File No. CA 004-09

M. Orr) Tuesday, the 11th day
Deputy Mining and Lands Commissioner) of May, 2010.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(15) of the **Conservation Authorities Act** against the refusal to grant permission for development within Valley Lands, Lake Ontario, Watershed 29, Part of Lot 2, Concession 2, Town of Grimsby, Region of Niagara, Application No. R.07.09.09;

AND IN THE MATTER OF

Ontario Regulation 155/06.

B E T W E E N:

3437400 CANADA INC.

Appellant

- and -

NIAGARA PENINSULA CONSERVATION AUTHORITY

Respondent

O R D E R

WHEREAS THIS APPEAL to the Minister of Natural Resources was received by this tribunal on the 5th day of June, 2009, having been assigned to the Mining and Lands Commissioner ("the tribunal") by virtue of Ontario Regulation 759/90;

AND WHEREAS a hearing was held in this matter on the 9th, 10th, 11th and 12th days of February, 2010, in the courtroom of this tribunal, in the City of Toronto, Province of Ontario;

. . . . 2

1. **IT IS ORDERED** that the appeal be and is hereby dismissed.

2. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this appeal.

DATED the 11th day of May, 2010.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

File No. CA 004-09

M. Orr) Tuesday, the 11th day
Deputy Mining and Lands Commissioner) of May, 2010.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(15) of the **Conservation Authorities Act** against the refusal to grant permission for development within Valley Lands, Lake Ontario, Watershed 29, Part of Lot 2, Concession 2, Town of Grimsby, Region of Niagara, Application No. R.07.09.09;

AND IN THE MATTER OF

Ontario Regulation 155/06.

B E T W E E N:

3437400 CANADA INC.

Appellant

- and -

NIAGARA PENINSULA CONSERVATION AUTHORITY

Respondent

REASONS

Appearances:

Mr. Randolph Smith: Counsel, appeared on behalf of the appellant.
Mr. Michael Kyne: Counsel, appeared on behalf of the respondent.

Introduction

This appeal of a conservation authority's refusal to grant permission to build a driveway contains, within its core, a history (going back to the 1990's) of previous planning applications envisioning grand plans for the subject lands as well as neighbouring lands. While these plans stayed on track for a period of time, they failed to come to fruition, leaving the owner of the subject lands to adjust his expectations for his own property. What began as a dream of a golf course and related buildings became a goal to build a single family residential home with a driveway.

. . . . 2

The passage of time brought a different regulatory regime, at least at the conservation authority level. While the owner had hoped to rely on what he considered to be positive planning results obtained in the past for the golf course to support his application for a driveway, such was not to be the case. His application was given a negative review by the Authority's staff and subsequently refused by the Authority's board. He appealed this refusal to the Minister of Natural Resources.

The Issues

1. Is the proposed driveway considered "development" and if so is it prohibited by the applicable regulations and policies?
2. If the proposed driveway is prohibited is there evidence of an existing private access road in the ravine such that it would qualify as an exception to the prohibition?
3. Should permission for development be granted?

Overview of Facts Not Disputed

The parcel for which driveway access is being sought consists of approximately twenty acres and is located in the Town of Grimsby, in the Regional Municipality of Niagara. Regional Road No. 8 (Highway 8 or Main Street) lies a short distance to the north and Ridge Road lies to the south. The parcel itself consists of a flat portion (the "bench") and a ravine which runs north from the bench area. Sandwiched between the parcel and Main Street (and to the north of the ravine) is a residential subdivision that was built with a cul-de-sac located at the entrance to the ravine. The ravine is sometimes referred to herein as the "subject land".

In terms of the planning regimes that affect the subject land, it is located within the Niagara Escarpment Plan (the "NEP") which is administered by the Niagara Escarpment Commission (the "NEC"). The Plan designations covering the parcel are Escarpment Natural Area and Escarpment Protection Area. The area for which a driveway is intended is also under the jurisdiction of the Niagara Regional Conservation Authority (the "NRCA"). The residential subdivision mentioned above is part of the Grimsby Urban Area in the NEP.

The parcel contains certain geological features associated with the Niagara Escarpment, including the "prominent wooded Escarpment slope at the south end" (sometimes referred to by the parties as the Escarpment "face"); a "steep wooded slope associated with the former Iroquois shoreline at the north end", and "a gradually sloping "Bench" historically in agricultural use".[1] The parties sometimes referred to this "Bench" as a plateau or tableland. The fact that agriculture had been carried out in some form on this part of the parcel was never at issue. A ravine which had formed on the northern slope had been proposed as an access route for an earlier development proposal (to the NEC) regarding a golf course (to be located on the appellant's lands as well as neighbouring lands). While a development permit application had been conditionally approved (and from time to time, renewed), it eventually lapsed.

It was proposed in this matter that the ravine act as the route for a driveway leading up to the plateau area where the residential dwelling was to be located.

. . . .3

[1] Exhibit 3a, Tab 12, page 61

Analysis

(a) Statutory Context

The relevant legislation includes the **Conservation Authorities Act**, the **Ministry of Natural Resources Act**, and the **Mining Act**. Some reference was made to the Niagara Escarpment Plan made under the **Niagara Escarpment Planning and Development Act**; however, this tribunal was only concerned with the question as to whether permission to build a driveway can be given pursuant to the **Conservation Authorities Act** and the relevant regulations and policies.

Under the **Conservation Authorities Act**, an authority's objects are "to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources…."[2]

An authority's powers are described in section 21 of the **Act** and they are intended to empower an authority to accomplish its objects. The powers include, among other things, the power to "study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed", and "to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof".

Authorities are given the power to make regulations under subsection 28(1) of the **Act**, and these can include regulations "prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland", and "prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, … or pollution or the conservation of land may be affected by the development". The required "permission" can be conditional and can also be cancelled should the conditions not be met. The various defined words and phrases that apply within the context of this matter will be dealt with as they become relevant.

Ontario Regulation 97/04 speaks to the requirements for the content of the regulations that authorities can make pursuant to subsection 28(1) of the **Act**. It contains a number of necessary inclusions in an authority's regulation including when a regulation shall prohibit development (in or on hazardous lands for example); the fact that development can occur with permission; that permission can come with conditions and so on. It also describes the hearing process to be followed for those occasions when permission is not granted.

The Niagara Peninsula Conservation Authority ("NPCA") has made a regulation in accordance with the **Act** and the aforementioned Ontario Regulation 97/04 and the version applicable to these proceedings is Ontario Regulation 155/06 which came into effect on May 4, 2006. In it, the prohibition against development is counter-balanced by the discretion which can be exercised by the Authority (to grant permission) where "if, in the [A]uthority's opinion, the control of flooding, erosion … pollution or the conservation of land will not be affected by the development".

. . . . 4

[2] Conservation Authorities Act, R.S.O. 1990, chapter C.27, s. 20

The regulation provides the opportunity for a hearing and under the **Act,** an appeal from a refusal of permission (or an objection to conditions), can be made to the Minister of Natural Resources (the "Minister") who may in turn refuse or grant the permission with or without conditions. The Mining and Lands Commissioner has been assigned the powers and duties of the Minister for the purpose of hearing and determining appeals under subsection 28(15) of the **Act** by virtue of Ontario Regulation 571/00. The **Ministry of Natural Resources Act** and the **Mining Act** deal with the administrative and procedural aspects of this matter.

An analysis of the statutory regime that applies to conservation authority matters would not be complete without reference to manuals that authorities produce and rely on in their processing of applications for permission. In this case, the NPCA's manual is entitled "Policies, Procedures and Guidelines for the Administration of Ontario Regulation 155/06 and Land Use Planning Document". This manual has undergone revisions but for the purposes of this hearing the version in effect is dated December 12, 2007.

Manuals are designed with the intention of giving guidance and information to all users (public and authority staff alike). The NPCA's manual is over 100 pages in length and it contains exactly what its title describes; namely, policies, procedures and guidelines all focusing on the administration of the regulation. Regulation 155/06 could be characterized as the raison d'être for the manual in that the regulation leaves it to the "opinion" of the authority to grant permission to develop. The manual assists the authority in formulating an opinion. While the manual on its own is not "law", it is a necessary tool in the regulatory "kit" used by the authority. The tribunal will refer to the NPCA's manual as a manual and sometimes as the "Guidelines" or "Policies".

The Evidence

Mr. Emile Saine is the owner and controlling shareholder of the appellant numbered company. For the sake of simplicity, any reference to the appellant can be taken to mean a reference to Mr. Saine and his company. Mr. Saine provided information as to the history of the subject lands once his consultants had testified. It is useful to refer to his testimony at this point. He recounted how his property (and neighbouring lands) had been used for agriculture (in the 1950's and 1960's); how as a youth he had seen the ravine occasionally accessed by tractor to carry fruit and how as an adult he had taken a tractor through it to cut grass on the plateau. He also testified as to his past efforts to combine forces with landowners to the east in order to create an 18-hole golf course complete with club house and associated buildings. The club house would be reached by way of a road (this had been described by his planner, Mr. Ariens as six metres in width)[3] which would start at the cul-de-sac and cut through the ravine. This venture began in the 1990s' with a development permit application being made to the NEC. Time passed; NEC approvals had to be extended and eventually the project died and approval lapsed. The appellant decided to focus on developing his own lands and to construct a single detached dwelling on the "Bench" area. It would be connected to the Golf Woods Drive cul-de-sac by way of a driveway (reduced to three metres in width) running through the ravine.

. . . . 5

[3] Transcript, Vol. 1, page 63, line 8

The appellant placed importance on technical information that had been produced for the golf course proposal made to the Niagara Escarpment Commission approximately 10 years earlier. In very general terms, the appellant said (through his consultants) that nothing had changed as far as things like soil conditions and topography and bedrock were concerned so the old information was still relevant. Part of the argument in support of the appeal to this tribunal also dealt with a perceived lack of access to the flatter land above the ravine should permission not be granted. The parcel would be "landlocked" if the driveway could not be constructed.

The appellant commenced with the evidence of his planner, Mr. John Ariens of the IBI Group. Mr. Ariens has planning experience in the Hamilton/Grimsby area including working on the aforementioned subdivision located to the north of the ravine. In fact, this subdivision had been built on land once owned by Mr. Saine. Mr. Ariens was familiar with the rules and regulations of the NPCA as well as the Niagara Escarpment Commission. The aforementioned subdivision has as one of its roads a public street named "Golf Woods Drive". This road, which runs roughly north-east to south-west on maps, terminates at its southerly end in a cul-de sac which is found at the entrance to the subject ravine.

The parcel within which the ravine is located is in the Niagara Escarpment Plan and displays a number of geological features that reflect this inclusion. While the various witnesses used terms such as "bench" and "plateau" and "tableland" and "face" throughout the hearing it makes sense in dealing with the Niagara Escarpment Plan to refer to the terminology used by its own planners for accuracy's sake. In this case, the tribunal has the benefit of at least one NEC staff report (provided by the appellant) that contains information describing the local geology and its relationship to the Niagara Escarpment. This in turn helps in understanding the terrain related to this appeal – the proviso being that the report was made in response to a request to extend the conditional approval of a development permit for the development of an 18 hole golf course. The proposed golf course application dealt with approximately 212 acres in total and included the subject parcel (and ravine). The terrain and features were described by the NEC planner on January 20, 2003 as follows:

> "The property consists of a steep wooded slope associated with the former Lake Iroquois shoreline at the north end, a gradually sloping "Bench" historically in agricultural use, and the prominent wooded Escarpment slope at the south end. Two watercourses and their associated ravines traverse the site…."… "An additional minor ravine formed on the northerly slope is the site for the roadway access connection with the newly developed residential subdivision beyond the toe-of-slope. This selected location includes a narrow tractor path through the ravine, thereby minimizing the degree of cut and fill for a traffic route to the "Bench" level."[4]

Visually speaking, in looking at the subject parcel from its northern boundary (standing in the Golf Woods Drive cul-de-sac looking south), one would see a ravine cutting in to a "steep wooded slope". To the left of the ravine one would also see a large retaining wall built of armour stone (which from photographs appear to be over two metres high at its highest

. . . . 6

[4] Exhibit 3a, Tab 12, page 61

point). Standing at the edge of the public road and looking in towards the ravine one would see a metal grate which covers a municipal drain. Just beyond that grate, one would also see some fencing that acts as a barrier to debris that might come down the ravine towards the drain. Moving further south one would see that the ravine gradually opens on to a relatively flat area (the "Bench" area) which would in turn be framed by the "prominent wooded slope" beyond. The subject parcel or lands in their "Bench" area are adjacent to neighbouring lands to the east, which happen to share the "Bench" and its relatively flat characteristics. The ravine itself is cut by a ditch (perhaps up to a metre in depth in places) and also contains a swale of varying width. This is depicted in a survey prepared by Kerry T. Howe Surveying Ltd. in 1998 and contained in NEC files (presumably for the golf course proposal). While Mr. Ariens used this survey to make reference to a "tractor path" the document itself makes no such reference. This survey provided the basis for the current driveway design – albeit only in a preliminary fashion.

Mr. Ariens was retained in 2008 by the appellant to deal with whatever permits might be required to accommodate the appellant's plans for the aforementioned single dwelling. A development permit application was required from the NEC, and permission was required from the CA for the driveway portion. An "Application for Development, Interference with Wetlands, and Alterations to Shorelines and Watercourses" was filed by IBI Group (Mr. Ariens) and received at the NPCA on February 6, 2009. The application was accompanied by a Niagara Escarpment Permit Application which had not actually been filed with the NEC as the intention was to "require the Authority [CA] to approve the proposal in principle."[5] Mr. Ariens also attached a detailed Site Plan which was produced for the NEC application. The proposed driveway would "require an alteration to the watercourse and … result in the redirection of flow into the existing ditch inlet at the toe of the escarpment." (This was later changed to reflect no alteration to the watercourse.) Mr. Ariens also indicated that a 150 millimeter perforated pipe would be positioned under the driveway (to accommodate drainage) and be connected with the ditch inlet. This inlet was located near the cul-de-sac for Golf Woods Drive and had been constructed to handle drainage that might flow down the watercourse. The application went on to say that "[t]ree removal will also be required for the creation of the proposed driveway."[6] Under cross-examination, Mr. Ariens testified that while there might have been some thought to "re-jigging" the watercourse earlier, that was not the plan now and that a formal revision to the plan for the driveway would be made should they obtain permission from the Authority. Both the NEC application and the Authority permission would be in "harmony". In fact, the intention was to not move the watercourse.

Mr. Ariens used the aforementioned Howe survey to align the proposed driveway (using the swale line as a guide) and suggested that retaining walls of various heights – the highest apparently being 1.1 metres be placed at strategic points along the driveway route. Some grading would be required and slope stability issues had to be addressed. The appellant was proposing that four conditions be made part of any permission granted by this tribunal. They included such things as stabilizing and naturalizing the existing channel to the satisfaction of the NEC and the NPCA.

. . . . 7

[5] Exhibit 3a, Tab 15, page 88
[6] Exhibit 2, Tab A, NPCA letter dated March 2, 2009, addressed to Mr. John Ariens

The appellant (through his consultants) placed much importance on historical planning comments made and approvals given approximately ten years ago in conjunction with the golf course proposal. According to Mr. Ariens, the conditional development permit approval given in the past (and subsequent extensions) was accompanied by approval from the CA. In support of his position he referred to various letters from CA staff members who were providing their comments in response to NEC circulations. None of these staff members were witnesses before this tribunal for this appeal. Mr. Ariens also pointed out that none of the letters from CA staff in the past mentioned anything about "significant groundwater flow" being anticipated in the ravine. However, it showed up as a concern in the March 24, 2009 report produced by CA staff for the Board hearing dealing with the most recent application. Mr. Ariens also pointed out that the CA staff report failed to mention the "ten years of history" dealing with the NEC and the development permit process. He maintained his view that the Authority had supported the application to the NEC at the time despite the Authority staff comments regarding slope stability concerns, given that the slope's height of approximately nine metres. In response to slope concerns Authority staff was also recommending that an alternate location for the golf course driveway be considered and felt that it could easily be accommodated elsewhere. According to Mr. Ariens, there was no alternate location for the driveway. In Mr. Ariens' view, the Authority's comments showed support for the application and this was an important fact for the purposes of this hearing. Furthermore, he maintained that the documents (through the development permit history) showed the valley was "approved for much more intense use". And this was after what he described as "full consultation" with public agencies including the NPCA.

Referring to Ontario Regulation 155/06 Authority staff responded to the development application on March 2, 2009 and advised "no person shall undertake development on the areas within the jurisdiction of the Authority that are river or stream valleys that have depressional features associated with a river or stream, whether or not they contain a watercourse." Staff referred as well to the "Policies, Procedures and Guidelines" Manual described earlier stating that it [indicated] "that: 'No new Development will be permitted within natural valleys where the bank height is equal to, or greater than 3 meters.'… To summarize, NPCA staff have determined that [the] proposal will disturb the existing natural ravine and is contrary to NPCA Board policy. As such, NPCA staff would advise that a permit … cannot be issued." Mr. Saine was informed of staff's position and took advantage of the opportunity to appear before the NPCA Board Directors to make his case. The Board refused the application on May 20, 2009, stating that: "the development of the laneway entails removal of trees, interfering/piping of a natural channel and grading/placement of fill, all within a natural valley and as such, has negative impacts on the conservation of the valley lands" and "that development of the laneway is contrary to section 3.25 of NPCA Policies, Procedures and Guidelines for Administration of Ontario Regulation 155/06 and Land Use Planning Policy Document, dated December 12, 2007". An appeal from that decision brought the appellant to this tribunal.

Mr. Ariens took exception with certain statements made by staff in the aforementioned March 24, 2009 report to the Authority's Board; including staff's saying that the applicant wanted to alter/pipe the watercourse, when the applicant had "checked off diversion of water,…because we were crossing that small area of the watercourse" (with the proposed driveway).[7] As this tribunal heard, the plans to cross the stream at the bottom of the ravine were changed so that the driveway would not cross the stream.

. . . . 8

[7] Transcript, Vol. 1, page 71, lines 23-25

Mr. Ariens presented photos depicting what he said was an "existing tractor path" and in his view, this fell within Policy 3.25.3 (3) which allows for reconstruction or alteration of development already existing within valleylands, subject to certain issues being addressed or addressable.

When questioned by the tribunal as to the current usability of the "tractor path", Mr. Ariens said that it would need "minor regrading", there was "some erosion … that needs to be corrected" and that it could be used by a tractor "with difficulty".[8]

Mr. Ariens referred to a geotechnical report and a storm water report – both of which had been prepared for the golf course proposal in 1999. He also described his actions responding to the contents of the latest CA staff report to the Board – including visiting the site in September of 2009 to check on the state of erosion and to quantify the number of trees that would have to be removed for the driveway. He found that the existing water channel had become blocked with debris in parts causing any water to leave the channel and flow down the tractor path. This in turn led to new erosion. He said that it was new in the sense that it had not been evident when he visited the site in March, 2009 (prior to the Board hearing). It was his opinion that erosion problems would be mitigated by the constant maintenance activities of an owner looking after the driveway once it had been built. Retaining walls could control erosion as well.

In reviewing Ontario Regulation 155/06, Mr. Ariens began by looking at clause 2 (1)(b) which states that "[s]ubject to section 3, no person shall undertake development … in or on the areas … that are river or stream valleys that have depressional features associated with a river or stream, whether or not they contain a watercourse…." Mr. Ariens said that the ravine feature would be considered a "stream valley". Under section 3, permission for development might be granted if in the Authority's opinion, "the control of flooding, erosion… pollution or the conservation of land [would] not be affected …." In his view, flooding was not an issue, erosion was present, and pollution was a "stretch". Conservation of land also applied but could be dealt with through appropriate conservation plans.

Mr. Ariens then reviewed the policies and guidelines manual dealing with the administration of the regulation and came to the conclusion that building a driveway would work to stabilize and protect the valley. It would be preserved and restored. This was tantamount to conserving the land. The driveway would not generate pollution and contaminants generated by "one house" would be "minimal". Mr. Ariens also explained how he approached the guidelines by saying that as such, they provide direction and that they did not have the status of law. More importantly, he did not view the Valleyland Policy 3.25 as restrictively as did Authority staff. It applied only to situations which were not found in this ravine which was only intended to accommodate a single driveway leading to a residential dwelling.

In cross examination, Mr. Ariens was taken to the CA's comments made in response to the NEC's circulations of the golf course proposal and acknowledged that the CA would have required a geotechnical survey if the final placement of the driveway was located in the valley, as CA staff were concerned about slope instability. In fact, the issue of slope insta-

. . . . 9

[8] Transcript, Vol. 1, page 74, lines 12-17

bility was a recurring theme in the CA correspondence, and as Mr. Ariens admitted, it was never cleared as a condition. Mr. Ariens also agreed that the review of a development application would have to take the regulation, the statute and the guidelines into consideration. However, he was adamant that if it was considered good planning at the time of the golf course proposal to allow for six-meter wide road, it was good planning today because the conditions today were the same as they were then. He was taken to task on this point by CA counsel who got him to agree that good planning was an "amorphous" standard and that the opinion of the Authority was what counted. Mr. Ariens also acknowledged that the valley wall would be disturbed by the construction of a driveway.

The appellant's first engineer, Mr. Llewellyn, testified that there was a "substantial" amount of erosion on the site, but that various controls could be put into place to address erosion, sediment, and flow of water to the point that the channel would function better. He also testified that he had seen granular material that may have been used to create the tractor path originally, although he seemed to contradict this testimony with his explanation as to why a survey failed to delineate the path. In his words, "… if the tractor path had been a visible different surface, then they would have picked it up as such."[9] Erosion was at work on the path and the water channel was being blocked in places. The valley would be stabilized by the construction of a driveway as proposed by the appellant. He opined that the proposed three metre wide driveway would have "significantly" less impact than the previously "approved" six metre wide golf course road.

The appellant's second engineer, Mr. John Monkman reviewed a geotechnical report dating back to 1998 prepared for the subdivision lands to the north of the ravine and viewed the site for the proposed driveway. Ten boreholes were made (in January) for that report – with one being located at the end of the cul-de-sac and one of them located somewhere on the ravine site. Mr. Monkman was not able to specify their exact location; however he was comfortable in saying that he considered the soil and bedrock stable. The soil was very hard and underneath was Queenston Shale bedrock. The borehole at the higher end of the ravine revealed till material. The slope was covered with mature trees and he considered it stable "in its present state." It was also his opinion that the proposed driveway route "has experienced some surficial erosion as the initial laneway was constructed within an erosion feature". The reference to an "initial laneway" is a reference to the alleged tractor path. He felt that the proposed driveway with its retaining walls and other mitigating features would have the effect of ensuring slope stability and he questioned the Authority's view that "significant" damage would be done to the existing natural valley system.

Under cross-examination, Mr. Monkman admitted that he had not carried out an extensive investigation for the proposed driveway application, but he had taken a shovel with him during a visit to the site in November. He noticed shale bedrock exposed along the laneway. He maintained that the soils found in the 1999 boreholes would be the same today. He was also unaware as to how the borehole located at the upper reaches of the ravine was accessed but he did acknowledge that a farmer's lane existed to the east of the subject ravine. He had been told by the appellant's counsel that the proposed driveway route followed a laneway used by previous owners to access agricultural lands at the top. He had not mentioned a laneway in his previous

. . . . 10

[9] Transcript, Vol. 2, pages 98, 99

report. However, he maintained that in carrying out the original geotechnical investigation he had walked the route so he knew "there was a former access route back at that time". He further admitted that the Queenston Shale backfill used in the driveway construction would have to be properly graded as it could expect to settle for many years even if compacted. The cut at the top of the ravine to accommodate the driveway might have to be 4.5 metres deep, he was not sure. He also acknowledged that groundwater seepage could be anticipated and would have to be addressed. This seepage had also been acknowledged by Mr. Saine.

The Conservation Authority's first witness was Mr. Steve Miller, an engineer by profession, whose work with the Authority required him to review development applications to determine their conformity with applicable statutes, policies, procedures and guidelines. Mr. Miller was thorough and detailed in his testimony.

Mr. Miller testified that the site (and neighbouring lands) first came under scrutiny when an unrelated third party asked about potential restrictions on their development potential in 2008. This person was told that the valley systems were the subject of regulation by the Authority and that "allowing [a] driveway through a valley would be contrary to [the] regulation. As such, the Authority [could] not support the creation of a driveway off of Golf Woods Drive or Terrace Drive …."[10]

Mr. Miller provided photographs depicting an access route located on comparable lands located to the east of the subject lands – an access route presumably used by a tractor and making use of the same sort of physical feature (a ravine). He explained that the Authority's jurisdiction extended to this feature and road as it was located within lands deemed to be "hazard lands" (a ravine). He also explained that as far as the evolution of regulations administered by the Authority were concerned, that prior to 2006, the intention was to mitigate hazards, but that after 2006, with the advent of the current regulation, the intention was to be restrictive when it came to development on such lands. As such, should the owner of the neighbouring access road seek to pave it, he would have to obtain the Authority's permission. Mr. Miller took the tribunal through the policy change worked by the 2006 regulation, comparing it to what went before in terms of regulatory regime. He described the change as a "fundamental shift" in the sense that prior to 2006, the Authority could only comment on planning proposals; but that after 2006, the Authority exerted approval authority. Experience had taught the regulators that allowing development on unstable slopes or in their vicinity led to problems involving loss of property and danger to human life. In short, the 2006 regulation brought in a more restrictive planning regime as far as the Authority was concerned. The appellant's application for a driveway to accommodate a single residential dwelling came to the Authority after the new regulation was in place. The proposed driveway it seems was located in exactly the conflux of features that were regulated by the Authority, namely hazardous lands, valley lands and watercourses. In referring to various photos, Mr. Miller pointed to "gullying", "leaning trees", and erosion in the watercourse saying that these indicate hazardous lands as erosion and unstable soil are at work and present. (The tribunal notes that the term watercourse connotes a depression that has a flow of water in it on a regular or continuous basis.) He also explained that the Authority is always concerned about works that could be damaged by unforeseen or unpredictable events such as large rainfalls and changes in the groundwater regime. His experience had shown him roadways

. . . . 11

[10] Transcript, Vol. 2, page 233

within valleys that had shifted and cracked; retaining walls that had shifted or been undermined and so on. He was also concerned about the effect that the proposed driveway would have on the watercourse feature – in his words, it would "completely obliterate it". It was not clear to him how the watercourse was going to be addressed. He pictured the driveway over time as requiring further mitigating actions as erosion would continue to necessitate the need for more retaining walls, trees would continue to lean and cause blockage of the driveway and so on. All of the features regulated by the Authority would be negatively impacted since the proposal would work to replace the natural state with a three-metre wide asphalt driveway, piping and a small swale.

When asked about whether there was a "private access road already existing" (one of the criteria under Policy 3.25.3 (3)), Mr. Miller said that he had compared the conditions on the subject site to a tractor path found on neighboring lands and listed all of the indicators that told him that the presence of a tractor path was not apparent to his eyes. These indicators were the presence of mature trees through the valley, significant erosion and the fact that the valley was overgrown. He indicated that while he could walk the valley on foot, in some areas he had a "difficult time". This meant then that the application could not come under the exemption provided by subsection 3 of Policy 3.25.3 which allowed for reconstruction or alteration of private access roads already existing, provided certain tests were met.[11] Those tests had to do with undertaking best efforts to relocate the road; completing a geotechnical study to in effect carry out a risk assessment, and not allowing for any adverse environmental impacts to existing natural features and functions. When asked by the tribunal what his response would be were he satisfied that a private access road actually existed, Mr. Miller indicated that the proposal would not be able to meet the third test having to do with adverse environmental impacts. The proposal would result in the removal of trees, impact on the valley land and watercourse and "fragmentation" of the valley. As he put it, the Authority was trying to keep the valley land as an "integral unit".

Mr. Miller produced photographs taken by him in August, 2009, which, as he put it, showed, among other things, a "massive erosion feature", a "massive gully that's coming into this valley perpendicular", (meaning that land that sloped adjacent to the subject valley was also being subjected to erosion), leaning trees, the "eroded watercourse", (which was about four feet in depth), washout, woody debris up against at least one tree high enough to indicate "significant flow". Mr. Miller reiterated that there was no tractor path apparent when he visited the site in August, 2009 and he clarified (in response to questions from the tribunal) that his assessment of the application as far as subsection 3 of Policy 3.25.3 was concerned, really happened at that time when he became aware of the appellant's reliance on the existence of an alleged tractor path. In fact, in 2008, when he conducted his first site inspection, he had "no impression that an access road existed".[12]

Mr. Miller also reviewed his interpretation of Policy 3.25 which deals with "valleylands". He disagreed with Mr. Ariens' interpretation which restricted the prohibition against "new development" to those situations specifically described in the Guidelines, namely, areas populated by homes and businesses such as those along the Twenty Mile Creek in Lincoln,

. . . . 12

[11] NPCA, Policies, Procedures and Guidelines for the Aministration of Ontario Regulation 155/06 and Land Use Policy Statement, December 12, 2007, Section 3.25.3(3), page 48
[12] Transcript, Vol. 3, page 82

and the Twelve Mile Creek in St. Catharines. According to Mr. Miller, the word "development" was not restricted to homes and businesses as such, but applied to any type of development (including driveways) which could be damaged, or could be a part of injury to humans, or have negative effects on the environment, including vegetative and animal/aquatic life.

In reviewing the policies and guidelines dealing with alteration to watercourses and floodplains (Policy 3.16), Mr. Miller was of the opinion that the standards set out by that policy had not been satisfied by the application. This policy calls for the use of natural channel design principles and in his review of the application he concluded that these were not being used. The tribunal notes that this policy would only apply to permitted development.

In differing with Mr. Ariens' opinion that the property would be landlocked were the permit not granted, Mr. Miller testified that as far as the creation of new lots were concerned, they were to have frontage on municipal rights-of-way, but that there were instances where a lot might have frontage on a municipal right-of-way yet development could not take place because it was covered by a floodplain.

Mr. Miller also questioned the conclusions reached by the appellant's soil expert, Mr. Monkman in that Mr. Monkman placed reliance on the stabilizing effect of bedrock without getting into the erosion action of surface soil and the possibility of retaining walls being knocked over, roads being covered (landslides) and so on by the sloughing off of soil. As for Mr. Monkman's testimony regarding groundwater, Mr. Miller took issue with the age of the report relied on by Mr. Monkman (being 11 years old) and by the fact that he failed to address the seasonal variability of groundwater. Mr. Miller described the effect that the geography of the escarpment had on the movement of water infiltration of the lands above the escarpment face, followed by the water making its way through and out the face of the escarpment. Water could also seep out through the valley. Furthermore, Mr. Monkman's boreholes were as old as the report and their locations were not clear.

Mr. Miller's chief concern was that the valley in question was prone to erosion, that such a force could have a negative effect on a driveway, that the presence of a driveway would lead to mitigation measures taken by the owner to further control erosion (which would be ongoing), and that all of this would be an intrusion in the valley – where nature was going about its business in its own way. The watercourse was "doing its own thing" as well, and affecting the watercourse with erosion controls would lead to increased erosion. At some point, he believed that the entire channel would have to be contained artificially (armoured) to prevent erosion. Given that the area was erosion-prone, he was concerned that a heavy or big rainfall could have a destructive effect on property and or life. In its present state, the valley system did not pose a threat to person or property but was more of a nuisance due to the placing of silt at the bottom of the slope.

In cross-examination, Mr. Miller was asked about previous policies and guidelines and their approach to matters dealing with the environment. Mr. Miller agreed that the Authority's concern for the "environment" pre-dated the current Policies and Guidelines and that the criteria used in the review of applications were similar, if not the same. He also agreed that the Policies and Guidelines were used to evaluate proposals and that they were not the same as regulations – but he disagreed with appellant's counsel's approach to the use of the words "conformity" or "compliance" when dealing with policy documents. Mr. Miller took the

. . . . 13

approach that the Guidelines set out the tests to be met and that if the Authority was satisfied that the tests had been met, then conformity had been achieved. Counsel for the appellant in pressing the point asked "… even if the Authority is satisfied it's a good project and it meets the criterion in Section 3.1 [meaning subsection 1 of section 3] of the Regulation, the application still has to conform to the guidelines as if it was a regulation…?" Mr. Miller's response was "[n]eeds to meet the tests of that guideline".[13] In responding to questions about the use of the guidelines Mr. Miller pointed out that while staff might give an opinion as to whether a proposal conformed with the guidelines, the final decision (grant or refuse the permit) rested with the Authority's Board.

Mr. Miller was also taken to his opinions regarding aquatic and fishery matters, as he had arrived at conclusions on these points prior to consulting with an expert on staff with the Authority. It was his opinion that the watercourse (despite its emptying into a storm sewer) provided a habitat for creatures that made use of water (albeit intermittent water) in their lives.

In addition to reviewing his conversations with Authority staff, Mr. Miller was asked about the definitive nature of the response given to the third party who had made inquiries regarding the subject lands and lands adjacent and their development potential ("show-stoppers" as Mr. Miller put it). Their response had been negative and "deliberately blunt".

Mr. Miller was also questioned about his conclusion that a tractor path was not evident in his August, 2009, visit to the site – when a staff colleague who had been present at the same time, referred to a former agricultural access road which had not been actively used in 20 to 25 years. Mr. Miller stayed with his opinion and maintained his position saying he would have to take someone's word for it – he could not draw the conclusion that there was a man made feature in the valley bottom.

Mr. Miller was cross-examined on a number of issues including the fact that he deliberately did not look at the old Authority file dealing with the previous golf course application; his opinion that allowing a driveway would contribute to pollution (salts, oil, grease and the like); his observations regarding the movement of water down the valley and the channels it created as a result; his opinion that there was a potential for groundwater to "cause bad things to happen in [the] valley", and his opinion that while the subject property itself might have limited development options, that it was not landlocked as it fronted a municipal road and the owner could access it by foot. He maintained his view that his review of the application did not include references to previous Authority files (dealing with the golf course application) because the rules had changed and the current application had to meet new regulatory tests.

Mr. Miller was also cross-examined on his interpretation of the Authority's Policies and Guidelines, specifically those dealing with development and hazardous lands – both being defined terms. The proposed driveway was going to be located in a valleyland that was a hazardous land as well. Policy 3.2 says that development in hazardous lands is prohibited except where allowed under Policies 3.4 – 3.28 inclusive. When asked by counsel for the appellant if he agreed that "even if the property was found to be in hazardous land that Section 3.25.3 provid[ed] an exception to [the policy] in Section 3.2", Mr. Miller said he disagreed with the statement. He replied that "…it's quite clear development is prohibited within hazardous lands".

. . . . 14

[13] Transcript, Vol. 3, page 129

The Authority also produced a biologist, Mr. Barrett, who had been asked to look for potential ecological or environmental impacts which might be caused by the proposed driveway. He made a site visit with Mr. Miller in August, 2009. Mr. Miller had asked for his opinion as to potential ecological or environmental impacts that would be associated with constructing a driveway up the valley. On visiting the site he saw "significant" signs of erosion in the channel of the valley, and a "fairly major accumulation of settlement at the catch basin just adjacent to Golf Woods Drive". He also surmised that finer materials had been washed down the watercourse bed as it displayed gravel and cobble in its makeup. He noticed slumped trees, trees with crooked stems, pointing to the possibility of unstable slopes or erosion. When asked about his observation regarding "the remnants of a former agricultural road", he said that he had seen a "fairly wide area that … appeared … may have been used at that one point for access at least partly up … the slope." He said that it did not appear to have been used recently – perhaps 20 – 25 years ago. When asked by the tribunal about the length of time trees found in the photos being used by witnesses had been lying across the channel he estimated perhaps 15 years. He also considered the ages of trees in the proposed driveway site to calculate his times. It had not been his intent to assess whether an access road was present. However, he was able to say that he calculated the access at the Golf Woods Drive entrance was about three metres wide and that there may have been some excavation to create a flatter surface. The quality of the access diminished as one traveled up the slope. At one point, they had to walk up the channel a short distance as flat ground was not always present. It was not passable by an agricultural vehicle in its current state, and he felt that it would not be considered an agricultural access today. He visited the site in November, 2009, to view the trees that would have to be removed were a driveway to be built. The trees were of varying ages – some being in the area of 25-30 years of age. Tree age and site conditions were some of the factors he used to gauge the age of the pathway. It was Mr. Barrett's opinion that the proposed driveway would have significant ecological impacts on the watercourse and valley. The driveway, retaining wall and relocation of the watercourse would all contribute to the impact. Although he had not carried out a flora/fauna inventory, it was his view that small mammals and reptiles would all be affected by the change in site conditions. The Authority's preference was to re-create what was there whenever watercourse relocation was planned. While the watercourse was of low sensitivity, it would also require a setback. The combination of a three-metre road and say a five meter setback would lead to significant alteration to the valley.

Mr. Barrett was followed by two other witnesses for the Authority. Ms. McInnes gave planning evidence which centred on Mr. Ariens' position that denying his client's application would leave the property "landlocked" – something that was not accepted planning. She described situations where development was not permitted on lots of record. In cross-examination, she maintained that the owner of the subject lands might access them through neighbouring lands. She was questioned extensively on the point, but maintained her position that alternative access routes could be canvassed.

Mr. Kukalis is a certified engineering technologist who also acts as Director of Water Management for the Authority. He had reviewed the previous golf course documentation and concluded that the Authority even at that time had flagged certain issues to be addressed. These included slope stability and erosion. He echoed the views of the Authority's previous witnesses and added information concerning the tests applied by the Authority when determining whether a private access road was in existence. He had started out by calling it a "primary"

access road, but in the end, reiterated the same approach to both saying that width, (wide enough for emergency, service vehicles) was a factor along with whether it could handle weight (of vehicles). As far as he was concerned, a private access road did not exist on the site. As he put it, "[e]xist" is a state of being now".

Mr. Ariens was brought back by the appellant's counsel to augment and clarify his evidence. The impact on the types of trees was reviewed; the number of necessary retaining walls was clarified; including dimensions; and a description of braiding (i.e. water encountering and circumventing blockages) would be eliminated by building the driveway overtop the channel was discussed.

(c) The Parties' Positions

The parties agreed at the conclusion of the hearing to provide written argument – which they subsequently did.

The appellant's plan is to construct a driveway leading from a municipal road through a ravine up to a flat area of land where he hopes to build a residential dwelling. The location of the driveway is based on what he claims to be "tractor road" not used since the "late 1980s". This same location was the focus for a wider roadway planned for a golf course in 1998 – a venture that was dependent on the inclusion of other parties and which fell through after having taken it through the development permit application process at the Niagara Escarpment Commission. The permit had been granted with conditions. The Conservation Authority had been contacted by the NEC as a commenting agency and had provided comments and outlined its concerns. The appellant says that the information related to the NEC permit is relevant to this matter before this tribunal. The proposed residential dwelling is a permitted use under the Escarpment Protection Area designation of the Niagara Escarpment Plan.

The appellant stated that without the proposed driveway there is no access to the "buildable" part of his lands. His application to the CA was made under subsection 3(1) of Ontario Regulation 155/06 which came into force on May 4, 2006.

The appellant's witnesses all pointed out in their professional capacities that the proposed driveway with its attendant features (armour stone, e.g.,) would serve to positively influence the natural functions and features of the ravine. Any flooding would be controlled by the driveway works. The works themselves would be built with the input of the CA and natural features would be enhanced through tree planting. Indeed, current conditions in the area would be "improved".

The appellant argued that the proposed driveway would not affect the conservation of land in a negative way. His consultants were confident that erosion and sediment control devices (manifested through an appropriate plan) would produce a product that would serve to address those natural functions.

As for the Conservation Authority's policies and guidelines, the appellant argued that his proposal is consistent with them and that a flexible approach should be taken when applying them. They did not have the same status as regulations or by-laws for instance. The

. . . . 16

stream in question was intermittent (appearing with rainfall and snowmelt) and the appellant had changed his driveway plans in any event to avoid crossing the intermittent stream. The proposed driveway and its construction features would alleviate erosion and the driveway itself would not be a contributor to pollution and any fertilizer, salt, oil, or grit would make its way to the town's storm sewer system. A catch basin was located at the bottom of the ravine where it met Golf Woods Drive. This road services a subdivision located immediately to the north of the appellant's lands.

The appellant also argued that the proposed driveway was following the route of an old tractor path that had been used by him and his family up until the late 1980s. He had not made any changes to it since 1983. His witnesses testified that they saw some evidence of granular fill, but that access with a tractor today would be "difficult". The appellant argues that the route is "passable today". As such, it met the test set out by Subsection 3.25.3 (3) of the CA's policies and guidelines which allows for reconstruction or alteration of existing private access road and that it could meet the section's conditions, including the condition that there be no "adverse environmental impacts to existing natural features and functions".

The appellant also argued that the proposed driveway was a means of access to his property and that without it his property was "landlocked". The lands located on the "bench" (sometimes referred to as tablelands during the hearing), could be used for residential or agriculture, but that access from the municipal road was necessary as the only other means of access was by way of neighbouring lands owned by others. He submitted a decision of this tribunal made by Commissioner Ferguson (*Galat v Halton Region Conservation Authority*)[14] where the issue was that of accessing land through a floodplain. The permission was granted in that case and it should be granted here on the same principles.

In referring to the historical record of the NEC development permit application process, the appellant argued that a larger driveway had been proposed and a permit issued, albeit with conditions. In fact, as far as the need for a geotechnical study was concerned, the CA was content to deal with that at the site plan approval stage. The historical record showed that both the NEC and the CA had to approve the necessary geotechnical report and the appellant was proposing that as a condition for this current proposal.

The Conservation Authority responded to the appellant's arguments by producing a chronology of the previous (golf course) application and reiterated the Authority's concerns (at that time) related to slope instability; its view that the driveway could be re-located; its requirement need for a "detailed geotechnical investigation", and concluded by referring to Ontario Regulation 155/06 and its granting of approval authority to the Conservation Authority in a matter such as this.

The Authority also referred to the **Conservation Authorities Act**, as well as the aforementioned regulation and set out a careful review of those sections dealing with the objects of the Authority, its powers, and its regulation-making powers specifically. It is a requirement of

. . . . 17

[14] OMLC Decision, George Galat v. The Halton Region Conservation Authority, Decision - July 4, 1977, Reasons April 5, 1977

the regulation that anyone seeking to undertake development in or on areas within the jurisdiction of the Conservation Authority obtains the Authority's approval. The Authority "may grant permission for development" if in its opinion "the control of flooding, erosion … pollution or the conservation of land will not be affected by the development".

The Authority also reviewed a comprehensive list of the relevant policy /guidelines paying close attention to what it called the "critical" Valleyland policy 3.25. Among the concerns it reviewed were "significant" erosion; the lack of an "existing" path; the view that the proposed driveway would disturb the existing natural valley; and the potential for destruction of property and injury to people. The removal of "numerous trees and shrubs" would have an adverse impact on the existing natural features and functions found in the valley and this would result in "a degradation and fragmentation of the existing wildlife habitat and associated migration corridor".

The Authority took issue with the appellant's witnesses' evidence pointing out amongst other things that the existence of a "tractor path" was not relevant to the NEC applications; that the evidence concerning the path was contradictory; that the width of the proposed driveway had been the subject of errors from two of the witnesses; that the evidence concerning the mapping of the proposed driveway path was contradictory; that the 1999 report dealing with boreholes was outdated and not specific to the subject lands, and that the appellant had never asked adjoining landowners for access permission.

In its arguments, the Authority took this tribunal to the recent decision of Commissioner Kamerman found in *Russell v. Toronto Region Conservation Authority*[15] , and drew attention to certain conclusions that it considered relevant to the matter before this tribunal. Along with conclusions relating to jurisdiction and consideration of an authority's policies, the respondent highlighted those conclusions dealing with conservation of land and the issue of "cumulative loss". Furthermore, applications with unique characteristics should not be the driver to adjust adopted policies to make the policy fit the situation as opposed to vice versa.

The respondent argued that its witnesses had provided evidence to "conclusively [demonstrate] that the proposed driveway would have an adverse affect [sic] specifically on the conservation of land". Erosion was occurring both surficially and in "what is generally stable valleyland" and there could be no guarantee and assurance that "natural erosion will not be exacerbated by a development that contemplates this magnitude of invasion". The Authority pointed out that the appellant's engineer had suggested that the bedrock would be destabilized by excavation. "Significant negative ecological impact to the watercourse and valley" would result from tree and shrub removal.

The Authority did not agree that a private access road already existed or that one had ever been created in the past for that matter. In addition, the policy still called for "best efforts" to relocate such a driveway. As for the phrase "no new Development" found in Section 3.25 of the Valleylands policies, the Authority described the appellant's arguments regarding the interpretation of the policy as "tortured". A "reasonable read" of the provisions "emphatically prohibits new development in valleylands".

. . . . 18

[15] OMLC Decision, Derek Russell v. The Toronto Region Conservation Authority, Decision –May 27, 2009

The Authority took issue with the appellant's evidence concerning access to the bench area of the appellant's lands and argued that the appellant was a victim of its own misfortune for not having sold the subject lands off after the golf course venture fell through. The *Galat* decision (cited by the appellant) had to give way to the principles of the *Russell* decision. Furthermore, the Galat decision was old (1977) and pre-dated the current CA regulation as well as the Provincial Policy Statement. Recent legislation (such as the **Greenbelt Act**) was restrictive. In addition, the *Galat* decision was from a time when different rules and concerns were in effect.

As for the appellant's reliance on the NEC development permit application history, the Authority argued that the permits had expired – they were "void". The conditions had never been met and the regulatory environment was different – the current one having given the Authority "enhanced approval powers".

In rebuttal, counsel for the appellant disputed the use of the *Russell* decision claiming that it was distinguishable as the majority of lands being proposed for development (the single residential dwelling) were located outside the Authority's jurisdiction and "a narrow driveway" was all that was the subject at issue and the driveway would actually serve to "preserve, protect and enhance that portion of the ravine through which it would travel." Dead trees were contributing to the erosion problem in the ravine since they blocked water movement. Their removal and replanting would "restore where harm has occurred". The owner of the residential dwelling on the bench lands would be the steward in effect of the driveway and its environment.

As for adverse environmental impacts, counsel argued that the Authority had not produced any evidence that the driveway would have this effect. Counsel pointed out that the concerns of the Authority's witnesses (all professionals), could be addressed and that risks associated with effects on migration routes could be reduced. While concerns were stated, they were not supported by evidence.

The issue of slope stability was addressed by the appellant's engineer Mr. Monkman who counsel claimed provided the only geotechnical engineering evidence at the hearing.

Counsel for the appellant also defended the appellant's approach to interpreting Policy 3.25 – it was not a tortured interpretation but an interpretation that took into account the purpose and intent of the policy and put the phrase "no new development" into context. The dangers described in the policy wording were those found elsewhere – not in Grimsby and that the conditions described in the policy could not be found in the subject lands. Further, the policy should not be applied as a "blanket prohibition".

The respondent's contention that no access road exists or even existed was strongly disputed as well. The ravine route had been used by the appellant's representative Mr. Saine as a tractor path (in the 1980's); Mr. Saine had seen the route used by the previous owner as a tractor path, and the fact that taking a tractor up the path with difficulty in today's circum-

. . . . 19

stances did not make it any less a road. Furthermore, the reference by Authority witnesses to the **Highway Traffic Act** for example to define motor vehicle and the resulting application of that definition to the matter at hand was "untenable". This was a private road, and while there was no definition of "access road" in the Authority's policies, there was a definition for "access standards" which meant "methods or procedures to ensure safe vehicular and pedestrian movement".

Counsel also took issue with the respondent's reference to current more restrictive planning legislation and the respondent's dismissal of the *Galat* case. The legislation quoted was not relevant. The *Galat* case was on point in that the appellant here was trying to obtain a driveway to access an existing lot of record and the appellant here had a "special access problem" since the property can only be accessed "by a driveway through a regulated area."

As for the respondent's criticism of the appellant's reference to the NEC development permit history, counsel pointed out that the geotechnical report required by the Authority to be a condition of the development permit became a condition at the site plan approval stage thereby indicating that the concerns of staff for the Authority regarding slope stability and impacts were satisfied to the extent that the report did not have to be approved before the development permit could be issued.

Application of the Law

The **Conservation Authorities Act** establishes conservation authorities and they are given areas of jurisdiction which roughly correspond to watershed areas. An authority's objects are set out in section 20 of the **Act** and they are "to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals."

Each authority has a set of powers which are intended to enable the authority to accomplish its objects. These powers are found in section 21 of the **Act**. Among these is the power to "study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed". Also included is the power to "control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof".

Under section 28 of the **Act** authorities can make regulations (subject to the approval of the Minister of Natural Resources) that restrict and regulate the use of water; that prohibit, regulate or require the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse; that prohibit, regulate or require the permission of the authority for development, if in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development; and that provide for appointed persons to enforce the regulations. Authorities are allowed under the **Act** to provide permission subject to conditions and to cancel the permission if the conditions are not met. The content of these authority-made regulations is governed by regulations made by the Lieutenant Governor in Council. An "authority-made" regulation that does not conform with a "government-made" regulation is not valid.

Those applying for permission from an authority are given the opportunity for a hearing should their application be refused and further appeal is possible to the Minister of Natural Resources. The Mining and Lands Commissioner has been assigned the powers and duties of the Minister for the purpose of hearing and determining appeals by Ontario Regulation 571/00 made under the **Ministry of Natural Resources Act**. Pursuant to subsection 28(15) of the **Act**, the Minister may refuse the permission or grant the permission, with or without conditions.

Subsection 28(25) contains defined words and phrases that are of importance to this matter. They are: "development", "hazardous land", "pollution", and "watercourse".

Ontario Regulation 97/04 sets out the contents needed in an authority's regulation including the NPCA's Regulation 155/06. It provides a list of prohibitions as far as development is concerned and follows the list with a section describing the basis upon which an authority may grant permission for development. Sections relevant to this hearing are 3 and 4. The basis for granting permission is "the authority's opinion". For example, an authority's regulation "shall provide" that an authority "may" grant permission for development (where permission is required) "if, in the authority's opinion, the control of flooding, erosion… pollution or the conservation of land will not be affected by the development".

Similar wording can be found addressing the "straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse".

Stepping back from the issues before this tribunal and only looking at the tone of these two regulations, it is apparent that the legislators' primary intention was to clearly state that development was prohibited in certain areas. But, an authority might grant permission if it could form an opinion that certain important interests would not be affected by proposed development. It is only reasonable to expect that in order to formulate an opinion, the authority would have to carry out some investigation, research, and apply appropriate standards and tests. It is reasonable to interpret the regulations in such a way that a blanket prohibition against development is indeed in place in certain features, but that the Authority can be selective in terms of where and under what circumstances it will consider granting permission.

An authority's work and applications for permission should not have to be carried out or perfected in a vacuum. In providing an "opinion", it also makes sense that an authority would want to give the public some indication as to how that opinion is formed. Hence, the creation of a document like the "Policies, Procedures and Guidelines" manual intended for the administration of Ontario Regulation 155/06 – a document produced by the NPCA. The version used in this hearing was dated December 12, 2007.

The manual's status came up for discussion during the hearing. It does not have the force of law. It sets out the policies, procedures and guidelines that are used by the Authority and others (including the public) to come to an opinion on a question of development. The legal authority for saying that development is prohibited (and where it is prohibited) is found in the aforementioned regulations and the **Act**. The legal authority for saying that permission might be

given in certain circumstances is found there as well. The manual is the implementation tool for making these seeming two dichotomies work together. It was sometimes referred to as the "Guidelines" and the "Policies" and the same approach is used here. For clarity's sake, specific policies are identified by their numbers where necessary.

The manual is set up in sections, each section dealing with a specific topic. It covers background information and procedures as well as policies and guidelines. The policies are found in Section 3 and are broken down into what are labeled as "guiding" policies, "general" and "specific" policies.

The guiding policies for watercourses, floodplains, valleylands, hazardous lands and lands adjacent are found in Policies 3.1, and 3.2. They stipulate that development is prohibited in certain areas except where allowed under Policies 3.4 – 3.28. During the hearing the subject land feature was labeled a ravine and a valley and both parties dealt with it as a "valleyland" containing a "watercourse" (albeit intermittent and of a lower class because it drained into a storm drain). It was also labeled as "hazardous land" for the erosion that occurred as a result of freezing and thawing at the toe of the slope. The prohibition against development is further refined in Policy 3.25 which deals with valleylands.

A serious point of contention for both parties centred on interpretations given to the wording in Policy 3.25 which is entitled "Valleylands". The section begins by highlighting slope failure situations in certain valleys in the Niagara area. Examples are given of the Twenty Mile Creek Valley in Lincoln and the Twelve Mile Creek in St. Catharines. Homes and businesses have been affected. The Authority has taken the approach through its policies that what's called a "structural" approach to solving problems associated with slope failure issues is too costly and can affect fish habitat. The Authority concluded that "[a]s a result, a comprehensive 'non-structural' approach to deal affectively with Development in these situations is of great importance." The policy reads, "[a]s such, no new Development (with the exception of Structures required for Erosion control purposes), will be permitted within natural valleys where the bank height is equal to, or greater than 3 metres (10 feet)."

During the course of the hearing, this tribunal heard testimony from the Authority's primary witness Mr. Miller, an engineer by profession, who was the Authority's lead person in the processing of the application. According to Mr. Miller, the Authority had acquired "approval" powers after Ontario Regulation 97/04 was enacted. While the Authority had been a commenting agency in the past, it now had the power to "approve" applications. Mr. Miller kept repeating the phrase "fundamental shift" as far as the change in the Authority's powers or its review of applications was concerned. As far as he was concerned the changes were significant and somehow represented an increase in conservation authority powers.

At first instance, Mr. Miller's approach to the interpretation of the regulations and the resulting implementation policies and guidelines seemed to take the phrase "fundamental shift" so seriously that his approach appeared narrow and inflexible. The initial impression of this tribunal was that his approach was simply a case of saying "the policy prohibits it so we did not approve it". A good example of this is in his review of the regulatory and policy changes that took place with the making of Ontario Regulation 155/06. His review of the changes that

affected the treatment of "hazard lands" is a case in point. Prior to the 2006 regulatory changes, the Authority's policy indicated that the Authority "shall discourage development within hazard land areas unless effective works can be implemented that would overcome the effects of the hazards."[16] This was contrasted with the current policy which is found under the heading "Lands Adjacent to Watercourses, Valleylands, Hazardous Lands, Wetlands and Shoreline" and which reads: "Except where allowed under Policies 3.4 – 3.28 inclusive, development is prohibited … within hazardous lands".[17] In Mr. Miller's words, "Now, Policies 3.4 and 3.28 do not speak any further of hazard lands. There is no other reference. Basically, the big shift is the Authority post-2006 does not allow development within hazardous lands, lands experiencing highly erodible soil conditions, period."[18] In cross-examination, he was pressed on the point of his interpretation and his response is illuminating. Counsel for the appellant asked "… wouldn't you agree that even if the property was found to be hazardous land that Section 3.25.3 provides an exception to the Section 3.2?" Mr. Miller responded, "I would disagree with that statement…."[19]

The tribunal was puzzled by this seemingly blunt assertion since Policy 3.25.3 does indeed deal with a form of exception to the general prohibition rule in that it recognizes the needs of existing development within and adjacent to valleylands" to sometimes be addressed. However, a careful reading of this particular policy reveals that it has been carefully crafted to recognize the existence of development that might have pre-dated the new requirements while at the same time it adheres to the general prohibition against new development. In short, the wording in Policy 3.25.3 has an equally limiting effect on existing development as do the policies against new development (Policy 3.1 and Policy 3.25). Mr. Miller's assertion is correct in that hazardous land is not even mentioned in any of the excepting policies and (to push this argument to its limit), even if one were to start from the proposition that the subject ravine or valley is hazardous land, one is still going to come up against the valley policies which prohibit new development. The tribunal is of the view that Mr. Miller's approach to interpreting the policies in the manual better reflects the intention and tone of the regulations.

How should Policy 3.25 be interpreted? Is its application limited to situations and landscapes resembling the Sixteen and Twelve Mile Creeks examples? This tribunal does not think so. The Policy has its origins in the wording of the Authority's Regulation 155/06. The Regulation prohibits development in "river or stream valleys that have depressional features associated with a river or stream, whether or not they contain a watercourse" and in "hazardous lands". This valley comes within that description and there is nothing in the wording that exempts it from the associated prohibition against development. It makes sense that all similar valleys are caught by this provision as size does not seem to matter when it comes to slope movement and erosion. The Policy does recognize that bank height can be a factor that might allow a valley to entertain development – as long as other important concerns are addressed and met. The bank height in this ravine is well over three metres which is the cut-off height. The Policy reflects the regulation's approach but at the same time recognizes that existing develop ment might require special treatment. However, because existing development might also be symptomatic of the harm that regulation and policy are intending to address, the resulting treatment is carefully formulated to ensure that the recurrence of harm is limited, mitigated or eliminated. This is evident in the wording of Policy 3.25.3.

. . . . 23

[16] CA Exhibit 7, Tab 3, page 14, section 3.5(d)
[17] CA Exhibit 7, Tab 7, page 26, section 3.2(f)
[18] Transcript, Vol. 3, page 36, lines 4-9 inclusive
[19] Transcript, Vol. 4, page 24, lines 21-24

The tribunal is satisfied that the policy's wording is clear enough to capture the valley or ravine that is at the heart of this matter even while it uses seemingly extreme examples to make its point. The fact is examples like the Sixteen and Twelve Mile Creeks describe hazards that could very well apply to the subject valley. Specifically it says "[s]lope failures can cause devastating damage to buildings, roadways and property. In many cases damage is exacerbated by human modification on or near the slope. Almost any modification increases the risk of slope movement. Slope failures can be triggered by atmospheric processes (heavy rainfall), geologic processes (earth tremors, freeze-thaw soil action), human modification or a combination of the above."

The tribunal considered the interpretation used by the appellant's planner and argued by its counsel which was that "the whole purpose of the guideline [meaning the policy] was to prevent damage to homes and businesses. Our home [meaning the future planned residential dwelling to be located on the flat land above the ravine] will be set back a significant distance from the brow. It will not be in a damaging or dangerous situation. It's not going to experience great risk of damage due to slope instability." And "[t]he guideline talks to homes and businesses that have been built on existing valley slopes or too close to the brow, and that's not the situation that we're facing in this application". The tribunal's view is that this approach simply does not work in a practical sense. The application is not related to a permit to build a structure on the flat lands above the ravine. It is an application to place a driveway through the ravine leading up to the flat land. Were the subject valley not to be covered by the policy, then where would it be covered? Why should it not be covered by the policy? If it is not covered by the policy, then how is that interpretation reconciled with the wording of the regulation which does not make the same differentiation that the appellant's planner does? The appellant's interpretation seems untenable and given the wording in the regulation and the policies and guidelines in general, awkward. This tribunal therefore does not agree with the appellant's interpretation of the Policy. Policy 3.1, which is called a "guiding policy" in the manual is clear – "development is prohibited within a watercourse, regulatory floodplain, valleyland, hazardous land, wetland and along the shoreline of the Great Lakes."

Policy 3.1 does allow for exceptions and these have to be found in Policies 3.4 – 3.28 inclusive. The tribunal could not find any exceptions that might allow development to be considered in this valley. The policies in question deal with development related to agriculture, fish habitat development, (amongst other things), watercourse alteration, floodplain mapping, permitted uses in floodplains, wetland development policies and of course, valleyland policies.

The subject valley is one of many found along Highway No. 8 (or Main Street in this case). They are a part of the geological fabric associated with the Niagara Escarpment and land in its vicinity. As Mr. Miller for the Authority pointed out, they capture surface water run-off (rain, snow melt) and groundwater seepages that is a feature of lands found in the vicinity of the Niagara Escarpment. Their function is to channel that water and give it somewhere to run. Any form of hindrance to the movement of that water is pushed aside, worn down or wedged up against something else to form a blockage that might remain before it in turn is pushed aside or down the slope. This water-related activity may only occur in times of rainfall or snow melt; however, it is an activity that regularly occurs, given the climate.

The subject valley or ravine (the terminology does not matter in this case), carries out the aforementioned function as the evidence in the form of testimony and photographs most adequately demonstrates. It is evident that the flow of water has enough force to move debris and even cut into the soil (and exposed shale) deep enough to form small gullies in some parts of the ravine proper. The water flow appears to expose tree roots along its path. Along with the washing away of surface soils and rock, this action has had the effect of weakening root systems to the point that trees have toppled into the ravine floor. The photographs submitted by both parties depict this phenomenon.

The ravine's slopes are also in motion (albeit slow). Again this is evidenced by the response of the vegetation. Younger trees on the slopes are bending their trunks in an attempt to access sunlight. Older trees are tilting in and down towards the ravine floor. This trend is evident in nearly every photograph that depicts the ravine vegetation on the slopes and floor.

The proposed driveway being at least three metres wide, will undoubtedly bring changes to the ravine in that clearing a path will necessitate the removal of shrubs, small plants and trees of various sizes; grading of the path will occur and the slopes will have to be held back with retaining walls. No doubt also, the presence of large equipment needed to carry out these tasks will have an effect on the ravine in terms of compacting soils that currently handle the flow and drainage of water run-off. The ravine will undergo a complete transformation.

There is no doubt in this tribunal's view that under the current regulatory and policy regime the subject valley should not be the location for a driveway complete with all of its accompanying features such as retaining walls, asphalt, vegetation changes, removal of natural features that currently control the flow of water to the point where it either percolates into the soil or flows into the drain at the bottom of the ravine. Indeed, while the appellant's witnesses proposed retaining walls measuring at most 1.1 metres in height, the tribunal has difficulty believing that this height could be maintained given the height of the retaining wall holding back the slope where the cul-de-sac meets the ravine. The height of that wall appears to measure over two metres in some places (given the normal dimensions of armour stone).

Finally, while the appellant's ravine measures more than three metres in bank height, can the appellant still claim an exception to the prohibition against development by claiming to have an existing private access road? As was indicated earlier, existing development is recognized as meriting recognition of a sort under the Valleyland policies. The phrase in question is found in the December, 2007, version of the manual at Policy 3.25.3 (3) and is part of an exception to the general prohibition against development in valleylands. As Policy 3.1 is worded, exceptions are allowed. However, as the tribunal noted above, it could find none. Policy 3.25.3 (3) refers to certain things already in existence – one of them being a "private access road". The view of the Authority was that the road had to resemble a driveway large enough and be capable of handling emergency vehicles. There is no definition for the phrase in any of the materials. The tribunal was directed to legislation dealing with roads for comparison. Mr. Miller (for the Authority) could not bring himself to agree that such a road was visible and even had difficulty agreeing that a tractor path might have been visible. On the other hand he compared the conditions in the subject ravine to those in a neighbouring ravine where a hard packed gravel road actually was visible.

. . . . 25

The word “road” connotes a means of travel and openness. Some dictionary definitions refer to it having a surface of some sort. The word “access” refers to the means, power or opportunity of approaching something (Blacks Dictionary). The word “private” can refer to the fact that one person who owns the soil uses the road or sometimes a group of people can use the road, an example being cottagers accessing a beach area and their cottages.

The tribunal is satisfied that the ravine does not exhibit the characteristics of what could be called an existing private access road. The floor of the ravine is overgrown with trees that are at least 15 years old. The word “road” could not be applied to the condition of the floor in any sense of the word. There is no access even by a tractor at this time, nor has there been for a number of years. In comparison, the neighbouring ravine to the east (Firestone property) has within it what could easily be called an existing private access road. It is clearly visible; the bench area above it can be readily approached through its use by tractor or truck, and it exhibits all the characteristics of a road in that its surface has been prepared in some way to accommodate traffic. Furthermore, it is currently used as an access road. It exists. Photographs submitted at this hearing bear out the fact that the subject ravine has a floor that at some point in the past might have been used by a farmer and his tractor – it bears no resemblance to the ravine next door with its passable gravel road. The tribunal would be stretching the definition for “private access road already [existing]” were it to accept the position of the appellant on this point. There is no doubt in the mind of the tribunal that at some point in its history a tractor may have traveled the ravine floor to reach the flat land above – however, it is hard to agree that it ever resembled what one could comfortably call a “private access road”.

Does this decision to refuse permission have the effect of “landlocking” the appellant’s parcel of land? Mr. Ariens, on behalf of the appellant, claimed that a refusal of permission would have the effect of landlocking the parcel thereby affecting its use (presumably for development). It was his view that existing lots of record were entitled to a building permit for a single detached dwelling as long as the lot had legal frontage. The Authority’s planner, Ms. McInnes, responded by pointing out that some regulatory standards might take away all development possibilities. She suggested an example where a parcel was covered by wetland that was not developable – or land that was located within a floodplain. Hazardous land could present the same result. In cross-examination, Ms. McInnes held fast to the suggestion that the appellant could explore access options, including making arrangements with his neighbours. However, she refused to engage in appellant’s counsel’s attempts to hypothesize about the possible uses and accesses for the land using the ravine as an access to the flat lands above. The tribunal did not find this to be useful. One of the possibilities the appellant now faces as a result of the decision of this tribunal is that his development options will be reduced. It may be that agricultural uses will be his only option, barring any changes to the current regulatory regime. The word “landlocked” at least in Black’s Dictionary, means “a piece of land belonging to one person and surrounded by land belonging to other persons, so that it cannot be approached except over their land”. Technically, the appellant can approach its land by way of a public road at the bottom of the ravine. He can follow the ravine up to the flat lands above. Should he remove trees and other vegetation, he can take a tractor up the ravine. Would this activity run up against the Authority’s regulation? Would it constitute “development”? These questions might be posed here; however, they are not at issue before this tribunal. Lands under the planning jurisdiction of public agencies often have their range of uses affected by regulations and policies. Developing land is a very qualified exercise in today’s world.

. . . . 26

Findings and Conclusions

The tribunal was rather surprised to see so much reliance by the appellant's witnesses on old documentation and outdated planning comments and approvals. (It was interesting to note that the Authority always maintained a sense of unease regarding the slope's stability throughout the planning history for this ravine). The tribunal was of the opinion that important issues were being left to some date in the future when conditions could be fulfilled. It was somewhat like working in a vacuum. The planning regime has changed, as the Authority was quick to point out at this hearing. There was no factual basis upon which the tribunal could agree that the planning history for this ravine could lend itself to granting permission under the new regulations and policies. The valley is caught by the regulations and policies and no exception exists to change that fact. The phrase "tractor path" seems to have made its way into a variety of planning documents mostly on the word of others. It may have been that a tractor was able to travel up the ravine to reach the plateau land. However, that is as about as sophisticated as things got. Nothing was done to transform the ravine into something the tribunal could be comfortable calling a "private access road already existing". The tribunal is not prepared to that leap.

The appeal is dismissed and no costs will be awarded to either party.