ISSUE DATE:

Dec. 30, 2002

DECISION/ORDER NO:

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Ontario

PL001187
PL010286

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Dr. J. W. Spellman, Dan Bissonnette (Friends of Marshfield Woods Coalition), Essex Region Conservation Authority and Dr. Thomas J. Barnard and Dr. Penelope J. Potter have appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law No. 252 of the Town of Essex
OMB File No. R000318 (O.M.B. Case No. PL001187)

Material Handling Problem Solvers Inc. and the Corporation of the Town of Essex have appealed to the Ontario Municipal Board under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Ministry of Municipal Affairs and Housing (Municipal Services Office – Southwestern) to refuse approval of Proposed Amendment No. 6 to the Official Plan for the former Township of Colchester South, now in the Town of Essex
Ministry File No. 37-OP-0205-006
O.M.B. File No. O010089 (O.M.B. Case No. PL001187)

The Essex Region Conservation Authority has appealed to the Ontario Municipal Board under subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from two decisions of the Town of Essex Committee of Adjustment which granted, upon conditions, two applications by Gary Chittle numbered B/04/01 and B/05/01 for consent to convey part of the lands composed of Part of Lot 12, Concession 6, in the Town of Essex
OMB File Nos.C010070 and C010071 (O.M.B. Case No. PL001187)

Material Handling Problem Solvers Inc. has appealed to the Ontario Municipal Board under subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Town of Essex Committee of Adjustment which granted, upon conditions, an application by A.F.F. Farms Limited numbered B/06/01 for consent to convey part of the lands composed of Part of Lots 9, 10 and 11, Concession 6, in the Town of Essex
O.M.B. File No. C010097 (O.M.B. Case No. PL010286)

Dr. J. W. Spellman has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 1902 of the Town of Essex (formerly the Township of Colchester South) to rezone lands respecting Part Lots 11 & 12, Concession 4, 5 and 6 from "General Agriculture (A1) Zone" to "Wetland (W) Zone"
Town of Essex File No. ZBA/12/00
OMB File No. Z000170 (O.M.B. Case No. PL001187)

Dr. J. W. Spellman has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the Town of Essex (formerly the Township of Colchester South) to redesignate land composed of Part Lots 11 & 12, Concession 4, 5 and 6 of the former Township of Colchester South from Agriculture to Significant Wetland Complex
Town of Essex File No. OPA/03/00
OMB File No. O000223 (O.M.B. Case No. PL001187)

A P P E A R A N C E S :

Parties	**Counsel*/Agent**
Material Handling Problem Solvers Inc. And the Hearn Group	L. Paroian* and J. Hewitt*
Town of Essex	E.B. Marshall*
Province of Ontario Ministry of Municipal Affairs and Housing	B. Linington*
Gary Chittle	E.C. Hooker*
Essex Region Conservation Authority	M.E. Duben* and S. Taylor
J.W. Spellman and Dr. P. Potter	J.W. Spellman
Mr. Jovin and Mr. Lafferty	B. Chillman*
AFF Farms Ltd	K.G. Melinz*

DECISION DELIVERED BY B.W. KRUSHELNICKI AND ORDER OF THE BOARD

The Background

Material Handling Problem Solvers Inc. is owned by Don Hearn, a well-known Windsor area businessman, the applicant in this case. He proposes to develop a golf course in a wooded area between the 5th and 6th Concessions of the Town of Essex a few kilometers north of Harrow. It would be about thirty kilometers south east of Windsor and the border with the U.S. Material Handling Problem Solvers Inc. ("Hearn" or "the Hearn Group") bought the land in the 1990s with the express intent of developing a golf course.

The site that is the subject of this hearing consists of a rectangular block of land about 194 acres in total, comprising about 174 acres of wooded area and a smaller rectangular farm field of about 20 acres in the northeast corner of the property. Hearn also has an interest in an additional 50-acre parcel immediately to the east of the main lot. This latter parcel would form a part of the proposal providing area for irrigation ponds and other uses related to the golf course.

Just across the 6th Concession north of the Hearn site is another wooded parcel owned by a local farmer, Gary Chittle. Quite independently of the Hearn proposal, Mr. Chittle has made application for two severances to create three lots. One of these would be a retirement a lot for him and the balance consists of the splitting of a remnant 100 acres into two farm lots, one for each of his sons. These plans are not related to the golf course proposal, but once they were made, it appeared that the Chittle severances would share issues of policy and planning with those of the Hearn proposal, and they were consolidated with the hearing of the Hearn matter.

The main issues in the Chittle matter are the wetland identification and the application of the prevailing severance policies regarding wetlands and agriculture to the consent applications. There is a complication arising from the prior installation of some water lines and driveway accesses that create a further difficulty for Mr. Chittle. In the end Mr. Chittle's applications will be approved. However, based on the application of the relevant policy and good planning, the applications must be modified. Let us leave Mr. Chittle for the time being and return to give his application more particular attention later.

The Hearn proposal for a golf course was immediately opposed by a local group of farmers, rural residents and environmentalists known as the "Friends of Marshfield Woods" (the "Friends"). Their opposition was based on the belief that the area – especially the Hearn property - is a very significant environmental feature. The local

Conservation Authority had identified it as an Environmentally Significant Area in its early 1990s inventory, based on it being a high quality woodlot. The Friends thought that the area might also be a significant habitat and possibly even a provincially significant wetland, although it had not been identified as either prior to its acquisition by Hearn.

When Mr. Hearn learned of the opposition that was mounting, he offered the lands for sale. He had purchased the approximately 200-acre parcel for $200,000 and offered it up for $400,000, explaining the increase as recompense for additional costs incurred. Apparently, as he hinted, much of the additional costs were in legal fees. The Friends of Marshfield Woods complained of the doubling of the price, some claiming that it amounted to "flipping" the land. However, after engaging in a whirlwind fundraising effort, they managed to raise only $30,000 or $40,000. Although the Conservation Authority entered an agreement of purchase and sale, it likewise did not follow through. Mr. Hearn has consistently said that the lands are for sale, although the price may have risen even further with time.

In July, 1998 the Hearn Group made the first application for a golf course on the site. The application involved amendments to the Township's Official Plan and by-law to permit a golf course in an area zoned and designated for agriculture. Following a public meeting, the Township, as it then was,[1] deferred and did not approve the applications. Further meetings and discussions were held and the application was still not approved. Finally, Hearn, through Material Handling Problem Solvers Inc., appealed the matters to the Municipal Board in May of 1999. Upon receiving the appeal, the Board placed the matter under case management and several pre-hearing conferences were held in anticipation of a hearing.

[1] At the time of the first application, this was the Township of Colchester South. Following municipal restructuring and an election on January 1, 1999, the Township became part of the new Town of Essex. The Official Plan and by-laws for the former Township were included in the consolidated plans and by-laws for the new Town.

The hearing was set to commence in the summer of 2000 and in the meantime several other things were happening. In late 1999 or early 2000, the Hearn group began working on the site, cutting trees, stacking wood, and altering the site with equipment. It is clear now that the tree cutting and other works were consistent with the plan for the golf course. Indeed they were cutting and clearing the golf course fairways and the paths between them. The area on the northeast that was farmed has become a construction staging area. Top soil and other materials have been stockpiled on this site along with construction materials. Some of the local residents observed this and alerted the Friends of Marshfield Woods who immediately sought to have the works halted.

The Town refused to do anything, claiming their hands were tied. Their planning and legal advice said that the lands are zoned for agriculture and that forestry is permitted in the agricultural zone. There are no tree cutting or site alteration by-laws in the County or the Town, and consequently nothing prevented the owner from cutting the trees, altering the site as he saw fit, and stockpiling soil and rocks. The Friends group pleaded to the OMB to halt the works pending completion of the upcoming hearing, but this was not successful. The work continued with the further stockpiling of wood, gravel, soils and other construction materials.

The Friends of Marshfield Woods had contacted Dr. J. Spellman, a local researcher and resident on lands containing a wood lot in the vicinity. He was involved in another matter elsewhere in the County, where wetlands had been identified. He had some experience with the OMB and agreed to lend his support and experience to the ‘Friends’ group who were not incorporated and loosely organized.

In the spring of 2000 as the hearing of the Hearn applications approached, Dr. Spellman retained a qualified wetland expert – Mr. Goodban - to conduct a wetland evaluation of the lands in the area of the Marshfield Woods. Mr. Goodban completed his evaluation of the area and using the Ontario Wetland Evaluation System (OWES), he

concluded that much of the wooded area constituted a forested swamp - one of the accepted wetland types - and that the wetland as identified comprises a provincially significant wetland. This includes the Hearn property, the Chittle lands to the north and additional wooded lands otherwise owned, immediately to the west of the Hearn property. The Board heard from the owners of these lands who were not represented, but who attended at the public sessions of the hearing. One of them, Mr. Burnell is a well known retired lawyer who lives on the property just west of the Hearn lands on the 6th Concession.

Dr. Spellman immediately submitted Mr. Goodban's OWES evaluation report to the Ministry of Natural Resources (MNR), the agency responsible, among many other things, for the identification of provincially significant wetlands. Staff at the Ministry reviewed the evaluation report and concluded, following some discussion with the author, that the evaluation had been properly conducted and that with a few minor adjustments, the lands identified by Mr. Goodban would be identified as a provincially significant wetland.

A letter acknowledging the evaluation, "accepting the data, mapping and scores" and finding "the Marshfield Woods Wetland Complex to be Provincially Significant" was sent on May 18, 2000 by Don Hector of the MNR to Dr. Spellman. This was the only formal notification of the decision. The property owners and the Town were not officially notified at the time. Notification has become an issue before the court and this Board, and the best that the Board can make of it is that Mr. Paroian, the counsel for Material Handling Problem Solvers Inc., probably learned officially of the identification on June 2, 2000, or just a few days before the hearing was to begin. The Town and some others probably knew at roughly the same time or shortly following.

Later in May, the OMB conducted a mediation process in advance of the forthcoming hearing, without prejudice and, as it turned out, without success. By this

time or shortly after, the applicant had learned that the subject lands had been identified by the MNR as a provincially significant wetland. On the first day of the hearing in early June, the applicant withdrew the applications and the appeals. This was not an adjournment. The matter was withdrawn and presumed abandoned, and the hearing went no further.

New applications were filed on August 15, 2000, some two months following the failed hearing. This time, following a public meeting held in October, the Town of Essex Council approved the by-law and Official Plan amendments. This time, however, it was the Province in the form of the Ministry of Municipal Affairs and Housing - the approval authority for Official Plan Amendment - that refused to approve the Official Plan Amendment in February, 2001. The Town and Hearn appealed this to the Municipal Board.

While all this was happening, indeed one day before Material Handling Problem Solvers Inc. filed its new application, Dr. Spellman applied for an Official Plan Amendment and corresponding zoning by-law amendment to designate and zone the Hearn lands and some others that were identified in the Goodban report as the Marshfield Wetland Complex. Dr. Spellman and Dr. Potter then appealed By-law Amendment No. 252 as passed by the Town of Essex following the Hearn application.

Now the Spellman applications are considered “third party applications,” that is applications to re-zone and re-designate lands that belong to another party – Material Handling Problem Solvers Inc. - without the consent of the party that owns the lands. This is permitted under the Ontario *Planning Act*, but as we will see, it is considered problematic by many. Among those who find the practice dubious is the Town who, as their planner Ms Prince explained it, does not even consider or process such applications. Only applications by landowners for their own lands (and one presumes applications from other legitimate authorities such as the Town itself) are considered

and processed. The Town did not therefore deal with the Spellman applications, leaving Dr. Spellman with the option to appeal to the Board, in accordance with the *Planning Act*, against Council's refusals to call a meeting, approve the amendments or adopt them.

And finally, the Essex Region Conservation Authority appealed the decision by the local authorities to grant consents to create three lots by severance on the Chittle lands. In the course of organizing the hearing for the numerous appeals now associated with the Hearn property, the Board consolidated the appeals of the Chittle severance with those on the Hearn property, based primarily on the fact that the appeal is related to the environmental values of the Chittle lands including the wetland identification, matters that are shared with the Hearn property.

To summarize the alliances, therefore, we have the Town of Essex having approved the applications for Hearn. They do not oppose the Chittle applications. The Town is allied with, and supported by Material Handling Problem Solvers Inc. who of course, made the applications for a golf course on their lands. They in turn are supported by Mr. Burnell, an adjacent property owner who attended occasionally as a participant, and who, while not calling a case in opposition to the Spellman proposal for his lands, wishes his property to remain free of any wetland zoning and designation. He is retired and plans to leave the property to his daughter, a physician practising in another province who insists through her father that the lands remain unencumbered.

They are all supported by Mr. Chillman's clients, Mr. Jovin and Mr. Lafferty, who farm a large amount of land in the County and are owners of significant land holdings, including woodlots. They represented a theme that was prevalent in the hearing, expressed forcefully by a number of local farmers and landowners. This is that they are first of all surprised to learn that someone "from outside" can apply to have their lands designated for environmental purposes without their knowledge and consent, and then

have this confirmed by the public authorities and thus have their rights in property – including potential development rights and perhaps even an acquired right to farm - taken without compensation. They say that as farmers and landowners they have been voluntary stewards of large areas of woodlot, but if this practice is allowed, many of them will “push over their bush” - that is, cut the woodlots and drain the lands for farmland - before their right to do so is taken away.

This theme was repeated many times by several farmers, the elected officials of the Town who came to support their decision, and by the Town’s retained planner who saw in this threat, the need to adopt a compromise on the golf course issue that would avert fear in the agricultural community. She is quite convinced should the Chittle and Hearn matters fail, that many local farmers would take action and remove what little remains of the woodlot and forested areas in the County. Several counsel for the parties understandably added their supporting submissions, including Mr. McQuaid who was retained by Material Handling Problem Solvers Inc. for part of the hearing, and who feared the implications of such third party appeals for farm and rural landowners province-wide.

On the other side are the opponents to the golf course. First among these are the appellants, Drs Spellman and Potter. They oppose the Hearn applications and advance their own applications for wetland designation and zoning on the properties that are the subject of their appeals. At first they expected to be taking this fight up on their own and with the assistance of the Friends of Marshfield Woods group, they managed to organize a case in preparation for the Board hearing. Their case included experts of various kinds, including especially Mr. Goodban as well as others, some by summons if necessary.

Following the involvement of Drs Spellman and Potter, the Essex Region Conservation Authority entered the fray. First they simply opposed the applications by

Chittle. Then they came fully to the support of the opponents to the golf course. They had recognized the environmental value of the Marshfield area and had identified much of the area as an Environmentally Significant Area (ESA) in their documents. They had considered purchasing the lands when they were available but in the end, did not.

The Essex Region Conservation Authority did not come to this position lightly or without some internal turmoil. Like other Conservation Authorities, their governing Board consists of elected representatives from the member municipalities. In Essex County this includes representatives of the Town of Essex, whose Council had unanimously approved the Hearn applications.

The Conservation Authority has a mandate which includes environmental stewardship. This is usually practised in a much less adversarial manner. Indeed, as Ms Prince explained, the Conservation Authority is circulated with planning applications and their expertise and advice on environmental questions are earnestly sought by the local municipalities, most of whom do not have such expertise on staff. And as Mr. Duben - counsel for the Essex Region Conservation Authority - explained, they have not been before the Municipal Board as an opponent for more than twelve years and rarely oppose their member municipalities. Usually, their interests are advanced by negotiation and discussion. Despite their distaste for confrontation, in this case, the Conservation Authority – with the approval of its governing Board - considered the issues worth the expense and difficulty associated with an adversarial hearing before the Municipal Board.

The Essex Region Conservation Authority continues, therefore, to oppose the Chittle applications, opposes the golf course proposal and now supports the applications made by Dr. Spellman to zone and designate the Marshfield Woods area as a wetland.

With the adoption by the MNR of the Goodban evaluation and the consequent identification of the site as a provincially significant wetland, the Province through the Ministry of Municipal Affairs and Housing and the “one window approach” has now become fully engaged. At first this was simply in the role of the approval authority that would not approve the Official Plan Amendment which would permit golf course uses in the agricultural area. However, their role has now escalated to that of actively opposing the Hearn and Chittle applications, and equally actively supporting the Spellman applications for the lands in question.

As one may imagine, the hearing that resulted from all this has been complicated. One example of its many complications was the filing of a motion in the midst of this hearing – indeed just before the summer break – seeking a halt to the works that have continued on the site. This included the tree cutting, storage of material and site alteration that had begun two years before as described above. Several matters had changed since the first attempt at halting the work had failed earlier in February, 2000. Importantly these included the abandonment by Hearn of the first application, the identification of the provincially significant wetland, the subsequent re-application by the Hearn Group, the counter application by Spellman, and of course the commencement of the hearing with a new jurisdiction and several new parties.

The Board considered these new requests for a halt to the works and did so with the benefit of a considerable amount of the evidence in place. Ms Prince explained her opinion and that of the Town on the matter, asserting that while the cutting was clearly in the configuration of a golf course, they considered it “forestry associated with agriculture.” Similarly, the proponent’s expert ecologist regarded the issue merely as a “public relations issue” that posed a challenge for the proponent. By contrast, the proponent’s golf course designer - in what the Board considered a refreshing moment of clarity and an honest reflection of his very distinguished reputation, admitted without elaboration - upon a question from the Board – that, in his many years of experience

and his extensive travels in the U.S. and abroad, he had never heard of a golf course developer cutting the fairways through a forested area before planning and environmental approvals were in place.

Following this request, the Board ordered a halt to further work associated with the development of a golf course until the hearing of the applications was completed. This was expressed in two rulings issued by this panel and identified as Decision/order (interim) no. 1227, issued September 11, 2002 and Decision/order no. 1292, issued September 25, 2002.

The Proposals

The Hearn Golf Course Proposal

The Hearn proposal is to develop a resort style 18-hole golf course within the forested area of the subject property. To this end, the proponent retained a number of experts to assist with the design and servicing of the site. Throughout most of their testimony, the Hearn experts compared the environment that would result from the development of the proposed golf course with an agricultural field rather than the existing woodlot. This is based on the view that the alternative to a golf course, if approval is not given, would be that Mr. Hearn would exercise his agricultural rights and clear-cut the wooded area and tile drain the property for disposition as farm land. Compared to monoculture farming, the Board agrees that a modern golf course would be potentially more varied and interesting.

The first Hearn witness was Dr. Herdzan, an internationally respected golf course designer whose specialty is designing “environmentally friendly” golf courses that make the best use of a site, taking account of the existing environmental characteristics of the site. Dr. Herdzan’s testimony followed two major themes: The first is that golf courses in

general can be constructed so as to minimize their impacts, and that they can improve the diversity of species and the prospects for protection of many plant and animal species when compared with agriculture. Using modern turf science and techniques such as integrated pest and nutrient management, site diversity and species composition can be maintained. He cites the example in New York State where the Audubon Society has joined forces with the golf course association to develop standards and techniques for golf course development that are environmentally friendly. In this respect, Dr. Herdzan refers also to the leadership provided by Mr. Hearn on this issue who, he says has well developed environmental values and would like to keep as many of the trees and natural areas as possible following the development of the course.

The second theme is that the specific proposal before the Board incorporates many of the principles and practices that make golf courses more environmentally friendly. Dr. Herdzan teamed up with a number of experts including servicing engineers, planners and ecologists to develop a configuration and layout for the course and the accessory uses that maximize environmental features and minimize damage. Dr. Herdzan himself took part in the design of the fairways and other features and explains that he or his staff would take some supervisory role in its execution. He says that the clear cutting was minimized so as to maintain as much forested area as possible. Site alteration for waterways and ponds in the wooded area are located to minimize impact. He estimated that the cleared area of the fairways would be about 65 acres, leaving about 100 acres forested. Dr. Herdzan admitted that neither a comprehensive environmental impact study nor a wetland evaluation were conducted to assist in determining the location or extent of fairways. He relied on his own experience and that of the other consultants for this. He also could not explain the fact that Mr. Hearn's ecologist, Mr. Young, estimated the cut area at 100 acres with 65 acres of retained forest. The estimates vary because of some confusion over the width of the fairways and the amount of cutting needed. Dr. Herdzan may have included in his calculation of

wooded areas, the area adjacent to the fairways where the bush is cleared leaving isolated tree specimens that would form part of the near rough on the fairway. This was explained several times but with little success in clearing up the matter entirely. Furthermore, he admits that the overall layout of the golf course is now pretty well determined by the cutting that has taken place. He admits that any adjustment to the pattern based on further environmental information would require further cutting.

The entrance to the course would be on the north side of the property where the construction entrance is now located on the 6th Concession directly opposite the Coulter Road. This is the northern corner area of roughly 25 acres that has been cleared and cultivated for some time. The clubhouse would be on the edge of the wooded area and the first fairway would send golfers south into the wooded area. From there they would criss-cross the wooded area.

The site is transected by the Richmond Drain, a constructed waterway typical of those found throughout the very flat area of Essex County. The Richmond Drain is an agricultural drain constructed and maintained under the provisions of the *Drainage Act*. It is three to five metres deep and serves the purpose of draining nearby agricultural fields and managing surface flows in the area to mitigate annual flood events and prevent wet ground. The drain passes diagonally over the southwest corner of property, leaving about one-quarter of the site separated from the main parcel. At least one crossing of the drain will be necessary on the golf course.

Berms are located along either side of the drain, comprised in all likelihood of the dug material deposited when the drain was constructed. There is no apparent pathway for surface drainage from the site to enter the drain through the berms, leading in part perhaps to its wetness, a matter for later discussion. The drain is a waterway under the jurisdiction of the Conservation Authority. When the berms were breached by the site

alteration that had taken place as part of the clearing for the fairways, the Authority stepped in to prevent any further alteration to the waterway.

The drain also plays a part in the water management for the golf course. The plan for the course is to capture all the water that falls on the site and manage it in such a way as to minimize the need to draw water from the drain or from some other source. This plan would require the storage of water in large storm water ponds proposed to be located on the 50-acre parcel immediately east of the site. This now requires that the additional area be included in the application for amendment to the planning documents, and a modification of the application is proposed. Water would be captured throughout the year but especially in winter and spring months, stored in the ponds, and then applied throughout the summer to irrigate the fairways, and if necessary according to the proponent's advisors, the forested areas in between the fairways. A water taking permit would be necessary and the Ministry of Environment confirmed to the applicant that its normal policy would be to permit a withdrawal of 10 percent of the flow at any given time.

There is some dispute about whether the water management scheme would work. The Conservation Authority along with the Ministry of Environment have doubts about the ability to irrigate the fairways and maintain flows in the Richmond Drain. The hydrologist for the proponent has modeled the plan and concludes that in average and wet years – that is most of the time - there should not be a problem. In some years it may even be possible to augment flows to the drain from the golf course during critical periods. The Conservation Authority planner is concerned with very wet years when the golf course may be inundated, and very dry years, when it may be necessary to apply for additional draws to keep the fairways green for discerning golfers.

The servicing of the site has been fully considered. Roads to the site - specifically the Coulter Road - will be improved and if necessary hard surfaced to the

municipal standard. Piped municipal water to service the clubhouse is available along the 6th Concession but the pipe may have to be increased in size. These improvements would be made at the developer's expense. Waste water will be dealt with by an on-site 40,000 liter sanitary sewer system, which will discharge its gray water into the irrigation system for application onto the fairways. Hydro and telephone services are available to the site and the heat will be provided by propane and perhaps in the future by natural gas, although not currently available to the site.

Accessory uses to the golf course will be located in the areas on the north and east of the site in the non-wooded areas. This includes, as we mentioned, the storage ponds on the east parcel and the club house on the northern edge of the wooded area. The cleared areas will also be the location of the entrance and reception area, parking lots, and practice areas, including a driving range.

The course is designed for the high range of resort or traveling golfer, likely at the $100 per round level. Essex is a border area and Mr. Hearn hopes to capture the tourist trade, especially from the United States, some of whom are now drawn by the casino trade, but would also target day travelers from the Detroit, Michigan area. At 30,000 to 40,000 rounds per year, Mr. Hearn sees this as an important addition to the commercial and recreational resources of the County and the Town, consistent with local and provincial plans and policies to boost tourism for the area, and golf tourism in particular.

The Board has no doubt that what is proposed would be a well designed, properly serviced and likely a commercially successful golf course. Dr. Herdzan is a renowned golf course architect, well known for his ability to integrate environmental values. The Board understands when he explains that the proposed golf course should not be judged by the standards of golf course architecture and management from the '60s. Under normal circumstances, modern design techniques, sensitive use of physical and biological materials, and modern course management practices together can likely

result in a golf course with minimal environmental effects. However, the proposal is not situated in a context that could be called normal. There are several other important issues that must be addressed before considering whether the course - however well designed, managed and serviced it may be - should be permitted to proceed on this site.

The application was translated into the necessary planning documents – including a by-law amendment and proposed Official Plan Amendment No. 6 – all of which was explained to the Board by Ms Prince, the Township's planner and Mr. Balfour, the planner for the applicant. Both of these documents were modified as the hearing progressed. The Official Plan Amendment proposed a new section to the Town's (formerly the Township's) Official Plan, section 3.9, initially titled "Natural Environment/Golf Course" and also initially only applying to the lands that were acquired as the main golf course parcel. The designation would permit a golf course that would be "designed and operated in a 'no impact' manner regarding the natural ecosystem existing on the subject property and in the subject area." The permissions also included agriculture and conservation uses, although it was not clear that either were a practical part of the proposal. The Official Plan Amendment policies outline in some detail the restrictions that would be placed on the development of the course, and re-iterate the "no negative impact philosophy" and the desire to protect "as many of the existing trees and natural vegetation as possible." Finally in the face of concerns that the proposal is the first step of a golf course/residential development, the Amendment provides that any future development in the area will be regarded "as if the land use designation and zoning on the property were Agricultural."

The corresponding by-law simply reflects the permissions in the Plan Amendment and zones the original site of the proposed golf course and all accessory uses "NE/GC(h)." The (h) is in place pending the completion of the course design and the preparation of site plan documents, a requirement of the Plan Amendment.

By the conclusion of the hearing several modifications were made to the plan and by-law – with the applicant's co-operation and consent – to address some of the issues that had been raised in the hearing. The modified Official Plan Amendment now acknowledges the provincially significant wetland identification by designating the lands "Wetland/Golf Course" with corresponding changes to the by-law and to the text of the Plan Amendment. The goals of the Plan are modified to include among other things, the following:

i) to preserve and enhance as much of the Wetland features and functions as possible notwithstanding the presence of a public golf course;
ii) to permit the development of a golf course facility *that puts environmental integrity first*; (emphasis added)

The "no negative impact" language is retained in the goals, but in the policies it is replaced by a requirement that the course "shall result in an environmental rating that is higher than the OWES (Ontario Wetland Evaluation System) rating provided in the Goodban report, using the same rating system." This will require that a "hypothetical OWES evaluation" must be completed on the site. The policies also add to the provision requiring the long term preservation of the trees and other vegetation with a site specific clear cut permit required to prevent unauthorized tree cutting and a policy requiring a restrictive covenant to further protect the trees. The area of the Plan Amendment is extended to include the adjacent lands to the east that are intended to be occupied by the water management ponds. Finally, again, the part of the amendment restricting future development in the Amendment is modified simply to say that any future residential development "in close proximity to the golf course shall be contrary to the intent of this Official Plan."

As with the first effort, the By-law presents a corresponding version of the designations. This time, however, there are two main uses provided: "GC(h)" (golf course -holding) and "W" (wetland.) The accompanying schedule is a map of the property showing the fairways as they have been cut. Each fairway is zoned GC along

with the parking lot, reception area, practice area and associated water management ponds area. The lands in between – the lands that have not been cut – are zoned “W”. Finally the by-law attempts to protect the natural areas from any possibility of further impact by stating that agriculture and forestry are not permitted uses and are not legal non-conforming. This, it seems, was added to address the concern that, once he has his approvals in hand, Mr. Hearn will simply exercise his legal non-conforming rights and remove further trees from the natural areas under the guise of forestry or agriculture.

Spellman Application

The Spellman application is short and simple, though not without controversy. His application proposes the re-designation from “Agriculture” to “Wetland” those lands that are identified by the Goodban report as a provincially significant wetland. They include:

- the Hearn golf course lands (not including the 25 acre parcel of cleared area on the northeast corner or the 50 acre parcel to the east);
- the lands to the west of the Hearn property – including lands owned by Mr. Burnell and others;
- the Chittle property; and
- a further parcel of land comprising some 50 acres to the south of the Hearn lands known as the “Pospicil” property.

This last property (Pospicil) was dropped in the course of the hearing by a modification agreed to by Dr. Spellman, since it was not identified as a provincially significant wetland by Mr. Goodban and its designation was not supported by any other agency. The Spellman proposal makes no text changes to the Plan. Instead, Dr. Spellman relies on the Official Plan policies as they exist in relation to the “Wetland” designation.

The by-law amendment proposed by Dr. Spellman creates a new Section 18 – Wetland (W) Zone, in which no use may be made except for conservation areas and

fish and wildlife management areas, and in which no construction may occur other than “boardwalks, observation decks, viewing platforms and other similar structures . . .” This zone includes the same lands as the Official Plan Amendment, and was similarly modified by the end of the hearing to exclude the Pospicil lands to the south.

Chittle Application

The Chittle proposal is primarily for land division –two severances creating three lots, one retiring farmer’s lot for Mr. Chittle and two farm lots of 50 acres each for Mr. Chittle’s sons. Such farm related severances are contemplated by the Official Plan, permitting retirement lots for bona fide farmers and farm splitting by a long standing farmer in the area. Mr. Chittle qualifies for such consideration.

However, Mr. Chittle acknowledges the wetland identification and has agreed to adopt a series of conditions - more or less finalized by the end of the hearing - which would stake out specific areas or building envelopes on the proposed lots. These would clearly indicate the areas where building construction and minimal clearing may occur. Mr. Chittle would then agree to the balance of the area being designated and zoned as a wetland and subject to the restrictions that would only permit complementary uses and would prevent any further site alteration and construction. Some limited forestry in a manner consistent with the protection as a wetland would also be permitted. Should the Board accept the configuration proposed, the Chittle proposal would also call for the reforestation of a part of the cleared area on the northern half. This amounts to about five acres and would form the northeastern corner of the more westerly of the farm split parcels.

Provincial Ministry of Municipal Affairs and Housing

Although they have no applications before the Board, it may be useful to spell out the position of the Provincial government as it applies to the applications. All ministries of the Province are represented by the Ministry of Municipal Affairs and Housing

through the “one window approach.” It opposes the Hearn proposal entirely. It firmly supports the Spellman proposal for both Hearn and Chittle properties, and inspired Dr. Spellman to modify his plan by dropping the inclusion of the Pospicil property. Following the modification, they agree fully with Dr. Spellman.

The Ministry experts, including people with years of accumulated experience in the formulation and application of ecological land classification and wetland evaluation, conclude that a golf course in this location would effectively spell the end of the remaining wetland features and functions on this site. This is despite the modern application of design, construction and management techniques based on minimal environmental impact. The site will have to be drained to accommodate the turf and extensive pedestrian and cart movements. The composition of the soils and vegetation will alter throughout the site including in the narrow remnant forested areas between the fairways. When asked, the Hearn experts suggested that irrigation in these areas could maintain the wetness and some wetland features. However, this was not included in the irrigation and water management plan and its effectiveness is doubted by the other experts. There will be significantly increased human activity on the site. The provincial experts also feared the impacts of increased pesticide and nutrient usage needed to maintain a high quality course and the effect this would have on the remnant areas between the fairways, and on the areas surrounding the course including adjacent properties. It was also acknowledged that additional clearing would be necessary and that this, coupled with further construction and site alteration to accommodate the extensive water collection and irrigation network, would further impact the wetland and forested areas of the site.

In short the provincial experts painted a picture of a wetland deciduous forest converted more or less completely from a healthy, varied natural area to one that would be highly managed and impacted. They say that the features on the site would be permanently and detrimentally altered leaving only poor remnant areas of forest cover,

and that the functioning of the site as a wetland would cease, no matter how environmentally friendly the golf course is designed to be. On this site further development would undoubtedly be required, involving site alteration and clearing that would forever change the character of the site. On the other hand, they were confident that the amount of impact now present on the site as part of the preparation for the golf course is reversible. Without further alteration and clearing and with some rehabilitation of the site, the functioning wetland could be maintained and restored, and a significant recovery could take place within twenty years leading eventually to its full restoration as a forested swamp.

The Province accepts the Chittle proposal but insists on smaller relocated envelopes and a reconfiguration of the severances. The Province prefers that the farm be divided on an east-west alignment and that the retirement lot be moved to the south east corner of the block so that all the lots will front onto the Coulter Road. This is because there has been some disturbance of the woods along the east side of the property and some further intrusion can be accepted with little additional impact. The present proposed configuration – preferred by Mr. Chittle because of the existing location of a waterline on Concession 6 – results in too much potential impact to the wetland and the forest interior for the Ministry of Natural Resources (a Ministry of Municipal Affairs and Housing client) to accept.

Essex Region Conservation Authority

Finally, like the Province, the Essex Region Conservation Authority does not have applications on the lands. It expresses support for the Spellman applications as they apply to the Hearn property and rely on Spellman and the Province to address this. However, by virtue of its appeal of the Chittle matter, the Essex Region Conservation Authority is more interested in the identification of the Chittle property and the reconfiguration of the severances to accord to the Province's suggestion. They are especially interested in protecting the forest interior habitat posed by the relatively

untouched Chittle woodlot and, like the Province, the Authority seeks a minimization of impact from the severances.

AFF Farms

The Board knows nothing of this application. Apparently it is an application in the vicinity of the Hearn proposal which was appealed by MHPS (Hearn). The appeal was withdrawn at the conclusion of the hearing. Following the withdrawal the Board closed the file without further order.

ISSUE: The Effective Date of the Applications and the Fairness of the Identification as a Wetland

When Material Handling Problem Solvers Inc. bought this property in the mid-'90s, it was not identified as a provincially significant wetland. The Essex Region Conservation Authority had identified it as an Environmentally Significant Area based on its value as a natural wooded area, but the ESA identification was never incorporated into the Official Plan for the Township of Colchester South. This would be the normal practice, according to Ms Prince. Ordinarily, the Township relies on the advice of Essex Region Conservation Authority when it comes to questions of environmental policy, and Essex Region Conservation Authority assures the Board that they would have notified the Township of the status of the lands when the identification took place. There is no apparent explanation for the Township's failure to make a change to its Plan to include the ESA designation. The Essex Region Conservation Authority asserts that the proponent (or his agent) would have been informed of the ESA status for the property when the land was being considered for purchase following discussions that the Material Handling Problem Solvers Inc.'s agent had with the Conservation Authority.

The subject lands have been designated and zoned agriculture. In Colchester South, this means that farming and a host of related accessory uses are permitted, but not a golf course. The proponent therefore knew that a golf course is not permitted as-

of-right and that he would need development approvals and would have to obtain amendments to the Official Plan and the by-law. He made application to do so. He was not aware that anyone was thinking of his lands as a wetland. Dr. Spellman says that when the applicant applied for development permissions, the normal requirement would be to consider the environmental impact of the proposed use, and in doing so should have commissioned an environmental study. This, says Dr. Spellman, should have revealed the wetland status of the lands. The proponent engaged environmental advisors. However, the consultants retained by Hearn did not conclude that it was a wetland as we will see below, so neither the proponent nor the Town (or for that matter any other agency such as the Province and the Essex Region Conservation Authority) treated it as a wetland.

The first applications for the golf course in 1999 were deferred and not approved by the Township. Material Handling Problem Solvers Inc. appealed the lack of a decision to the OMB. As Mr. Hearn described it, he knew about the opposition, but simply wanted a fair hearing of his proposal by an independent body. In early 2000, as the hearing approached, Dr. Spellman and the 'Friends of Marshfield' took the initiative and retained an expert to determine whether the lands in the vicinity of Marshfield are provincially significant wetland. The study by Mr. Goodban, a qualified wetland evaluator, concluded that certain of the lands are a provincially significant wetland. This evaluation was submitted to the Ministry of Natural Resources (MNR) whose responsibility it is to confirm the findings of an evaluation. Following this, the MNR agreed with Mr. Goodban's analysis and formally identified lands as a provincially significant wetland. This was all confirmed to Dr. Spellman and others by a letter of May 18, 2000. However, neither the Town nor the landowners were formally notified by the MNR. The Ministry explains that the protocol for identifying a provincially significant wetland does not currently include notification of the landowner, and the Town would have eventually been notified by the MNR or the Conservation Authority so that it could

incorporate the provincially significant wetland identification into a proper designation in its Official Plan.

Mr. Hearn found this all very unfair and has protested the process through his counsel, claiming that the identification should not be changed to the landowner's disadvantage after he had purchased it. However, after learning of the identification some time in May, 2000 possibly during an OMB mediation, the Hearn Group withdrew their application on the first day of the hearing, June 2, 2000 and abandoned its appeal and application.

Now here is the problem. The rule that the Board consistently applies in matters where policies are changed in relation to a development proposal is that every proposal should be judged on the basis of the policies as they existed on the date of the application. This is a well-known principle confirmed by numerous cases and, as a result of confirmation by the courts, binding on the Board as a result of the *Clergy* decision (*Clergy Properties Ltd. v. City of Mississauga* [1996] O.M.B.D. no. 1840), as it is known. It is a principle that is normally invoked and defended by landowners and developers in situations where the public authority attempts to "change the rules" after an application has been made. In most cases the *Clergy* doctrine works to their advantage by requiring the application of the former rules. Where it does not, landowners will usually consent to the application of new rules, but only if they consent will the newer rules apply. This has been firmly regarded as fair.

In the case before the Board, the landowner abandoned his application and he then re-applied *following the identification* by the Ministry of Natural Resources of the lands (or part of them) as a provincially significant wetland. What should be the effective date of the applications? And what policies should therefore apply?

Material Handling Problem Solvers Inc.'s counsel argues that they really did not abandon the application and the withdrawal was not really a withdrawal. Instead, they assert that the re-application should be regarded in the same way that an adjournment would be considered. To them the effective date of the application is July 1998, well before the provincially significant wetland identification was officially confirmed.

The Board does not agree. Withdrawal of an application and the abandonment of an appeal are not to be regarded lightly. The Hearn Group is well represented by capable advisors who understood or should have understood that withdrawal of an application is as serious as making the application itself. By making and withdrawing applications and appeals, processes are engaged and disengaged, rights are gained and lost. Had the Hearn Group sought an adjournment of the Board's hearing or had it somehow simply kept its application to the Town alive, it would have kept its rights as they existed on the date of the first application. They did not, and in doing so, they abandoned not only their application, but also their rights under the *Clergy* principle to have their applications considered under the policies as they existed on the more favorable date.

The Board concludes that the effective date of the applications that are now before the Board is August 15, 2000. This date follows the date of May 18, 2000 when the subject lands were identified as a provincially significant wetland by the Ministry of Natural Resources following the wetland evaluation conducted by Mr. Goodban. The application also follows the time when the applicant, his counsel and the Town came to be informed of the identification, although in fairness there was never any formal notification.

Although it is not directly related only to the question of the effective date, the Hearn Group considered the identification of the lands as a wetland to be a fundamentally unfair administrative decision affecting Hearn's property rights following

the purchase of the land. After learning that the MNR had identified the lands as a provincially significant wetland, Hearn applied for a judicial review of the MNR decision. This was heard by the court in August, 2002 while the Board enjoyed a brief summer break (Ontario Superior Court of Justice [Divisional Court file no. 366/2001] heard August 20, 2002). The court determined that "declaratory relief (requested by the Hearn Group) is not applicable in respect of the identification by the Ministry official of the lands in question as provincially significant wetlands because it does not involve the exercise of a statutory power." The court went on to say that the identification is "not binding" but will form part of the pertinent considerations that the Municipal Board must make when it has regard to the Provincial Policy Statement. The court endorsed the view offered by this panel of the Board given in the course of the OMB hearing, namely that "although the OMB does not sit on appeal of the making of the identification, the OMB will decide the merits of the identification and whether it should become part of the planning documents of the municipality."

The implication of all this is that all natural justice considerations can be met by the OMB hearing which is being conducted under a statutory authority. The court suggested that the request for judicial review was premature and that only after the OMB hearing had been completed and the identification confirmed in a binding planning designation could such an application be heard.

In short, therefore, the Board concludes, first, that the identification of the subject lands as a provincially significant wetland by the MNR has been made fairly and, secondly, that the date of the identification is prior to the date of the applications made by the Hearn group, now before the Board. It is therefore fair and appropriate for the identification to be considered by the Board. Indeed the Board is now clearly obliged to consider the identification as a matter falling within the Provincial Policy Statement, for which the Board must have regard, in accordance with the *Planning Act,* a point that the Board will return to later.

ISSUE - Is the site a Provincially Significant Wetland?

Section 2.3.1(a) of the Provincial Policy Statement says that “development and site alteration will not be permitted in. . . significant wetlands south and east of the Canadian Shield.” In the definition section of the same Policy, “wetlands”:

> means any lands that are seasonally or permanently covered by shallow water, as well as lands where the water table is close to or at the surface. In either case, the presence of abundant water has caused the formation of hydric soils and has favored either the dominance of hydrophytic plants or water tolerant plants. The four major types of wetlands are swamps, marshes, bogs and fens.
>
> Periodically soaked or wet lands being used for agricultural purposes which no longer exhibit wetland characteristics are not considered to be wetlands for the purpose of this definition.

“Significant” as it applies to wetlands is defined as

> . . . an area identified as provincially significant by the Ministry of Natural Resources using evaluation procedures established by the province, as amended from time to time.

The “identification” of a site as a provincially significant wetland is by Provincial Policy therefore a clear responsibility of the Ministry of Natural Resources (MNR). The identification is made on the basis of the Ontario Wetland Evaluation System (OWES) which fulfils the policy requirement that identification be made “using evaluation procedures established by the province. . .” The OWES Manual, now in its third edition, defines the proper procedure for identifying and evaluating a wetland. That is, it sets the criteria to determine first if a site is a wetland and secondly it evaluates the significance of the site in terms of the application of provincial policy.

An identification is not itself a planning designation. The OWES Manual describes itself as “an aid to broad land use planning (and) . . . an essential cornerstone of the Provincial Wetlands Policy Statement under the Planning Act (now the Provincial

Policy Statement, Section 2.3)." As an identification, its accuracy or veracity is not *directly* subject to an appeal to this Board. It may seem obvious to some, but this Board has no authority to officially monitor or supervise the identification of a provincially significant wetland by the MNR.

Nevertheless, the Board is compelled to have regard to the Provincial Policy Statement and therefore to any identification made under the policy when determining if the identification of a provincially significant wetland should be translated into the planning documents of a particular municipality. In doing so the Board is perfectly within its authority under the "have regard to" obligation to ensure that the policy it is asked to apply is correct, that it is fairly applied and that its interpretation in a given situation is within the overall objectives of the Provincial Policy Statement. Applying broad provincial policies to local plans and to specific sites and circumstances is a well established and fundamental function of the Ontario Municipal Board under subsection 3(5) of the *Planning Act*.

In the case before the Board, the MNR did not itself complete the identification of the wetland. The MNR does not have a program of comprehensive identification and relies instead on evaluations conducted by trained and qualified wetland evaluators, some of whom act in the capacity of private consultants. Both Mr. Goodban retained by Dr. Spellman, and Mr. Young retained by Mr. Hearn, are qualified wetland evaluators and both are knowledgeable in the use of the OWES manual. Mr. Goodban was specifically retained to conduct a wetland evaluation of the Marshfield area. In doing so he was allowed access to the Hearn property by a Board order given for the earlier hearing.

Mr. Goodban completed his evaluation in accordance with the OWES Manual and concluded that most of the lands in the Marshfield area form a provincially significant wetland as provided by Provincial Policy. Specifically he concluded that the

wooded areas form a “pin oak swamp” comprising three distinct wetland features covering the wooded areas of the Hearn and Chittle properties and the wooded properties to the west of the Hearn site, including those of Mr. Burnell. Mr. Goodban was not able to inspect the Pospicil property and did not include it in with the wetland areas. He drew his conclusion for this site and initially for the Chittle property from roadside observations and from a review of aerial photographs. His conclusions that a large part of the Chittle property is a wetland were later confirmed by an on-site visit by the MNR.

The key features of the site that lead to this conclusion are seasonal presence of standing water on the surface, the presence of hydric soils, that is soils that are permanently or largely inundated with moisture, and hydrophytic or moisture-tolerant/moisture-loving plants. This last characteristic is established by observing the species composition as well as the abundance of certain species after determining the degree to which the species present ‘prefer’ or more readily adapt to dry or wet conditions. The conclusion that a site is a wetland follows where the prevalent species are those which tolerate, prefer or require wet conditions over those that prefer dry conditions. Although there may be a variety of species of all kinds in a healthy ecosystem, predominance of some species over others and abundance will determine the prevailing type of environment. Mr. Young, for instance, observed many upland or dry species. However, he did not compare the abundance of various species to arrive at a view of predominance.

In accordance with the OWES Manual, the Goodban evaluation based its findings on scores compiled for the various sites in the Marshfield area. The scores are compiled in four areas: the biological component; the social component; the hydrological component; and a special features component. While it is not necessary to go into great detail on the scores, and because the criteria and scoring are firmly set by the OWES Manual, the Board acknowledges that assigning scores requires some

exercise of judgment and that there is some question about the fairness of the scores. For instance a great deal will turn on the weight given to certain highly valued species for their provincial rareness, despite their apparent local abundance. Similarly, critics express concern that values that are inherent to Essex County artificially elevate the scoring and thus create a bias for all properties in the County that would make avoiding a wetland identification difficult.

In response, the proponents of the Manual and the identification process in general, assert that the wetland identification is based on firm ecological science. They say also that it is an “open file.” By this they mean that the identification - including the observations, scores and judgments - can be challenged at any time and the file can be modified. This amounts to a kind of ongoing internal appeal process in which the identification can be reviewed if new data are discovered or if a successful challenge is mounted to the judgments contained in an evaluation. The Marshfield evaluation was in fact questioned by the proponent’s consultants and reviewed by an internal expert committee of the MNR following the initial confirmation by the MNR of the contents of the evaluation.

The OWES evaluation was conducted by Mr. Goodban in early 2000 This means that it was conducted following the clearing of the “fairways” that had begun by then on the property. Mr. Goodban explained that the clearing had not significantly altered the evaluation. However, under examination, he admitted that the scoring of certain features actually improved because of the clearing. This became the basis for the modification to the planning documents proposed by Ms Prince that a golf course be allowed that has a higher “hypothetical” OWES evaluation. It also formed a key part of the applicant’s position that the golf course could be built in an environmentally acceptable manner. The opponents, especially those in support of the wetland evaluation defended by explaining that the clearing may not have materially altered the evaluation but the completion and eventual operation of a golf course would be

incompatible with the wetland. The wetland would simply cease to exist. They also could not conceive of a “hypothetical” OWES evaluation and argue that the policy statement does not contemplate such a practice.

When completed, the Goodban evaluation was reviewed by Mr. Hector of the MNR. Following discussions and some adjustments, the evaluation was accepted by Mr. Hector and a letter confirming the identification was sent to Dr. Spellman.

As mentioned earlier, the property owners and the Town were not notified of the identification, at least not until the wetland issue became known through the OMB hearing process. The Board shares some of the distress held by the property owners at this slight and considered it as a matter of fairness. The Board is bound by the determination of the court as noted above, that the identification as a provincially significant wetland is not binding and is not the exercise of a statutory power. Notice of the identification is therefore not required and while its absence may be a discourtesy, it is not specifically unfair. By contrast, this hearing is the forum where a binding planning designation can be made based on the identification, and where notice and other matters of natural justice are therefore necessary. Although Mr. Burnell complains that he did not receive adequate notice of the identification based on some sort of discrepancy in the property description, the Board is not persuaded that the notice of the hearing was inadequate. The Board concludes instead that there has been adequate notice to all parties and that there now exists every opportunity to exercise natural justice rights. The identification has been fairly made.

The main objections to the provincially significant wetland identification are substantive. The proponents and property owners say that the identification is inaccurate, or perhaps is biased in favor of the identification or inclusion of marginally wet areas as provincially significant wetlands.

Ms Prince, in her evidence, considered it nearly absurd that these lands be considered wetlands. She showed the Board photographs of the sites that she considers wetlands. Her idea of wetlands is the creek marshes and lakeshore estuaries. They include areas that are clearly and permanently under water. This perspective clearly informed her advice to the Town, which agrees that the Marshfield Woods – despite the name - are not wetlands.

However, this view is not consistent with the definition in the Provincial Policy Statement which ascribes wetland status to lands that are seasonally covered by shallow water or where the water table is close to, or at the surface. The definition of wetland is also based on the predominant vegetation and soil types. To be fair, Ms Prince is a planner not a wetland evaluator (although she has had some training). Her perspective, while understandable, does not reflect the expertise of a trained wetland evaluator. As an experienced, highly respected and extremely capable planning expert, whose views before this Board on matters more specifically within her realm are given the greatest consideration, she will understand the limits of her expertise.

Mr. Young, the ecological expert retained by Mr. Hearn, also asserts that the site is simply not a wetland. He takes the perspective in the first place, that the site does not exhibit the threshold characteristics of a wetland. In short, it is not wet enough by his observation. He walked it several times and rarely got muddy shoes. Furthermore he observed numerous excavations on the site – carried out as part of the golf course preparation – and noted that there was no seepage from the walls of the excavation and that the holes left by the excavation did not readily fill up with water indicating an elevated water table. In fact he firmly and repeatedly asserted that, since there is no elevated water table, the site is not a wetland. He therefore went no further and did not, and would not, conduct a wetland evaluation of the site. According to him, it simply does not qualify.

Mr. Young's criticism goes further than this. Although he did not conduct an evaluation, and was not specifically familiar with all the species data discussed by Mr. Goodban, Mr. Young concluded that the evaluation system included biases that made the identification as a provincially significant wetland a foregone conclusion. The example he cites (there are others) is the pin oak. Its high OWES score is based on the relative rarity in the Province of large stands of the tree, found only in Niagara and Essex. It is not rare in Essex and he showed the Board a photograph of a pin oak on the front lawn of a Windsor City home to demonstrate its commonness and to show that they are not endangered in Essex. Mr. Young says that the rationale for identification is therefore unfair. It makes a high score inevitable and poorly reflects the environmental value of the site.

Similarly scores attributable to the size of the site reveal a bias. Mr. Young and Mr. Balfour noted that just about anything over two hectares in Essex is given prominence in the scoring. This too is unfair to owners of the subject site, they say. And further, they assert that the evaluation system is biased against Essex because it gives a high score for the fact that there is little remaining forest cover and few wetland areas. This is punitive of the properties in the County based on a characteristic of the County which is unrelated to the site. To illustrate all this, Mr. Young undertook an exercise in which he conducted a wetland evaluation of some 25 nearby wooded sites in the County. He concluded that a large number of them would likely qualify as wetlands under the OWES evaluation. This, he asserted, showed the inherent bias in the OWES method. The parties opposite found it interesting that Mr. Young completed an OWES evaluation on some 25 properties, but never conducted one for the site for which he was retained to provide ecological advice.

Mr. Young's views were supported by Dr. Sawhill, a wetland expert with considerable experience in wetland rehabilitation and in the development of golf courses in wetlands, mostly in the United States. He too asserts that the site would not

qualify as a wetland, based on generally accepted wetland definitions. He visited the site on two occasions and made observations similar to those of Mr. Young, noting a lack of seepage on the sides of excavations, no presence of standing water, and no emergent moisture when he scraped his boot in the soil. He made no boreholes or excavations. He was not specifically familiar with the definition wetlands in the Ontario Provincial Policy Statement. He had worked in Ontario, but was not familiar with the OWES Manual and was not trained in application of the Manual.

One area of the evidence that was not in real dispute is the fact that the soils present on the site are indeed hydric in appearance. Dr. Acton's findings for the proponent are consistent with those of the wetland evaluator, Dr. Goodban. The soils are wet gleysolic clays overlain by a thin humic or organic layer 25 cm deep. It is good agricultural land that often requires additional drainage because of the dense impermeable clays. This area was formed as broad flat lake bottom with dense silts forming the clays. In the specific location of the site, the soils have the bluish grey appearance of soils which are frequently if not permanently inundated. Some witnesses observed that the soils are not classic organic peat or black soils found in wetlands, leading to further doubts. However, those types of soils are common in wetlands where decomposing organic matter has built up over time forming deep layers of peat, such as in a bog. The swampy conditions here are based on a thin organic layer and deep relatively impermeable clays.

The location of the water table is not clear. The definition of a wetland includes reference to this and Mr. Young relied firmly on the fact that the water table is not observable near or at the surface to arrive at his conclusion that this is not a wetland. Mr. Lee, an ecologist with the MNR and one of the authors of the OWES Manual, theorized that the water table may be perched on, or very near the surface. This point was disputed by the proponents who argued that this is not the classic formation of a perched water table.

In fact a water table could not be readily discerned. Mr. Taylor, the water specialist with the Essex Region Conservation Authority – a practical expert with a firm grasp of local natural conditions - furnished the most likely explanation of this. He observes that the soils permit very little moisture movement through them and that without drainage, they remain wet if not saturated throughout the year. The only pathway for water to get on the site is by precipitation and when it falls it does not readily enter the soils. Most of the precipitation comes in winter and spring and remains on the surface where it forms the characteristic vernal (spring) pools and seasonal ponding experienced on the site for several months each year. The soils remain wet throughout the year which over time gives it the bluish-grey appearance. Because of the constrained permeability, the presence of a clear water table – that is a subsurface level of soil saturation - in this type of soil structure is not relevant to the determination of a wetland. Instead the wetland is created by the seasonal presence of standing surface water, wet and hydric soils, and an abundance of known hydrophytic plants, in other words all the ‘textbook’ characteristics of a provincially significant wetland.

The Board has considered the evidence as it relates to the identification of this site as a wetland, and concludes that by the best standards of science and policy, this site is a wetland as contemplated by the Provincial Policy Statement. The soils are wet and hydric, displaying the characteristic colour and appearance of soils that are commonly wet or frequently inundated. The plant life can be typed as a deciduous, mostly pin oak swamp with numerous examples in abundance of wetland type vegetation. While the water table is not apparent at or near the surface, the explanation that these are thoroughly wet soils commonly requiring substantial drainage works to improve their agricultural productivity is a compelling alternative explanation to the water table issue.

Counsel for the proponent has suggested cleverly that the wetland definition is a political definition, not one based on science. The experts on their side say that because of the pin oak and some other “special features” items, the score on this site is unfairly high and restrictive. Neither of these arguments is persuasive. The OWES manual is the prescribed method for evaluating a wetland to determine its significance. The Board is satisfied that its formulation is not purely political, but instead that it has been based on more than a decade of scientific development in the field, and practical experience in the evaluation and identification of wetland features in the Province of Ontario.

By definition an evaluation requires judgement. To the greatest extent possible the judgements take the form of scoring which can be generally replicated by experts to establish an objective or impartial weighting of factors. The factors include rarity, provincial significance, and estimates of threat among other things. The evaluation incorporates these values into the scoring to arrive at a quantitative assessment of the significance of the site. Having had all this explained and having had the benefit of a very thorough critique of the imperfections of the policy as it applies to this site and to the County by the proponent’s experts, the Board is nevertheless satisfied that by the prescribed standards, the wetland is correctly evaluated and identified as provincially significant.

As its preamble states, the aim of the Provincial Policy Statement is to provide leadership to the planning approval system, recognizing “complex interrelationships among environmental, economic and social factors in land use planning,” and thus make wise use of the resources, including natural resources of the province. The Board is obliged to have regard to the policy and in any given situation, determine whether and how it should be applied to maintain the overall objectives of the Provincial government as reflected in the Provincial Policy Statement. The Board is satisfied that the wetland evaluation system properly takes account of the complex interrelationship of factors and

that the evaluation and identification in this case is accurate and scientifically defensible.

In short the area of the Marshfield Woods identified by Mr. Goodban constitutes a provincially significant wetland within the meaning of the Provincial Policy Statement. It has been correctly evaluated, fairly identified and maintains the objectives of the Provincial Policy Statement.

ISSUE: "Have regard to. . ."

The position of the applicant, Material Handling Problem Solvers Inc., is that even if the lands are properly identified as a provincially significant wetland, or alternatively, if there is any question of the propriety of the identification, the Board is not obliged to strictly apply the policy. Subsection 3(5) of the *Planning Act* sets out the Board's obligations:

> (5) In exercising any authority that affects a planning matter, the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the *Municipal Board* and Ontario Hydro, *shall have regard* to policy statements issued under subsection (1). [Emphasis added]

The policy statements referred to are the Provincial Policy Statements including for the purpose of this decision specifically Section 2.3. Natural Heritage, the relevant sections of which dealing with wetlands, read as follows:

> 2.3 Natural Heritage
>
> 2.3.1. Natural heritage features and areas will be protected from incompatible development.
>
> (a) Development and site alteration will not be permitted in:
>
> - Significant wetlands south and east of the Canadian Shield…

The proponent's representatives say that the "have regard to. . ." requirement of the *Planning Act* provides the Board with the discretion to consider the policy and in the context of the circumstances of the case, to apply it or to set the policy aside according

to one's conscientious exercise of judgement. Mr. Balfour, the proponent's planner, explained the history of this section of the *Act*, pointing out that for a short time the standard was higher. In 1995 the *Planning Act* was amended by Bill 163 which included Section 3(5) which as excerpted read as follows:

> 3(5) A decision of . . . the Municipal Board under this Act and such decisions under any other Act as may be prescribed *shall be consistent with* policy statements issued under subsection (1). [Emphasis added]

This higher standard stood for only about one year and, following a change in the composition of the legislature, the original language "have regard to . . ." was restored. The implication of this is that the intent of the legislature was to abandon the higher test, unfetter the Board (and others) in its exercise of judgment, and to provide the Board with the latitude to make the most appropriate decision in the given circumstances.

A number of Board cases have reflected on the meaning of the obligation to have regard to provincial policies. In a Durham Region case (*Re Regional Municipality of Durham Plan of Subdivision 18T-91019* [1993] O.M.B.D No. 257) a case that is similar to the matter now before the Board, the Board stated simply that ". . . in having regard to a provincial policy statement, one must not apply it mechanically, in a manner that pays no regard to the circumstances at hand." The Board in that case took account of the fact that the lands were privately held and zoned agriculture and that the lands could be farmed much more intensely as a matter of right. The Board there concluded that the "lands should not be left in their natural state," and permitted residential development.

In the well known Ottawa Palladium case (*Re: Regional Municipality of Ottawa-Carleton Official Plan Amendment No. 8* [1991] O.M.B.D. no. 1427) in which the Board carefully considered the meaning of the "have regard to . . ." obligation, the Board concluded as follows:

> The Board is not bound to follow (statements of government policy); however, the Board is required to have regard to them, in other words, to consider them carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect. The Board is then to determine whether and how the matter before it is affected by, and complies with, such objectives and policies, with a sense of responsible consistency in principle.

In a more recent, but equally reflective example of the Board's consideration, Ms Rogers writes in *Victoria Point Homes Inc. v. City of Orillia* (1998) O.M.B.D. no. 684 (QL paragraph 64), as follows:

> In the Board's view, a requirement to have regard to a statement of provincial planning policy means more than considering whether a completed design has met a provincial objective, and if it has not, deciding not to apply the policy. Having regard to these policies requires a careful consideration of the planning objective and a determination of how to meet that objective in a particular situation; or alternatively, determining if circumstances make it inappropriate or impossible to meet that objective in a particular situation.

A review of the decisions reveals some key elements that have emerged in the understanding of the Board's duty to have regard. The first is that the Board must consider the policies carefully. This means that one cannot - following a reading of the policy - simply, capriciously or with a minimum of interest discount their applicability. One must take care to understand them and to consider the implications of applying the policies or failing to apply them.

Secondly the Board must not take a narrow or merely particular approach but should consider the overall objectives of the policies. In doing so the Board must determine the intended outcome of the policy. It is not necessarily the duty of the Board to judge or question the intent, but rather to understand "what they are meant to protect" and in the Ms Roger's words, "how to meet the objectives in a particular situation." To formulate a policy, whether it is a policy plan for a community or a region, or a provincial policy statement, means first of all, to make a statement of intent: in our case, for example "Natural heritage features and areas will be protected from incompatible development." This forms one of the overall objectives of the policy. A policy statement

then goes on to explain how the objective is to be achieved in any given set of circumstances: again, in our example, “Development and site alteration will not be permitted in significant wetlands south and east of the Canadian Shield.” In other words, a policy statement is a conscious or stated choice – a kind of public promise - to take a consistent and fair approach to similar circumstances in the future and to make decisions (or have others who hold similar authority make decisions) that will advance the desired objectives of the policy. Like an unkept promise, a policy observed ‘more in the breach’ is of little true value.

Furthermore, although the test does not require consistency, the phrase “having regard to” nevertheless evokes a sense that a policy by definition will be applied evenly to similar situations. In the *Ottawa* case, Mr. Howden asserts that the Board must make its determination with “a sense of responsible consistency in principle.” The reasonable expectation following the adoption of a policy is that it will be applied, and that it will be applied evenly. The decision said this before the Act was amended to read that decisions must be “consistent with” provincial policies. Nevertheless, as a matter of definition and principle, anyone reading a policy should reasonably expect that if the circumstances apply to them, so will the policy. By the same token, it may be reasonably expected that it will be applied equally and fairly to others where similar circumstances obtain. The fact that the statute was changed to omit the obligation that all decisions are to be consistent with provincial policies does not mean that there is no obligation to apply policies fairly and equally to all similar situations. The planning system depends on the reliable application of policy to achieve some measure of certainty for the participants in the process and to avoid arbitrary and volatile decision-making.

Even so, a policy is not like a law. Adherence to a policy statement is not strictly mandatory and the consistent application of policy is not mandatory in the same way that it is for the law. The intent of the *Act* is to clearly permit a very broad discretion to

depart from the policy. The proponent's representatives rely on this. They say that, yes, the Board must have regard to the policies, but having done so, it can simply exercise its discretion and ignore or bypass the policy in the exigencies of the situation. They say correctly that the Board is not "bound" by the policies and that the language of the *Act* gives the Board a complete discretion to act in any way that it sees fit after having had regard to the policies. All this is correct.

But even discretion must be exercised with reason. Ms Rogers suggests that discretion may be exercised where "circumstances make it inappropriate or impossible to meet the (policy) objective in a particular situation." "Inappropriate or impossible" may seem to be a steep test. Nevertheless, at the very least, establishing a policy implies that it should be followed fairly and equally unless there is some good and sufficient reason, arising out of the circumstances before the Board, to do otherwise. This marks the reasonable exercise of discretion.

The proponents say further that the Board "only" has to have regard and should not apply the Provincial Policy Statement "slavishly." In a leave to appeal ruling arising from a Board decision in King Township (*Concerned Citizens of King Township v. King Township* [2000] O.J. No. 3517), the court considered the Board's decision to accept the testimony of a planner who said that "the approval authority need *only* 'have regard to' these (provincial) policies." While the matter is yet to be heard, leave to appeal on this issue was granted by Campbell, J. who in his reasons wrote:

> The key word here is the dismissive "only." It diminishes the importance of the provincial policies to say that one need "only" have regard to them. Although one should not place too much emphasis on one word in an entire decision, the judgement in its entirety makes only two references to provincial policies. The judgement as a whole raises the question, whether the Board erred in failing adequately to have regard to provincial policies.

Taking account of these reflections, the Board in the present case considers the obligation to have regard to the Provincial Policy Statement as one that requires: a

careful consideration, not a dismissive one; a fair application of, and approach to policy which applies it similarly to all similar situations, rather than one that allows frequent departure from the policy; and the exercise of reasonable discretion, that is departing from the requirements of the policy only when it would make more sense to depart from the policy than to comply with it.

A careful consideration of the policy and of the circumstances of the matter before the Board reveals that it is meant to deal precisely with the circumstances as they present themselves in this case. Large high quality wetlands are valued and rare in Southern Ontario and even rarer and thus more valued in Essex. The objective of the policy is to correct the historic loss by protecting identified provincially significant wetlands and by prohibiting development. The Board sees no reason to warrant not applying the policy approved for consideration under Section 3 of the *Planning Act* in the circumstances of this case.

So far as the Board can determine, the policies make sense in this case and should therefore be applied fairly, and the Board having had regard to them, will do so.

ISSUE: Is this a “down zoning” or a taking without compensation?

From the very outset, Mr. Hearn’s intention was to build a golf course on the subject site. He searched for a site that he thought would be suitable and selected this one. When his intentions became known to area residents and others in the County and the City, an opposition mounted. Mr. Hearn continued his plan but responded to the opposition with an offer to sell the land, as we explained in the background to this decision, for $400,000 or twice the amount he had paid in the mid ‘90s. The opponents could not raise this amount and the Essex Region Conservation Authority did not elect to buy it despite showing some interest.

The Hearn group regards the efforts by the opponents to identify the lands as a wetland and then to zone and designate it - first by the Friends of Marshfield Woods, later by Drs Spellman and Potter, and eventually by the Ministry of Municipal Affairs and Housing and the Conservation Authority - as unfair. It is, according to Mr. Hearn, an attempt simply to "take" his privately owned lands - including existing rights bought and paid for - and make them into a reserve or public park without paying the price of acquisition.

Mr. Hearn earnestly opposed this - at first politically. Following the identification as a provincially significant wetland by the Ministry of Natural Resources, he contacted the Minister of Natural Resources and met with him personally. Mr. Hearn and his lawyer then wrote to the Minister following the meeting, complaining of the ease with which sites can be identified, the unfairness of evaluating some sites and not others, and the impact of taking rights including development opportunities without acquisition or compensation at fair market rates. The Minister's staff responded to Mr. Hearn's lawyer, saying that "the Minister holds the opinion that this land use planning system is appropriate for the Province of Ontario." The author of the letter went on to explain that:

> It is established law in Canada that compensation does not follow land use planning decisions, whether land uses are increased or decreased. Thus landowners are not compensated for decreases in land uses, nor do they have to reimburse the government when they receive an increase in land use made pursuant to the land use planning process.

Lacking any success on this front, the identification was challenged as a matter of law, by way of an application to the court for judicial review of the Ministry's decision to identify the site following the Goodban evaluation. As we explained above, the court did not grant the requested relief, ruling instead that the authority to identify the site as a provincially significant wetland was not the exercise of a statutory power, was not binding until translated into enforceable planning documents, and was thus premature pending the results of these Municipal Board proceedings.

Mr. Hearn's remaining opportunity lies with the appeals now before this Board. His appeal in this respect is akin to one of equity. His representatives - including counsel and Mr. Balfour, the planner retained by the Hearn Group – assert that the identification, designation and zoning of the subject lands would be a draconian taking of rights that would render the lands virtually useless and without value. Mr. Chittle's counsel, Mr. Hooker, along with Mr. Chillman representing other substantial Essex County landowners, all fully endorse this view on behalf of similarly held concerns by their clients. The Town in its view also supported the complaint, to the point that it simply refused to consider the Spellman applications and directed their staff to question the Ministry's actions regarding the implications of the identification.

The Board and other tribunals have frequently commented on the matter of down zoning and the related question of the unreasonable taking of rights through land use planning decisions. The Minister's advisor quoted above provides a reasonable summary of the law, as generally understood. Down zoning is not by itself a compensable taking. In Canada and Ontario we do not compensate for loss, nor do we tax the betterment or gain achieved by a favourable planning approval.

Nevertheless, the Board and the courts have developed several principles applicable to the question of down zoning. In the first place, down zoning should not be considered lightly or undertaken in bad faith or for wrong reasons. Furthermore, it is well established that zoning and planning designations cannot be used to create public parks or publicly accessible open spaces. This requires that the lands be legally acquired by consent or through due process, and that fair compensation be paid. And finally it should only be undertaken with care and with a strong and compelling public justification following a very careful consideration of the impact of the reduced rights of the landowner.

A most recent case that bears upon this question is *Russell v. the City Toronto* (2000) 52 O.R. 3rd 9, also known as *Russell v. Shanahan et al.* This was a case in which the owner of a vacant ravine lot in the prestigious Rosedale Neighbourhood of Toronto applied for a building permit for a residence permitted by the City's general zoning by-law. Although a permitted use, the application required the further approval of City Council under the City's ravine control by-law. The day following the permit application, City Council enacted an interim control by-law prohibiting residential development on the ravine. Later, following a study by an outside consultant, Council passed a new ravine by-law prohibiting residential development. Two property owners affected by the new by-law appealed to the Ontario Municipal Board which dismissed the appeal following a lengthy hearing, ruling that the by-law had been "enacted for a valid reason" and that there was no reason for the appellant property owners to be exempted from the new by-law.

An application was made under Section 43 of the *OMB Act* for a review of this first decision and, following a hearing of the motion for review by a second panel , the first decision was overturned and the appeals were allowed by the second panel. The decision of the second Board panel to permit a review was then appealed to the Divisional Court which overturned the second OMB decision and restored the first. And finally, the decision of the Divisional Court was successfully appealed to the Court of Appeal which restored the second Board decision to allow the appeals and thus to permit the development of the ravine lots.

This case is cited by the Hearn representatives and their supporters as a binding statement of the proposition that down zoning uses is unacceptable. It is true that the second panel of the Board, in reversing the decision of the first, did find that the first panel's approval of the new ravine zoning was unacceptable. In strong language the review panel found that the effect of the by-law would be "profound and inexorably devastating" insomuch as the "underlying residential rights will be effectively removed"

and both properties will be sterilized. In describing the second ruling, the Court of Appeal acknowledged that the effect of the by-law was to render “the entirety of the Dickenson premises and a good portion of the Russell premises . . . unfit for development.”

It is important to remember that the Court of Appeal was not being asked whether the review panel had made the correct decision. Rather, the court was considering whether the review panel had the authority to overturn the decision of the first panel. A careful reading of the cases reveals that that the Court of Appeal was not necessarily endorsing the view held by the review panel, but rather that the review panel of the Board had itself not erred in accepting the jurisdiction to overturn and to make an opposite finding to that of the first panel. In other words in making its finding the court of appeal did not assert that all down zoning is sterilization or that it was wrong. It simply found that the second OMB panel had the authority to review the first decision and to find that a long-standing Board policy had not been applied.

Neither the review panel of the Board nor the Court of Appeal asserted that the municipality could not down zone. The review panel acted on the principle that doing so entailed a balance of the public and private interests. The principle is that not all down zoning is “sterilization” but that down zoning must be justified by a strong and compelling public interest and must take account of the rights that are lost. In its assessment of the balance the review panel of the Board found that the first panel had not done this. In a defence of the review panel, the Court of Appeal stated:

> The (review panel of) the Board was not taking issue with the ability of the municipality to pass such a by-law. Rather, it was asserting its own independent jurisdiction to insist on a justification for such a drastic action. This was completely within its jurisdiction under s. 43 to do so.

In short the Court of Appeal decision upholds the right of the review panel of the Board to act on its own judgement, as it sees fit, and to apply a well established OMB

policy that weighs the effects of a zoning by-law on the rights of a property owner against the public interest benefits to be achieved. In the present case, this panel of the Board is agreeable to being bound by the court's conclusion that the Board has such authority. However, it does not follow that I am bound to make the same finding in this case as the review panel found in that one. First, Board decisions are not binding on subsequent panels. Even ostensibly longstanding Board policies – however well established and fervently professed by one panel - cannot be held to fetter the independent judgement of another.

Secondly, however, the circumstances of the *Russell* case are distinguishable in several key ways. In Russell, the owners of vacant land had pre-existing residential rights and at least one of them was acting on those rights in applying for a building permit. The permit was for a use which would have met the requirements of the by-law. The by-law amendment that followed extinguished existing rights. There were few if any legal non-conforming uses that the owners could maintain. Whether one agrees with the first OMB panel in the *Russell* case that this was warranted by the public interest in preventing construction of homes on Toronto's ravines, or with the review panel's position that it was not, the outcome is not very instructive to the Marshfield case.

Mr. Hearn purchased a mature bush lot in a very rural area, partially (about 25 acres) cleared for agricultural uses. It is designated and zoned only for agriculture. This would permit farming, a limited amount of residential use, accessory buildings, and accessory uses such as forestry.

Importantly Mr. Hearn purchased the land for a golf course. Unlike the *Russell* case, Mr. Hearn has no pre-existing underlying right to such a use. It is not a use that is permitted by the designation or the zoning. He knew that if he wished to make such a use of the lands, planning documents would have to be modified and planning approvals must be received. As a well advised land owner undertaking an important

development proposal it is not unreasonable that he should understand that decisions relating to a development proposal and the proposal to amend planning documents are made on their merits, and in light of prevailing policy relevant to the proposal and to the site in question. These include local planning policy and applicable provincial policy. Approval of a proposal to amend the planning documents is not a right and should not be seen as a foregone conclusion to which one may lay claim as a right.

Following the identification of the appropriate portion of the lands as a wetland, and following the proposed corresponding designation and zoning, Mr. Hearn would continue to own a parcel of land with mature bush and about 25 acres of adjacent cropland. He would retain the right to farm the cleared area and would likely continue, as would any other landowner/farmer, to have the right to limited residential uses and farm buildings on the cleared land, subject perhaps to an environmental assessment to identify a suitable location for buildings and accessory uses. The Town concludes that Mr. Hearn's practice of tree cutting on the site amounts to the exercise of logging which is a form of forestry which is, by their interpretation, an acquired right and a permitted agricultural use. Both the wetland policy and the principle of legal non-conforming uses (subsection 34(9) of the *Planning Act*) would permit the continued use of the lands for agriculture.

In other words, the lands are not sterilized in the "devastating" way that the review panel of the Board concluded would be the case in *Russell*. Mr. Hearn would continue to enjoy many of the same permitted uses he enjoyed when he purchased the property, uses that many of the other owners of rural properties in the vicinity now enjoy. His counsel scoffs at the idea that he might use the land for a rural home, or for hunting, hiking, or other personal recreational uses and asserts that a wetland designation and zoning on a significant portion of the land amounts to a taking of the lands for a public open space. However, no public access is proposed and like all other

private owners of the bush lots in the area, Mr. Hearn will continue to enjoy exclusive access supported by the laws of trespass.

The Board in this case concludes that the proposal to identify the pertinent portion of the lands as provincially significant wetland, and to designate and zone them accordingly, does not amount to an unreasonable down zoning. Nor is it a taking of rights without compensation or without a proper weighting of the demonstrated private interest considerations in comparison with the public interest.

ISSUE: Third Party Appeal

The Board is made aware that this matter arises as a result of conflicting counter appeals, one of which is referred to as a "third party appeal." Everyone familiar with the Ontario planning system will understand the circumstance where a development proposal made by the landowner and supported by the Town is appealed to the Municipal Board by opposing ratepayers. This is quite common. It is also common for the Town or the Province or some other public authority to propose a planning designation for some lands within its jurisdiction that the owner of the lands does not like and which is appealed to the Board. However, in this case the Board has a counter appeal by two private citizens, Drs Spellman and Potter, to designate and zone the lands owned by MHPS in a way that the landowner strongly opposes. This is referred to as a "third party private appeal," referring to an application - and, as in this case, an OMB appeal following the failure of the application - by private citizens with no legal interest in the land, to designate or zone the lands on a site specific basis against the owner's wishes and without the support of the municipality.

In many municipalities, and in the minds of many fair minded people, the idea that a person should be able to dictate the use of another's lands against the landowner's will is anathema. As Ms Prince explained, the Town of Essex will not even process or consider such an application, and did not give any consideration to the

application by Dr. Spellman in this case. Nevertheless, when this happens and the appellant follows through, it comes to the Municipal Board where the Board is obliged to conduct a hearing and, it is fair to say, will look at such a proposal with corresponding scepticism.

To be sure, third party appeals are permitted by the *Planning Act*. The application and appeal sections of the *Act* as they apply to the adoption or amendment of official plans refer to “any person” or “public body” and in none of the relevant sections restricts the right “to apply” or “to appeal” to land owners [Subsection 17(24); 17(36); and 17(40]. The language is similar in the sections pertaining to zoning by-law applications or appeals [Subsections 34(11) and 34(19)]. Lest one should surmise that this may be an inadvertence or poor drafting on the part of the legislature, the Board was reminded that in several other sections of the *Act*, applications may only be made by “property owners” or their authorized agents. For example, section 45(1) of the *Act* provides that only the owner of the lands that are the subject of the application or a person authorized by the owner may apply for a minor variance from the by-law. Similarly sections 51(16) and 53(1) provide that only the owner of the lands or the owner’s agent can apply for subdivision or consent to sever lands respectively. The corresponding sections relating to appeals of these applications grant appeal rights to “persons” or “public bodies.” And although all persons must comply with a site plan, only the owner of the land to be developed is required to file the information needed for a site plan and site plan agreement. In other words, the legislature as it should always be presumed, was very careful in its use of language and meant to use the words “person,” “public body,” “land owner” and “agent” in ways that clearly distinguishes the various kinds of actors and their assigned rights within the planning process.

In short the statutory right to make a private application for amendment to the official plan and by-laws of a municipality, for any parcel of land, is given to any *person*, including those who have no legal interest in the subject lands. And similarly the right to

appeal to the OMB should the application not be approved is a right held by all *persons*, again without reference to their legal interest in the subject of the application and appeal. The law as expressed in the *Planning Act* makes no distinction and offers no qualifications. It requires that all appeals be judged equally on their merits, unless found to be frivolous, vexatious, or made in bad faith or for wrong reasons. Unlike the Town, the Board does not have the luxury of simply ignoring the application or dismissing the entire category of third party appeals. On the contrary, the law obliges the Board to conduct a hearing, and the Board's jurisdiction and mandate compel it to regard the matter seriously and to treat all parties that come before it without favour, that is equally, fairly and impartially. Having said this however, the Board can give consideration to the weighing of conflicting rights, in this instance, the rights in law of a property owner against the statutory application-and-appeal rights of others. In doing so there is perhaps some consensus that the benefit of the doubt in such cases should be given to land owners over those seeking designations over the lands of others without their permission. As Mr. McQuaid, a lawyer for Hearn on some issues, explained, the Board should be careful. He worried of the province-wide consequences arising from a decision that permitted a third party appeal. Undoubtedly he was referring to the possibility for malicious or vexatious use of the practice or perhaps also that it might give some incentive to irresponsible activists or send an inappropriate message to landowners.

All this is a fair caution to the Board. However, this case is no longer simply a third party appeal by a few private citizens or by a local lobby group of environmentalists against an unwilling landowner. It may have started out like that, but as the Ministry of Municipal Affairs and Housing and the Essex Region Conservation Authority became increasingly involved in, and committed to the applications by Spellman, the character of the applications and the appeals changed. This is not to trivialize the role of the first appellants, but rather to say, instead, that by gaining the support of significant public authorities with responsibilities in the area that are the subject of this hearing, this has

become a different kind of proceeding. The Province and the Essex Region Conservation Authority have effectively adopted the Spellman position (as modified) as their own. The applications and appeals are consistent with the positions and policies of these agencies and as they themselves now assert, the case advanced initially by Drs. Spellman and Potter is now the same case as that advanced by the Province through Ministry of Municipal Affairs and Housing and by the Essex Region Conservation Authority.

Mr. Hearn's counsel ask: why then does the Minister not make an order? The Ministry of Municipal Affairs and Housing answers that such an act would be redundant and unnecessary. If an order was issued, the appeal of such an order has for all practical purposes the same effect, and would have brought us all to the same place. The Board understands and accepts this rationale. The Ministry acts to achieve its ends in the way it sees most fit, and has chosen in this case to support the applications and appeals as filed and as modified.

In short this is no longer merely (if that is the correct word) a third party private appeal and the Board does not see that it should be treated as one. By taking the positions that have been taken and by giving their support in the way they have, the Province and the Conservation Authority have made these applications and appeals their own, with all the implications that this bears.

This will distinguish this case from those where less responsible private applicants and appellants - lacking the support of any responsible public authority and lacking a similar body of expertise and evidence - attempt to dictate land use policies to unwilling landowners. In this case, the "Spellman" applications and appeals are regarded as though they have been made by the Ministry of Municipal Affairs and Housing and the Essex Region Conservation Authority, and must be considered therefore upon the merits, not on the basis of who has initiated them.

ISSUE: The Wildlife Issue

In an intensive agricultural region such as Essex County sites such as Marshfield Woods offer an important area for wildlife migration and habitat. This is doubly true in Essex because of the creeks and lakeshore areas, and its strategic position on the migratory paths of birds on the land bridge between the two large lake systems. Many of the opponents and other area residents remarked on the wildlife in the area and some of the residents, including especially Ms Meloche, documented for the Board visually and in great detail the ample array of species present on and moving through or near the site. Ms Meloche's document books offer a testament to the efforts of an amateur wildlife 'expert' to document the species on the site and in the vicinity. Her work included a large amount of pictorial evidence of the presence in the vicinity of several species including the rare eastern fox snake. Her evidence was supported by the evidence of the wildlife experts retained by the proponent Mr. Hearn, especially the bird experts of Glenside Ecological Services who found a large number of bird species, some of them important and rare, but none endangered or threatened.

The Natural Heritage Section of the PPS has a section relating to habitat. It states that:

> 2.3.1. Natural Heritage features and areas will be protected from incompatible development.
>
> a) Development and site alteration will not be permitted in:
>
> - Significant portions of the habitat of endangered and threatened species.

In the definitions, a threatened species:

> Means any native species that is at risk of becoming endangered through all or a portion of its Ontario range if the limiting factors are not reversed.

An endangered species:

> Means any native species, as listed in the Regulations under the Endangered Species Act, that is at risk of extinction throughout all or a significant portion of its Ontario range if the limiting factors are not reversed.

Of the species identified by Glenside, a few were identified as rare or rare/common and one, the Tufted Titmouse, is very rare. However, none of the species seen on the site in their extensive observations were threatened or endangered. Their surveys were, in the Board's estimation, very through and the methodology resulted in a very credible inventory of the activity on the site. From this alone it can be concluded that the proposal to develop a golf course will not have any significant adverse effect on habitat of threatened or endangered species. There may be some impact to the population of forest interior species arising from the clear-cutting of the fairways. By extension this becomes a more important consideration for the Chittle application where the forest interior remains mostly intact. The Essex Region Conservation Authority would like to see it remain intact as a high quality wooded area with opportunities for interior species habitat. However, the golf course on the Hearn site and the permission for limited residential development on the Chittle lands would not appear to create a concern in terms of the Provincial Policy Statement.

In the course of the hearing the matter did not remain that simple. Shortly before the hearing began, Dr. Spellman arranged for a visit to the Hearn site by two local experts: a forester, Mr. Coldhurst and Mr. Phil Roberts, a local birder employed by the airport as a wildlife behaviour expert. Mr. Roberts' field notes reveal that he saw a Prothonotary Warbler, an endangered species in Ontario. Mr. Roberts is a respected and very able birder. The field of ornithology, among the natural sciences, is one in which local, highly skilled amateurs/experts are relied upon and trusted for their skill in identifying and tracking birds in their respective regions for the purposes of establishing bird populations and mapping them on bird atlases for habitat and migration patterns. The local detailed knowledge of such amateur experts in relation to certain species is often extraordinary. Mr. Roberts is such an expert, and one of the very best in the Essex area, as it relates to the P. Warbler. He is a very experienced and trusted member of

local birding organizations, including the organization led by Mr. McCracken which is devoted to the restoration of the P. Warbler in Southern Ontario.

Mr. Roberts attended on the site during a Board ordered visit by Dr. Spellman's proposed experts and witnesses. The visitors were accompanied on the site by Ms Layman, a Hearn employee and Mr. Hewitt, Mr. Paroian's co-counsel and a Hearn lawyer. Their firm instructions from Mr. Paroian were to stay close to the visitors and record anything interesting, especially any such thing as a sighting of a P. Warbler. Mr. Paroian's prescience was remarkable. Despite claiming to be permanently in the company of Mr. Roberts and the others, they saw no such event take place.

At a point in the midst of the hearing as Mr. Roberts was about to give his testimony, he gave his field notes to Dr. Spellman to provide to the other parties. By the terms of the order granting him access to the property, he was supposed to surrender a copy of any notes promptly to the others. Furthermore, by the procedural order for the hearing, such evidence should have been filed in advance at the very least. He did neither. The Board was faced with a motion to disallow the evidence but chose instead by way of an oral ruling, to allow the evidence to be introduced following a generous period of time in which the parties opposite could review the evidence and prepare a response, which the Board would permit. This was considered a fair way to solve the problem of potential surprise and the hearing proceeded to hear the evidence.

Mr. Roberts' evidence was that he saw the bird and reported it almost immediately to his associate Mr. Coldhurst who, as a forester, did not immediately understand the significance. He recalls Mr. Roberts saying it, but did not consider anything about the event as unusual.

Ms Layman and Mr. Hewitt assert that they heard no such remark, and saw no notes being made, despite being close and attentive to such events. They imply that the

story was concocted and that the field notes were prepared in the parking lot following the visit. They believe that they would have noticed had a sighting been made, and they are firmly of the opinion that one was not. They wonder why the discovery, if significant, was not made more forthrightly or publicly. Mr. Roberts explained that he is not familiar with the proper protocol for such a visit and did not feel obliged or inclined to report his observations to the others besides his friend, Mr. Coldhurst.

In addition to Ms Layman and Mr. Hewitt, Mr. Paroian called Mr. McCracken, the head of the regional P. Warbler restoration project. Mr. McCracken works out of the Long Point area and attended the hearing under summons from Mr. Paroian. He has known Mr. Roberts for some time and trusts him without qualification as a capable birder with expressed ability to identify the P. Warbler and to understand its habitat and behaviour. He too was astonished that he was not immediately informed of the sighting. Mr. Roberts explained that it would have been part of one of his regular reports to Mr. McCracken and that he was unsure whether he should be discussing evidence for a Board hearing in advance with other parties. Interestingly Mr. McCracken had heard of this hearing by the ‘e-mail grape vine,’ had initially refused an invitation to be a witness, and was under the impression that there was some sort of “gag order” on the evidence. In short, although he was disappointed in not being told of the sighting, when all was explained to Mr. McCracken, he understood Mr. Roberts’ situation a little better. So did the Board.

Mr. McCracken’s evidence did not end there. As an expert on the P. Warbler, he was not as convinced as Mr. Roberts that the site was a probable habitat. Mr. Roberts had seen nesting material in the bird’s mouth, but even if true, it was just as likely to have been a lone male with unrequited ambitions. Based on his knowledge of the bird, he was not as sure that the site offered all the necessary habitat requirements, especially the need for standing water. Although he was not as familiar with the site as others, he judged it a poorer potential habitat than did some of the others. He was also

not as concerned with the golf course proposal. The P. Warbler, although threatened, acclimatized to the presence of humans so long as habitat requirements are met. He thought a golf course could be compatible with a P. Warbler restoration site.

Having considered all of these events and noting the significance of the evidence to the questions before the Board, the conclusions to be drawn from this are as follows: Mr. Roberts probably saw the bird and correctly identified it. He is observant, knowledgeable and a credible witness. His interest in creating a falsehood is exaggerated by the counsel for Mr. Hearn. Neither his employment nor any material retainer depends on his testimony. He is a committed birder and environmentalist and has participated in this process all along. He has done so honestly and there is no reason to believe that he would do otherwise. In short he saw the bird and shortly following the sighting, he reported it discreetly to his colleague, who again credibly reported how it could have happened. It is conceivable that despite their best efforts to comply with Mr. Paroian's strict orders, Ms Layman and Mr. Hewitt, both equally credible, were simply not present when the discreet conversation in which the sighting was reported from one friend to another. Mr. Roberts made his notes in the field and added to them in the parking lot just before leaving and as soon after the sighting as possible. He was observed doing the latter, not the former. He did not report his finding to Mr. McCracken or Dr. Spellman. He is not an expert on OMB processes and did not know he had to. He was planning on reporting the sighting to Mr. McCracken when he filed his scheduled report. Although it was an exciting find and under normal circumstances, he may have excitedly reported the find immediately, with an OMB hearing pending, he though better of it and kept his knowledge to himself.

All this is credible and understandable. Mr. Roberts saw the bird. It was a P. Warbler with nesting material in its mouth. However, this does not provide proof that the site is "habitat" in the meaning of the Provincial Policy Statement, or that development of the site as a golf course would be incompatible with its maintenance as a habitat if it

were one. Having regard to the provincial policies, the Board concludes that the policies can be maintained should a golf course be developed, and the Board so finds.

The Board also concludes from the large amount of wildlife evidence that the site nevertheless is a high quality wooded area and wetland that forms a valuable element of the sparse natural features remaining in the region. Essex is highly and almost completely developed as a prosperous agricultural area. The price of this level of development has been the removal by clearance and drainage of a large amount of the potential habitat for native and migratory wildlife. While a golf course, it is true, especially one designed to retain as many environmental features as possible, may have a lesser impact on the wildlife potential, the impact would be to reduce its capability for habitat. Although wildlife and habitat considerations do not form a fatal consideration for the golf course proposal, the quality, rarity and relative value of the site are key components in the overall judgement of the appropriateness of this site for more intensive development.

ISSUE: The Application of the Agricultural Policies

In the midst of the debates over wetlands and wildlife, Mr. Oliver of the Ministry of Municipal Affairs and Housing reminded the Board that the provincial agricultural policies continue to apply as do the local policies in the respective official plans. Two subsections of the Provincial Policy Statement section 2.1 Agricultural Policies apply. As excerpted these are:

> 2.1.3 An area may be excluded from prime agricultural areas only for:
>
> c) limited non-residential uses, provided that:
>
> 1. There is a demonstrated need for additional land to be designated to accommodate the proposed use;
>
> 2. There are no reasonable alternative locations which avoid prime agricultural areas; and

3. There are no reasonable alternative locations in prime agricultural areas with lower priority agricultural lands.

Impacts from any new non-agricultural uses on surrounding agricultural operations and lands will be mitigated.

2.1.4 New land uses, including the creation of lots, and new and expanding livestock facilities will comply with the minimum distance separation formulae.

In compliance with these policies the local Official Plan states as a goal, “to reduce the amount of non-farm development occurring in the agricultural area.” The County Official Plan which is adopted but not approved identifies the site as being before the Board, but the general area in which it is located is an Agricultural Area. The goals and policies of this plan are more elaborate but similar to the Provincial Policy Statement and the local plan in protecting agricultural areas and minimizing non-farm uses and impacts.

The site is identified as prime agricultural land, that is Class 3 in the Canada Land Inventory system. However, this is true of nearly all the lands in Essex, which as Ms Prince, the planner with extensive experience in the area, pointed out. The circumstance of having so much valuable agricultural land is a mixed blessing. It has presented the conditions for the agricultural prosperity in the area, but has created a genuine planning challenge to find lands that are suitable for needed non-farm developments. In this case Ms Prince, as she often must when advising her clients, concludes that in the absence of any less valuable lands or other alternatives, the site would be appropriate for a golf course development. Only a small portion of it is now farmed. It is, as we have seen, poorly drained and would require clearing and drainage to make it agriculturally productive. Identifying lands for a golf course use is very difficult in this area. Almost any such proposal would likely impinge on the agricultural inventory. The advantages of this site are its obvious natural qualities, especially the remaining mature wooded areas. Ms Prince regards the need for a golf course of this kind to be demonstrated and the need forms a justification that complies with the Provincial Policy Statement.

The issue of need is raised by the Provincial Policy Statement as a justification for non-farm uses. The proponent dealt with this by retaining a marketing expert who competently demonstrated that a golf course in this location of the kind proposed would succeed financially by satisfying a proven demand or need for such facilities by consumers in the local region and in proximity to the nearby Michigan market. To this is added the provincial initiative to increase tourism to the area and to increase specifically the draw of golf tourism as an added benefit to a visit to the area. Although it may be hard for some to identify a need for a golf facility, like all other land uses, commercial recreation facilities are a legitimate part of land use pattern and should be accommodated, especially in areas where tourism is a growing part of the economy. In this case, the Board finds that this is an acceptable expression of need in this case, and concludes that additional lands may indeed be needed to be identified for a golf course use and that this forms a general justification for identifying lands in the area.

Mr. Oliver says that the change in designation requested for a golf course use does not comply with the Provincial Policy Statement by permitting non-farm uses in a prime agricultural area. Mr. Oliver does not agree with the justification by need. He questions whether a market study is an adequate expression of need in a land use context. He notes the number of courses available locally to serve the existing local need. Even if it is needed locally, he asserts that drawing golfers from Michigan is not a need and is unlikely to succeed, given the travel times and complications with cross border travel. But more to the point, he criticizes Ms Prince's approach to this re-designation by saying that she is treating the site as a rural area rather than as prime agricultural land.

Mr. Oliver also objects based on the location of a golf course with potential minimum distance separation (MDS) implications. Ms Prince says that intensive animal operations are no longer a significant feature of the local agricultural industry. However,

one of the local farm operators opposing the golf course indicated that they keep livestock as do several others. In terms of provincial policy and the application of the MDS, golf courses are considered a “sensitive use” in the same category as residential uses, and can therefore create a constraint on the future development or expansion of livestock operations in the area. Mr. Oliver also cites the impact that the golf course use may have on other nearby agricultural uses. However, this was a matter that split the local farmers. Some thought it might have an adverse impact; others thought a golf course is a use that is compatible with their farm operations and would be quite willing to accept it into the neighbourhood.

The objection to the golf course on agricultural grounds is by itself a relatively weak critique in this case. Were it not for the other issues pertaining to this site – especially the provincially significant wetland consideration and the many other qualities of the natural environment - the Board is doubtful that so strong an opposition would have formed even from the provincial authorities against the proposal. Nevertheless taking a more comprehensive approach to the planning of the site in this location and taken together with the other issues, the issue of compliance with the agricultural policies of the Provincial Policy Statement and the local plans is yet another reason cumulatively for not approving the golf course in this location and for giving serious consideration to the designation of the site as a provincially significant wetland. In terms of conformity, the Board agrees that the presence of a wetland woodlot in a rural area is a common feature of the rural fabric and land use pattern with beneficial impacts on the adjacent agricultural areas and farm uses.

ISSUE: The Golf Course as a Compromise Use

Stepping back from the analysis of the individual issues pertinent to this site, there is a larger question and perspective to address. A fundamental (and very credible) fact in the course of this hearing is that in the County of Essex it is estimated that about three percent of its land area is in forest or natural areas. This is a lush and productive

region where prior to development a very dense forest likely covered the entire land mass. As the Board was frequently reminded, the Essex area is almost completely covered by prime agricultural lands, and quite understandably, the area was readily cleared to make full productive use of as much of the land as possible.

For context, the Board was advised that other regions of Southern Ontario, including many that are similarly blessed with large areas of productive agricultural lands, maintain 20 to 30 percent forest cover. International authorities cited by the Essex Region Conservation Authority (the local agency responsible for dealing with such subjects) say that 25 percent is normal and the very minimum forest cover that can be considered acceptable for a healthy regional environment is 12 percent forest cover. The Essex Region Conservation Authority has this very modest international and provincial level as its target. To be fair as Ms Prince pointed out, the Town of Essex does better than the rest of the County, maintaining an estimated 8 percent forest cover, somewhat better, but still nowhere near the generally accepted level. The effect of this is best demonstrated visually with maps of Southern Ontario showing forest cover. Essex is clearly deficient in comparison with the rest of Southern Ontario. There are green areas along the lakeshores, especially at Point Pelee and a small corridor of natural lands appears diagonally along the Cedar Creek. Together these form the only significant areas of forest cover and natural area. Marshfield Woods forms a part of the Cedar Creek corridor.

All of this is now a matter of attention and concern in the County and, as Ms Prince asserts, lands are being acquired by the Essex Region Conservation Authority and other bodies and reforestation and natural regeneration are taking place on several fronts. She cited examples with photographs of many trees planted along roadways and drives. However, attempts to prevent further clearing are hampered by prevailing land use planning attitudes and a longstanding and understandable reluctance by landowners and farmers in the area to have the use of their lands further regulated.

All this pertains to the subject applications before the Board. Ms Prince summarizes her opinion of the Hearn and Chittle applications as a “compromise” – a good and practical planning compromise – that would see the protection of the greatest part of the Marshfield Woods, including the trees and many of the natural features and functions. If this proposal is not approved, she fully expects that the site will be cleared, drained and sold for agricultural land. She expects this because that is precisely what the owner and his representatives firmly promise. Mr. Hearn did not buy this as a recreational bush or as a country property. He has always intended to build a golf course and if he is not permitted to do so, he will continue clear-cutting the trees and if necessary, drain the property to dispose of it as farmland to recoup the expenses he has invested to date. Ms Prince confirms that, in her view, this would be his right and that she fully expects that he will do just that. Nor would it stop there, according to Ms Prince. She says that many landowners in the area are watching this case carefully, and judging by what happens to these applications, she expects that many of them, including many farmers will do the same, that is they will “knock down” their bush, sell the lumber, drain the property if necessary, and farm it or sell it for farmland.

Despite the evidence of clearance, forest cover and natural features, neither the Town of Essex nor Essex County has a tree cutting by-law or a site alteration by-law. Essex is among the very few counties that have elected not to exercise this authority under the *Municipal Act* (or under the *Forestry Act*). Ms Prince explains that local elected officials have been determinedly reluctant to pass such by-laws for fear of alienating the farm community who she explains have traditionally opposed tree cutting by-laws as an excessive restriction on their rights as land owners. In the absence of tree cutting or site alteration by-laws, the municipality and the County are powerless to prevent any of the clear-cutting that is threatened. And as they have maintained throughout the hearing, even if the designation and by-laws prohibiting the golf course were approved, the owner would have legal non-conforming rights to agriculture and

forestry. They say that the owner could clear the land for farming either as logging (forestry) or in preparation for agriculture as a pre-existing right if not as a present use.

The Province and others are not so sure of the right to these as legal non-conforming uses. They say that what has taken place on the property does not fit any responsible definition of forestry, a point that was well established in evidence by Mr. Lebedyk, the Essex Region Conservation Authority forester, and other competent witnesses. Only a small portion of the lands has been farmed in recent memory, so little claim can be made to an existing agricultural use in the form of crops.

The question of legal non-conforming uses occupied a significant element of the argument in this case. Frankly, however, the Board does not see that it is necessary for it (or within its authority) to make a determination of what legal non-conforming uses are present and what actions may be taken or what rights may be exercised following a decision. It is enough to presume that Ms Prince is likely correct and that following an unfavourable (to Hearn) decision, the entire wooded area of Marshfield could be lost or at least imperilled. And further, that if the decision is poorly received by the local landowners, several other landowners may follow suit. Ms Prince says that in the absence of tree cutting by-laws, her only recourse as a practical planner is to protect as much as possible and to protect it as firmly as the prevailing planning and property laws will permit. She says that this leads her to conclude that an environmentally friendly golf course would be an appropriate compromise use for the site, as it firmly protects a significant fraction (somewhere between 65 and 100 acres) of the wooded area and permits a relatively low intensity form of recreational development. The planning documents she proposes, as amended, do this. Better that this should be accepted than for the entire site (and others) to be lost to clear-cutting and monoculture. For Ms Prince this is a planning compromise that permits her to conclude that the proposal would be good planning in the circumstances, including especially the circumstance that there are no tree cutting by-laws to offer any other form of protection.

Mr. Hooker on behalf of his client, Mr. Chittle, makes a similar case under somewhat different development circumstances. He joined the debate on legal non-conforming use rights, claiming that his client – a farmer - would also seriously consider knocking down his bush for cropland, if he does not receive approval of the severances he has applied for. Indeed there may be other equally unsavoury outcomes. Mr. Chittle now has a building permit for a barn and some firm expectation of another severance with additional buildings. He could clear the sites and locate the buildings in such a way that they would do much greater harm. For instance, he could locate the development in a large clearing in the very middle of the interior forest where it would disrupt forest interior habitat and breeding. As Mr. Hooker asserts, it is better that Mr. Chittle should be permitted his development proposal in the location proposed on the outer edges of the property, with firm protections of the lands to the interior from any further clearing and development.

The opponents to this view - notably the Ministry of Natural Resources technical staff and Essex Region Conservation Authority representatives – say that the compromise would accomplish little. What they see as a relatively rare, high quality wetland and wooded area – in an area that is clearly deficient of such features - would not continue to exist if a golf course is constructed, no matter how environmentally friendly it is planned to be. Little if any fraction of the existing wetland environment could be sustained following the construction, operation and management of a golf course on this site. Waterways and irrigation will be installed; the site will be drained and much, if not all, of the wetland will dry out; the forest cover will be further removed; buildings, paths and hard surfaces will be constructed to facilitate movement of golfers throughout the site; nutrients and pesticides will be introduced that will have a discernible effect on the natural character of the area. What will be left will be relatively insignificant in natural terms compared to what is there now. In other words, to them the golf course is not an acceptable planning compromise. It salvages few of the natural

features and functions of this site. They imply that the compromise is a poor one because the starting position of the public authorities was itself compromised by a political choice not to exercise any authority to regulate tree removal and site alteration or thereby give effect to a program of responsible stewardship of the local and regional environment.

The Board agrees that the golf course would be a compromise for this site, but concludes on the basis of all the circumstances of this case - including the very large volume of evidence pertaining to the site and to the regional environment, and a careful consideration of the prevailing local and provincial planning policies - that the compromise would be one that would not have proper regard for the Provincial Policy Statement or the protection of wetlands as a natural heritage feature, and would not represent good planning for this very special site within the Town and the County.

Though related to some of the same issues as the Hearn application, the question of compromise for the Chittle applications must be considered independently as the circumstances are very different. In the case of the Chittle applications, the Board has concerns, but takes account of the much lesser degree of development and impact proposed and of the opportunities that some additional adjustments to the application in the form of conditions of consent will have in effecting a good planning outcome for Mr. Chittle. The Board will also rely on proposed amendments to the application that would permit three lots to be developed in a location and configuration where building envelopes would be situated mostly outside of the provincially significant wetland or on the very periphery of the wetland. For this reason and with the proposed amendment, the Board accepts the principle of compromise more favourably in the Chittle case, as it will clearly result in a very large protected wooded area and a relatively large undisturbed wetland which, apart from low intensity residential uses by a few families along the roadway, will not have the effects that a large scale commercial public golf course will have on the lands to the south.

Summary of Conclusions and Decision of the Board

The Board must make three decisions based on the modified applications made by: 1) Mr. Hearn and MHPS; 2) the Chittle applications; and 3) the applications by Drs Spellman and Potter.

In order to do so the Board summarizes broadly its conclusions arising from this decision. The first is that by the date of the various applications, the Provincial Policy Statement as it pertains to Natural Heritage features and more specifically the identified provincially significant wetland apply.

The second is that the identification of the provincially significant wetland as evaluated by Mr. Goodban and confirmed by the Ministry of Natural Resources staff has been made fairly, in accordance with the method approved by the Provincial Policy Statement, and in a way that is scientifically sound and defensible.

Thirdly, the Board has concluded following a careful review of the prevailing practice of the Board that having regard to the Provincial Policy Statement in this case means that the Provincial Natural Heritage policies can and should be applied fairly to the applications for development approval.

Fourthly, the Board acknowledges the implications of this as a third party appeal. However, the eventual adoption of the appeal case by the Provincial Ministry of Municipal Affairs and Housing acting for the MNR and others within the “one window approach” as well as the local Essex Region Conservation Authority leads the Board to conclude that this is not merely a third party appeal and that it is certainly not an appeal made vexatiously, frivolously, in bad faith or for inappropriate reasons. This is now more aptly regarded as an appeal by responsible public authorities as well as certain private

citizens to have lands designated for planning purposes in accordance with approved Provincial Policy.

Fifthly, the Board has considered with equal care the claims that this is a taking of property rights without compensation. The Board concludes following a consideration of the relevant cases, that the identification and designation of the part of the subject lands as a provincially significant wetland constitutes a down zoning but one fairly made on the basis of a compelling public interest justification. In the Hearn case, there is no taking of the right to a golf course. In the Chittle case, the opportunity to develop three lots – albeit not in the exact configuration applied for – remains and will be allowed by the Board.

Sixthly, the Board concludes that the Marshfield Woods area constitutes a high quality site for wildlife. In this respect it is an Environmentally Significant Area as identified by the Essex Region Conservation Authority, and consideration of this is warranted in the course of reviewing any application for development. It cannot, however, be identified as a habitat of significant or endangered species and thus, having regard to the Provincial Policy Statement, the Board therefore does not consider this part of the Natural Heritage Policy to be applicable to this site.

Furthermore, this area is located on prime agricultural land. However, having regard to the Provincial Policy Statement as it applies to agricultural lands and non-farm uses, the Board concludes that the Provincial Policy Statement although applicable does allow exceptions based on justifiable need. The Board concludes that the Essex area is almost completely high quality agricultural land and that following some consideration of need and the relative availability of alternatives, the golf course could be considered favourably, on this criterion alone, in regard to the policy.

Finally, the Board has considered the issue of the approval constituting a compromise use for these lands. The evidence does not favour this. Having regard to the Provincial Policy Statement, the Board regards this as a clear exception to the policy rather than a compromise. The absence of tree cutting and site alteration by-laws leaves the municipality vulnerable to the loss of this feature and has resulted in a compromise that would not have proper regard for applicable sections of the Provincial Policy Statement.

For these reason, the Board makes the following decisions:

The Hearn Proposal

The decision of the Board is that the proposal by Materials Handling Problem Solvers Inc. (The Hearn Group) is not approved. The Board orders that the appeals by Dr. Spellman *et al*. against Zoning By-law no. 252 of the Town of Essex are allowed. The by-law is not enacted. The appeal by the Hearn Group and the Town of Essex against the failure by the Ministry of Municipal Affairs and Housing to approve Official Plan Amendment No. 6 of the Town of Essex is dismissed. Official Plan Amendment No. 6 is not approved.

The Spellman Proposal

The decision of the Board is that the Official Plan Amendment and zoning by-law amendment initiated by Dr. Spellman are approved. The Board orders that the appeals are allowed in part, subject to their modification to correspond to the evidence and findings of this Board as it pertains to the extent of the provincially significant wetland as identified. The Board withholds its order in this respect, pending receipt by the Board of a final version of the documents prepared to the Board’s satisfaction and in accordance with the normal format and practice of the Town.

The Chittle Application

Although the consolidation of the Chittle matter with the Hearn applications is warranted by the common consideration of the wetland and the application of the Spellman appeals, the Chittle application can be considered on its own, quite independently of the Hearn application. The Chittle application is a relatively straightforward application for farm severances for which there exists a well-known local process.

The disagreement that develops in respect to Chittle arises over the location of the proposed housing envelopes following the severance of the lands. Three lots – and therefore three building envelopes - will result from the application: one farm retirement lot; and two lots from a split of the remnant farm parcel. Mr. Chittle acknowledges the value of the forested area and wetland, and proposes to locate all three envelopes on the southern edge of the site along the 6th Concession Road. According to the final version of the conditions proposed through Mr. Hooker, his lawyer, Mr. Chittle says that his proposal for the lots will create three small building envelopes on the edge of the site rather than one very large one, potentially in the centre where the greatest impact would be done to the forest interior and wetland. Mr. Chittle has a building permit in hand for buildings for one residential/farm use on the property and will exercise his rights if he does not obtain approval for the severances.

The Essex Region Conservation Authority and Ministry of Municipal Affairs and Housing oppose the severances but recognize the existing rights and the development opportunities associated with the severance applications. Mr. Oliver proposes that he could accept the applications if the lots were split east-west and if all the building envelopes were located along the Coulter Road on the east side of the site. This edge has been cleared somewhat, especially on the north half and further development on this side would be acceptable within equally well-defined building envelopes.

Mr. Chittle insists on the southern edge of the property for his building sites. One of the sites has been partially cleared and there is an existing municipal water line on the 6th Concession that could be easily accessed. Entrances have already been built to some of the southern sites in anticipation of approval. Because of the depth of the ditches in this area, crossings of the roadside ditches to access building sites can be costly. Adding the cost of additional entrances to the cost of extending a water line along the Coulter Road, Mr. Chittle concludes that the building sites on the south would be much more efficient. Mr. Chittle also retained the services of an environmental advisor who identified building envelope opportunities on the south side that would have the least environmental impact, and would involve the minimal loss of forest and wetland features. The approach was to minimize impact of the proposed development of three lots on the south and did not consider other lot configurations that might be preferred from a planning standpoint.

Ms Prince had agreed to the applications for lots facing south with strict conditions on the opportunities for site development. Mr. Oliver said that considering the agreed environmental values of the site, good planning dictates that if the applications are to be approved, the building opportunities should be located on the east edge where they will have the least effect. When asked to make a similar comparison, Ms Prince agreed that this would be good planning, but had accepted the former proposal as a compromise that would achieve voluntary protection of the environmental areas of the site. Under closer examination, she agreed that locating the sites to the east would be good planning, but that it would involve additional expense to the proponent, and raise the cost of developing the lots.

Considering the Chittle applications independently of the Hearn applications but in light of the Spellman applications for wetland designation, the Board is satisfied that some level of residential and farm-related development can be justified and can be permitted on the subject property along the lines permitted by the policies of the local

plan for severances in the agricultural area. However, the Board must always take account of the principles of good planning in permitting lot creation to take place. It is agreed among the planners that the preferred location for the building envelopes from a planning perspective would be along the east edge of the lands. The existing location of water services and prior construction of lot access should not be held to dictate the location of development over other more pertinent planning considerations such as resource protection and considerations associated with the natural features of the site in question. This is consistent with subsections 51(24) of the *Planning Act*, especially items (a), (d) and (h).

The Board will therefore dismiss the appeals by the Essex Region Conservation Authority against the decision of the Town of Essex Committee of Adjustment approving applications B/04/01 and B/05/01, provided that the applications are modified to locate the building envelopes and road access for building sites to the east side of the subject property on Coulter Road, and subject also to the conditions put forward by Mr. Chittle's counsel (marked as Exhibit 215 to these proceedings) appropriately modified to accord with the re-located building sites. The Board will withhold its order on the Chittle applications pending receipt of the documents necessary to give effect to this decision.

B.W. KRUSHELNICKI
MEMBER