



CLEARVIEW

**CORPORATION OF THE
TOWNSHIP OF CLEARVIEW**

DATE: **DECEMBER 7, 2015**
MOVED BY: **DEPUTY MAYOR BURTON**
SECONDED BY: **COUNCILLOR DAVIDSON**

Be it resolved that Council direct the CAO and Municipal Solicitors being Barriston LLP to appeal the Niagara Escarpment Commission decision to refuse the issuance of a Development Permit for the reconstruction of the 26/27 Sideroad, from the 10th Concession westerly to the Grey County Road 31 in Application File No. S/T/2013-2014/9152 in accordance with the recommendation of Barriston LLP in its letter to the Township dated December 2, 2015, and;

Further that the letter prepared by Barriston LLP dated December 2, 2015 be made public.

MOTION CARRIED

CARRIED UNANIMOUSLY

MOTION LOST

Chris Vanderkruys

MAYOR

PRIVILEGED AND CONFIDENTIAL ADVICE

PLEASE RESPOND TO: THE ADMIRAL BUILDING, ONE FIRST STREET, SUITE 224, COLLINGWOOD, ON. L9Y 1A1

December 2, 2015

DELIVERED BY EMAIL: [SSAGE@CLEARVIEW.CA](mailto:ssage@clearview.ca)

Mr. Steve Sage, CAO
Township of Clearview
217 Gideon Street
Stayner, ON L0M 1S0

Dear Mr. Sage:

RE: RECOMMENDATION REPORT - NIAGARA ESCARPMENT COMMISSION REFUSAL OF DEVELOPMENT PERMIT (THE "DECISION") - APPLICATION NO.: S/T/2013-2014/9152 (THE "APPLICATION") - RECONSTRUCTION OF 26/27 SIDEROAD (THE "WORK") - OUR FILE NO.: 2446

At its meeting of November 19, 2015, the Niagara Escarpment Commission (the "NEC") refused the Application. The Decision is dated November 27, 2015, and the last date for an appeal is December 11, 2015. Upon receipt of an appeal or appeals, the Minister will appoint a hearing officer and a hearing will be conducted. The final decision will, however, rest with the Minister, even if the hearing officer's recommendation is to uphold the NEC's decision. You have requested our recommendation on the Decision.

Recommendation

It is our strong recommendation that the Decision be appealed.

Background

The requirement for a development permit arises from the details of the settlement reached between the Township, the County of Simcoe (the "County"), and Walker Aggregates ("Walker"), as part of the Duntroon Quarry expansion hearing. In particular, the Minutes of Settlement contemplate the closure and conveyance to Walker of County Road 91, from Grey Road 31 to Concession 10, and the upgrade of Sideroad 26/27 and Concession 10, from Sideroad 26/27 to County Road 91.

The Joint Board approved the settlement document, and ordered that the Niagara Escarpment Plan (the "NEP") be amended, that development permits be issued, that the Township Official Plan be amended, and that an *Aggregate Resources Act* license be issued.

The Need for a Permit

At the time of the quarry applications and the Joint Board hearing, the road upgrades to Sideroad 26/27 and Concession 10 did not require a permit. Ontario Regulation 828/90 was amended following the Board's decision to require that any road works beyond regular maintenance would require a development permit. The Regulation provides that regular road maintenance and upgrades do not require a development permit, however, a permit is required once the proposed works:

- 1) Open an unopened road allowance;
- 2) Expand the width of the road;
- 3) Change the road from a seasonal to a year round road;
- 4) Change the surface of the road from gravel to pavement; or
- 5) Require road cuts and contour changes.

The proposed upgrades to Sideroad 26/27 can be summarized as reconstruction to convert the road from seasonal to year-round maintenance, improving the vertical alignment, improving the road base, clearing and grubbing and controlling drainage through roadside ditches, all occurring within the existing right-of-way, and being finishing with a gravel base. This work now requires a development permit.

Staff and Commenting Agencies Recommended Approval

Staff at the NEC produced a very detailed report, recommending approval of the development permit application, with conditions. This recommendation was consistent with submissions from the Township, the Ministry of Natural Resources and Forestry, the Nottawasaga Valley Conservation Authority, the Grey Sauble Conservation Authority, and the Bruce Trail Conservancy.

The NEC's Reasons to Refuse

Notwithstanding staff's position, however, the NEC refused the permit for the following reasons:

1. *The road project does not meet the test of "essential" as defined in the NEP (Appendix 2, Definitions), which requires consideration of all options in the Escarpment Natural Area. The Development Permit application did not provide adequate evidence that all options had been taken into consideration.*
2. *A tunnel under (former) County Road 91, that will be used to move aggregate from the new Duntroon Quarry to the processing plant on the floor of the existing Duntroon Quarry, was not in place, or taken into consideration, when the Development Permit application was made and is now operational, which further erodes the case for this road project to be deemed "essential."*



3. *Development would offend the objectives of the NEP's two most sensitive land use designations; Escarpment Natural Area and Escarpment Protection Area.*
4. *Development would cause environmental harm, in particular to cold water streams and would damage steep Escarpment slopes.*

Analysis

1. What is the Meaning of Essential

"Essential" is defined in the NEP as *that which is deemed necessary to the public interest after all alternatives have been considered.* The brief comments in the Decision indicate that the NEC did not believe that the alternatives had been properly considered.

It is important to note that, although no development permit was before it for 26/27, faced with the same circumstances, the Joint Board found that the proposed upgrade was "essential" for the purposes of the quarry expansion:

The Joint Board finds that Sideroad 26/27 should be considered an existing use and essential transportation facility with respect to the various land use designations found in the NEP, and that the determination to open this local road on a year round basis is an operational matter that vests with the Township of Clearview.

In our opinion, the NEC erred in tying the test of essential to the operation of the quarry, rather than considering whether the road improvements were essential to the road network, and, accordingly, in the public interest.

We believe it is arguable that the proposed works are essential to the public, as these roads are essential to the larger transportation network. Road safety, road width, roadside drainage and road base structure deficiencies have now been identified, and are required to be addressed.

As well, all alternatives were considered: closing the road, leaving the road as-is, or upgrading the road. Closing is not an option as many residences rely on the road for access, and leaving the road as-is is not an option as many deficiencies have been identified, and the road is not safe in its current state. The proposed works are not required to elevate this road into a "haul route", but only to make the road safe for local traffic.



2. The Tunnel

The tunnel is unrelated to the need to upgrade Sideroad 26/27 and is, in our view, not a relevant consideration in determining whether Sideroad 26/27 needs to function year-round as part of the public road network. The NEC was simply wrong to base its decision on the existence of the tunnel.

3. The Objectives of the NEP Designations

Escarpment Natural Area

- *To maintain the most natural Escarpment features, stream valleys, wetlands and related significant natural areas and associated cultural heritage features.*
- *To encourage compatible recreation, conservation and educational activities.*
- *To maintain and enhance the landscape quality of Escarpment features.*

Escarpment Protection Area

- *To maintain and enhance the open landscape character of Escarpment features.*
- *To provide a buffer to prominent Escarpment features.*
- *To maintain natural areas of regional significance and cultural heritage features.*
- *To encourage agriculture, forestry and recreation.*

Simply put, it is difficult to understand the argument that the proposed reconstruction of the existing sideroad “offends” any of the objectives of either the Escarpment Natural, or the Escarpment Protection areas. It is expected that our experts will be able to clearly establish that the proposed work will have either no impact on these features and functions, or will enhance them.

4. Damage to the Environment

An Environmental Impact Study was prepared, reviewed by NEC staff, and an Addendum was submitted. Staff found this work to adequately address all potential environmental impacts. As noted in the staff report, the applicant has demonstrated that any potential impacts can be minimized and mitigated.

Staff found that the proposed road works may have some positive effects on the Escarpment environment, as upgrading ditch drainage will better convey stormwater and eliminate washouts into sensitive wetland and coldwater streams. The current condition of the road is such that sheet flow surface run-off empties gravel and soil into the watercourses and adjacent wetlands. This



could be corrected by improving culvert sizes, improving ditching and moderating the grade, as proposed. The reconstructed roadway is proposed to be further from the existing watercourse than the existing travelled surface, and is proposed to be implemented through a final engineering design that ensures sediment and erosion control measures are in place.

The EIS identified means to maintain the water quality and quantity by improving conveyance (to reduce the chance of warming), use of open-bottom culverts, and thermal gradient mapping. Moreover, there are anticipated benefits to the fish habitat in the area, namely, improved stability of the road base will reduce the current erosion and sedimentation, thermal impacts will be mitigated, and the replacement of culverts will improve fish and amphibian passage.

The existing road bisects a Provincially Significant Wetland (PSW) complex, however, the proposed upgrades will not result in a loss of wetland functions.

Extensive field investigations and studies did not identify the presence of significant habitat for any of the "listed" endangered species in the area of the improvements. Two SAR bird species were identified, and it was determined that the minimal vegetation removal along the existing right-of-way will not have a measurable effect on the function of the forested communities. Three SAR butternut trees were identified, two non-retainable and one healthy, and a protective buffer will be erected and maintained around the one healthy retainable specimen. Finally, as the proposed works are simply improvements to an existing road, no measurable effect to wildlife movement is expected, and in fact, the increased sight lines may potentially reduce wildlife road mortality.

Development Criteria – General and Transportation and Utilities

Part 2 of the NEP sets out the Development Criteria. Part 2.2 is the General Development Criteria and Part 2.15 is the criteria for Transportation and Utilities.

The objective of the General Development Criteria is to permit reasonable enjoyment by the owners of all lots that can sustain development, while the objective of Part 2.15 is to "design and locate new and expanded transportation and utility facilities so the least possible change occurs in the environment and the natural and cultural landscape". The objective is followed by a series of site and design guidelines.

Based on the design and engineering work completed to-date, we believe that both the General and Transportation and Utilities development criteria can be satisfied.



Conclusions and Recommendation

There are strong arguments to refute the NEC's reasons for refusing the Application, and compelling environmental and engineering evidence is available to establish that the NEP's purpose and objectives are met, and its development criteria satisfied. Accordingly, it is our recommendation that the Township appeal the Decision.

Yours very truly,
BARRISTON_{LLP}

Per: Harold Elston
helston@barristonlaw.com