home, motorhome, trailer, snowmobile or marine craft.”

[109] She asked the Tribunal to note that there is only one section in the 1985 By-law that regulates a tent and trailer park and that is s. 29 Open Space—Tent and Trailer Zone (“OST”), and on that basis she submitted that a plain reading of that section implies that zone envisions more than one motorhome on the land and therefore one motorhome on one lot is not regulated as a use; rather it is a vehicle and its only regulation is where it can be parked in a residential or commercial zone.

[110] On behalf of her client, Ms. Smith made two requests: firstly that the Tribunal should dismiss the appeal, which would mean that the 1985 zoning by-law applies. And as a by-product of that dismissal, the Tribunal’s interpretation would allow for seasonal recreational uses and docks and boat ramps.

[111] In the alternative, she asked the Tribunal allow the appeal in part and add more uses with the same result as found in Exhibit 4, (the County By-law of 2016 that was later repealed by the County). This she submits would implement the County Official Plan policy calling for a reasonable compromise.

[112] Brian Duxbury on behalf of his clients argued that the proposed Draft Order for the zoning by-law which prohibits a trailer use is a result of the PPS, that the evidence validates the prohibition of trailers, and that in this area where there is a complex environmental overlay with a worrisome profile of a number of new applications, placements of trailers, and an enforcement vacuum, that a new zoning by-law is required and that legal non-conforming rights will be protected.

[113] Mr. Duxbury started with the proposition that the Hazard Land zoning in the 1985 by-law states that:

no land shall be used and no building or structures shall be used, altered or erected except in accordance with the following provisions...

which allow a park and an open pavilion.

[114] He addressed the question as to where are trailers allowed? The answer was in the OST zone for tent and trailer zone because the Hazard Land excludes trailers and the interpretation of the zoning by-law provides in section 1.3.2(b) words in the singular shall be deemed to include the plural, words in the plural shall be deemed to include the singular. Therefore trailers are allowed in the Tent and Trailer Park but not in the Hazard Land zone. Thus to put a trailer on Hastings Drive (and the Subject Lands) would be a change of use and that offends the PPS.

[115] Secondly, he submitted that there is a preponderance of evidence, none of which is disputed, with regard to the natural features and natural hazards that exist on Hastings Drive. First and foremost it is a dynamic beach and the PPS in s. 3.1.2 states that development and site alteration shall not be permitted within the dynamic beach hazard.

[116] The photographic and oral evidence details the existence of large trailers, some clearing of various lots, that grading has gone on, levelling and filling has gone on. He reminded the Tribunal that all the expert planners had agreed that trailers are not allowed as a use on Hastings Drive, and to put them there would constitute site alteration.

[117] Further he submitted that allowing trailers is not a good land use planning outcome. The evidence he stated is that Lake Erie can be a hostile and threatening lake, that it is variable and unpredictable, that the Subject Lands are in an ever-changing area of beach erosion and deposition and that in many instances many of the lots that were created by the Registered Plan 251, half of the land portion of those lots

have been lost to the lake. The outcome is a road that floods, causing issues of access, beach erosion resulting in some dramatic drop-offs and this all arises within the spectre of climate change. The presence of trailers on Hastings Drive he stated engages and impacts land uses in terms of services, safe access, hydro lines and poles, grading, lawns, paving stones: all attempts to tame the land for habitation. And as time passes, those impacts creep and grow larger. He stated that the zoning by-law has to address the issue of a trailer as a building or structure as set out in the s. 34(4) of the *Planning Act*.

[118] He argued that the Draft Order found at Exhibit 17, Tab 15, is the right result: that it will deal with this emerging trend of placement of large trailers on the properties notably for the last three to four years, that it is currently the “wild west” on Hastings Drive with regard to what is there and that the new zoning by-law is clear, it is restrictive, it allows day use, and is the right result.

[119] Mr. Hare on behalf of MMA took issue with the argument that this was a downzoning and argued that if there had been a downzoning, it was in 1985 with the zoning by-law and not with the proposed Draft Order that was before the Tribunal.

[120] He too argued that all planners agree with regard to no trailers being permitted in the 1985 zoning by-law. He states that only Mr. Crough now suggests that for the new by-law there might be “small trailers during the day” but this he suggests is contrary to s. 3.5 of the *Planning Act* which requires the decision of the Tribunal to be consistent with the PPS.

[121] With regard to the suggestion that docks and boat ramps are a permitted use in the Hazard Land zone due to the General Provisions of the 1985 By-law, he disagreed and referred the Tribunal to Exhibit 25, Tab 6, page 39 where it deals with the repeal of By-law No. 1-NO-85. It states the following:

By-law 1-NO-85 (the Township of Norfolk Zoning By-law) and all amendments thereto, passed pursuant to the Ontario *Planning Act* as amended, and which were approved by the Ontario Municipal Board, the

Region of Haldimand-Norfolk or the Township of Norfolk, **are hereby repealed** except insofar as it affects the area known as Hastings Drive (South Walsingham Plan 206, Lots 66 and 67, and South Walsingham Plan 251, Lots 1 to 148. The Hazard Land Zone (HL) as set out in 1-NO-85 remains in effect. (Emphasis added)

[122] Thus Mr. Hare submits that s. 6.1 (Uses Permitted in All Zones) in Exhibit 50 was repealed and it was only the Hazard Land Zone (s. 30) that remained in effect, not any of the uses permitted in all zones.

[123] With regard to the argument that the *Nepean* principle obligates compensation for a landowner who suffers loss as a result of a land use change, Mr. Hare argued there is no statutory basis to implement the *Nepean* principle, that the *Planning Act* mandates that the Tribunal make decisions that are consistent with the PPS and that all the cases provided by Mr. Richardson predate the PPS. Moreover looking at the narrow language used by Mr. Chapman in the *Nepean* decision Mr. Hare submitted that both the courts and the Tribunal have been clear that downzoning does not automatically qualify for compensation.

[124] The *Dickenson et al* case specifically provides that:

The dicta do not state or imply that there is no justification for a municipality to deploy its statutory armour pursuant to the *Planning Act*, R.S.O. 1990, c. P.13 to re-designate or re-zone for the public benefit or arrest a trend that is harmful or undesirable. Nor do they impose a requisite financial burden or obligation on a municipality whenever it embarks on a course to re-designate or down-zone an area. The dicta of Mr. Chapman is narrow in its scope and focused in its application and has a relevance to our case at hand. **Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well-being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation.** (Emphasis added)

[125] With regard to the issue of imminent danger Mr. Hare referred the Tribunal back to the 1989 SMP which stated in part:

The specific aspects of the preferred SMP concept applicable to Hastings Drive reach were developed based on **the severity of the**

damage to which those areas are subject, and the imminent danger that exists. An important aspect in developing the preferred concept for the Hastings Drive reach is the difficulty (or better described as the impossibility) of maintaining reasonable access and egress to this area. (Emphasis added).

[126] He referenced the evidence of Ms. Elder with regard to the circulation comments from Emergency Medical Services where they stated that they continually struggle with access and egress problems to remote areas such as Hastings Drive especially during the winter months and from the comments of Fire and Rescue Services that Fire would not go down the road if flooded due to the concern of the road being washed out, would wait for the roads and a front end loader to make sure the road is passable and to remove any obstacles.

[127] Mr. Hare submitted that Issues 1 and 2 in the Issues List should be answered in the affirmative, that the uses and limitations in paragraph 4 of the Draft Order are consistent with the PPS, conform to the County Official Plan and that the Tribunal should approve the Draft Order at Exhibit 17, Tab 15.

[128] Peter Tice on behalf of the County told the Tribunal that the County supports the submissions by Mr. Duxbury and Mr. Hare. He noted that the proposed Draft Order before the Tribunal in Exhibit 17, Tab 15, is supported by three of the planners, and that all of the planners in the Agreed Statement of Facts confirm that the existing Norfolk Zoning By-law does not permit trailers on Hastings Drive.

[129] Turning to the PPS he indicated that s. 3.1.2(a) "Development and Site Alteration" shall not be permitted within (a) the dynamic beach hazard.

[130] This, he argued, is the "trump" card that does not allow development or site alteration on the Subject Lands, and that the Subject Lands have more than just the natural hazard of the dynamic beach, but also adjacency to a PSW, they are part of a coastal wetland, within an area of natural scientific interest where there are endangered and threatened species and it is subject to flooding and erosion.

[131] He submitted that the visual evidence is overwhelming, that it is an area of constant change with the weather and the impact of Lake Erie on Hastings Drive as illustrated by the December 1985 (the big storm) and more recently with the video storm footage provided by Mr. Bradley.

[132] Turning to the Issues List, Mr. Tice submits that only Mr. Crough has suggested that there could be a daytime trailer usage of the Subject Lands and in light of that he had expected that those in opposition to the proposed Draft Order would come forward with a draft zoning by-law that would set out the required setbacks, lot coverage, the seasonal use of the proposed lands, but nothing came forward.

[133] He said what in fact they want is something that predates the PPS, predates the 1989 SMP and does not conform to the County's Official Plan where in s. 4.3.3.1 Hastings Drive site specific policy area it clearly states "on land designated hazard lands—site specific policy area 4.3.3.1 on Schedule "B" to this plan, no new development shall be permitted."

[134] Mr. Tice argued that with regard to the zoning by-law, that the Tribunal should allow the appeal in part, put in place the Draft Order as found in Exhibit 17, Tab 15, as this would constitute good land using, it would be consistent with the PPS, conform to the County's Official Plan and be in the public interest.

COMMENTARY

[135] Registered Plan 206 dates from the 1930s.

[136] Registered Plan 251 dates from the 1950s.

[137] Both of which predate any version of an official plan, and any version of the PPS, let alone the PPS 2014.

[138] The evidence is that a number of cottages on Hastings Drive were severely damaged by Hurricane Hazel in 1954.

[139] The evidence is that a number of cottages on Hastings Drive were severely damaged by the “big storm” in 1985.

[140] At the present time the Subject Lands are designated in the Official Plan as Hazard Land and zoned based on Zoning By-law No. 1-NO-85 as Hazard Land for which the only permitted uses are a park and an open pavilion.

[141] The process of considering a new zoning by-law for the Subject Lands, has created tensions among existing cottage owners, those property owners who either seek to fully develop their property or seek fewer restrictions on the use of their property and approval authorities.

[142] The matter before the Tribunal is solely the consideration of the zoning for the Subject Lands.

FINDINGS

[143] After reviewing all the oral evidence of the experts, the oral evidence of the parties and the participants, and upon consideration of the submissions of counsel, the Tribunal finds:

- on Issue No. 1 the issues and limitations of the Draft Order are consistent with the PPS:
- on Issue No. 2, the issues and limitations of the Draft Order conform to the Norfolk County Official Plan; and
- on Issues No. 3 and No. 4, that paragraph 4 of the Draft Order should not be amended;

- all for the reasons set out below.

[144] Thus, the Tribunal will allow the appeal in part, and will approve the Draft Order as found in Exhibit 17, at Tab 15.

[145] In reaching its decision, the Tribunal has considered and preferred the expert land use planning evidence of Mr. Boyd, Ms. Elder, and Mr. Chauvin.

[146] The Tribunal finds the environmental/natural heritage evidence concerning the Subject Lands to be unchallenged and overwhelming.

[147] The Subject Lands are:

- i. Within a dynamic beach hazard;
- ii. (the road access to the Subject Lands is itself within the dynamic beach hazard;)
- iii. Within or adjacent to a Provincially Significant Wetland;
- iv. Within or adjacent to a Provincially Significant Coastal Wetland;
- v. Within an Area of Natural and Scientific Interest;
- vi. Within an area of Endangered Species and Threatened Species;
- vii. Within the Lake Erie Floodplain;
- viii. Subject to flooding hazards; and
- ix. Subject to erosion hazards.

[148] Were draft plans of subdivision to be proposed for approval today for the Subject Lands, they would not be approved as being inconsistent with the provisions of the PPS which directs development away from such hazardous areas.

[149] The Tribunal finds that there is no probative value in deferring this matter to await updated studies or reports with regard to the environmental/natural heritage status of the Subject Lands. Had that been an issue, one would have expected such expert opinion evidence and reports to that effect.

[150] Neither does the Tribunal accept the suggestion that this matter be deferred until the County has completed its Official Plan review. The Tribunal agrees that there is a need for a timely determination with regard to the zoning for the Subject Lands.

[151] Turning to the matter specifically at hand, the Tribunal has considered the provincial interests set out in s. 2 of the *Planning Act* and more specifically with regard to:

(a) the protection of ecological systems including natural areas, features and function;

...

(h) the orderly development of safe and healthy communities;

...

(o) the protection of public health and safety;

(p) the appropriate location of growth and development.

[152] The Tribunal reads s. 3.5 of the *Planning Act* to be “mandatory” in its wording that a decision of the Tribunal shall be consistent with the PPS.

[153] In that regard, the PPS takes a comprehensive, integrated and long-term approach to land use planning.

[154] It protects public health and safety by directing development away from areas of natural or manmade hazards where there is an unacceptable risk to public health or

safety or property damage and not to create any new or aggravate existing hazards (s. 3.0).

[155] The PPS is a vision statement for Ontario's land use planning system and that vision clearly provides that it is important to protect the overall health and safety of the population. The PPS directs development areas away from natural and human made hazards. This preventative approach supports provincial and municipal financial wellbeing over the long term, it protects public health and safety and minimizes cost, risk and social disruption.

[156] With regard to the Subject Lands, s. 3.1.2 states that:

development and site alterations shall not be permitted within (a) the dynamic beach hazard.

[157] The entirety of the Subject Lands is found within the dynamic beach hazard.

[158] The Tribunal finds that the Draft Order is consistent with the PPS.

[159] Those in opposition to the Draft Order rely on s. 4.3.2 of the Official Plan in the Hazard Land designation which states in part:

There are areas of extensive development located on hazard lands. In these areas, a reasonable compromise shall be made between the extent of the hazard and the continued use and future development of the area.

[160] In this regard, the Tribunal first notes that the rest of the section states:

... This situation is particularly applicable to the Urban Areas, Hamlet Areas, and Resort Areas as set out on Schedule A.

[161] Schedule A does not show the Subject Lands to fall within any of those designations, and thus s. 4.3.2 is not particularly applicable.

[162] Moreover, the Tribunal observes that s. 4.3.2 must be read in context with the rest of the policy directions in the Official Plan. For example there are these introductory words to the Hazard Land designation:

Hazard lands are lands that have inherent and environmental hazards such as flood susceptibility, erosion susceptibility, and other physical conditions which are severe enough if developed upon to pose a risk to occupants of loss of life, property damage, and social disruption.

[163] Additionally, in the Hazard Land designation, it is the intent of the County:

... to protect life and property by respecting natural and manmade hazards and constraints in land use development. New development should only take place in areas which are not susceptible to the hazards.

[164] As one continues to drill down in the Hazard Land policies of the Official Plan, s. 4.3.2.2(b), under the heading Shoreline Policy, states:

Development and site alteration shall not be permitted within:

- i) the dynamic beach hazard.

[165] Finally, s. 4.3.3.1 is entitled "Hastings Drive Site Specific Policy Area". It is the most site specific and direct reference to Hastings Drive and it states that:

On the land designated Hazard Lands - Site Specific Policy Area 4.3.3.1 on Schedule "B" to this plan, no new development shall be permitted.

[166] To the Tribunal it is abundantly clear that the intent of the Official Plan is to direct development and site alteration away from Hazard Lands; not to allow development on hazard lands; more specifically not to allow development within the dynamic beach hazard; and finally most specifically, not to allow new development and site alteration on Hastings Drive (and the Subject Lands).

[167] A zoning by-law must conform with its official plan. In this regard, the Tribunal finds that the proposed draft zoning by-law as found in the Draft Order (Exhibit 17 Tab15) conforms to the Official Plan.

[168] In response to the submission that were the Draft Order to be approved, it would constitute the overriding of the “*Nepean Principle*” and extinguish or debilitate the proprietary interests of existing owners, the Tribunal does not agree. The Tribunal was not shown any case law to support the proposition that the *Nepean Principle* “trumps” the PPS. In fact all the case law presented to the Tribunal on this issue predate the PPS.

[169] And to the contrary, the Tribunal finds that s. 3.5 of the *Planning Act* requires the Tribunal to make decisions that are consistent with the PPS.

[170] In the alternative, were the Tribunal to be wrong in this finding, the Tribunal finds that the outcome of this case fits clearly within the wording of the *Dickenson et al* decision:

Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well-being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation.

[171] Based on the oral evidence of Ms. Boyce and Mr. Bradley, based on the photographs and videos with regard to the destruction and by Hurricane Hazel, the “big storm” of 1985, the finding of “imminent danger” by the SMP and the circulation comments from Emergency and Medical Services and Fire and Rescue Services, the Tribunal finds the Subject Lands are within an area where there are patent and imminent hazards. The Draft Order does not sterilize the Subject Lands but it does severely limit their use, in accordance with the risks to public health and safety that are posed.

[172] With regard to the submission that the Tribunal should approve a zoning by-law similar to the 2016 Zoning By-law of the County (Exhibit 4), the Tribunal is not persuaded that it would be appropriate to make legally existing uses into “permitted” uses, as this would mitigate against the entire concept that legal but non-conforming uses are to eventually cease.

[173] The Tribunal finds that the placement of trailers on the Subject Lands would constitute a change in use which is contrary to the PPS and the evidence before the Tribunal is that where there has been the placement of trailers on the Subject Lands, it has resulted in site grading, excavation, and placement of fill, which are also contrary to the PPS.

[174] With regard to the submission that docks and boat ramps are a permitted use under s. 6 of By-law No. 1-NO-85, the Tribunal disagrees. Exhibit 25, Tab 6 provides with regard to the repeal of By-law No. 1-NO-85 that only the Hazard Land zone as set out in No. 1-NO-85 remains in effect. The rest of the by-law was repealed including s. 6 General Provisions.

[175] With regard to the submission that the placement of one motor home on a lot of the Subject Lands is not regulated as a use, the Tribunal disagrees. In the Hazard Land zone, there is an outright prohibition that no land shall be used, and no building or structure shall be used, altered or erected, except for the permitted uses, which are a public park or a day use.

[176] The Tribunal finds that the placement of a motor home on a lot of the Subject Lands and leaving it there overnight, seasonally, or permanently does not comply with the permitted uses.

[177] Thus, the Tribunal will allow the appeal in part, and the Tribunal approves the Draft By-law found within the Draft Order at Exhibit 17, Tab 15.

[178] So the Tribunal Orders.

“Blair S. Taylor”

BLAIR S. TAYLOR
MEMBER

If there is an attachment referred to in this document,
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Local Planning Appeal Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario
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