

ISSUE DATE:

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DECISION/ORDER NO:

0469



PL011151

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

561650 Ontario Inc. and 1252051 Ontario Inc. have 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 City of Ottawa to redesignate land located in Part of Lot 22, Concession 10, former Goulbourn Township, City of Ottawa from Provincially Significant Wetland to General Urban Area and Other Wetlands to permit the development of 512 single detached homes

City File No. 43-00-0132

OMB File No. O020007

561650 Ontario Inc. and 1252051 Ontario Inc. have appealed to the Ontario Municipal Board under subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from the failure of the City of Ottawa to make a decision respecting a proposed plan of subdivision on lands composed of Part of Lot 22, Concession 10, former Goulbourn Township, City of Ottawa

City File No. 06T-00022 and 15-00-SD22

OMB File No. S020005

561650 Ontario Inc. and 1252051 Ontario Inc. have 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 40/99 of the City of Ottawa to rezone lands respecting Part of Lot 22, Concession 10, former Goulbourn Township, City of Ottawa from Future Development (D) and Wetland (W) to Residential Type 1, Exception 3 (R1-3), Open Space (OS) and Wetland (W) to permit the development of 512 single detached homes

OMB File No. Z010167

APPEARANCES:

Parties

561650 Ontario Inc. and 1252051 Ontario Inc.

City of Ottawa

Goulbourn Wetlands Group

Counsel*/Agent

D. B. Kelly*
U. K. Melinz*

J. R. McIninch*

S. Walker
J. Gillick

DECISION DELIVERED BY N. M. KATARY

The location of a serpentine line indicating the boundary of a wetland is at the heart of the dispute because the location determines whether or not the wetland is Provincially Significant thereby affecting the proposed development of a subdivision. It may be difficult to conceive that a moveable serpentine line subject to evolving knowledge can be the source of so much controversy but such is the case in this instance. The different lines in different colours in the map on the next page give an idea of the nature of the dispute. It is helpful to keep this map in view, admittedly indicative, to follow the reasoning in this decision.

The Backdrop

There are three matters before the Board. First, is an application to amend the former Regional Official Plan. Second, is an application to amend the local former Township of Goulbourn Official Plan. Third, is an application to amend the former Township of Goulbourn Zoning By-law. There is also an application for a draft plan of subdivision that was not canvassed at the hearing and will be dealt with separately in the end.

The dispute can be encapsulated as follows. The applicants/appellants want the 1999 MNR boundary to be recognized and their applications approved. The City of Ottawa wants the 2000 MNR boundary to be recognized and designated Provincially Significant, which results in a substantial reduction of development on the subject parcel. The Goulbourn Wetlands Group (GWG) wants its own 2000 boundary recognized and designated Provincially Significant, which results in a substantial reduction of development on the subject parcel.

At the end of the hearing all parties realized that there was some merit in waiting for a decision on *Material Handling Problem Solvers Inc.* After that decision issued, the parties agreed that there was no need to make further submissions on that matter in this hearing.

The subject parcel of land is approximately 55 ha. (136 ac.) in size and is located in the former Township of Goulbourn, now the City of Ottawa. It is bounded on the north by Abbott Street, on the east by Elm Street, on the south by Fernbank Road, and on the west by the western boundary of the former Village of Stittsville. The subject parcel is the second phase of a subdivision locally known as "Westwood" and is owned by two landowners operating as two numbered companies. The first phase has been developed and is in the final stages of construction.

The second phase or the current proposal consists of 512 single detached dwelling unit residential lots, a stormwater retention pond, and parkland. The subject parcel includes a part of the Fernbank Wetland whose boundary is the principal issue in this dispute.

The following people gave evidence in opposition to the applications during the day hearing: Ms Sally Switzer, a land use planner with the City of Ottawa; Mr. Shaun Thompson, the District Ecologist with the Ontario Ministry of Natural Resources; Mr. Albert W. Dugal, a botanist by training who was in charge of the Herbarium at the Canadian Museum of Nature from 1970 to 1997.

The following people gave evidence in support of the applications during the day hearing: Mr. Ted Fobert, a land use planner; Mr. Stephen G. Simmering, a professional engineer who specializes in storm water management and sewage treatment; Mr. Keith G. McLean, a transportation engineer; Mr. Philip D. Niblett, an environmental physiologist who specializes in wetland evaluation; Mr. J. Christopher Ellingwood, a wetland ecologist; Mr. Ronald Huizer, a zoologist who specializes in wetland evaluation; and Mr. Frank Argue, a professional engineer by training but appeared in this hearing as a land owner.

The following people gave evidence in opposition to the applications during the evening hearing: Ms Keldine Fitzgerald, a resident of the area; Ms Louise Beggs, the President of Stittsville Village Association; Messrs Dan Williston and Marcos Alvarez, residents of the area; Mr. Stanley D. Rosenbaum, of the Greenspace Alliance of Canada's Capital; Mr. Jeffrey Holmes, a resident of the area; Mr. Brian Finch of Friends of the Jock River; Mr. Michael Hoshko, and Ms Amal Malouf, residents of the area.

The following people gave evidence in support of the applications during the evening hearing: Mr. Phil Sweetnam and Ms Betty Hill, residents of the area.

History of The Boundary

The fluidity of the wetland boundary draws attention to the history of the mercurial nature of the line. There was a good deal of evidence and submissions on this matter by the Goulbourn Wetlands Group (GWG) and the applicants/appellants. All parties agreed on the chronology of boundary shifts but disputed the reasons for the boundary shifts. It is therefore helpful to examine how the line has moved with the passage of time.

At the end of the hearing the Board requested the parties to file an agreed upon coloured map showing the different boundary lines that were in question. The parties did so. The coloured map can facilitate the understanding of the chronology.

June 19, 1991 – Ontario Ministry of Natural Resources (henceforth MNR) accepts the northern boundary of wetland based upon a study of Fernbank Wetland done by TNK Environmental. The first boundary line designating the least amount of subject parcel as wetland is identified.

August 16, 1993 – MNR confirms the 1991 boundary based upon field studies by two independent MNR trained wetland evaluators, namely, R. Paquette on July 7, 1993 and J. McNaughton on July 30, 1993. The first boundary designating the least amount of subject parcel as wetland is confirmed.

March 7, 1995 – A new Official Plan for the Township of Goulbourn adopted showing the 1991 & 1993 wetland boundary and designating the remainder of the subject parcel as “Stage 2 – Residential.” The Regional Municipality of Ottawa-Carleton approved the local Official Plan on June 26, 1996. The first boundary designating the least amount of subject parcel as wetland is recognized in the local Official Plan.

January 22, 1997 – Amendment 61 to the 1988 Regional Official Plan was adopted showing the 1991 & 1993 wetland boundary. The first boundary designating the least amount of subject parcel as wetland is recognized in the Regional Official Plan.

July 1997 – A new Official Plan for the Regional Municipality of Ottawa-Carleton adopted showing the 1991 & 1993 wetland boundary. The first boundary designating the least amount of subject parcel as wetland is recognized in the new Regional Official Plan.

September 1998 – Rob Snetsinger of Ecological Services undertook the Fernbank Wetland Evaluation for FoTenn, the planning firm that was processing the planning applications (Exhibit 22). The wetland boundary was shown to be significantly north of the 1991 & 1993 boundary. Also, the Snetsinger study found that the wetland was not Provincially Significant. The Snetsinger study did not lead to any revisions in the wetland boundary by the MNR or the Township or the Region.

October 1998 – Niblett Environmental Associates Inc. (NEA) undertook the Fernbank Wetland Re-evaluation showing the wetland boundary moving slightly north, west and east. Also, a significant part of the wetland is shown to the southeast of the existing phase 1 subdivision extending south and east beyond the subject parcel.

January 18, 1999 – OMB accepts the agreement between the landowners of the subject parcel and the Township, approves the Township of Goulbourn Official Plan Amendment Number 9. OPA #9 designates the subject parcel for residential development in phases 1 and 2 and acknowledges 1991 & 1993 wetland boundary. The first boundary designating the least amount of subject parcel as wetland is once again recognized in the local Official Plan.

From this point onwards the wetland boundary commences its formal journey north and northwest.

June 30, 1999 – Marshall Macklin Monaghan (MMM) retained by the Region and the Town to undertake the Upper Poole Creek Sub-watershed Study informs the Steering Committee for the study that the wetland boundary on the subject parcel identified and confirmed by MNR and accepted so far by several organizations was not quite accurate (Exhibit 2, Tab 26, p. 3).

September 24, 1999 – The above letter from MMM led to a site visit by 13 people interested in the identification of Fernbank Wetland. The list of people attending is shown in a memo from Susan Murphy, a planner with the Region and one of the people

present (Exhibit 2, Tab 27, p. 1). Mr. Shaun Thompson, the District Ecologist with the Ministry of Natural Resources (MNR) was part of the 13-person team.

December 7, 1999 – The letter by the Area Manager with the MNR accepted the 1998 Snetsinger boundary and stated that the Fernbank Wetland was not Provincially Significant (Exhibit 2, Tab 29). The letter was categorical in making reference to the participation of Shaun Thompson in the September 24th team site visit and the 1998 Snetsinger study that was based upon the third edition of the Southern Ontario Wetlands Evaluation Manual (Exhibit 26). The MNR revised its long held 1991 & 1993 position with respect to the location of the wetland boundary. The result of this revision was that the wetland area increased from 30.0 to 41.5 ha. and is shown on the coloured map.

September 7, 2000 – Letter from Goulbourn Wetlands Group (GWG) to Mr. Shaun Thompson of MNR with attachment of the letter and documentation sent by GWG to the Region (Exhibit 7, Tabs 6 & 7). GWG filings indicate their concerns about the wetland evaluation and suggest a substantial revision of the wetland boundary to include a significant part of the subject parcel. The GWG boundary is shown on the coloured map.

September 15, 2000 - A site visit by MNR District Ecologist, Mr. Shaun Thompson accompanied by the two landowners, Messrs Frank Argue and Mike Gauthier, and Mr. Chris Ellingwood of Niblett Environmental Associates.

October 11, 2000 – Letter from MNR signed by the Acting Supervisor but written by Mr. Shaun Thompson, the District Ecologist who has been part of wetland evaluation on the subject parcel (Exhibit 2, Tab 33). The wetland boundary was revised again by the MNR and is shown on the coloured map. The revised boundary extending to Abbott Street in the north meets the complexing criteria in conjunction with the Upper Poole Creek to the north and west and therefore, the wetland on the subject parcel is now treated as Provincially Significant.

To recapitulate, MNR accepts the smallest area wetland boundary in 1991 and confirms it in 1993. MNR expands the boundary significantly to the north in 1999. MNR once again expands the boundary significantly to the north in 2000 to include a significant part of land in the subject parcel. The Goulbourn Wetlands Group also

suggests a boundary that includes a significant part of the subject parcel. Several other wetland evaluators have suggested different boundaries but all of them are either the same as the 1999 MNR boundary or encompass land less than the 1999 MNR boundary.

Applicable Planning Instruments and Status of Boundary

The current legal status of the subject parcel of land is as follows. The subject parcel is designated General Urban Area in the Regional Official Plan which permits residential uses. The subject parcel is designated Residential in the Goulbourn Official Plan. Both the Regional and the Goulbourn Official Plans show the 1991 wetland boundary and designate the wetland as Provincially Significant.

The detailed chronology set forth earlier showed the mercurial nature of the wetland boundary. The changing boundary has had an impact upon the applications. It is necessary to see how history has shaped the present. The owners of the subject parcel accepted the significantly expanded boundary by the MNR in 1999 notwithstanding the loss of some developmental rights. Also, the owners accepted the MNR stance that the wetland was not Provincially Significant.

Based upon the 1999 boundary and its status, in July 2000, the staff of the Region initiated Regional Official Plan Amendment Number 16 to alter the designation of the wetland from Provincially Significant to General Urban Area. In August 2000, the applicants/appellants filed the application for an amendment to the Goulbourn Official Plan to alter the designation of the wetland from Provincially Significant to Other Wetlands in order to align the local Plan amendment with the Regional Plan amendment. In September 2000, the applicants/appellants filed the application for a draft plan of subdivision for phase 2 on the land outside the 1999 wetland boundary.

In October 2000, the MNR changed its stance again, expanded the wetland boundary and declared it Provincially Significant. Upon learning of the latest position of the MNR, the Region terminated the Amendment 16 effort. The Township took the position that it was not going to process the applications for amendment to the Goulbourn Official Plan, rezoning, and the draft plan of subdivision in light of the latest position by the MNR.

In November 2000, the applicants/appellants filed the application for rezoning of phase 2 land as well as the application for an amendment to the Regional Official Plan along the lines of the now terminated Region's Amendment Number 16.

Thus, we have the three applications before the Board.

A point worth noting is that neither the Region nor the Township have taken any steps to amend their respective Official Plans to reflect the **positions** of MNR with respect to the boundary and status of Fernbank Wetland in 1999 or 2000. This fact is noted not to draw any inference from it but only to underline that the current legal boundary of wetland in the planning instruments continues to be the boundary accepted by MNR in 1991, i.e., the least amount of subject parcel as wetland with the designation that it is Provincially Significant.

This simple observation leads to the all-important question for the applicants/appellants, namely, what rules apply in assessing the applications?

A long established principle in Board jurisprudence is that an application is judged on the basis of applicable planning instruments (statutes, regulations, policies, plans, etc.) as they existed on the date of the application. This oft repeated principle is rooted in a number of cases by the Board over a period of time. Also, this principle was upheld by the Divisional Court in what has come to be known as the *Clergy* decision (*Clergy Properties Ltd. v Mississauga (City)* (1997), 34 OMBR 277 (OMB), p.280 & 283). The well-known principle enunciated by the Board and upheld by the Court is now the law as well.

If the *Clergy* principle is clear and if the current wetland boundary shown on the schedules in the two Official Plans have a decade long history, the question arises why can't the applicants/appellants proceed with the development of a subdivision based upon the 1991 MNR boundary legally recognized in the two Official Plans?

There are two reasons for this, namely, administrative/legal and the other substantive. First, the applicants/appellants have to secure the approval of the subdivision proposed. Second, the applicants/appellants have unambiguously acknowledged the desirability of designing the subdivision based upon the best evidence on the extent of the wetland by voluntarily agreeing to a significant expansion

of the boundary to the north, i.e., the 1999 MNR boundary and filing applications for amendments to the two Official Plans in accordance with the 1999 MNR boundary. By recognizing the doctrine of best evidence they are being not only prudent in their design but also paying homage to the three centuries old scientific principle, namely, that all knowledge is tentative. Mr. Huizer, a qualified and experienced wetland evaluator called by the applicants/appellants stated, "... wetland evaluations are 'open files' and can be subject to change from time to time" confirming the scientific principle.

The question for the Board, however, is whether or not all changes to the boundary are valid.

The chequered history of the wetland boundary points to several important things about the identification of the boundary of a wetland. First, the methodology employed is less than purely scientific invariably leading to less than perfect results. Second, the methodology calls for the exercise of judgement by the person evaluating. Third, given the uncertainties in the methodology different people can come to different conclusions with the fairest possible interpretation of field data as they see them. It is not altogether inappropriate to state that wetland boundary definition is more of an art than science. The number of wetland evaluators who have come to different conclusions in this instance validate this observation in the most persuasive manner possible.

The most arresting aspect of all the wetland evaluation studies is the steady movement of the boundary to incorporate more and more land within its ambit. The unidirectional movement does raise a question of some import. With the passage of more time accompanied by more wetland evaluation studies, is it likely that more and more land will become part of the wetland as seen by different wetland evaluators? In such an eventuality, where does one draw the line?

The most meaningful way to answer this question is to examine the validity of the different boundaries suggested by different evaluators. This is not a case of where is Waldo as much as, who among the six body doubles is the authentic Waldo.

Both during opening statements and closing arguments, the counsel for the City, was categorical in his view about the role of the Board in determining the location of the wetland boundary. During opening statement he stated, "You have no jurisdiction to say this is wetland." During argument he stated, "OMB has no jurisdiction to order MNR

as to the location of the wetland boundary or as to its status with respect being Provincially Significant or not.”

In making these two statements, perhaps, counsel was assisting the Board as to its proper role. It is true that the Board does not hear an appeal on the matter of identification of the wetland boundary. The Board, however, has to decide on the merits of the identification and whether or not it ought to become part of the planning instruments of a municipality. The Divisional Court decision heard on August 20, 2002, File No. 366/2001, clarifies the matter.

It is in that spirit that the Board will examine the substantial evidence by several witnesses on the matter of identification of the Fernbank Wetland boundary on the subject parcel.

The Appropriate Boundary

The identification of wetland and its status as to whether or not it is Provincially Significant is a responsibility of MNR. The identification is made employing the Ontario Wetland Evaluation System (OWES) and the methodology is delineated in a Manual. The Manual has gone through some revisions over time and is now in its third edition dated May 1994. The manual sets out the criteria to determine first if a site is a wetland and secondly if the site is Provincially Significant. The Manual states that it is “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).” The important thing to keep in mind is that identification does not constitute a land use planning designation in a planning instrument such as an Official Plan.

In this instance, the MNR has relied upon both its own staff and qualified wetland evaluators in identifying the boundaries. The 1991 MNR boundary was based upon the evaluation by TNK Environmental. The 1993 MNR boundary confirming the 1991 boundary was based upon evaluations conducted by two independent evaluators for the MNR. The 1999 MNR boundary was based upon the evaluation by Ecological Services (Snetsinger). The latest 2000 MNR boundary was based upon data submitted by the Goulbourn Wetlands Group and an analysis by the MNR District Ecologist, Mr. Thompson.

The expansion of the boundary between 1999 and 2000 within a span of approximately ten months bears close examination. The letter by MNR dated October 11, 2000 is helpful in understanding how the MNR changed its mind.

On September 7, 2000 the GWG forwarded a set of data based upon their own investigations to the MNR. The document by the GWG (Exhibit 7, Tab 7) included a set of their findings and a set of errors and omissions in the wetland evaluation by Ecological Services as they saw them. The GWG members stated that they came to these conclusions based upon site visits during July and August 2000 and applying the methodology contained in the Ontario Wetlands Evaluation System Manual.

On receipt of the documentation by GWG, Mr. Thompson first adjusted the wetland score upwards from 490 points to 527 points. The new score was still below the required 600 points in order to declare the wetland Provincially Significant. Second, he noticed the list of plant species, their locations, and additional information about organic soils and hydrology. In order to verify the evidence provided by GWG, Mr. Thompson arranges for a meeting on the site with Mr. Ellingwood, a qualified and experienced wetland evaluator retained by the two landowners and the two landowners.

As a result of this site visit, Mr. Thompson came to the conclusion that there was more wetland north of the 1999 MNR boundary and that the boundary extended up to the southern edge of the of phase one development on the subject parcel. He then determined the distance between the southeast boundary of the Upper Poole Creek Wetland and the northwest boundary of the newly revised boundary of the Fernbank Wetland. He found the distance to be 603 metres – a separation distance that is less than 750 metres, thus enabling the two wetlands to be complexed. Once the two wetlands are complexed, the Fernbank Wetland on the subject parcel is declared to be Provincially Significant.

The most important point made by MNR in its letter of October 11, 2000 is that the wetland is Provincially Significant if and only if the northern limit of the Fernbank boundary is within 750 metres from the southern limit of the Upper Poole Creek boundary. Otherwise the Fernbank Wetland is not Provincially Significant because it does not meet the required criteria in OWES Manual.

Mr. Thompson confirmed all these facts, identified in the above three paragraphs that led to the expansion of boundary, during his oral evidence-in-chief at the hearing. He was rigorously cross-examined. In the light of the central importance of his evidence in determining the validity of the wetland boundary recommended by him at the hearing, i.e., 2000 MNR boundary, it is necessary to reproduce in detail his evidence during cross-examination. The Board read back to the witness several times the statements made by him to make sure that the Board wrote down his statements correctly.

I am familiar with the Manual [Ontario Wetlands Evaluation System] and agree with it. Sometimes an aerial photo is adequate to determine the boundary without a site visit. If you go on site you should make field notes taking the time necessary and they should be on file. I have not seen this letter [Exhibit 2, Tab 7 – the MNR letter of August 16, 1993 confirming the 1991 MNR boundary] until recently. No one gave me the file. I agree that I had the opportunity to review it. I do not recall what I reviewed in September 1999 but that was the first time I became aware of two watersheds [Upper Poole Creek and Fernbank] in this area. I was not directly aware if the 91-line was in the Official Plan. I was not aware of this letter and this letter with e-mail until I started preparing for this hearing [June 30, 1999 letter from MMM alerting parties about possible inaccuracies in wetland boundary – Exhibit 2, Tab 26 and 24 June 1999 letter + e-mail from Region stating the need for an Official Plan Amendment – Exhibit 7, Tab 9]. Seip [his supervisor at the time] never handed me the e-mail.

I do not recall speaking to Snetsinger about his evaluation before going on the site visit on September 24 [1999] with twelve others. I did not have the two reports [Exhibits 22 & 23] prepared by Snetsinger at the time of our site visit, I got them later. By the time the MNR letter was written [December 7, 1999 – expanding the boundary] I had critiqued the Snetsinger report [Exhibit 22] but do not recall seeing his earlier field notes [Exhibit 23] identifying significant vegetation. There was nothing in the Snetsinger report [Exhibit 22] to justify the boundary he had drawn in the last page. I based my letter [December 7, 1999] on my field visit and observations. I also discounted the MMM report during the field visit and afterwards. I did not speak to anyone at MMM. During the site visit I did not make any field notes because I was not there to determine the boundary but only to assess general conditions. Even I had seen the e-mails, letters, and the two reports by Snetsinger, I still would not have done boundary during the site visit on September 24th [1999].

I was aware of the e-mail from Susan Murphy [Exhibit 24 – October 13, 1999] and the potential phase 2 development and I knew the critical importance of a wetland boundary for their plans. I still did not see the need to go back and do any field work after the September 24, 1999 site visit with a number of people. I based my letter of December 7, '99 on Snetsinger report, Ellingwood study, Murphy e-mail, looking at a black and white aerial photo at 1:10,000 scale and a colour aerial photo at 1:15,000 scale, and the site visit on September 24th '99.

I changed my mind about the boundary based upon the documents provided by the Wetlands Group [GWG – Exhibit 7, Tab 7] on September 7, 2000, especially because of the maps and species identified by them. Also, I took into account the previous submission by them [GWG] on the Upper Poole Creek Wetland to the north and west. I arranged for a site visit on September 15th [1999]. My field notes from that visit are not as tidy as those by Ellingwood [Exhibit 6, Tab 15]. If I had gone to that length during my site visit on September 24, 1999, hopefully, the boundary would have gone north. The submission by the Goulbourn Group was more complete and persuasive and I thought the line could be north of the 99-line.

Complexing of the two wetlands [Upper Poole Creek and Fernbank] is necessary because they both function as part of one large wetland complex. If the expected subdivision development to the west of the property owned by Meliambro and Gauthier lands go ahead there will be a definite reduction in the functional links between the two wetlands. There will be a lower rate of success in animals getting through from one to the other and the functionality will be jeopardized. Phase 1 has already done that and the functionality has greatly diminished. There are no natural streams connecting Fernbank to Poole Creek. Natural creek connection is better than a piped connection.

Mr. Thompson's evidence during cross-examination highlight several things. Even allowing for some flustering during intense cross-examination, his evidence raises serious doubts about the veracity of his statements. The Board is refraining from making any observations on his lengthy evidence because the evidence speaks for itself.

The categorical statement by the District Ecologist with the MNR who is responsible for identifying the wetland boundary that he relied upon the submission by the Goulbourn Wetlands Group (GWG) and a site visit eight days later means that the GWG submission made a transforming impact upon the analytical framework of the MNR official. It is therefore necessary to examine the total evidence by GWG closely. GWG called Mr. Dugal as the expert witness to testify on the extent of the wetland and introduced five exhibits of direct relevance on the mater of boundary, namely, a report prepared and signed by six members of the GWG (Exhibit 7, Tab 7), a document folder prepared by Mr. Dugal (Exhibit 25, pp. 15 – 22) containing his assessment of the wetland boundary, a set of maps and photographs (Exhibit 27), a set of six aerial photographs attached to a photomap of Stittsville, and a videotape showing the topographic features, vegetative, and soil types on and in the vicinity of the subject parcel.

Using the aforementioned four documents and videotape, Mr. Dugal, stated that historically the two wetland areas, namely, Upper Poole Creek and Fernbank were connected and that the connection had broken because of residential developments in the area. He was of the view that because of the types of vegetative species north of the 1999 MNR boundary, the boundary extended all the way to the southern edge of the current subdivision under phase 1. Also, he stated that the two wetlands ought to be complexed because the two were hydrologically linked.

The Board has taken the time to analyze the documents, the videotape, and the complete oral evidence by Mr. Dugal. The documents, the videotape, and the oral evidence reflect a deeply caring group of people who have put forward their evidence through Mr. Dugal. An analysis of the evidence indicates the following. Mr. Dugal is a professional botanist with approximately 27 years of experience in the National Museum of Canada and the Canadian Museum of Nature. Although he brings a good deal of knowledge on vascular plants, he is not a wetland evaluator and has not done any wetland evaluation using the OWES Manual as he forthrightly stated during cross-examination. In fact, he stated that he did not know what the OWES Manual required by way of depth of soil in order to classify it as wetland related. He stated simply that he had not seen the 1998 preliminary soils report by McRostic Genest St-Louis & Associates Ltd. and that he did not write the paragraph on soils included in the submission by GWG (Exhibit 7, Tab 7, p. 45)

The most instructive part of his oral evidence was his description of the features in the video and his concluding remark, "the wetland has been destroyed by Phase 1." Using the aerial photograph taken in August 1993 (Exhibit 28, Sheet 6) he pointed out how the wetland had been removed by the Phase 1 subdivision and expressed deep disappointment at the demonstrable loss. Using the photographs of site preparation for phase 1 (Exhibit 27) he stated that Phase 1 had effectively removed the land from being a wetland notwithstanding the finding of certain plant species north of the 1999 MNR boundary.

The Board has given anxious consideration for all of the evidence adduced by the GWG but is unable to be of assistance to them given the nature of the evidence.

What is troubling to the Board is that a senior officer of the MNR relied upon the evidence by GWG without a critical analysis of the evidence to come to his conclusion and extend the boundary of the wetland to the 2000 MNR boundary to encompass virtually the entire subject parcel. In doing so, he not only set aside the opinions of qualified and experienced wetland evaluators but also did not undertake a systematic professional evaluation of the wetland himself.

Messrs Niblett and Ellingwood, the two wetland evaluators called by the applicants/appellants, with the consent of the parties, appeared as a panel. They relied upon the wetland evaluation study done by Snetsinger/Ecological Services and studies done by themselves (Exhibits 22, 23, and 6). First, they described the history of different evaluations of wetland on the subject parcel. Second, they outlined the desktop evaluation of wetland wherein the features of a site are studied in the office with aerial photographs and the like. Third, they explained in detail how they employed the methodology set out in the Ontario Wetlands Evaluation System (OWES) Manual to arrive at their recommended boundary. They detailed how the scoring on the wetland in four areas is done, i.e., the biological, social, hydrological and the special features. They also noted how the scoring depends upon experience because the assignment of points calls for judgement. Fourth, they went into great detail in describing the complexing process where the foundation idea is the functional relationship or hydraulic connectivity as they called it between two adjacent watersheds. Fifth, they explained at length why they did not agree with the positions taken by the GWG and the District Ecologist with the MNR.

The main point by the two witnesses was that the Fernbank Wetland boundary on the subject parcel ought to be the 1999 MNR boundary based upon the Snetsinger study and that the wetland, regardless of where the boundary was placed, was simply not Provincially Significant.

Mr. Niblett was rigorously cross-examined on the most straightforward interpretation of the sentence in his letter dated 24 July 2001, "We have carefully examined the wetland area and are in agreement with the newest Ministry of Natural Resources boundary suggestions" (Exhibit 6, Tab 17, p. 199). The significance of this sentence stems from the date of the letter; a date that is after the 2000 MNR boundary came into existence. Mr. Niblett readily conceded that a simple reading of his sentence

would mean that he accepted the 2000 MNR boundary and added, "It is a poor choice of words and is an error. You must see it in context. If you read the following two sentences you will get a sense of what I meant." Although the Board is understanding of the explanation by Mr. Niblett, the Board is troubled by the poor choice of words on a matter at the heart of the dispute.

Both Mr. Niblett and Mr. Ellingwood were rigorously cross-examined at length. Their opinions on the location of the wetland boundary to coincide with the boundary first identified by Snetsinger and accepted by the MNR in 1999 were not shaken.

Mr. Huizer, a wetland evaluator who has conducted over 250 evaluations was called by the applicant/appellants to review the work of other evaluators and comment upon the idea of "evaluations are 'open files.'" Like almost all the witnesses, he dwelt at some length on the history of evaluations. He adopted the wetland boundary identified by Snetsinger, Niblett, and Ellingwood, i.e., the 1999 MNR boundary. His main point was:

It is my experience that agency site visits as was undertaken in 1999, are typical and are used to clearly identify wetland areas and boundaries (which are typically staked or flagged at that time with agreement by MNR) and from that point on no changes are made. Good planning cannot be undertaken when existing conditions on a site are in a continual state of change. At some point in the planning process, existing conditions must be agreed upon and then supported by all stakeholders. (Exhibit 8, Tab 1, pp. 2-3)

During cross-examination, Mr. Huizer stated, "The MNR letter of December 7, 1999 [MNR 1999 boundary] predates the planning applications. Public as a stakeholder can come question it as they are doing now. I cannot recall an instance where after MNR set the boundary and the planning process began, MNR expanded [the boundary] later in a significant way. In most instances, boundary changes are minor."

The Board prefers the evidence by Mr. Ellingwood and Mr. Huizer because their opinions are rooted in a deep seated understanding of the complexities of wetland evaluation. Also, their analysis of the documents prepared by GWG and the rationale by MNR in expanding the boundary in 2000 was most helpful in critically analyzing the entire body of evidence related to the identification of wetland.

A subject of related and relevant interest is the matter of sanctity of contracts. According to the counsel for the landowners, the 1999 MNR boundary was relied upon by the landowners in reaching the agreement (Exhibit 2, Tab 22) between the appellants/applicants and the then Township of Goulbourn (now part of the City of Ottawa) with interested residents of the area (some of whom are now members of the Goulbourn Wetlands Group) being “kept in the loop” of the agreement. The agreement is dated May 12, 2000 and the date takes on a significance if we keep in mind that this is after the December 7, 1999 MNR boundary and before the latest MNR boundary dated October 11, 2000. The agreement stipulates in paragraph 42, “The design of the Abbott Street reconstruction shall anticipate the full build out of the Stage 2 lands.”

Although the landowners could have relied upon the legal boundaries shown in the two Official Plans, i.e., the smaller 1991/1993 MNR boundaries, they elected to accept the larger 1999 boundary and forego some developmental rights in exchange for an agreement among the interested parties. Having entered into an agreement, the landowners undertook the upgrading of Abbott Street, constructing the storm water pond, water and sewer outlets, and revising their subdivision proposal – all involving substantial costs.

The City of Ottawa as the successor party, having entered into an agreement, is now in opposition to the four applications. The opposition of the City is based upon the latest MNR boundary, i.e., October 11, 2000. The counsel for the applicants/appellants made much of this requiring the Board to restate its view.

There is nothing inherently wrong about a party to a contract changing its position based upon new knowledge as long as the party goes back to the other signatories of the contract and renegotiates the contract. What is happening here is that a contract between a public body and two private landowners is being bypassed through a planning process amounting to a *de facto* regulatory expropriation.

The ordinary activities of landowners cannot be restricted either by private persons or the state under the *Expropriation Act* without just compensation. This restriction is intended to protect the landowner from the temptation of the majority of two (in a three person society) in abusing the legitimate planning process to obtain ends that ought to be pursued privately. Such behaviour on the part of private persons

constitutes political mobilization and amounts to nothing less than an invasion of individual property rights where the state has explicitly stated (through the *Expropriation Act*) that it has no legitimate business.

Only if and when it can be conclusively demonstrated that the activities associated with the uses of private property contravene the larger public interest does the use become a sufficient nuisance to justify a taking without compensation. The analysis of evidence earlier with respect to wetland boundary demonstrates that public interest is not compromised in any manner by recognizing the 1999 MNR boundary. Nuisance law is intended to demarcate the dividing line between situations the redress of which rightly belongs to the private sphere and those that can legitimately be passed over to the public sphere. Nuisance law serves to prevent the majority of two from transferring a private loss into a public victory and thereby overriding the system of property rights enshrined in common law and *The Canadian Bill of Rights* (1960), which is still good law. These ideas are rigorously discussed by Richard Epstein in his book, *Takings: Private Property and the Power of Eminent Domain*, 1987; Mancur Olson in his book, *The Logic of Collective Action*, 1965; and L. Cohen in "Holdouts and Free Riders," 20, *The Journal of Legal Studies*, 351, 1991. Any arrogation of authority on the part of private persons or the state in restricting the legitimate activities of landowners without just compensation on the grounds of public interest violates the essential distinction between public use and police power exercised through Official Plans and zoning by-laws.

The central dynamic of the scientific revolution in the past three centuries has been that all knowledge is tentative. This dynamic implies constant improvements to the body of knowledge. A decision, however, is based upon the idea of best evidence at the time of decision-making. The two ideas, namely, tentative nature of all knowledge and best evidence at a time are compatible as long as rules for decision-making are clear, certainty is built into the process accompanied by finality. Tentative nature of knowledge does not mean either that practical decisions should be subject to never ending disputations and resulting paralysis or deferring practical decisions until knowledge ceases to be tentative. By definition, knowledge is always tentative. It is, therefore, necessary to rely upon the best evidence and make decisions. The crowning achievement of the scientific revolution is rooted in this elementary axiom.

In coming to its determination of the appropriate boundary of the wetland the Board is chastened by the consciousness of the injunction of the great philosopher of science, Alfred North Whitehead, "Intelligence is quickness to apprehend, as distinct from ability, which is capacity to act wisely on the thing being apprehended."

On the basis of an analysis of all of the pertinent evidence, the Board finds that the boundary accepted by the Ontario Ministry of Natural Resources in 1999 is the appropriate boundary for the purposes of assessing the four applications before the Board within the context of planning instruments. The Board, therefore, also finds that the wetland is not Provincially Significant.

Planning Instruments

Ms Keldine Fitzgerald, a resident of the area, was concerned about the potential adverse impact of traffic created by the proposed subdivision upon existing traffic conditions. Using a series of comprehensive transportation impact studies (Exhibit 5) done by him and his firm, the transportation engineer, Mr. McLean, explained the potential impacts. His opinions were not contradicted by any other duly qualified and experienced professional witness.

Based upon an examination of the pertinent evidence, the Board finds that the proposed development does not cause an unacceptable adverse impact upon the existing transportation system.

There was a concern by some witnesses on how storm water runoff from the proposed residential development would be managed and what its impact would be on the Fernbank Wetland. Using a report (Exhibit 4, Tab 3) prepared by him, the professional engineer, Mr. Simmering, explained the potential impacts and how the storm water would be managed on the subject parcel and in the vicinity. His opinions were not contradicted by any other duly qualified and experienced professional witness.

Based upon an examination of the pertinent evidence, the Board finds that the proposed development does not cause an unacceptable adverse impact upon existing development – both natural and built.

Using a witness statement (Exhibit 10), the land use planner with the City, Ms Switzer, gave evidence in opposition to the proposed amendments to the two Official Plans and the Zoning By-law. Both during her evidence-in-chief and during cross-examination, it became clear that her opposition was rooted primarily in the MNR finding that the Fernbank Wetland on the subject parcel was Provincially Significant.

In the context of the evidence by the planner with the City, the Board takes judicial notice of the Report to Planning and Development Committee by the General Manager of the Development Services Department dated July 9, 2002 (Exhibit 13). Ms Switzer, during cross-examination, confirmed that the conclusions on pages 6 and 7 of the Report applied to the proposed applications. The conclusions section in the Report give three reasons for supporting the applications and starts the paragraph with the statement, "Staff are recommending support of this subdivision and implementing Zoning By-law (subject to the revisions described) at the OMB despite nonconformity with environmental policies for the following reasons:"

Using forty-two (42) documents including his own lengthy witness statement (Exhibit 2), the land use planner for the applicants/appellants, Mr. Fobert, explained in exhaustive detail the chronology of events, the nature of the applications, and how they represented planning that is good. He detailed how the applications conformed to the Provincial Policy Statement and how the constant changes to the wetland boundary had resulted in uncertainty in relying upon publicly adopted planning instruments.

Although the planner for the landowners was cross-examined rigorously and at length, his opinions were not shaken.

The Board prefers the evidence by the planner for the applicants/appellants because of his masterly grasp of the multifarious issues and problems involved in a complex matter such as the one before the Board.

The case law on interpretation of the phrase "have regard to" in Subsection 3(5) of the *Planning Act* is significant. An examination of the case law indicates that to have regard to requires a careful consideration and not merely a perfunctory one involving a consistent application to similar situations all the while retaining discretion to consider particular fact situations. In this instance, the Board has applied this principle in assessing the applications before it.

The Board has taken into account the substantial arguments made by all three parties and has reviewed the authorities presented to it by the counsel for the City and the applicants/appellants.

Based upon an analysis of all of the evidence including the written briefs by the participants, arguments, and case law, the Board finds that the proposed subdivision is appropriate for the site, that the proposed Zoning By-law amendment conforms to the Official Plans, and that the proposed amendments to the Goulbourn Official Plan and the Regional Official Plan represent planning that is good.

Decision

Accordingly, the Board allows the appeals with respect to the two Official Plans and the Zoning By-law.

The Board directs the applicants/appellants and the City to forward draft amendments to the two Official Plans and the Zoning By-law that is satisfactory to the parties and that generally conform to the format of existing planning instruments. The agreed upon drafts shall be filed with the Board within forty-five (45) days from the date of issue of this decision.

The Board's Order will not issue until the applicants/appellants file the most up-to-date plan of subdivision together with any appropriate conditions in consultation with the City of Ottawa. The applicants/appellants shall file such a plan of subdivision within ninety (90) days from the date of issue of this decision.

At the end of the argument, the counsel for the applicants/appellants stated that he reserved the right to bring forward a motion for costs. The applicants/appellants shall bring forward the motion for costs, if they elect to do so, within ninety (90) days from the date of issue of this decision.

N. M. KATARY
MEMBER