



Environment and Land Tribunals Ontario

# Niagara Escarpment Hearing Office

A Guide to Development Permit Appeal  
Hearings and Niagara Escarpment Plan  
Amendment Hearings under the *Niagara  
Escarpment Planning and Development Act*

This guide provides a general overview of hearings before Hearing Officers appointed under the [Niagara Escarpment Planning and Development Act](#). This guide should not be relied upon as an authoritative text. The statutes, regulations, and [Rules of Practice and Practice Directions](#) of the Environmental Review Tribunal that apply to hearings under the [Niagara Escarpment Planning and Development Act](#) prevail.

Information about specific cases is available on the [Hearings page](#) and/or [Decisions & Orders page](#) on the [Tribunal's website](#), or by contacting:

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## **What is the Niagara Escarpment Hearing Office?**

The Niagara Escarpment Hearing Office (NEHO) holds hearings under the [Niagara Escarpment Planning and Development Act](#) involving the [Niagara Escarpment Plan](#). The NEHO holds public hearings on appeals of the Niagara Escarpment Commission's decisions on development permit applications and applications to amend the [Niagara Escarpment Plan](#).

Members of the Environmental Review Tribunal have been appointed as Hearing Officers with the NEHO under the [Niagara Escarpment Planning and Development Act](#). Hearings held by the NEHO are governed by the rules of the Environmental Review Tribunal's [Rules of Practice and Practice Directions](#).

## **What is the purpose of the *Niagara Escarpment Planning and Development Act*?**

The purpose of the [Niagara Escarpment Planning and Development Act](#) is "to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment."

## **What is the Niagara Escarpment?**

The Niagara Escarpment is a massive ridge of fossil rich sedimentary rock that stretches 725 km from Queenston on the Niagara River to the islands off Tobermory. It contains more than 300 bird, 53 mammal, 36 reptile and amphibian and 90 fish species, and 100 varieties of special-interest flora, including 37 types of wild orchids. The Niagara Escarpment was named a World Biosphere Reserve by the United Nations Educational, Scientific and Cultural Organization in 1990.

## **What is the Niagara Escarpment Plan?**

Established under the authority of the [Niagara Escarpment Planning and Development Act](#), the [Niagara Escarpment Plan](#) is Canada's first large scale environmental land use plan and covers over 194,000 hectares. The Plan includes policies for seven land use designations (Natural, Protection, Rural, Recreation, Urban, Minor Urban and Mineral Resource Extraction), provides development criteria, and sets objectives for the Niagara Escarpment Parks and Open Space System, which has over 140 parks, open spaces and protected areas.

The Niagara Escarpment Plan was originally approved on June 12, 1985 and has been amended from time to time since then. The current Niagara Escarpment Plan was approved on June 1, 2017.

## **What is the Niagara Escarpment Commission?**

The Niagara Escarpment Commission (“Commission”) was established in June 1973 under the authority of the [Niagara Escarpment Planning and Development Act](#). The Commission holds regular public meetings to make decisions on development permit applications, consider recommendations on Plan Amendment applications, and comment on other requests for land use changes being proposed within and adjoining the Niagara Escarpment Plan area. The Commission reports to the Government of Ontario through the Minister of Natural Resources and Forestry. The Commission is supported by a professional planning staff.

## **Part 1: Development Permit Appeals**

Most developments within the Niagara Escarpment Plan Area, including changes to land use, require a development permit from the Commission. Examples of applications for development permits include: proposals for new single dwellings and other buildings, quarries, wineries, irrigation or recreational ponds, altering the grade of land, and changes in the use of any land, building or structure.

An application for a development permit is submitted to the Commission for review by one of its land use planners. The planner then prepares a staff report with a recommendation to the Commission. The Commission may issue, refuse or impose conditions on the development permit.

### **Who can appeal a development permit decision?**

The following persons may appeal the Commission’s decision regarding a development permit application:

- the person making the application;
- those persons who have asked to receive notification of the decision;
- those persons whom the Commission considers may have an interest in the decision; and
- all property owners within 120 metres of the subject property.

An appeal results in a public hearing conducted by a Hearing Officer appointed under the [Niagara Escarpment Planning and Development Act](#). The person who has applied to the Commission for the development permit is referred to as the “Applicant”. The Applicant may appeal the approval, conditions or a refusal of a development permit, in which case the Applicant is also the “Appellant”. Any other person who appeals the Commission’s decision regarding a development permit application is also referred to as the “Appellant”.

## **What is the deadline for filing an Appeal?**

Within 14 days from the date of the mailing of the Commission's decision, the Appellant must file a Notice of Appeal by mail, fax or email with the Commission. The Notice of Appeal must set out the reasons for the appeal.

In determining whether a Notice of Appeal has been filed in time, "days" are calculated as calendar days. There are no provisions under the [Niagara Escarpment Planning and Development Act](#) for extending the time to file an appeal. If a Notice of Appeal is not filed on time, the NEHO does not have the authority to hold a hearing.

## **What information must a Notice of Appeal contain?**

The Commission has a form that may be used to file an appeal, which is available on the [Commission's website](#). However, this form is not mandatory.

There is also no fee for filing an appeal.

The Notice of Appeal **must** include:

- the Appellant's name and address, along with the name and contact information of anyone representing the Appellant;
- the telephone number, fax number and e-mail address where the Appellant can be contacted during business hours;
- the Commission's file number for the decision being appealed;
- the grounds for the appeal (i.e. the reasons why the Appellant is appealing); and
- a description of the relief requested (i.e. what decision the Appellant would like the NEHO to make).

The reasons for the appeal should be specific. The Notice of Appeal should state whether an appeal of the approval, conditions or refusal of the development permit is being requested. A reason such as "the Commission was wrong to make this decision" is not specific and may result in the dismissal of the appeal.

The Commission will forward any appeals along with copies of related information such as the decision, application, staff reports, and etc. to the NEHO.

## **How can neighbours and other concerned people participate?**

Neighbours and other people who feel that they are affected by an application for a development permit may apply to the NEHO for permission to participate in the hearing. They may choose to support or oppose the application, or advance a different position.

If you receive notice of the pre-hearing conference and hearing, you may write to the NEHO, at least seven days before the date of the pre-hearing conference, and request to be included in the pre-hearing conference. At that time, you can request the Hearing Officer to add you as a Party, Participant or Presenter. A person may also attend the hearing and request to be added as a Party, Participant or Presenter. However, if the matter settles at the pre-hearing conference, a hearing will not take place and the person will have missed their chance to offer input in the matter.

Requests for status must be relevant to the subject matter of the appeal before the NEHO.

### **What is the difference between a Party, Participant and Presenter?**

The NEHO has different levels of participation so that anyone interested in the hearing can be involved. The NEHO encourages participation in its hearings. As set out below, the three options for participation (i.e. Party, Participant, and Presenter) address different needs and interests.

### **Who can be a Party?**

Persons that are specified as Parties by the [Niagara Escarpment Planning and Development Act](#) are automatically Parties to the appeal. If a person requests Party status, the NEHO may also name that person as a Party after considering:

- if the person's interests may be directly and greatly affected by the hearing or its result;
- if the person has a genuine interest, public or private, in the subject matter of the appeal; and
- if the person is likely to make a relevant contribution to the NEHO's understanding of the issues in the appeal.

### **What is the role of a Party?**

Those who request and receive Party status from the NEHO take on the fullest range of rights and responsibilities. Parties may act on their own behalf or be represented by a lawyer or another type of representative. A Party can be either one person (including a corporation) or a group of persons. Generally speaking, unincorporated associations are not considered to be legal persons who can receive status before the NEHO. Therefore, an individual who can bring forward the interests of an unincorporated association may seek status on behalf of the association.

An added Party may not raise a new issue without permission of the NEHO.

A Party may:

- be a witness at the hearing;

- be questioned by the Hearing Officer and the Parties;
- bring motions;
- call witnesses at the hearing;
- cross-examine witnesses called by other Parties;
- make submissions to the Hearing Officer, including opening statements and final argument;
- receive copies of all documents exchanged or filed by the Parties;
- attend site visits; and
- claim costs and be liable for costs, where permitted by law.

### **Who can be a Participant?**

A person who has an interest in the subject matter of the hearing may be named as a Participant. The Hearing Officer may decide to name a person as a Participant, rather than as a Party, if the person's connection to the subject matter of the appeal or issues in dispute is more remote than a Party's would be. A person who may otherwise qualify as a Party may request Participant status.

### **What is the role of a Participant?**

A Participant has the right to observe and present their views at a hearing. They may also:

- be questioned by the Hearing Officer and the Parties;
- make submissions to the Hearing Officer, including opening statements and final argument;
- receive a copy of the documents exchanged by the Parties that are relevant to the Participant's interests (upon request); and
- attend site visits.

However, a Participant cannot:

- raise issues not already raised by a Party;
- call witnesses;
- cross-examine witnesses;
- bring motions; or
- claim costs or be liable for costs.

### **Who can be a Presenter?**

A person who has an interest in the subject matter of the hearing may be named as a Presenter. The Hearing Officer may decide to name a person as a Presenter, rather than a Party or Participant, if the person's connection to the subject matter of the appeal or issues in dispute is more remote than a Party's or Participant's would be. A person who may otherwise qualify as a Party or Participant may request Presenter status.

## **What is the role of a Presenter?**

A Presenter only needs to attend the hearing when they are presenting their evidence. In addition to the right to observe and present their views at a hearing, a Presenter may:

- be a witness and present their views either during the regular daytime sessions or at a special evening session (if scheduled);
- be questioned by the Hearing Officer and the Parties;
- provide the Hearing Officer with a written statement to support their oral testimony; and
- receive a copy of documents exchanged by the Parties that are relevant to the Presenter's interests (upon request).

However, a Presenter cannot:

- raise issues not already raised by a Party;
- call witnesses;
- cross-examine witnesses;
- bring motions;
- make submissions to the Hearing Officer, including opening statements and final argument;
- claim costs or be liable for costs; or
- attend site visits (unless allowed to do so by the Hearing Officer).

## **What is a pre-hearing conference?**

The purpose of the pre-hearing conference is to prepare for the hearing by:

- identifying Parties, Participants and Presenters, and the scope of their participation in the hearing;
- determining the length, schedule and location of the hearing;
- hearing preliminary motions;
- identifying, defining or narrowing the issues;
- establishing dates for the exchange among Parties and with the NEHO, of all documents relevant to the appeal and documents to be relied on at the hearing, witness lists, witness statements and resumes of any proposed expert witnesses;
- establishing facts or evidence that may be agreed on;
- discussing the possibility of the settlement or withdrawal of any or all the issues;
- determining the order of presentation of evidence and submissions; and
- considering any other matters that may assist in the just and efficient adjudication of the appeal.

The Hearing Officer who conducts the pre-hearing conference may preside at the main hearing unless the Hearing Officer considers it inappropriate to do so. A Hearing Officer who conducts a pre-hearing conference at which the Parties attempt to settle issues will not conduct the main hearing, unless all Parties consent.

After the pre-hearing conference is completed, a Hearing Officer will conduct the main hearing. Most hearings regarding development permits take less than a day to complete.

### **How does one prepare for a hearing?**

The key to effective participation in a hearing is to be well informed and prepared to present your views and evidence. The Hearing Officer can only consider the information that is presented at the hearing.

The evidence intended to be relied upon should be relevant to the issues before the NEHO. In particular, the evidence must relate to the question of whether the development proposal accords with the objectives, permitted uses and development criteria in the [Niagara Escarpment Plan](#).

Parties, Participants and Presenters are strongly encouraged to review the [Niagara Escarpment Planning and Development Act](#), the [Niagara Escarpment Plan](#) and the Tribunal's [Rules of Practice and Practice Directions](#).

### **What are the disclosure requirements?**

All Parties must provide a copy of every relevant document that is in their possession, control or power, to all other Parties without charge. This must be done no later than the date the Hearing Officer sets for the exchange of these documents. Participants and Presenters may request to receive a copy of all documents relevant to their interests. Privileged documents are exempt from disclosure requirements.

All documents intended to be relied upon at the hearing must be filed with the NEHO. The NEHO must be given two or more copies of all documents filed, or as many as the NEHO directs.

The obligation to disclose is ongoing throughout the hearing process. All relevant documents discovered during the course of the hearing must be provided to the other Parties and, if the document is to be relied upon at the hearing, to the NEHO.

### **What is a witness statement?**

Witnesses may be trained professionals, members of the community, academic specialists or individuals with specific knowledge who can give the Hearing Officer relevant information.

A witness statement is a written statement of the evidence a witness intends to present.

A witness statement should be direct and to the point. It should also be complete, meaning that the witness should not have to add anything new to the evidence at the hearing. However, the witness is entitled to explain more fully anything contained in the statement.

A witness statement should contain the following information:

- the name, address and telephone number of the witness;
- if the evidence will be factual evidence or, if the witness is a qualified expert, opinion evidence;
- a resume of their qualifications and a signed copy of [Form 5, Acknowledgement of Expert's Duty](#), for each proposed expert witness;
- whether or not the witness has an interest in the development permit application and, if so, the nature of the interest;
- a summary of the witness' opinions, conclusions and recommendations;
- references to other documents that form an important part of the witness' opinions, conclusions and recommendations;
- a summary of the answers to any interrogatories (i.e. pre-hearing examination of the witness) that will be relied on at the hearing;
- a discussion of proposed conditions of approval that are in controversy among the Parties or agreed upon conditions that may be related to issues in dispute (where applicable);
- the date of the statement; and
- the signature of the witness.

If the witness statement does not contain all of the above information, Parties may risk their right to have the evidence admitted or may delay the hearing.

Witnesses will normally attend in person to give oral evidence and be subject to cross-examination. A Party who wishes to have witnesses present opinion evidence must have them accepted as experts by the Tribunal before their evidence can be admitted.

Witness statements should be exchanged between the Parties and filed with the NEHO within the time directed by the Hearing Officer, which is usually no later than 15 days before the start of the hearing.

### **Can the NEHO require a witness to attend a hearing?**

The NEHO has the power to summon a witness to attend a hearing to give evidence and to bring relevant documents and materials. A summons can be

issued because the Hearing Officer wants to hear from the witness or because a Party has requested that the Hearing Officer require the person to act as a witness.

The Party calling a witness is responsible for paying for the witness' attendance costs at the same rate that a person summoned to appear before the Superior Court is paid. For more information on attendance costs for summoned witnesses, please see Tariff A of the Ontario [Rules of Civil Procedure](#) under the [Courts of Justice Act](#).

It is the responsibility of the Party calling a witness to obtain and serve the summons ([Form 3, Summons to Witness – Oral Hearing](#) or [Form 4, Summons to Witness – Electronic Hearing](#)) as soon as possible before the start of the hearing. For more information on summons to a witness, please see Rules 191 to 196 of the Tribunal's [Rules of Practice and Practice Directions](#).

### **Can a hearing be postponed or adjourned?**

Once the date has been set for a hearing, the hearing will proceed on that date except in exceptional circumstances, such as the sudden illness of a Party. If a Party cannot attend a pre-hearing conference or hearing, they may request, in advance, an adjournment to change the date. If a person has been notified of the time, date and place of a pre-hearing conference or hearing and fails to attend, the NEHO may proceed with the pre-hearing conference or hearing and make its decision or recommendation in the absence of that person.

For more information on adjournments, please see Rules 104 to 107 of the Tribunal's [Rules of Practice and Practice Directions](#).

### **How does the NEHO hear an appeal?**

The NEHO may conduct a hearing by a panel of one, two or three Hearing Officers. An appeal will normally be conducted through an oral hearing. It might sometimes be conducted electronically (i.e. by telephone), through written submissions, or a combination.

At an oral or electronic hearing, each Party will have an opportunity to present evidence and submissions, call and cross-examine witnesses and explain their case to the Hearing Officer.

At a written hearing, all Parties will be provided with the opportunity to make written submissions and to comment on other Parties' written submissions.

### **What is the order of presentation at a hearing?**

Parties and Participants may give brief opening statements stating what they feel are the issues in the case before the NEHO, a brief summary of the evidence

they intend to present, the names of the witnesses that they intend to call, and the amount of time they feel they will need to present their case.

While evidence is usually presented orally, it may be supplemented by written submissions and the use of visual aids. Witnesses give evidence under oath or by affirmation.

While the Hearing Officers can direct the order of the presentation of evidence, a representative of the Commission usually first presents the staff report and the justification for the Commission's position regarding the development permit application.

Generally, the Appellant and those persons in support of the appeal next present their case and call their witnesses; however, this is subject to the direction of the Hearing Officer. Where the Applicant for the development permit is not the Appellant, the Applicant and persons opposed to the appeal will then present their case and witnesses. All witnesses are subject to cross-examination.

Reply evidence may be allowed at the discretion of the Hearing Officer. This evidence must be limited to any additional evidence that comes out of the evidence submitted by another Party and that the presenting Party could not have reasonably expected during their initial presentation of evidence.

When all the evidence has been heard, each Party and Participant can make a final submission. This submission gives the Parties and Participants a chance to summarize the important facts that they are relying on, to summarize any points of law or policy that they think are relevant for the Hearing Officer's consideration, and to persuade the Hearing Officer to accept their argument or position.

At any time during the hearing, the Tribunal may ask questions of Parties, Participants, Presenters, witnesses, lawyers or representatives.

### **Who can attend NEHO hearings?**

NEHO Hearings are open to the public unless ordered otherwise by the NEHO. The NEHO may order a hearing closed to the public on its own initiative, or at the request of a Party. The NEHO will only order a hearing closed to the public when the NEHO determines that intimate financial, personal or other matters may be disclosed at the hearing.

### **What is the role of the Hearing Officer?**

The Hearing Officer will conduct a public hearing to hear evidence from all Parties, Participants and Presenters about the Commission's decision on the development permit application. The Hearing Officer will then report to the Minister of Natural Resources and Forestry a summary of the representations

made during the hearing, and their opinion on the merits of the Commission's decision.

The Hearing Officer is required to take into account the objectives of the [Niagara Escarpment Planning and Development Act](#) and the requirements of the [Niagara Escarpment Plan](#).

Development permit appeals are also governed by the [Statutory Powers Procedure Act](#) and the Tribunal's [Rules of Practice and Practice Directions](#).

Under the [Niagara Escarpment Planning and Development Act](#), the Hearing Officer can decide to do one of the following:

1. The Hearing Officer may decide that the Commission's decision was correct and should not be changed. In this case, the Commission's decision will be deemed to be confirmed. The Hearing Officer's decision is final. (This option is not available if the Commission's decision was appealed by a municipality.)
2. The Hearing Officer may amend the terms and conditions of the development permit, and the Commission's decision will be deemed to be confirmed if:
  - a) the Commission's decision was to issue a development permit;
  - b) the Parties who appeared at the hearing have agreed on all of the terms and conditions that should be included in the development permit, and all of these terms and conditions are set out in the Hearing Officer's report; and
  - c) the Hearing Officer expresses the opinion in their report that if the Commission's decision included the terms and conditions as agreed to, the decision would be correct and should not be changed.

In this case, the Commission's decision will be deemed to be a decision to issue the development permit with the terms and conditions as agreed to. The Hearing Officer's decision is final.

3. In all other cases, the Minister, after considering the Hearing Officer's report, may confirm or vary the Commission's decision, or make any other decision that in their opinion ought to have been made. The Minister's decision is final.

### **When will the Hearing Officer's report be released?**

The Hearing Officer will make a report to the Minister within 30 days after the conclusion of the hearing, or within a longer period if the Minister allows it.

If the Hearing Officer makes a final decision on the merits of the Commission's decision, then a copy of the Hearing Officer's report is sent to all Parties when it is sent to the Minister.

If, however, the Hearing Officer makes a recommendation to the Minister, the Minister will release a final report to the Parties advising them of the Minister's decision and the Hearing Officer's recommendation. The Minister is not bound by the Hearing Officer's recommendation. The Minister's decision is final.

### **Can the Hearing Officer award costs?**

Participating in a hearing usually involves some costs. These costs may include:

- fees for lawyers, representatives or agents;
- fees for expert assistance and witnesses;
- travel and accommodation expenses; and
- costs for materials used for presentations (e.g. photographs, graphics, etc.).

In rare circumstances, costs may be awarded but only where there has been improper conduct by a Party. For more information on costs, please see Rules 212 to 220 and 225 to 231 of the Tribunal's [Rules of Practice and Practice Directions](#).

### **Can the report of the Hearing Officer be appealed?**

The [Niagara Escarpment Planning and Development Act](#) does not provide for a right of appeal; however, the opportunity exists for judicial review of the decision by the Divisional Court.

### **Is a lawyer, planner or other expert needed?**

You can represent yourself or you can have someone else represent you. If you choose a representative, then you must give your representative signed written authorization. A representative, who can be either a lawyer or non-lawyer, must be authorized under the [Law Society Act](#), which means that they must be licensed or exempt under the Act or by-laws. There is an exemption that allows for persons who are not in the business of providing legal services to occasionally provide assistance to a friend or relative for no fee. For information on licensing and exemptions please see the [Law Society of Upper Canada's website](#).

### **How is accommodation provided?**

Parties, Participants, Presenters, witnesses and representatives are entitled to accommodation by the NEHO for needs related to the [Human Rights Code](#), such

as a disability. Those requiring accommodation should notify the assigned Case Coordinator or the Tribunal Secretary as soon as possible.

### **What language services are available?**

Those who require the pre-hearing conference or hearing to be translated into French should write to the Case Coordinator at least 25 days before the event to make their request.

### **Who can access NEHO documents?**

All documents filed with the NEHO and all communications to and from the NEHO are part of the NEHO's public record and are available for reasonable access by all persons (unless the NEHO orders otherwise).

## **Part 2: Plan Amendment Hearings**

### **What is a Plan Amendment?**

Any person, ministry or municipality (referred to as an "Applicant") may propose an amendment to the [Niagara Escarpment Plan](#). For example, this could include a proposed development that is not a permitted use under the Plan. To authorize the development, the Applicant must bring an application for an amendment to the Plan either to change the Plan's permitted uses or development criteria, to change the land use designation of the subject property, or to remove the subject property from the Plan Area entirely.

### **How is an application for a Plan Amendment processed?**

Once an application for a Plan Amendment is submitted to the Commission, it seeks comments by publishing a notice in the local newspapers notifying the public of the proposed Plan Amendment and by circulating a copy of the application to the local municipalities, ministries, agencies and advisory committees. The comment period usually lasts between three to four months.

After the comment period has passed, the Commission will appoint one or more Hearing Officers from the NEHO to hold a public hearing if there are written objections to the proposed amendment. The purpose of the hearing is to receive representations from the public about the proposed Plan Amendment.

Within 60 days, or longer if the Commission allows, the Hearing Officer will provide the Commission and the Minister of Natural Resources and Forestry with a report summarizing the representations made during the hearing, and their recommendation on if the Plan Amendment should be accepted, rejected or modified.

After considering the report, the Commission submits its recommendation to the Minister of Natural Resources and Forestry. In some cases, as set out in the [Niagara Escarpment Planning and Development Act](#), the Minister of Natural Resources and Forestry may approve, modify or refuse the amendment or may be required to submit the Plan Amendment with their recommendations to the Lieutenant Governor in Council. The Lieutenant Governor in Council may approve, modify or refuse the Plan Amendment.

### **How is the hearing conducted?**

The hearing is conducted under the same basic principles as noted above in “Part 1: Development Permit Appeals”. As hearings conducted for Plan Amendment applications are not subject to the [Statutory Powers Procedure Act](#), the Tribunal’s [Rules of Practice and Practice Directions](#) are employed with necessary modifications.

### **Can the Hearing Officer award costs?**

Unlike development permit appeal hearings, costs awards are not permitted in plan amendment hearings.

### **For more information:**

For more information, please refer to the [Niagara Escarpment Planning and Development Act](#), the [Niagara Escarpment Plan](#), the [Statutory Powers Procedure Act](#), the Tribunal’s [Rules of Practice and Practice Directions](#) and the [Tribunal’s website](#).

Information on the Niagara Escarpment Commission’s process for filing development permit applications and Plan Amendments, as well as the [Commission’s form](#) to appeal the Commission’s decision on a development permit application, is available from the [Commission’s website](#).