

Natural Systems and Alternative Urban Development

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Abstract

The preservation of the Oak Ridges Moraine has forced an unprecedented examination of the ramifications of traditional urban growth patterns on natural systems. In 2000 and 2001, the focus of the debate became the relatively narrow corridor of undeveloped land that runs through the Town of Richmond Hill linking more undisturbed halves of the Moraine to the west and east. Using this 'ground zero' as a springboard, this paper, informed by the tenets of landscape ecology, examines the planning framework as a source of, and possible solution to, the ecological issues engendered by the forces of urban growth in the GTA. The planning framework is defined to include the legal framework, the policy framework and the effect of the Ontario Municipal Board, which interprets the planning framework in arbitrating land use decisions to finality. The planning framework will be revealed as largely pro-growth, inhibiting ecologically innovative approaches to land use, such as is needed presently on the Moraine. It concludes that an ecologically comprehensive and legally binding policy framework would allow more ecologically informed and innovative land use decisions, by mitigating the pro-growth effects of the legal structure and by providing appropriate direction for the OMB. Interestingly, this paper was completed only a few months before the Ontario Government introduced and then passed the *Oak Ridges Moraine Conservation Act*, a measure that went beyond anything this author would have predicated possible from the government of the day. A remarkable example of the effect public protestation can have on governments in power.

Table of Contents

1. Introduction	1
1.1 Introduction	1
1.2 Approach	3
1.3 Note on Urban Theory	6
2. Moraine History	10
2.1 The Oak Ridges Moraine	10
2.1.1 Geological Formation	10
2.1.2 Settlement History and Natural Characteristics	12
3. Case Study: Richmond Hill's OPA 200 and Landscape Ecology	16
3.1 Context	16
3.2 Landscape Ecology: Framework of Evaluation	22
3.2.1 Origin and Principles	22
3.2.2 Application to the Moraine	27
3.3 OPA 200 v. OPA 129	28
3.3.1 OPA 129	29
3.3.2 OPA 200	31
4. The Provincial Roles – Policy Formation and Oversight of the Planning Process	35
4.1 Introduction	35
4.2 General Provincial Policy	36
4.2.1 Bill 163	36
4.2.2 Bill 20	38

4.3 Moraine-specific Policies	41
4.3.1 The Oak Ridges Moraine Implementation Guidelines	42
4.3.2 Moraine Strategy for the GTA	44
4.4 Prescriptions	46
4.4.1 The Need for Provincial Policy Direction	46
4.4.2 Reducing Decision Uncertainty	48
4.4.3 General Provincial Policy	49
4.4.4 Moraine-specific Policies	51
4.5 Means for Implementing Moraine-Specific Policies	52
4.5.1 Moraine-specific PPS	53
4.5.2. Provincial Plan under the OPDA	53
4.5.3 Moraine-specific Legislation	54
4.6 Provincial and Regional Involvement in Local Planning Decisions	58
4.6.1 The One-Window Planning Service	59
4.6.2 The Regional Role	61
4.6.2.1 Municipal Plan Review	62
4.6.2.2 Role of Regional OPs	63
4.6.2.3 Revisiting the Regional Role	65
5. Legal Structure of the Planning Framework: Tools and Powers of the Municipalities	66
5.1 Municipal Subordination	66
5.2 The Effects of the <i>Planning Act</i>	69
5.2.1 A Note on Zoning	73
6. Ontario Municipal Board	74
6.1 Role, Accessibility and Powers	75
6.2 The OMB and the Role of Provincial Policy and the <i>Planning Act</i>	79
6.2.1 The Effect of the Provisions of the <i>Planning Act</i>	80

6.2.2 The Effect of Provincial Policy	81
6.2.3 OMB Inconsistency	83
6.2.4 The Effect of Changes to the Policy Framework	87
6.3 The OMB's Interpretation of Open Space Designations	88
6.4 Looking Forward	91
7. Concluding Remarks	93
7.1 OPA 200 Re-visited - Lessons for the Planning Framework	93
7.2 The Necessary Changes	95
8. Bibliography	

1.1 Introduction

Settlement of the Oak Ridges Moraine (Moraine) began in earnest 175 years ago. Since then it has suffered astounding natural degradation, though it has also borne witness to the amazing restorative potential of nature. It exists today as a great ecological treasure, slicing across the north of the Greater Toronto Area (GTA). From many places on the Moraine it is possible to see the bustle of Toronto's burgeoning suburbs, and on clear days the high-rises and skyscrapers of Toronto. Only recently the people in that view have begun to look back to the Moraine. Many have discovered that the ecological characteristics that make the Moraine so unique in the GTA and Southern Ontario are now vulnerable to a wave of prosperity that threatens to spill across its southern flank. At stake is the ecological integrity of the Moraine and of the natural systems of the GTA.

In 2000 Campbell J. of the Ontario Superior Court of Justice remarked in an application for judicial review from an Ontario Municipal Board (OMB) decision approving dramatic growth increases for King Township that

“The ecological integrity of the Oak Ridges Moraine, and the legal interpretation and application of public instruments designed to protect it, raise important planning and environmental issues.”¹

Perhaps an understatement, considering the public outcry that accompanied the Town of Richmond Hill's latest attempts to manage growth on its part of the Moraine. For the Moraine has become the epicenter of the debate concerning the appropriate nature of, and place for, urban growth in the GTA. Most importantly, it has forced an unprecedented examination of the ramifications of traditional urban growth patterns on natural systems and led to a debate concerning the adequacy of the present planning framework in protecting the natural environment. Involved in the debate are concerned citizens, environmental organizations, municipalities, the province, and the development industry.

¹ *Concerned Citizens of King (Township) v. King (Township)*, [2000] O.J. No.3517 (O.M.B.) at para 11 online: QL (MUNQ) [hereinafter Concerned Citizens].

The current focus of the debate is a relatively narrow corridor of undeveloped land that runs through the middle of one of the GTA's fastest growing communities, the Town of Richmond Hill. That narrow strip of land is the last remaining undeveloped stretch of the Moraine to pass across Yonge St., linking more undisturbed halves of the Moraine to the west and east. Environmentalists and many citizens fear development would sever this key ecological corridor, seriously threatening the ecological integrity of the entire Moraine. Yet, this is precisely what could occur. Richmond Hill presented a land use plan for the corridor in early 2000. Developers already pushing for growth, rejected Richmond Hill's plan as too ecologically rigorous, yet environmentalists and concerned citizens also rejected the measures as inadequate. Caught in between, the Town was handicapped from taking greater and legally defensible ecological measures by the unhelpful legal framework governing municipal planning decisions. The issue, now before the OMB, promises to have a dramatic effect on the course of urban development and ecological protection on the Moraine, and therefore on nature of growth in the GTA.

This paper will focus on the planning framework as a source of, and possible solution to, the ecological issues engendered by the forces of urban growth in the GTA. It will focus on the plight of progressive municipalities,² or municipalities such as Richmond Hill, that are faced with undertaking stronger ecological land use decisions in spite of the planning framework. The term 'planning framework' (defined in 1.2) is akin to stating the legal framework of the planning process. The framework will be examined for the legal and policy opportunities, and constraints, it poses for progressive municipalities that wish to take measures towards large-scale preservation of lands, including 'ecologically benign' land.³ In doing so the planning framework, will be revealed as largely

² 'Progressive municipality' is one that wishes to enact strong and innovative ecological measures, perhaps stronger than the planning framework would allow, in order to protect the environment in and beyond its borders.

³ The term 'ecologically benign' land is used to refer to undeveloped land that has no explicit or readily identifiable ecological characteristics. In other words, it may not be 'valuable' in the same way as a forest,

pro-growth, facilitating against ecologically innovative approaches to land use, such as is needed presently on the Moraine. The locale with the most influence in this regard is the policy framework. An ecologically comprehensive and legally binding policy framework would allow more ecologically informed and innovative land use decisions, by mitigating the pro-growth effects of the legal structure and by providing appropriate direction for the OMB.

1.2 Approach

The planning framework in Ontario can be understood as consisting of a legal structure and a policy framework. As in all provinces, the planning framework establishes the planning roles and responsibilities of the municipalities and the province.

The legal structure of the planning framework defines the planning roles of the province and municipalities in three ways. First, the province empowers municipalities in the *Planning Act*⁴ to make local land use decisions. The primary municipal planning tools of concern in this paper are Official Plans (OPs) and OP amendments (OPAs), though zoning by-laws and subdivision controls have complimentary roles. The OP is the focus of this paper because it is the primary policy tool a municipality has to articulate and defend policies and objectives for its future well being. It is foremost a growth document detailing how a municipality shall “manage and direct physical change and the effects on the social, economic and natural environment of the municipality.”⁵ As policy documents, OPs have limited legal effect. An OP only takes effect when by-laws are passed to enact its policies, otherwise the rights of the affected landowner are unaffected.⁶ Once an OP, or OPA, takes effect all by-laws passed thereafter

or kettle lake, or wetland complex. It may be land in early succession or agricultural lands. Such land is not without ecological importance, because all land contributes to some degree to the ecological health of a landscape. Rather, it has no identifiable characteristic that makes it the obvious target of typical protection policies.

⁴ *Planning Act*, R.S.O. 1990 c. P.13, as amended.

⁵ *Ibid.*, s.16(1)(a).

⁶ I. Rogers, *Law of Canadian Municipal Corporations*, looseleaf (Toronto: Carswell, 1971) [hereinafter Rogers].

must conform to the OP.⁷ Zoning by-laws, on the other hand, are not policy-based, but rather generally apply OP policies specific areas and are thus not a comprehensive tool of planning in the same manner as an OP. They can permit only a single use and can exclude a single use, but they cannot prohibit the use of land for any purpose.⁸ Subdivision controls regulate land use at an even smaller scale – the scale of the property itself. The subdivision of land requires the approval of a subdivision plan by a municipal approval authority.⁹ In this manner the approval authority can review proposals with regard for the ‘health, safety, convenience and welfare of the future inhabitants’ of the community and provincial policies.¹⁰ Municipal councils can forward recommendations to their approval authorities, exercising a restricted degree of influence.¹¹ The key point is that the OP determines the policies or objectives of a municipality that result in the decision it takes regarding the use of zoning by-laws and approvals of subdivision plans. Accordingly, this is where municipal ecological land use policy¹² examination is most appropriate.

Second, the legal role of the province has traditionally included the participation in the local planning process and approval authority over OPs and OPAs. Both of these provincial responsibilities have been reduced over recent years, with the Regions filling some of the void of responsibility in both, particularly the latter. Third, the OMB is an element of the legal structure at the back end of the planning process. It is empowered by the *Ontario Municipal Board Act*¹³ and the *Planning Act* to resolve land use conflicts involving

⁷ *Planning Act*, *supra* note 4 s.24(1).

⁸ *Ibid.*, s.34. See also *R. v. King* [1971] 1 O.R. 441.

⁹ Subsection 17(2) of the *Planning Act* provides that Regional Municipalities may assume approval authority status in place of the province to review OPs and OPAs. As such, the so-called approval authorities, are charged with identifying and protecting provincial interests under the *Act*. Richmond Hill’s approval authority is the Regional Municipality of York.

¹⁰ *Ibid.*, s.51(24).

¹¹ *Ibid.*, s.51(23).

¹² ‘Ecological policies’ is used in this paper to include provincial or municipal policies that address identification or protection of natural areas, groundwater and natural features. ‘Environmental policies’ is a broader term that includes issues such as waste minimization or energy conservation.

¹³ *Ontario Municipal Board Act*, R.S.O. 1990, Chap c. O.28 [hereinafter OMBA].

municipalities, the province and private landowners, all of whom to which it is accessible.

Informing the legal structure of the planning framework, and thus integral understanding it, is the provincial policy framework. The province provides local planning guidance, or restrictions, beyond the empowering provisions of the *Planning Act* through its articulation of a policy framework that includes declarations of provincial interests, Provincial Policy Statements (PPSs), guidelines and special planning area legislation. Policy is integral to support municipal decisions, by defining a level of provincial involvement in local planning and by providing guidance to the deliberations of the OMB. Thus, the policy framework is the meat on the bones of the legal structure.

The planning framework, in the manner it is described above, is the focus for this paper. Before that can proceed the paper's context must be established. The case study for this paper is an undeveloped two-kilometer wide Corridor¹⁴ on the Moraine that has been the locus of growth pressures in the Town of Richmond Hill. As such, Section 2 of this paper is devoted to giving some natural and settlement history of the Moraine and describing some of its more relevant natural characteristics. Section 3 profiles Richmond Hill and the Corridor. Focus is paid to evolution of the Town's ecological policies in recent OPAs, particularly OPA 200,¹⁵ which addressed the Corridor. At the same time the evaluative tool of landscape ecology is introduced in order to establish, from an ecological perspective, necessary protection measures for the undeveloped land and to therefore evaluate Richmond Hill's protection efforts.

Once the background for the paper has been established, the planning framework will be examined to determine whether it can accommodate the protection measures Richmond Hill took, or even more ecologically minded measures. This examination will take its organization from the breakdown of the planning framework described above. In Section 4 the ecological policies of the

¹⁴ Where 'Corridor' is capitalized the undeveloped corridor of land on the Moraine in Richmond Hill is being described.

¹⁵ Richmond Hill (Town of). The Boundary Corridor: Amendment No.200 to the Official Plan of the Richmond Hill Planning Area (7 January 2000) [hereinafter OPA 200].

policy framework governing land use in general and land use on the Moraine are canvassed and examined. Because the policy framework is the most decisive means the province has to strengthen the ecological content of land use decisions, certain prescriptions to improve the present ecological will be offered. The lessons of Section 4 are used in the remaining sections to provide greater understanding of certain aspects of the planning framework. First, in Section 5 recent troubling reductions to the provincial role, or participation in, the local planning process are examined with focus on the efficacy of the enhanced role of Regional municipalities who have assumed traditional provincial responsibilities. Second, in Section 6 those specific municipal powers in the *Planning Act* that mitigate against ecological protection measures are considered. Finally, in Section 7 the difficulties the presence of the OMB in the planning framework causes for ecological protection are briefly discussed. Throughout the effectiveness of the planning framework is evaluated with regards to OPA 200 and the principles and prescriptions of landscape ecology for the Moraine.

1.3 Note on Urban Theory

The numerous overlapping perspectives on the complex factors driving urban growth are an enormous source of debate and analytical interplay in urban studies. The examination of theories of urban growth is not the objective of this paper, nor does any one of them form the evaluative framework of its analysis. That being said two issues relevant to this paper need to be, from the start, set in appropriate context. First, the theory of the corporate city which provides, for the purposes of this paper, the source and nature of development pressures in the GTA. Second, informing any analysis of urban growth and the planning framework is the general tension common to all urban theories. That tension is the struggle to find balance between the property rights of the landowner and the greater public interest.

For the purposes of this paper and the simplicity of its approach, the development industry¹⁶ is viewed as the driving force behind the development process where growth pressures exist. That is not to say that other forces are not influential. Clearly, consumer behavior, determined by socio-cultural and economic factors plays a tremendous role in determining growth pressures, as does the corporate municipality seeking expanded wealth and tax revenue streams. However, within the guise of this paper it is most useful to regard development pressures as arising from the development industry. Such a perspective has theoretical and empirical support.

The decidedly economic theory of the corporate city suggests that urban growth is an outcome of producer-led exploitation, or commodification, of land for profit.¹⁷ The lead players in this model of the city are the producers, including the property industry, composed of the real estate and land development sectors and the development industry, composed of developers, builders and financial institutions. More often than not the development industry is an influential power broker at the local level, dominated by a few large vertically integrated corporations. Financial institutions play an eager role in facilitating the massive investments needed to launch the large-scale development that defines suburban expansion. Local government is understood to be either an active partner seeking increased revenues, or as a relatively powerless facilitator, depending on the context.¹⁸ Often times when trying to promote or protect the public interest in a manner contrary to developers' plans, municipalities are cast as the latter.¹⁹ Above all, the legal framework governing the corporate city is pro-growth. Accordingly, the development industry places tremendous importance on the exercise of, or defence of, their property rights. Although a tremendous amount of leverage is used 'behind the scenes,' in planning departments and

¹⁶ The 'development industry' is defined to mean an amalgam of development, real estate and construction companies. Notably, many development companies are sufficiently vertically integrated to serve as all three.

¹⁷ J. Lorimer, *A Citizen's Guide to City Politics* (Toronto: J. Lewis & Samuel, 1972).

¹⁸ B. Reid, "Primer on the Corporate City" in (ed) K. Gerecke *The Canadian City* (Montreal: Black Rose, 1991).

¹⁹ J. Lorimer, *The Developers* (Toronto: James Lorimer & Company, 1978).

municipal offices, more often than not the legal framework becomes the focus of conflict between their agendas and those with alternative visions.²⁰

Empirical evidence of the development industry's effect on the land use decision process is rife in the GTA. Developers own much of the land in the GTA, as far north as Orangeville. They have also become vertically integrated conglomerates spanning the producer side of the development equation. Many development companies now include development, real estate, marketing and construction arms. They are well-armed, well-endowed and well-informed corporations pushing the development agenda. Certain elements of the planning framework allow development companies, or landowners, to take the legal initiative in forwarding development proposals for approval by municipal governments. Accordingly, development companies benefit from municipalities placed in a relatively weak position subject to provisions and policies in the planning framework that are pro-growth in orientation.

The industry expends considerable effort using the legal framework to guard its enormous economic interests. It has the most to gain from an unimpeded development process. More importantly, it has the most to lose from the negative effects on land values that would result if large-scale preservation of land were to occur in the GTA. The practical effects are clear in Richmond Hill. As will be discussed below, many of the land issues there arose, were accelerated or were exacerbated by the development industry's agenda for its land, the land in the Corridor. Ultimately, and most importantly for this paper, it is the planning framework that permits the development industry to continually take such aggressive stances.

Property rights have always been subject to government regulation, particularly environmental initiatives.²¹ The extent of restrictions has been controversial. The common law has held that there is no right to arbitrarily

²⁰ *Ibid.*

²¹ It should be acknowledged that in many instances property rights bestow strong defences or rights from environmental harm. See on this topic in a Canadian context E. Brubaker, *Property Rights in the Defence of Nature* (Toronto; Earthscan Publications Ltd., 1995).

interfere with a landowner's right to use and improve their property. This was most famously enunciated by Riddell J. in *Toronto (City) v. King* (1923), 54 O.L.R. 100 (C.A.): "The common law right of every man is to build upon his own land whatever kind of building he sees fit, so long as it is not a nuisance, public or private."²²

In the Canadian Constitution, or the Canadian *Charter of Rights and Freedoms* there is no explicit guarantee of property rights.²³ Government has always, through statutory authority, restricted a landowner's common law property rights, thereby limiting the promise of the free use and alienability of property. Traditionally, this intervention was in an effort to control future development and expansion. As concerns local land development, "strategies focusing on producers' actions lead to [government] attempts to regulate land development by restricting the rights inherent in land ownership."²⁴ Statutorily authorized measures allow municipalities to restrict property rights to a material degree. Measures can range from ecological policies in OPs and corresponding zoning by-laws to outright expropriation, imposing varying limitations. In reaction, producers cling to a conception of property rights, that asserts there are inherent, or even absolute, rights in property ownership, causing producers to be highly averse to government intervention for the public interest.

If significant ecological protection measures are to be taken at the municipal level then clearly some sort of public regulation of the development process is necessary. Inevitably, this process will re-visit the controversial balance between the rights of property ownership and the public interest in the environment, particularly when ecological measures are enhanced. Leaving aside other undeniable factors of urban growth, this paper acknowledges that tensions concerning property rights will affect any attempts to strengthen ecological land use policies. The legal framework is an appropriate focus of

²² *Toronto (City) v. King* (1923), 54 O.L.R. 100 (C.A.) at 102

²³ *Constitution Act, 1982*, R.S.C. 1985 [hereinafter *Constitution Act*]

²⁴ Skelton, I, Moore Milroy, B., Fillion, P., Fisher, W. & Autio, L., *Linking Urban Ecological and Environmental Concerns: Constraints and Opportunities* (1995) 4 Canadian Journal of Urban Research 229 at 232.

examination for the possibility of infusing ecological concerns into the planning process precisely because it is where the tension over property rights is most identifiable and most directly addressed.

2. Moraine History

2.1 The Oak Ridges Moraine

*Drive north from Lake Ontario, almost anywhere along its length, and the pattern is the same: a fringe of urban life near the lake that gradually gives way to suburbs, and a flat, square grid of roads and farms laid out with careful precision. But a little farther north yet, the land begins to rise in an irregular ridge of sandy hills. Woodlands crown farm fields, and the roads dip and weave through hummocky terrain. You have reached the Oak Ridges Moraine.*²⁵

The varied natural landscape of the Moraine dominates the north of the GTA. Located in south-central Ontario the Moraine stretches 160 kilometers from the Niagara Escarpment in the west, across the north of the GTA, to Rice Lake in the east (see Maps 1 and 2). Its width varies from 3 to 27 kilometers, assuming an area of 1400 square kilometers. It ranges in elevation from 250 to over 400 meters. The Moraine is one of Ontario's largest and most important glacial legacies. Over the last 200 years its presence has grown in the consciousness of those who live on it and nearby (see Table 1).

2.1.1 Geological Formation

The Moraine is a “fluke of glacial geography.”²⁶ Its origins can be traced back to the last ice sheets to cover eastern North America. An interlobate moraine, it was created in a short period of time 13,000 to 15,000 years ago as the Laurentide ice sheet retreated rapidly northwards.²⁷ Two lobes of ice formed at the southern margin of the retreating glacier, in what is now Southern Ontario.

²⁵ Save the Oak Ridges Moraine Coalition. *Oak Ridges Moraine* (The Boston Mills Press: Erin, Ontario, 1997) at 11.

²⁶ L. Johnson, *Hiking the Oak Ridges Moraine*, (1999) 39(3) Seasons 24 at 24.

²⁷ J. Erickson, *Glacial Geology*, (New York: Facts on File Inc., 1996).

Between the Simcoe lobe to the north and the Ontario lobe to the south lay a narrow trough dammed by the Niagara Escarpment into which massive volumes of glacial meltwater containing fine sandy and larger unsorted sediments flowed.²⁸ It formed a ridge that in places rises up to 200 meters above the underlying bedrock, making it Ontario's thickest glacial deposit.²⁹

Table 1

The History of Moraine Perception³⁰	
1824	Described as a 'bold line of heights – breaking into confused ridges and hummocks'
1836	Described as 'bold sweeping hills'
mid-1850s	Widely known as the Pickering Sandhills
1888	A text on geology of Southern Ontario by E. Chapman refers to the 'Oak Ridges' as a glacial landform near Maple.
1913	In a geological journal article J.W. Spencer refers to the 'Oak Ridges Moraine but only maps part of them. F. Taylor in the same year refers to it as a series of moraines, but does not use the term 'Oak Ridges.'
1966	Chapman and Putnam's <i>Physiology of Southern Ontario</i> uses the term 'Oak Ridge Moraine' to identify the moraine in its presently accepted entirety.
1970s	'Oak Ridges Moraine' comes into common usage among scholars and the public.
1990s	<i>Space for All. Options for a Greenland Strategy for the Greater Toronto Area (Greenlands)</i> ³¹ and the reports of the <i>Royal Commission on the Future of the Toronto Waterfront (Watershed: Second Interim Report</i> ³² and <i>Regeneration: Toronto's Waterfront and the Sustainable City: Final Report</i> ³³) identify the Moraine significant and sensitive natural feature integral to the effort to comprehensively preserve the natural areas of the GTA. Responding to public concern and urban pressures the Oak Ridges Moraine Technical Working Committee is formed by the province to come up with a land use and planning strategy for that part of the Moraine in the GTA.

²⁸ Howard, *supra* note 28.

²⁹ J. Fisher, & D. Alexander, *The Symbolic Landscape of the Oak Ridges Moraine: Its Influence on Conservation in Ontario, Canada*, (1993) 22(1) *Environments* 100 [hereinafter Fisher].

³⁰ Much of the information for this chronology was drawn from: K. Howard, N. Eyes, P. Smart, J. Boyce, R. Gerber, S. Salvatori and M. Doughty, *The Oak Ridges Moraine of Southern Ontario: A Ground-water Resource at Risk* (1995) 22(3) *Geoscience Canada* 22(3) 101 [hereinafter Howard] and The Oak Ridges Moraine Technical Working Committee, *A Cultural Heritage Resources Assessment Study for the Oak Ridges Moraine Area. Background study no.7 to the Oak Ridges Moraine Area Planning Study* (1994) prepared by Ministry of Natural Resources [hereinafter Cultural].

³¹ R. Kanter, *Space for All: Options for a Greater Toronto Area Greenlands Strategy* (Queen's Printer: Toronto, 1990).

³² The Royal Commission on the Future of the Toronto Waterfront, *Watershed: Second Interim Report* (Toronto: The Commission, 1990).

³³ The Royal Commission on the Future of the Toronto Waterfront, *Regeneration: Toronto's Waterfront and the Sustainable City: Final Report* (Toronto: Queen's Printer of Ontario, 1992) [hereinafter The Royal Commission, 1992].

2.1.2 Settlement History and Natural Characteristics

For centuries the Moraine was inhabited, and served as the hunting grounds for, natives of the Huron and Iroquois tribes. The Moraine was surveyed, as much of the rest of Southern Ontario, in the late eighteenth and early nineteenth century. Soon John Simcoe, the first Lieutenant Governor of Upper Canada, realized that the Moraine would serve as an obstacle to the northward settlement so necessary to the colony's security.³⁴ The United Empire Loyalist immigration of the same time resulted in sporadic settlement of the Moraine. Large-scale European settlement of the Moraine did not begin in earnest until the first two decades of the nineteenth century when waves of British veterans of the War of 1812-1814 and of the Napoleonic Wars accepted Crown grants of free land lots. Yonge St., then a military trail, was the artery of settlement surrounding which the original settlements on the Moraine were created. Richmond Hill was first settled in the last years before 1800, clustered along Yonge St. and on the Don River, which powered the settlers' mills.

As Ontario's population exploded in the 1830's the pressure for land increased and the merciless bark-stripping and slash and burn methods of forest clearance prevailed. Early activities were focused on clearing the land for agriculture and harvesting the forests of the Moraine, particularly for White Pine. Through to 1860 settlement and prosperity accelerated on the Moraine. By the 1850s there were twelve saw mills and seven grist mills in Richmond Hill, as well as five hotels, carriage factories and a tannery.³⁵ Road building spread with the introduction of several plank roads, and the railways arrived when the Northern Railway was extended from Toronto to Aurora in 1854.³⁶ Some accounts suggested that the Moraine was not so much settled as it was overrun.³⁷

³⁴ D. Wood, *Moraine and the Metropolis: the Oak Ridges and the Greater Toronto Area* (1991) 39 International Journal of Environmental Studies 45.

³⁵ N. Mika & H. Mika, *Places in Ontario: Their Names, Origins and History in Ontario Part III N-Z* (Belleville: Mika Publishing Company, 1983).

³⁶ Howard, *supra* note 28.

³⁷ *Ibid.*

Despite the limited agricultural utility of its sandy soils most of the Moraine was being farmed during this period.³⁸ Unsustainable agriculture on the nutrient-starved and erosion prone soils, and the exhaustion of commercially viable timber supplies, contributed to considerable rural de-population after a population peak near 200,000 in 1861. Descriptions of the Moraine at the time describe a devastated landscape devoid of natural vegetation.³⁹ Considerable land was left derelict and sand dunes and blowouts became frequent.⁴⁰

The unique ecological character of the Moraine began to be recognized in the 20th century as its natural environment regenerated to a level of health not seen for decades. The deteriorated physical and hydrological conditions of the Moraine attracted attention from conservationists through the 1920's and 1930's, resulting in a number of replanting initiatives. In the 1940's the Moraine established a little-known legacy as the site of Ontario's first large-scale conservation program. In 1942 the Ontario Conservation and Reforestation Association chose the Ganaraska watershed to demonstrate the benefits of conservation. The positive results led to the development of watershed conservation policies and conservation authorities across Ontario.⁴¹ Following World War Two ongoing natural and government-sponsored reforestation and continued depopulation resulted in large tracts of natural regeneration on the Moraine. The more heavily populated areas surrounding the Yonge St. corridor have not regenerated as extensively. Today, the Moraine hosts an abundance of native biota rare or eliminated from more disturbed areas of the GTA. Dozens of significant natural areas have been identified across the Moraine. 28 percent of the Moraine is forested compared to an average of five percent throughout the rest of Southern Ontario (see Map 3), providing a rare refuge for habitat sensitive and large terrestrial species. Over 100 species of birds, 15 mammalian species and at least 15 species of reptiles and amphibians

³⁸ Cultural, *supra* note 28. Land that is today classified between Class 4 and 6 as having severe limitations and minimal agricultural utility.

³⁹ *Ibid.*

⁴⁰ Howard, *supra* note 28.

⁴¹ Fisher, *supra* note 33.

rely on the Moraine. A 1994 study noted that “the natural habitat located in the Moraine is essential to protecting the diversity and health of the native wildlife in this part of Southern Ontario.”⁴² Species travel, or in the case of plants, disperse along the natural corridors that link it with other natural areas, such as the Lower Rouge or Niagara Escarpment. Thus, the Moraine provides some of the most functional, continuous, and therefore, critical wildlife habitat in Southern Ontario. The porous Moraine also plays a key role in the collection and release of water in the GTA. The sandy sub-surface layers make the Moraine a massive and critical aquifer, whose precise extent and volume remains unclear.⁴³ As the high ground between Lake Simcoe and Lake Ontario, the Moraine supplies the source and baseflow for 65 streams and 30 watersheds, including the Credit, Humber, Don and Rouge Rivers, all of which begin on its southern flank. In addition, there are innumerable wetlands and many kettle lakes across the Moraine.⁴⁴

The automobile and Toronto’s proximity made the Moraine accessible for recreational and residential uses, threatening its recovering health. In 1980, the population on the Moraine exceeded 200,000, surpassing for the first time the previous population peak of 1861. Meanwhile, the GTA grew from a population of two million in the 1970’s to over four million in the 1990’s. Projections estimate the population will reach 6.5 million by 2021.⁴⁵ Thus, at the end of the 1990’s the trickle of re-population on the Moraine threatened to become a flood, spilling out from the Yonge St. corridor⁴⁶ onto the its adjacent flanks. At the beginning of the 21st century surging suburban growth made difficult land use decisions on the Moraine inevitable. The traditional pattern of suburban development in the GTA takes very little account of ecological considerations, thus leaving minimal room for the healthy functioning of natural systems. This development pattern is poised to spread across the Moraine.

⁴² The Oak Ridges Moraine Technical Working Committee. *The Oak Ridges Moraine Area Strategy for the Greater Toronto Area: An Ecological Approach to the Protection and Management of the Oak Ridges Moraine* (1994) Queen’s Printer of Ontario: Toronto [hereinafter Strategy] at 4.

⁴³ Howard, *supra* note 28.

⁴⁴ Including Lake Wilcox and Bond Lake in Richmond Hill.

⁴⁵ Howard, *supra* note 28.

⁴⁶ The Yonge St. corridor refers to the historical channel of urban growth north from Toronto along Yonge St. between Bathurst St. and Bayview Ave.

Urban encroachment of the Moraine has caused concerned citizens, environmentalists and governments to take notice. Larger public concern was set in motion by a 1989 report by the Environmental Assessment Advisory Committee which called upon the province to recognize the Moraine as a provincial resource in need of environmental protection.⁴⁷ Since then a series of initiatives and reports have followed, the cumulative impact of which has been to stress the integral ecological role the Moraine plays in the natural systems of the GTA, and its increasing vulnerability (see Table 2).

Table 2

Chronology of Governmental Concern for the Moraine	
1989	A report by the Environmental Assessment Advisory Committee recommends that the province recognize the Moraine as a provincial resource and that it take appropriate measures to ensure its environmental protection.
1990	Liberal MPP Ron Kantor's <i>Greenlands</i> identifies the Moraine as a significant and sensitive natural feature unto itself that is a foundational element of the natural systems of the GTA. In response, the province declares a provincial interest in land use on the Moraine.
1990; 1992	The Royal Commission on the Future of Toronto's Waterfront reports <i>Watershed: Second Interim Report</i> and <i>Regeneration: Toronto's Waterfront and the Sustainable City: Final Report</i> that the protection of the Moraine was key to an integrated and comprehensive approach to natural systems preservation in the GTA. It also urged a greater provincial role and interest in the preservation of the entire Moraine
1991	Newly elected NDP issue <i>Implementation Guidelines for Development of the Oak Ridges Moraine Area within the Greater Toronto Area</i> ⁴⁸ (Guidelines) The Guidelines are the only thing to survive beyond the Conservative's election in 1995. They are short on detail and have no legal effect. Also created is the Oak Ridges Moraine Technical Working Committee (Committee) to devise a strategy for the long-term protection of the Moraine. The Committee commissions 15 studies of the Moraine which are completed by 1994.
Nov. 1994	The Committee present their report <i>The Oak Ridges Moraine Area Strategy for the Greater Toronto Area: An Ecological Approach to the Protection and Management of the Oak Ridges Moraine</i> ⁴⁹ to Howard Hampton, then Minister of Natural Resources. The final recommendations arising from the report make

⁴⁷ Ontario, Ministry of the Environment, Environmental Assessment Advisory Committee, *Report No. 38: the Adequacy of the Existing Environmental Planning and Approvals Process for the Ganaraska Watershed* (15 November 1989).

⁴⁸ Ontario, Ministry of Natural Resources, Ministry of the Environment, Ministry of Municipal Affairs, *Implementation Guidelines: Provincial Interest on the Oak Ridges Moraine Area of the Greater Toronto Area* (1991) Toronto: Publications Ontario [hereinafter Guidelines].

⁴⁹ Strategy, *supra* note 42.

June 1995	it to Cabinet in final form in late 1994, but are not acted upon or made public before the the spring 1995 election. The Conservatives are elected and do not follow up on any of the Moraine initiatives. Language of section 3 of the <i>Planning Act</i> regarding the effect of provincial policies is changed from 'shall be consistent with' to the less binding 'shall have regard for. 7 PPSs accompanying the <i>Planning Act</i> are repealed and replaced with 1.
Nov. 1999	Environment Minister Tony Clement re-affirms province's belief that development and environmental protection can be achieved by following existing government guidelines and policies. He refuses both a proposed building freeze on the Moraine and calls to re-kindle the shelved 1994 proposals.

3. Case Study: Richmond Hill's OPA 200 and Landscape Ecology

3.1 Context

The Town of Richmond Hill provides an illustrative and topical case study of the issues that surround land use decisions on the Moraine. The Town is located partly on the southern edge of the Moraine, 16 kilometers north of Toronto on the Yonge St. corridor. It assumes a functional, if uninspiring, rectangle of space amongst three 400-series highways (400, 407, 404).

The village of Richmond Hill had a population of 900 in 1885.⁵⁰ The broad tide of urban growth pressures in the GTA swept over the Town's boundaries around a century later. By 1994, the Town's population had grown to 80,000, more than double the 1980 figure of 36,600. One of the fastest growing communities in the GTA, it has demonstrated a pro-growth approach to land use, approving no less than 70 OPAs between 1995 and 2000.⁵¹ With its only undeveloped land situated on the Moraine, the Town is at the epicenter of a collision between the forces of environmental conservation and development.

The northern 54 percent of Richmond Hill's 9,880 hectares, falls on the Moraine. The southern half of the town is developed to the threshold of the Moraine (South Urban Area, SUA). A narrow North Urban Area (NUA) strip on the Moraine is lightly urbanized, owing to presence of historic communities. In

⁵⁰ Places, *supra* note 35.

⁵¹ J. Sewell, *Upstream, Downstream: Will Richmond Hill Council Ruin our Rivers?* The Eye (27 January 2000) 22.

between, across the heart of the Town is the Rural-Urban Fringe, a narrow 2 – 3 kilometer Corridor of 3520 hectares entirely on the Moraine, largely untouched by development (see Maps 4). In 1994, only 17 percent of the Town's residents lived on the Moraine.⁵² Table 3 demonstrates the Town's population is expected to more than double by 2011 to 180,000, while the percentage of the population living on the Moraine is projected to increase 260 percent to 54,000, or 30 percent of the Town's population.⁵³

In the late 1990's, the Corridor became the focus for the next phase of Richmond Hill's growth, which would ultimately be expressed in OPA 200. It is characterized by rolling farmland, forests, including Jefferson Forest,⁵⁴ one of the largest woodlands in the GTA (see Map 3), nine kettle lakes and 150 wetlands. By a unique twist of topography the Corridor serves as the headwaters for *each* of the Humber, Don and Rouge Rivers.⁵⁵ Importantly, on either side of Richmond Hill the Corridor extends into undeveloped areas in the City of Vaughan to the west and the Town of Whitchurch-Stouffville to the east. It is the last largely undeveloped tract of the Moraine to cross Yonge St., though all of the Corridor's land is owned by 20 developers, or would be developers.⁵⁶ Its development would effectively sever the Moraine in two at Yonge St. making significant natural links across the Moraine impossible (see Map 5).

⁵² The Oak Ridges Moraine Technical Working Committee, *Land Use Patterns on the Oak Ridges Moraine Area Within The Greater Toronto Area. Background Study No.1 to the Oak Ridges Moraine Area Planning Study* (1994) prepared by the Ministry of Natural Resources.

⁵³ Durham Region, Regional Municipality of Peel and Region of York, *The Oak Ridges Moraine: Towards a Long Term Strategy*. (15 September 1999) at 14 [hereinafter Regions].

⁵⁴ The Jefferson Forest was purchased by the Toronto and Region Conservation Authority (TRCA) in 2000.

⁵⁵ The Oak Ridges Moraine Technical Working Committee, *Biophysical Inventory of the Oak Ridges Moraine Area within the Greater Toronto Area. Background Study No.2 to the Oak Ridges Moraine Area Planning Study* (1993) prepared by Ministry of Natural Resources [hereinafter Biophysical].

⁵⁶ D. Stein, *Environmentalists Battling for Crucial Swath of Green*. The Toronto Star (26 May 1998) B1, B4.

Table 3. Richmond Hill Total and Moraine Population and Population Projections 1991 – 2021

	1999 Population	1999 Population on Moraine	Projected Population 2011	Projected Population on Moraine	Projected 2011 Population	Projected 2021 Population on Moraine
Town of Richmond Hill	116,035	21,287	180,000	53,721	200,000	64,181

Source: Strategy at 14.

Table 4. Development Applications Submitted in the Corridor (as of Jan. 2000)

Application	Total Area (ha)	Total Units (est.)	Population (+/-)
Yonge West – Oak Ridges Farm Co-Tenancy Private OPA	165	4,077 – 4,485	13,167 – 14,485
Yonge West - Drynoch Farms Private OPA	128	1,865	5,900
Yonge West – Duke of Richmond Private OPA	209	2,200	7,00
Yonge East – Bond Lake Park Homes & Bond Lake Investors Private OPA	250	2,700	8,640

Source: Strategy at 18, 19.

In the early fall of 1999 growth pressures were such that four landowners (developers) in the Corridor applied for private OPAs to develop their land. They were impatient with the Town's more methodical approach to the development question of the Corridor, commenced a year earlier with a series of population and servicing studies, as well as the Town's Corridor Study which surveyed the natural characteristics of the lands.⁵⁷ The developers' proposals would create over 11,000 housing units, covering 752 hectares (see Table 4). The environmental standards they proposed were based on those that prevailed in OPA 129, the Town's most recent comprehensive amendment.⁵⁸ In November, when a response to their OPA applications was not forthcoming in the appropriate time set out under the *Planning Act*, they appealed to the OMB.⁵⁹

The Town's response to the developers' OPA requests was OPA 200,⁶⁰ which was released on January 7, 2000 (for a chronological review of significant events related to OPA 200 and the Corridor see Table 5; for a review of its contents see section 3.3.2). OPA 200 provoked strong reactions from all sides immediately upon its release. What follows is a brief summary of the reactions of prominent stakeholders⁶¹

Environmental groups, such as the Save the Oak Ridges Moraine Coalition (STORM) and Save the Rouge Valley System (SRVS) wanted to see the *entire* Corridor preserved from development, or at a minimum a natural corridor at least two kilometers in width to ensure connectivity across the Moraine. The extent of the ecological policies in OPA 200 was of little consequence in light of the size of development being contemplated. Judging by the voracity of citizen protests, they were strongly supported by Town residents.

⁵⁷ Geomatics International Inc., *Richmond Hill Corridor Study*, 1998. The Corridor Study identified key natural features for protection through the establishment of continuous natural corridors with linkages across the Moraine, particularly to the east and west.

⁵⁸ Richmond Hill (Town of). *Official Plan Amendment #129- North Urban Development Area Secondary Plan (Ontario Municipal Board Consolidation)* (10 July 1995) Richmond Hill Planning Department. [hereinafter OPA 129]. It applied to the NUA west of Yonge St. and was the object of a contentious OMB challenge where it was approved in 1995.

⁵⁹ *Planning Act*, *supra* 4 s.22(7)(c).

⁶⁰ OPA 200, *supra* note 15.

⁶¹ The following observations are based on a survey of newspaper accounts from the time of OPA 200.

Developers were quick to declare that their construction and engineering technologies and the relevant municipal and provincial environmental policies were sufficient to allay fears that the ecological functions of the Moraine could be irreparably impaired by development. However, for the most part they stayed low, waiting for the OMB hearing.

The Town's Planning Department countered that it was compelled by the threat of litigation and a restrictive policy framework to proceed with a comprehensive plan for growth that could be reasonably defended at the OMB. It was forwarded as an effective means of officially designating land for protection before specific development plans could be drawn. As a result, large-scale preservation of the Corridor was never seriously considered. In defence of this strategy, the Town's mayor, Bill Bell noted that the provincial government had not empowered municipalities with the planning tools necessary to set aside large areas of land from development.⁶²

In the end, under considerable public pressures, Town Council unanimously rejected OPA 200 in March 2000. Meanwhile (now) five developers with land development proposals in the Corridor have continued with their appeals to the OMB. The OMB hearings began on May 29, 2000 and continue through May 2001.

Table 5

Recent Concern for the Richmond Hill Corridor	
1998	Town begins to examine land use options in the Corridor.
October 1999	Town applies to York Region to expand its Urban Boundary to encompass the corridor.
November 1999	4 (now 5) developers launch pre-emptive appeals to the OMB to obtain approval for proposals that were based on the environmental standards of OPA 129, the Town's most recent Official Plan Amendment. The lands are located in the 'Yonge East' and 'Yonge West' development zones
January 7, 2000	OPA 200 is released publicly.
February 21, 2000	MMAH asks Richmond Hill protect a corridor 600m wide in

⁶² G. Swainson & R. Brennan, *War of Words Over the Moraine* The Toronto Star (26 February 2000) A4.

February 23, 2000	the amendment. Town Council delayed decision on the amendment to allow the province to commit funding for the 600m corridor it requested.
March 15, 2000 May 4, 2000	Town Council votes unanimously against passing OPA 200. A provincial position filed with the OMB outlines a new provincial stance on the Moraine. It states that development is inappropriate in much of OPA 200 and that the development applications do not adequately protect the Moraine. It calls for preservation of a natural corridor up to 2 kilometers wide in places
May 29, 2000	OMB hearing on the developers' development proposals begins. 11 weeks are set aside. 29 parties and participants are set to partake in the hearings.
August 1, 2000 May, 2001	The Hearings are extended a further 9 months. The OMB hearings continue. No interim report has been released. The projected completion is pushed back until early 2002.

Over the course of OPA 200 the province repeatedly refused to re-shape a planning framework that many, including the Richmond Hill's mayor, perceived as unable to accommodate ecological objectives. Yet inexplicably, in May 2000 its OMB position stated that 80 percent of the lands in the Corridor needed to be protected to ensure the ecological integrity of the Moraine.⁶³

In the end OPA 200 pleased no one and resolved little. OPA 200 challenged strongly held perceptions of the limits of the planning framework. Richmond Hill will inevitably come under tremendous pressure to bring forth another, more ecologically sensitive, OPA.⁶⁴ Whether the relatively innovative ecological measures of OPA 200 are defensible, or more importantly whether the Town could achieve measures towards large-scale preservation that embody the principles of landscape ecology, under the parameters of the present planning framework will occupy the remainder of this paper. Notably, one developer

⁶³ *1133373 Ontario Inc. v. York (Regional Municipality)*, [2000] O.M.B.D. No. 461. (O.M.B.), online: QL (OMB). The decision of the sixth pre-hearing conference. This built upon a February 2000 declaration that a 600 metre corridor should be preserved across the pivotal Yonge St. threshold.

⁶⁴ The OMB has the power to approve the development application and in effect create an OPA for the Town (*Planning Act, supra* 4 s.17(50)). For the purposes of the paper and owing to the unending OMB hearings, the assumption will be made that Richmond Hill will have to formulate a new OPA.

suggested that in the future it will be “unfortunate the Town of Richmond Hill won’t have the environmental policies of OPA 200.”⁶⁵

3.2 Landscape Ecology: Framework of Evaluation

3.2.1 Origin and Principles

Landscape ecology is an ecologically principled conservation approach that can be applied to rural regions and urbanizing areas alike to overcome the effects of habitat fragmentation thereby achieving greater ecological integrity and biodiversity. This is achieved by retaining and regenerating key connections between natural areas in the landscape so that ecological processes may operate at a level sufficient to maintain ecological function and human co-existence. The purpose of landscape ecology is to provide a spatial language of analysis for these landscapes, thereby mediating between the natural sciences and changes of the landscape.

For the purposes of this paper, the adoption of landscape ecology provides that the legal framework governing land use decisions on the Moraine in Richmond Hill will be measured from a decidedly ecological perspective. Its success will be determined by its ecological criteria and the measures it produces on the ground. If certain key principles of landscape ecology are not achieved then the planning framework cannot be said to have enabled an outcome that will ensure the ecological integrity of the Moraine.

The study of ecosystems at the scale of landscapes is not new. For decades the natural sciences’ approach to habitat protection tended to focus on, and describe, relatively homogeneous landscapes. Until recently in North America there was an emphasis on identification and protection of rare and unspoiled ecological areas, often in isolation from one another.⁶⁶ At the same time, the highly fragmented landscapes of Europe were already causing the fusion of the natural sciences with landscape planning. In the 1986 seminal text,

⁶⁵ Swainson, G., *Strong Moraine Defence Urged at OMB* The Toronto Star (20 March 2000) A22.

⁶⁶ G. Katz, *Natural Areas in City, Suburb and Town and the Application of Landscape Ecology* (1995) 35 Plan Canada 18 [hereinafter Katz].

Landscape Ecology, North American Richard Forman and European Michel Godron brought this fusion to greater North American attention while clarifying the key principles of landscape ecology.⁶⁷

Since 1986, landscape ecology has found general, though not universal, practical acceptance among conservation biologists.⁶⁸ Noss, one of landscape ecology's most esteemed proponents, acknowledges that it can be applied too eagerly and generically without diligent research on the particularities of each case. However, he also notes that the protection and linkage of natural habitat areas "would seem to be the prudent course" based on present biological data and the unending pressure of human disturbance.⁶⁹

At its core it is the study of spatial patterns and ecological *processes* (flows of energy, water, nutrients and species). Thus, its great contribution is the principle of connectivity of ecological processes across the landscape. Such an approach flows from the understanding that when ecologically significant areas are isolated from one another ecological processes are interrupted or lost. This is most often and easily understood in terms of biodiversity loss.

The analysis of landscapes occurs at the scale of many, to hundreds of, kilometers square to encompass the mosaic of ecosystems or land use types repeated over the land and the linkages between them.⁷⁰ Each landscape has its own structure and function, thereby allowing consideration of heterogeneity, or biotic diversity, species flow, nutrient distribution, energy flows and landscape change and stability on a much larger and realistic scale than previous approaches. In applying landscape ecology it is hoped that the landscape will retain enough of its structure and function to allow ecological processes to occur

⁶⁷ R. Forman, & M. Godron, *Landscape Ecology*, (New York: Wiley and Sons, 1986) [hereinafter Forman & Godron].

⁶⁸ R. Hobbs, *Future Landscapes and the Future of Landscape Ecology*, (1997) 37 *Landscape and Urban Planning* 1.

⁶⁹ R. Noss, *Corridors in Real Landscapes: a reply to Simberloff and Cox* (1987) 7(2) *Natural Areas Journal* 159. See also: R. Noss, *Nodes, Networks and MUMs: Preserving Diversity at all Scales*. (1986) 10(3) *Environmental Management* 299.

⁷⁰ R. Forman, *Some General Principles of Landscape and Regional Ecology*, (1995) 10 *Landscape Ecology* 133 [hereinafter Forman].

naturally and to withstand the effects of changes to the matrix, such as further habitat fragmentation or disease.

Forman and Godron established the key principles of landscape ecology. The structure of a landscape is made up of natural patches of ecological significance linked by corridors, all of which vary in size and frequency depending upon the extent of human disturbance.⁷¹ These elements, together with remaining lands, comprise the landscape's overall matrix. Not unlike an equation, the matrix is the major determinant of the scale and integrity of the ecological processes through the landscape over time. As much of the elements of the matrix as possible must be protected.

Patches are the reservoirs of ecological processes and thus the anchors of landscape ecology. Generally, they are relatively homogeneous, though they vary in size from the very small and specific, such as significant wetland, to the very large and ecologically representative, such as an area of forest capable of sustaining core habitat.⁷² The shape of a patch and the nature and extent of its edges also determines its effect on, and how it will be affected by, ecological processes and changes. For instance, the less edge a patch has the less vulnerable it is to the attrition of certain species within, or to invasion by others.⁷³

Corridors provide the essential natural connectivity between various patches and ecological nodes. They have to provide sufficient cover and area to allow migration of species, and energy and nutrient flows. The size of an effective corridor is directly related to the size of those species that require the greatest space and the size of the landscape in question. Common corridors include vegetated ridge tops or river valleys.

Landscape ecology is well suited to assess land use decisions in urbanizing areas precisely because it acknowledges the reality of human interaction with ecological processes. It is not focused on 'unspoiled nature,'

⁷¹ Forman & Godron, *supra* note 67.

⁷² Forman, *supra* note 70.

⁷³ D. Saunders, R. Hobbs, & C. Margules, *Biological Consequences of Ecosystem Fragmentation: A Review*, (1991) 5 *Conservation Biology* 18.

rather it explicitly links the natural sciences with landscape planning.⁷⁴ There is a gradient of modification caused by human interaction with the environment that increases from relatively undisturbed natural areas to agricultural areas to suburban and then urban areas. The structural elements of landscape ecology, and the vitality of the ecological processes discussed above, tend to decline along this gradient as human disturbance increases, yet they do not disappear. Thorne and Huang describe the ultimate objective of landscape ecology, wherever it is applied, as ameliorating the effects of human disturbance by bringing together the various elements of the matrix in a comprehensive and integral manner.⁷⁵ Generally, large and small patches are linked in a matrix through corridors. This can not always be achieved by linking ecologically healthy or significant areas. Often 'ecologically benign' land must be incorporated into a protection plan to ensure the overall ecological integrity of the landscape. For example, it may be necessary to set aside undeveloped land that has no particular 'characteristics' of a natural corridor in order to link natural patches and ensure the overall health and integrity of the ecological processes in a landscape.

Ideally, human settlement is concentrated in other lands in the matrix that do not fall within these constituent elements. This is not to say that the built and natural worlds are treated in isolation by landscape ecology. Rather, landscape ecology envisions that humans live within healthy functioning ecosystems, however certain ecological processes need a certain assured integrity in order for that to be achieved. Landscape ecology operates above the smaller scale concerns of the built environment's environmental design and the extent to which it is symbiotic with the natural environment.

Landscape ecology's acceptance among the municipal planning community has been sparse. Instead, ecosystem planning, a related conservation planning approach, has garnered much of the attention. Ecosystem

⁷⁴ J. Thorne & C-S. Huang, *Toward a Landscape Ecological Aesthetic: Methodologies for Designers and Planners*, (1991) 21 *Landscape and Urban Planning* 61 [hereinafter Thorne & Huang].

⁷⁵ *Ibid.*

planning effectively applies many of the same physical principles as landscape ecology for preserving natural areas. However, it goes beyond physical prescription to describe how ecological concerns need to be integrated into the social and economic factors that drive the decision-making process. In essence it describes an ecological process of planning as well as ecological measures, whereas landscape ecology is exclusively concerned with the measures of ecological protection on the ground. Each approach has utility in different contexts, but for the purposes of evaluating the ecological effects of the planning framework, landscape ecology is the most straightforward. Notably, reports that recommend, or rely on, ecosystem planning models are endorsing many of the key principles of landscape ecology, while further describing an ecological methodology to planning.

Table 6

Key Principles of Landscape Ecology Applicable to the Moraine

The preservation and enhancement of ecological processes, and therefore ecological functions, relies on the following principles:

1. application to landscapes at sufficiently **large scale** to ensure the protection of ecological processes
 - the scale of many square kilometers is most appropriate, particularly for large natural regimes.
2. the landscape is a matrix of **ecological elements** which must be protected
 - the fundamental elements in the matrix are: natural patches and natural corridors
 - large or significant natural areas that serve as reservoirs of ecological processes must be protected as patches (i.e. wetland complexes, large forested areas, unique ecological regimes)
 - corridors must be protected and enhanced (i.e. continuous natural areas, river valleys, ridge tops)
3. **connectivity** of the elements of the matrix, to ensure the integrity of ecological processes
 - natural patches, as reservoirs of ecological processes, must be connected with other patches through natural corridors
 - connectivity must be at a scale sufficient for those species that require the largest space and/or for the landscape being protected

4. integration of **ecologically benign land** to ensure that the overall ecological integrity of a feature is protected
 - where necessary land that has no prominent or readily identifiable ecological importance (it would be readily identifiable if it were, for example, a wetland, or old-growth forest) must be protected as part of the matrix to ensure the overall objectives of landscape ecology are met
5. **human settlement** is concentrated in areas of the landscape matrix that are not part of the connectivity system, in a manner which does not compromise the connectivity
 - landscape ecology does not prescribe the isolation of the natural and built worlds, but rather the minimization of the gradient of human modification of ecological processes

3.2.2 Application to the Moraine

The principles of landscape ecology surfaced in the GTA in the 1990s. During that time, the flurry of initiatives that sought to address the plight of the Moraine recommended approaches to, and measures of, land protection that reflected several of the key principles of landscape ecology. Among the most prominent examples is Kantor's *Greenlands* which sought to overcome habitat fragmentation by linking the Moraine with the valley corridors that flowed from it and the natural areas of the Niagara Escarpment. Similarly, the reports of the Royal Commission endorsed the concept of landscape ecology in proposing a series of "major green corridors [that] should connect the waterfront, valley systems and Oak Ridges Moraine."⁷⁶ Certain of the reports for the Moraine produced for and by the Oak Ridges Moraine Technical Working Committee (Committee) also identified many of the approach's key principles, particularly the need for the conservation and linkage of large natural areas.⁷⁷

Landscape ecology principles are ably applied to relatively well developed, or well-altered, regions, such as the GTA. It originated in the heavily altered landscapes of Europe. San Diego County's use of landscape ecology in its current effort to preserve diverse habitats over its 6700 square kilometers is considered a model of regional scale for growth pressured areas in the United

⁷⁶ The Royal Commission 1992, *supra* note 31 at 51.

⁷⁷ Strategy, *supra* note 42.

States.⁷⁸ Closer to the GTA, in 1993, the Region of Ottawa-Carleton incorporated into its new OP the principles of landscape ecology at a regional-scale.⁷⁹

Landscape ecology has undeniable applicability to the landscape of the Moraine and to the landscape of its surrounding region. The Moraine is a key component of the natural systems of the GTA region by linking with important river valleys and the Niagara Escarpment. The undeveloped Corridor in Richmond Hill is recognized as a key natural corridor of a regional scale on the Moraine. It is the only remaining potential natural link between the key natural areas, or patches, of the Moraine. Its integrity and health has a determinative effect on the viability of the ecological processes occurring across the Moraine and the broader region. Consequently, applying landscape ecology's principles, anything less than a very broad and largely undeveloped natural corridor would not ensure the maintenance or enhancement of the ecological process of the Moraine itself. What is optimally needed is large-scale protection of the Corridor. This conclusion provides the determinative evaluative framework for the ecological effectiveness of the planning process. The March 2001 donation of federal lands at the juncture of the Moraine and the Lower Rouge Valley bolsters the already large natural Lower Rouge area, demonstrating that large-scale opportunities of protection in the spirit of landscape ecology can be realized.

3.3 OPA 200 v. OPA 129

Before embarking on an examination of whether the existing planning framework could support progressive ecological approaches to land use in Richmond Hill, a base line of analysis must be established. The following section will set out certain key ecological policy differences between Richmond Hill's OPA 129 and OPA 200 in order to highlight the ecological advances the latter contained, but also to illuminate the tensions that shaped the course of OPA 200. Thereupon the discernment of how effectively OPA 200 was able to achieve the objectives of

⁷⁸ P. Rookwood, *Landscape Planning for Biodiversity* (1995) 31 *Landscape and Urban Planning* 379.

⁷⁹ Katz, *supra* note 66.

landscape ecology will enable an informed analysis of the planning framework's potential to support initiatives such as OPA 200 or even more comprehensive ecological protection measures.

3.3.1 OPA 129

The original root of controversy concerning OPA 200 focused on its ecological policies, which were considerably strengthened from those of OPA 129. OPA 129 was a comprehensive amendment that addressed the NUA, an area of 1100 hectares bounded by Bathurst St to the west, Bloomington Rd. to the north, Bayview Ave to the east and by a line just south of Lake Wilcox on the south (see Map 6). The area, including the community of Oak Ridges, had long been designated urban by Richmond Hill and had experienced historical episodes of small-scale development. Lake Wilcox was the defining ecological feature in the NUA, in addition to some headwater streams of the Humber River. Developer owning land in the NUA, had forwarded development proposals as early as the late 1980s for 8000 housing units for over 23,000 people.⁸⁰ The affected developers had OMB appeals pending for OPA 71, OPA 129's predecessor, when the former was abandoned for the latter in 1993. OPA 129 was undertaken by the Town to infuse greater ecological policies and Moraine considerations into the NUA plan.⁸¹ OPA 129 was approved by the Town in September 1994. The developer appeals were transferred to OPA 129 and were resolved in an OMB decision rendered in July 1995. That decision approved, in large part, OPA 129 and its strengthened ecological policies.

In OPA 129 Richmond Hill adopted policies for growth in the NUA based on the 'Environment First' philosophy. It held that "any development in the community be undertaken in a manner which preserves and embraces the integrity of the natural environment and natural systems."⁸² In order to achieve this, among other measures, the OPA introduced two levels of Environmental

⁸⁰ *Re Richmond Hill (Town) Official Plan Amendment No. 129* (July 10, 1995) [unreported] O.M.B. file No. O 940001 (O.M.B.) [hereinafter *Re OPA 129*].

⁸¹ *Ibid.*

⁸² OPA 129, *supra* 58 at 2.1.

Protection Areas (EPA). EPA 1 lands were the most ecological significant in the NUA and no development or land disturbances would be permitted whatsoever on

3.2.2 a) Lands [that]... contain most the significant plant species and wildlife species known to be present within the North Urban Area as well as Environmentally Sensitive Areas, Areas of Natural and Scientific Interest, mature forests, all wetlands classified by the Ministry of Natural Resources and the Humber River Corridor.⁸³

Thus, while the EPA 1 definition was progressive in the evolution of Richmond Hill ecological policies, it was still defined narrowly. EPA 2 areas were even more restrictively defined to encompass only those woodlots in advanced regeneration that “frequently adjoin significant mature vegetative communities and generally harbour interior forest – nesting bird species,” or minor watercourses that drain to the Humber River.⁸⁴ There were no other specific categories of ecological protection, other than for watercourses, buffers and ecological restoration areas. There was no acknowledgement of natural connectivity nor any provision for natural corridors. Approximately 20 percent of the NUA was protected, though most of the protection was EPA 2.

Affected developers’ challenge of OPA 129 at the OMB was in an effort to loosen the perceived restrictiveness of its ecological policies.⁸⁵ The thrust of their challenges were aimed at the ‘Environment First’ principle and the sanctity of EPA 1. At the OMB hearing the Town emphasized that no other planning objectives could assume precedence over OPA 129’s environmental objectives. The OMB agreed in the context of a disputed EPA 1: “the Town has adopted the position that in this area, the environment comes first and other matters that would ordinarily be of importance.... must take second place to the environment.”⁸⁶ Further, it asserted that developers’ “hardship is regrettable but

⁸³ *Ibid.*, at 3.2.2 (a), (b).

⁸⁴ *Ibid.*, at 3.2.2(a).

⁸⁵ One developer unsuccessfully appealed to have the amendment’s coverage expanded to include part of the Corridor, which would later be subject of OPA 200.

⁸⁶ *Re OPA 129, supra* 80 at 82.

the policy is a necessary consequence of accepting the principle of Environment First.”⁸⁷

The implications of the OMB’s decision were subsequently interpreted by the development industry as having established the ‘best practices’ of environmental standards for development and the ceiling of what provincial policies would permit.⁸⁸ The Urban Development Institute points to the finding that OPA 129 “satisfied the tests of proper planning, conformance with matters of provincial interest... and was in the public interest” and to its characterization of the plan as having ‘faithfully’ incorporated the [Oak Ridges Moraine Implementation] Guidelines (Guidelines).⁸⁹

3.3.2 OPA 200

OPA 200, crafted in late 1999, addressed the undeveloped Corridor on the Moraine and as such promised to be considerably more contentious than OPA 129. Undeterred, the Town Planning Department, in the introductory text of OPA 200, clarified that its measures would represent the next step in ecological policies and acknowledged the legal gamble of taking its policies beyond the ceiling that the OMB had approved in *Re OPA 129*:

... the Town is raising the policy expectations with respect to environmental protection in the absence of provincial legislation. This could lead to requests of the Ontario Municipal Board to modify these policies to make them less stringent.⁹⁰

It was also conceded that environmental groups might demand more comprehensive measures.

Generally, the ecological policies of OPA 200 were broader in coverage and included more comprehensive criteria than OPA 129. Unlike OPA 129, it went beyond the vague ecological prescriptions of the Guidelines to draw from

⁸⁷ *Ibid.*, at 83.

⁸⁸ Urban Development Institute, *A Question of Restoring Balance: Balancing the Interests of the Environment and Growth Expectations for the Oak Ridges Moraine: A Response to the Process for the Preparation of a Long-Term Strategy for the Oak Ridges Moraine* (30 November 1999) [hereinafter UDI].

⁸⁹ *Re OPA 129*, *supra* note 80 at 39.

⁹⁰ Richmond Hill (Town), *Staff Report: SRP.00.003* File No. D10-OP-E (12 January 2000).

the unadopted *Oak Ridges Moraine Area Draft Strategy for the Greater Toronto Area: An Ecological Approach to the Protection and Management of the Oak Ridges Moraine*⁹¹ (Strategy) and the Town's Corridor Study. The Corridor Study identified key natural features for protection through the establishment of continuous natural corridors with linkages across the Moraine, particularly to the east and west. Thus, a good part of OPA 200 was devoted to describing a more detailed ecological approach to land identification and to protection measures that mirrored the principles of landscape ecology.

As in OPA 129, the primary guiding principle for development in OPA 200 was 'Environment First':

...[Environment First] approach provides not only for the protection of natural areas but also the maintenance, restoration, and enhancement of ecological processes, biological diversity, wildlife habitat, corridors and ecological linkages between significant natural features.⁹²

The objectives of the Environment First principle were expanded and improved. Added was a supportive purpose statement "to preserve, protect and enhance the natural environment and natural heritage to ensure a sustainable natural system."⁹³ New objectives also more explicitly acknowledged the unique character of the Moraine, and pledged to move from minimizing impacts on groundwater resources to the maintenance and enhancement of this resource where possible.⁹⁴

OPA 200 represented an improvement upon OPA 129 because its ecological policies were devoted to describing a more detailed approach to land identification and to protection measures that mirrored the principles of landscape ecology. The improvements are most apparent in the natural corridor policies and the EPA 1 designation criteria. Natural corridor policies were included in OPA 200, representing its most singular improvement upon OPA 129.

⁹¹ Strategy, *supra* note 42. See the section 4 for a full discussion of the Strategy and the Guidelines.

⁹² OPA 200, *supra* note 15 at 1.4.8.2.

⁹³ *Ibid.*, at 1.3.2.1(ii).

⁹⁴ *Ibid.*, at 1.3.2.1 (i)-(v).

Aligning with the principle of connectivity, the “fundamental structuring element” of long-term protection was identified as the ‘natural corridor system:’

This amendment provides... specific environmental policies and criteria to ensure the long term protection and sustainability of significant environmental areas through a natural heritage corridor system.⁹⁵

Natural corridor policies encompassed protection for interior, wetland, riparian and edge corridors.⁹⁶ For instance, interior corridors were stated to “serve to maintain and link forests with interior conditions through a functional connection for the migration and dispersal of forest interior flora and fauna.”⁹⁷ The connectivity policies increased the ambit of lands that could be protected. Importantly, however, in restricting corridors to existing natural regimes or features, the Town did not enact policies to protect land as corridors that did not fall into a natural areas category. More to the point, the Town could not devote land to corridors unless the land had a specified natural characteristic beyond simply being logical territory on which to create a corridor. As a result, the authority to achieve large-scale protection of lands in a manner consistent with landscape ecology for a feature of the Moraine’s scale, was significantly restricted. This limitation was likely due to the above mentioned compromises the Town had to make to ensure that OPA 200 defensible at the OMB by not overreaching provincial policies (see section 5.3).

Considerably more effort was devoted in OPA 200 to identifying and describing the key structural elements intended to achieve ecological sustainability. For instance, eleven ecological regimes could be considered for EPA 1 designation, significantly increasing the potential coverage of EPA 1 protection policies.⁹⁸ As such, the extent of natural patches was increased considerably over that of OPA 129. In addition, certain natural features were

⁹⁵ *Ibid.* at 4.

⁹⁶ *Ibid.*, at 2.2.1.16.7 – 11.

⁹⁷ *Ibid.* at 2.2.1.16.8.

⁹⁸ Included were environmentally sensitive areas, mature forests or significant woodlands, areas supporting vulnerable, threatened or endangered species and areas with significant groundwater discharge function.

targeted for more explicit and comprehensive protection, including groundwater resources and kettle lakes.⁹⁹

Although 35 percent of the Corridor was protected, OPA 200 did not protect its entirety and considerable room for was devoted to development (see Map 7).¹⁰⁰ That development was even permitted is the source of environmentalist and citizen groups' anger. Moreover, while the policies of OPA 200 may have been stronger than OPA 129, it also opened up previously undeveloped land for development, whereas OPA 129 was 'filling in' areas that had historically seen development. Depending on final subdivision approvals, as many as 17,000 homes could be built to accommodate up to 50,000 people.¹⁰¹ The center of protection was the Jefferson Forest, from either side of which the key natural corridors were organized. Notably, the corridor is at its narrowest at, and west of, Yonge St, no more than a few hundred meters wide. Included for protection in EPA 1 areas were many of the Corridor's wetlands and kettle lakes.

Insofar as *only* the Corridor is concerned, OPA 200 achieved many of the objectives of landscape ecology compared to the environmental policies of Richmond Hill's neighbours.¹⁰² Connectivity was stressed and facilitated by inclusive corridor policies, while the scope of potential natural patches was increased. On negative side, the absence of policies to allow for the protection of ecologically benign land and the extremely narrow natural corridor at Yonge St. undercut the overall effect of OPA 200's ecological policies and a fuller reflection of the principles of landscape ecology. Perhaps most importantly, landscape ecology dictates that the appropriate scale of analysis of a landscape the size of the Moraine has to be considerably larger than just the Corridor. As such, the Corridor cannot be considered in isolation, rather it must be considered in the

⁹⁹ The detail of the protection is illustrated by prohibitions on development of kettle lakes. Development is prohibited where it would alter a natural shoreline, result in reduced natural shoreline vegetation or adversely affect the hydrological characteristics of the lake (OPA 200, *supra* note 15 at 2.2.1.16.16).

¹⁰⁰ C. Alphonso, *Richmond Hill Considering Plan to Save Part of Moraine* The Globe and Mail (13 January 2000) A6.

¹⁰¹ G. Swainson & L. Feneng, *Moraine Plan Called 'Death Warrant'* The Toronto Star (21 February 2000) B3. The FUA 2 would also see major arterial roads constructed, expanded or extended

¹⁰² Compared to the ecological policies most recently approved in neighbouring Aurora, Vaughan and Markham.

context of the Moraine and the natural systems of the GTA. At such a level of analysis, the ecological measures in OPA 200 are insufficient. As proponents of landscape ecology stress, and as environmentalists understood, large-scale landscapes need large-scale protection. Inconsistent and site-specific measures will not preserve larger-scale ecological processes.¹⁰³ Because the Corridor is the last significant undeveloped tract of the Moraine to pass across Yonge St. landscape ecology dictates that its role as a natural linkage is vital. Anything less than a very broad and relatively undisturbed natural corridor through the Corridor would not ensure the maintenance or enhancement of the ecological processes of the Moraine itself. In other words, the larger part of the Corridor needs to be entirely set aside from development. Consequently, development approvals on the scale of OPA 200 are too large and pervasive. Ironically, for reasons that will be discussed below, it was the province that finally acknowledged that something greater than OPA 200 was needed. Thus, in the end, OPA 200 did not fulfill a key objective of landscape ecology applied to the Moraine as a whole – the most appropriate level of analysis.

4. The Provincial Roles – Policy Formulation and Oversight of the Planning Process

4.1 Introduction

Whether Richmond Hill can achieve something more comprehensive and genuine than OPA 200 in the present planning framework is the issue that will occupy the remainder of this paper. The first factor to consider is the provincial policy and planning role. The most decisive means by which the province of Ontario can regulate the direction of municipal land use decisions is through the policy framework of the *Planning Act*. Strong policies guide land use, yet they also serve as both an authority and justification for municipal land use decisions. Insofar as ecological policies are concerned, stronger policies do not appear

¹⁰³ See Forman & Godron, *supra* note 67 and Noss, *supra* note 69.

forthcoming. The present policy framework, in combination with the legal structure, has been designed to increase municipal autonomy, yet it has set them adrift, leaving them solely responsible with their limited planning tools to protect ecological concerns.¹⁰⁴ Accordingly, the question of the appropriate reach and depth of provincial policy is, in fact, a question concerning the appropriate role, or level of involvement, of the provincial government in local land use decisions. To be sure, more comprehensive ecological policies addressing the Moraine would embolden Richmond Hill's efforts to set aside land from development. Such policies could have spawned more comprehensive ecological measures than were possible in OPA 200.

The following section will examine the general and Moraine-specific provincial policies that inform the ecological considerations of land use decisions on the Moraine. The effectiveness of these policies will be related to OPA 200 and prescriptive measures will be proposed, including Moraine-specific legislation.

4.2 General Provincial Policy

The general ecological policies authorized under *Act* are insubstantial. Despite a series of legislative changes in the 1990s, the ecological policies informing land use in Ontario remain, as they were in 1990, generally unhelpful to those seeking large-scale land preservation.

4.2.1 Bill 163

The first package of recent changes to provincial policies occurred as a result of the Commission on Planning and Development Reform in Ontario (Commission).¹⁰⁵ The Commission was established by the NDP government, in

¹⁰⁴ Bill 20, *Land Use Planning and Protection Act*, 1st Sess., 36th Leg., Ontario, 1996 (assented to 6 April 1996, S.O., c.23) [hereinafter Bill 20].

¹⁰⁵ Commission on Planning and Development Reform in Ontario. *New Planning for Ontario: Final Report of the Commission on Planning and Development Reform in Ontario* (1993) Queen's Printer for Ontario: Toronto.

part, to respond to concerns that land use decisions were having a negative impact on the natural environment.¹⁰⁶ Most of the Commission's recommendations were adopted in Bill 163, the *Planning and Municipal Statute Law Amendment Act* in 1994,¹⁰⁷ (Bill 163) by way of new PPSs with considerable more ecological detail made more legally binding by changes to the language of section 3. The changes thereby infused ecological considerations and a stronger provincial direction into the policy framework of the *Planning Act*.

To give effect to the mix of provincial interests listed in section 2, Bill 163 attached seven comprehensive PPSs to the *Act*.¹⁰⁸ PPSs are broad statements of provincial policy with respect to specific issues that, unlike other policies and guidelines, authorized under section 3 of the *Act*. PPSs articulate a provincial position, and direct municipal decisions. Prior to 1990 the only PPS with any direct ecological implications was the Wetlands Statement. Under the amended *Act*, all municipal land use decisions had to 'be consistent with' the seven PPSs, replacing the previous language of 'shall have regard for.' In effect they had been elevated in importance "from the level of mere guidance to that of strict governance."¹⁰⁹ They could not be breached.

The detail and coverage of the PPSs and the change in the language of section 3 more clearly defined, for the municipalities the expanded ecological considerations for which they needed to account. PPS A, *Natural Heritage and Ecosystem Protection and Restoration Policy* (PPS A)¹¹⁰ went considerably further in ecological detail and application than any previous land use policy expression in Ontario, and is illustrative of the scope of the PPSs (see Table 7).

¹⁰⁶ Perhaps most instrumental in the formation of the Commission was the *Greenlands* report which called for greater provincial policy input and consistency in order to aid municipalities in preserving land from urban expansion and to protect natural features, such as the Moraine.

¹⁰⁷ Bill 163, *An Act to Revise the Ontario Planning and Development Act and the Municipal Conflict of Interest Act, to amend the Planning Act and the Municipal Act and to amend other statutes related to planning and municipal matters*, 3rd Sess., 35th Leg., Ontario (assented to 28 November 1994, S.O. 1994, c.23).

¹⁰⁸ The 7 PPS were as follows: Natural Heritage, Environmental Protection and Hazard; Economic, Community Development and Infrastructure; Housing; Agricultural Land; Conservation; Mineral Aggregate and Petroleum Resources.

¹⁰⁹ M. Vaughan, *Ontario Implements Report of Sewell Commission* 104 *Municipal World* (July 1994) at 18.

¹¹⁰ Ontario, Ministry of Municipal Affairs and Housing, *Comprehensive Set of Policy Statements* (1995) Toronto: Publications Ontario.

The language of the PPS A encouraged the application of landscape ecology principles and criteria. Its progressive aspects included the requirement of natural connectivity and the prohibition of development in several natural regimes,¹¹¹ unless it could be demonstrated to have no *adverse effects*. Such language increased the potential scope of ecological effects that could be found contrary to provincial policy, compared to the former, and more narrowly worded, *negative effects*. Notably, there was little support for protection of ecologically benign land. Land had to fall into an ecological category to achieve protection.¹¹²

In formulating extensive and effectual PPSs, the province articulated a strong vision and, therefore, a greater involvement, but left realization to the municipalities. At the same time, the changes defined for municipalities the ecological considerations for which they had to account in a more comprehensively and unequivocal manner – no development meant no development. Thus, progressive municipalities were emboldened with unprecedented justification of legal effect for land use decisions and therefore, significantly enhanced planning tools.

4.2.2 Bill 20

Like so many other areas of environmental regulation, significant, even drastic, changes were made to the policy framework following the election of the Conservative government in 1995. Two of the objectives of Bill 20, passed into law as the *Land Use Planning and Protection Act* (Bill 20) in 1996 were to reduce the ‘heavy-handed’ role of the province in planning to give municipalities greater autonomy and, therefore, flexibility. The development industry welcomed the return to primacy of economic considerations in the planning process, yet others

¹¹¹ Development was prohibited in several areas, including groundwater recharge areas, areas of natural or scientific interest, stream and natural corridors or the habitat of threatened or vulnerable species,

¹¹² In the short window of time that the above amendments were in effect several municipalities, including the Town of Markham, the City of Vaughan and City of London undertook extensive environmental reviews of their Official Plans in order to meet the ecological considerations demanded by the new PPSs.

felt the changes “substantially re-instated the mess that was land use planning in Ontario in the late 1980’s.”¹¹³

Bill 20 repealed many of Bill 163 key provisions and replaced the seven comprehensive PPSs with a single PPS introduced by principles that were decidedly pro-growth, or economic in orientation. The first of the three principle that precede the PPS is illustrative:

Ontario's long term economic prosperity, environmental health and social well-being depend on:

managing change and promoting efficient, cost-effective development and land use patterns which stimulate economic growth and protect the environment and public health¹¹⁴

A comparison of the natural areas language of the former PPS A and the present PPS in Table 7 is illustrative of the degree to which the ecological policy framework of the *Act* has been weakened. The entire PPS is permissive and replete with vague and qualifying language, protection for natural areas is gutted and the ‘no means no’ approach is now ‘no means maybe.’ For example, development is prohibited only on significant wetlands (the definition of which has been narrowed) or on *significant portions* of the habitat of endangered or threatened species. Development can occur in significant areas if developers can achieve the easier standard of no *negative* effects on the natural features or ecological processes.¹¹⁵ The qualifying language of section 3, has been returned to ‘shall have regard for’ indicating a reduction in provincial concern for the adherence to the PPS by municipalities.¹¹⁶ ‘Shall have regard for’ is a problematic phrase that can be interpreted to justify a very limited involvement by the province.¹¹⁷ The Ontario Superior Court of Justice recently emphasized the breadth of the phrase: “to ‘have regard for’ falls somewhere on the scale that

¹¹³ K. Cooper, Letter to the Minister of Municipal Affairs and Housing (4 March 1996).

¹¹⁴ PPS principle 1

¹¹⁵ Ontario, Ministry of Municipal Affairs and Housing, *Provincial Policy Statement* (1997) Toronto: Publications Ontario [hereinafter PPS 1997]. Of note, nowhere is there mention of recharge areas or groundwater resources.

¹¹⁶ *Planning Act*, *supra* note 4 s.3.

¹¹⁷ The Butler Group (Consultants) Inc. *Land Use Planning Controls: Background Report for the Greater Toronto Greenlands Strategy* (1990) Toronto: The Butler Group.

stretches from ‘recite them and ignore them’ to ‘adhere to them slavishly and rigidly.’¹¹⁸ In its decision the court indicated that the wording demands more than superficial consideration, at least by the OMB. The development industry supported the wording change because it promised to return flexibility to the planning process.¹¹⁹ In reality, ‘flexibility’ is a subtle way of communicating ‘uncertainty’ or ‘lower standards.’ Undoubtedly, without legal effect, policies are considerably less effective.

The new PPS was part of a provincial effort to restore autonomy to municipalities. When considered in conjunction with the One-Window Planning Strategy (discussed below in section 4.5.1), it constitutes a withdrawal of provincial leadership in defining the overall and ecological direction of land use decisions. On the one hand, the detached and less rigorous policy framework could be said to release municipalities from the strictures of one that was detailed, yet generally applied. On the other hand, it casts municipalities adrift without a detailed direction from above, thereby removing from their limited decision-making repertoire a key planning tool necessary to implement environmental protection at the local level. The experience of OPA 200 points towards the latter scenario in the context of environmental decisions.

Table 7: Changes in the PPSs Addressing Natural Systems

1994 Provincial Policy Statement A.	
A. Natural Heritage, Environmental Protection and Hazard Policies - section 1 of 3;	
1.1	Development [defined four ways] may be permitted only if the quantity and quality of groundwater and surface water are protected. Development that will negatively impact on ground water recharge areas, head-waters and aquifers which have been identified as sensitive areas will not be permitted
1.2	Natural heritage features and areas will be protected.
a)	Development will not be permitted in significant ravine, valley, river and stream corridors, and in significant portions of the habitat of endangered species and threatened species. Development will not be permitted on adjacent lands if it negatively impacts the ecological functions listed above.

¹¹⁸ *Concerned Citizens*, *supra* note 1 at para. 19.

¹¹⁹ UDI, *supra* note 88.

- b)** Except for the areas covered in a), significant portions of the habitat of vulnerable species, significant natural corridors, significant woodlands, south and east of the Canadian Shield, areas of natural and scientific interest, shorelines of lakes, rivers and streams, and significant wildlife habitat areas will be classified into areas where either:
- 1)** no development is permitted; or
 - 2)** development may be permitted only if it does not negatively impact the features or the ecological functions for which the area is identified
- Development will not be permitted on adjacent lands to 1) and 2) if it negatively impacts the feature or the ecological functions for which the area is identified.
- 1.3** Development may be permitted if it does not harmfully alter, disrupt or destroy fish habitat. There will be no net loss of productive capacity of fish habitat, and a net gain of productive capacity wherever possible.'
- 1.4** In decisions regarding development, every reasonable opportunity should be taken to: maintain the quality of air, land, water, and biota; maintain biodiversity compatible with indigenous natural systems; and protect natural links and corridors. The improvement and enhancement of these features and systems is encouraged.

1996 Provincial Policy Statement

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; and
 - significant portions of the habitat of endangered and threatened species.

- b.** development and site alteration may be permitted in:
- fish habitat
 - significant wetlands in the Canadian Shield;
 - significant woodlands south and east of the Canadian Shield;
 - significant valleylands south and east of the Canadian Shield;
 - significant wildlife habitat; and
 - significant areas of natural and scientific interest
- if it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the areas is identified.

2.3.2 Development and site alteration may be permitted on adjacent lands to a) and b) if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area is identified.

2.3.3 The diversity of natural features in an area, and the natural connections between them should be maintained, and improved where possible.

4.3 Moraine-specific Policies

To understand the complete policy framework that governs Richmond Hill's decisions, it is necessary to examine those policies specifically designed for the unique character of the Moraine. More so than the general provincial planning policies, it appeared in the early 1990s that there would be considerable change

to these policies. Despite several years of unprecedented study and activity, and several hundreds thousand dollars, that did not happen (see Table 2).

In 1989, *Greenlands* warned that there was no single comprehensive provincial land use objectives for the 'sensitive' Moraine. In light of the encroaching development pressures, it recommended that the province take a Provincial Interest in the Moraine under section 2 of the *Act*.¹²⁰ The following year the Royal Commission made the same recommendation.¹²¹ In response, the Liberal government declared the Moraine a Provincial Interest in 1990 in order to generate a better understanding of, and planning approach to, the ecological complexity and significance of the Moraine.

4.3.1 The Oak Ridges Moraine Implementation Guidelines

The Guidelines were released in 1991 by the newly elected NDP government as a follow up to the Moraine's designation as a provincial interest in 1990. Intended to be an interim measure pending the completion of a permanent strategy by the Committee, they remain today as the only expression of the province's interest in the Moraine and the only criteria guiding land use decision there. The primary objective of the Guidelines was to articulate a means of protecting its significant natural features while controlling development.¹²² To achieve this it pronounced eight principles: growth and settlement, ecological integrity, landform conservation, significant natural areas, woodlands, watercourses and lakes, highly permeable soils and groundwater resources. In *Re 129*, the OMB described the Guidelines' effect as "limiting development and establishing strict tests for it in the area of the Moraine."¹²³ This interpretation suffers in its persuasive effect because as it was made during the reign of Bill 163 in reference to the ecological policies of OPA 129 which have been surpassed in OPA 200 for the lands in the Corridor. The Guidelines are of limited practical effect and minimal legal importance within the planning

¹²⁰ Kantor, *supra* note 29.

¹²¹ The Royal Commission, 1992, *supra* note 31.

¹²² Guidelines, *supra* note 48.

¹²³ *Re OPA 129*, *supra* note 80.

framework due to their broad language and scant details, and lack of legal effect, respectively.¹²⁴ They are short on details and very imprecise in places, as the following examples illustrate. The principle of ecological integrity was described in the following broad manner in 4.2.1: “Development must *recognize* natural systems and take steps to ensure they are maintained or enhanced.”¹²⁵ Not only does the word ‘recognize’ not provide clear definitions, but what might constitute ‘steps to ensure’ ecological integrity are only partially revealed in the descriptive evaluation criteria that follow. For instance, evaluation criterion 4.2.2(b) required that development demonstrate a maintenance and enhancement of significant natural areas. Other evaluation criteria states that connectivity between natural areas must be maintained, yet it does not elaborate on what constitutes connectivity. Like other policies, the Guidelines require the identification of recognized natural features to attach protection measures.

The above criticisms could be shrugged off if the Guidelines were in place for only as long as they were intended, or if they had legal effect under the *Planning Act*. However, because a long-term Moraine strategy was never implemented the oft-vague Guidelines are all that the policy framework has to provide to guide planners through the specific land use concerns that are raised on the Moraine.

Provincial guidelines addressing planning decisions have to be considered during OP reviews and OPAs, yet without legal effect they constitute the weakest form of provincial intervention. The general PPS has greater legal effect even with the permissive language of ‘shall have regard for,’ because it is at least authorized under the *Act*. The Guidelines need only be considered by municipalities and the OMB, and their application by both is discretionary. Thus, they provide unreliable legal support for the Moraine-specific measures in OPA 200 and even less for large-scale protection measures.

¹²⁴ Judging by a survey of OMB cases, many municipalities draw from the Guidelines.

¹²⁵ Guidelines, *supra* 48 s.4.2.1

4.3.2 Moraine Strategy for the GTA

After three years of study and fifteen background reports the Committee released the Strategy in early 1994.¹²⁶ It was meant to fulfill the 'expression of the provincial interest on the moraine.'¹²⁷ The Strategy's recommendations were not acted upon before the call of the 1995 provincial election and the Conservative government has since refused to re-visit the final report's recommendations. The moment had passed and the Committee's reports ultimately represent a lost opportunity for the province to institute a more thorough framework for protecting the Moraine's natural systems that went well beyond the limited utility of the Guidelines.

The Strategy boldly advanced an ecological planning framework for the Moraine in the GTA, defined by the interconnectedness of three identified natural systems: the water resources, landform conservation and the natural heritage systems.¹²⁸ In its criteria and principles the Strategy builds on many of the key principles of landscape ecology. For example, natural corridors are described as being critical to ecological processes, such as the movement of native plant and animal species between natural areas.¹²⁹ The extent of protected areas that would result from the natural cores and corridors identified amounts to 25 percent of the Moraine in the GTA. Though the ecological categories of protection are quite comprehensive, there are no explicit criteria in the Strategy upon which a municipality could rely to defend a decision to set aside ecologically benign land. At most, such a decision could be argued to be necessary to achieve the spirit or objectives of its inter-connectedness approach. Notably, the Strategy does aim to channel development to those areas of the Moraine where it would be least damaging.

Overall the depth of ecological considerations addressed, criteria raised and the specificity of detail provided is appreciable for a policy document and far

¹²⁶ After further public consultation a final report was furnished to then Minister of Natural Resources, Howard Hampton in late 1994 whereupon it became a Cabinet document and never became public.

¹²⁷ Strategy, *supra* note 42 s.9.1.1.

¹²⁸ The natural heritage system addressed the need for core areas to be linked by natural corridors.

¹²⁹ Strategy, *supra* note 42 at 23.

exceeded that of the Guidelines. For example, Table 8 demonstrates the scope of the definition of natural core areas in the natural heritage system. As concerns its potential legal effect, the Strategy has an implementation section which states that the “policies of the Oak Ridges Moraine must be paramount and take precedence over any other provincial or municipal policy or document.”¹³⁰ The report also recommends greater co-ordination between the MNR, MOEE and MMAH in review of planning applications to ensure its criteria are achieved. The present One Window approach has altered significantly the basis of this recommendation. In the end, the Strategy forwards three means of formal implementation by the province: a PPS under section 3 of the *Act*, a Provincial Plan under the *Ontario Planning and Development Act*¹³¹ (OPDA) and; new Moraine-specific legislation.

Clearly the Conservative government was uninterested in the Strategy. It was shelved, and the planning structure on which it was premised has been substantially altered. Presently, the only provincial input to the planning framework that is Moraine- specific remains the Guidelines.

Table 8

Natural Core Area Definition in the Natural Heritage System (Strategy)

4.1.2 Elements of the Natural Heritage System

a) Natural Core Areas (NCA) are areas currently containing the critical ecological processes, attributes and functions needed to maintain native plant and animal species that are most stressed or vulnerable to human induced change in the landscape. They comprise,

- Environmentally Sensitive Areas (ESAs) as identified by Conservation Authorities,
- Provincially and Regionally Significant Areas of Natural and Scientific Interest (ANSI) – Life Science as identified by the MNR,
- Critical fish and wildlife habitat identified by the MNR,
- Wetlands identified as Class 1 to 7 by MNR,
- Kettle lakes, including an areas of 30 metres (approx. 100ft) along the shoreline,
- Coldwater and warmwater streams as identified by the MNR including an area of

¹³⁰ *Ibid.*, at 99.

¹³¹ *Ontario Planning and Development Act*, R.S.O. c.23 [hereinafter OPDA].

- 30 metres from both sides of the stream to allow for habitat protection,
- Threatened, vulnerable and endangered species habitat as identified by MNR,
- All woodlands in excess of 100 years of age as identified by the MNR,
- All non-planted forest areas equal to or greater than 30ha (approx. 75 acres) in size, and
- All forest areas regardless of type, equal to or greater than 1000ha (approx. 2500 acres) in size

4.4 Prescriptions

4.4.1 The Need for Provincial Policy Direction

Richmond Hill acknowledged that it was raising the bar of ecological policies beyond what the policy framework could support in OPA 200. However, it confidently argued that such changes were scientifically justified and therefore appropriate.¹³² In the end, not only did the policy framework not provide for the measures environmentalists and citizens demanded, but it invited the development industry to challenge the basis of the amendment's ecological policies.

The above analysis demonstrates that the unenviable decisions that have faced, and will face, Richmond Hill are a direct result of the insufficiency of the ecological planning tools available to municipalities. Yet, often during the life of OPA 200 the Minister of Municipal Affairs and Housing suggested that the province had "provided municipal governments with the tools to conduct the town's affairs in an environmentally sensitive manner."¹³³ Wary of increasing concerns, the development industry asserted that

our industry is becoming increasingly concerned about requests made by planning authorities for provincial intervention in local land use planning decisions when in our opinion, feasible and reasonable alternatives exist currently in legislation, policy and practice.¹³⁴

¹³² OPA 200, *supra* note 15.

¹³³ R. Mackie, *Ontario Says it Wont Protect Moraine* The Globe and Mail (26 February 2000) A26. The Minister at the time was Tony Clement.

¹³⁴ UDI, *supra* note 88 at 7.

One wonders why the province felt it necessary in May 2000 to intervene in the OMB hearing to bolster the respondents battling for greater protection of the Moraine in Richmond Hill, if its ecological policies were sufficient. Both statements also contradicted the Town's mayor who countered that without stronger policies, municipalities were denied the necessary planning tools to protect sensitive and important natural areas: "they gave us a tool box, but there isn't anything in it ... we don't have the tools to do it ourselves."¹³⁵ The preceding examination of the policy framework and of the legal structure suggests that the mayor had a greater grasp of the legal reality of the planning framework.

Presently, there is an unacceptable void of provincial involvement in local land use decisions. The present provincial policy framework does not embolden a municipality that desires to protect significant parts of its land from development. It does not grant full decision-making autonomy to municipalities. Rather it handicaps them by failing to provide legally formalized and progressive ecological direction. Consequently, municipalities are denied the legal justifications, and thus, the planning tools necessary to confidently implement strong ecological measures. In doing so, progressive municipal agendas are exposed to the development industry, and ultimately, the OMB.

A greater provincial direction will go further in ensuring that the municipalities and the Regions on the Moraine have legal, as opposed to just ecological, reason to co-ordinate land use plans. Presently, the Regions are limited by the same policy framework and could therefore do little to demand or defend such measures (see section 4.6.2). Similarly, the provincial position at the OMB is isolated in applicability to Richmond Hill, or one percent of the Moraine.

Should planning on the Moraine continue in this vacuum of uncertainty, it will most certainly be overrun in piecemeal fashion by historic models of ecologically damaging development. Put simply, the province needs to be an equal partner in the planning process. A return to strong provincial responsibility

¹³⁵ Swainson, G. & Brennan, R., *War of Words Over the Moraine* The Toronto Star (26 February 2000) at A4.

in the form of more comprehensive ecological policies will result in ecologically stronger municipal land use decisions. Such a change to the policy framework does not pre-suppose a return day-to-day involvement in local planning decisions. Rather, satisfactory provincial involvement can be achieved so long as there is an unambiguous provincial policy framework that all players understand and follow.

Many of the solutions to the problems of the planning framework do not lie far afield. What is principally needed to inform the planning framework are many of the measures contained in Bill 163 and the implementation of a provincial plan that incorporates the key elements of the Moraine Strategy.

4.4.2 Reducing Decision Uncertainty

Regardless of means chosen, the policy framework must change in order to reduce the confusion and frequency of conflict surrounding contentious land use decisions. The present policy framework only infuses uncertainty and acrimony into the land use decision-making. The aftermath of OPA 200 demonstrates that the logic and reforms of Bill 20, that land use decisions would be made less controversial and faster, has had the opposite effect. Expected to last twelve weeks in May 2000, the OMB hearings addressing the Corridor have now lasted nearly one year, while the deadline for a final decision has been pushed back to the middle of 2002.¹³⁶ More than likely the decision will please none of the interested parties involved.

OPA 200 also demonstrates that where there is loss of clarity there is a loss of effective planning tools.¹³⁷ Under the present policies, municipalities are challenged by developers on one side, upset over protection that goes beyond the minimal policies, and on the other by citizens, upset by the lack of environmental protections. In the case of OPA 200, there is little in the present PPS or Guidelines that would have removed the lands that were designated for

¹³⁶ The OMB hearing has cost Richmond Hill between \$3-4 million.

¹³⁷ Canadian Environmental Law Association. *Submissions of the Canadian Environmental Law Association to the Standing Committee on Resources Development Reviewing Bill 20, The Land Use Planning and Protection Act* (February 1996) CELA Brief No.277 [hereinafter CELA Brief No. 277].

protection in OPA 200 from developer challenge, save for some of the wetlands and forested habitat areas and developers understood this. What results is a return to site-specific land use battles that end up at tremendous cost at the OMB where uncertain interpretations have determinative effect.

A comprehensive and detailed provincial land use strategy, would accommodate a larger role for science and ecological expertise and leave less room for uncertain speculation while raising the minimum standards of protection that must be attained for all stakeholders to see. In a 1993 speech Murray Koebel, then president of the Greater Toronto Home Builders' Association, stated his organization

supports in principle the adoption of a comprehensive provincial policy framework. We believe that such a framework will indeed bring more certainty to the process.¹³⁸

The greater scope and detail of Bill 163's PPSs would not be burdensome to the planning process because they would avoid the very uncertainty that confused and aggravated decisions in the Corridor. Where lines are clearer there is less time lost to opposing interpretations and more time spent on resolving details.¹³⁹

4.4.3 General Provincial Policy

Ideally PPSs provide substantive policy direction for local land use decisions. Municipalities would be placed in a much better position if the general policy framework authorized by the *Planning Act* returned to the legal and substantive status it attained following the passage of Bill 163. The Regional Planning Commissioners of Ontario supported Bill 163 because it would in their view "greatly improve the provincial role in the planning system."¹⁴⁰ Accordingly, what is presently needed are similarly ecologically detailed and exhaustive PPSs.

¹³⁸ M. Koebel, *Remarks* (Insights Seminar on Planning & Development Reform in Ontario, Toronto, 9 September 1993) at 6.

¹³⁹ That being said, there will always be conflict over the proper designation of lands.

¹⁴⁰ J. Green, S. Thorsen & N. Tunnacliffe, *The Provincial Role: Perspective of the Regional Planning Commissioners of Ontario* (Insights Seminar on Provincial Interests and Land Use Planning: How to Deal Effectively with Escalating Provincial Involvement in the Planning Process, Toronto, 7 April 1992) at 11.

Ideally, such an improvement would include policies to allow a municipality to protect large areas of ecologically benign land.

The PPSs must also have legal effect. 'Shall have regard for' has been promoted by the development industry and certain municipalities as achieving 'well-accepted balance,' by not imposing general standards on municipalities faced with specific circumstances.¹⁴¹ Such an argument is not convincing in the environmental context. The present language does not provide the planning tools to adequately protect land. Far too much room is left to interpretation and dispute between local level stakeholders, while the province escapes responsibility for the uncertainty it created. If strong ecological measures were introduced, the province could limit itself to overseeing that its interests are executed by the municipalities and the relevant approval authorities. Stronger provincial ecological policy direction will go further in ensuring that the municipalities and the Regions on the Moraine have reason to co-ordinate land use plans.

A 1996 OPA 88 effort in London, Ontario demonstrates the inadequacy of the present framework.¹⁴² While Bill 163 was briefly the law, London had prepared an exhaustive ecological plan to conform to its criteria. Once Bill 20 was proclaimed the affected developers insisted on weaker ecological provisions under the threat of OMB challenge. London, deprived of the ecological planning tools and the legal support provided by Bill 163, moved towards accommodating developers' wishes. Despite the concessions, the developers' challenged the weakened ecological measures at the OMB. The final OMB-approved OPA is considerably scaled back from the original effort of London's Planning Department and serves to demonstrate how a change in the ecological policy framework can have a dramatic practical and legal effect. Legally, under Bill 20, London had lesser and uncertain support for its measures. This caused them to take the practical decision to avoid tremendous acrimony by reducing the strength of the ecological measures in its OPA. Plainly contradicted is the

¹⁴¹ Regions, *supra* note 53.

¹⁴² This example is drawn from CELA Brief No. 277, *supra* note 137.

development industry's assertion that the present policies provide the tools of superior ecological protection.¹⁴³

4.4.4 Moraine-specific Policies

Contrary to assertions from the development industry, the Guidelines are legally and practically unreliable. A provincial plan reflecting the main recommendations of the Moraine Strategy would be a good starting point for a comprehensive and appropriate provincial ecological plan for the Moraine.¹⁴⁴

The Strategy could garner support among many of the interested stakeholders. At the least, insofar as Richmond Hill is concerned, a Moraine-specific plan would be superior to a renewed general PPS. From the province's perspective, it may be easier to accept the imposition of strict ecological considerations in land use decisions if the scope of such a policy was limited to the unique conditions of the Moraine. In addition, it is worth noting that the Urban Development Institute, an organization funded by developers, participated in the creation of the Strategy and endorsed its final content. That being said, that same organization has in the present policy context stated its position in favour of keeping the status quo:

we strongly believe that the current policy framework will continue to achieve the goal of appropriate protection of natural features and ecological function of the Moraine.¹⁴⁵

Finally, even STORM has endorsed the Strategy's recommendations as the centerpiece of its campaign to reform the planning framework governing the Moraine.¹⁴⁶

Formalizing the Strategy would improve the planning framework by infusing a highly principled ecological guide to land use planning. As the above analysis highlighted, the Strategy's criteria and intent were derived in large part

¹⁴³ *Re London (City) Official Plan Amendment No.88*, [1999] O.M.B.D. No. 602 (O.M.B.) online: QL (OMB) [hereinafter *Re London 88*].

¹⁴⁴ Ideally, such a plan would build upon strong and legally binding PPSs.

¹⁴⁵ UDI, *supra* note 88 at 8.

¹⁴⁶ Save the Oak Ridges Moraine Coalition. *STORM Coalition Position on the Oak Ridges Moraine* (2000), online <www.stormco.org> (last modified: 19 February 2000), accessed January 24, 2001.

from the principles of landscape ecology in order to protect the ecological integrity of the Moraine as a whole, not just isolated parts.¹⁴⁷ Its principles of inter-connectedness would ensure that the ecological functions of the Moraine are protected and preserved.

4.5 Means for Implementing Moraine-Specific Policies

There are a variety of means by which Moraine-specific protection measures could be achieved. New ecological policies must supersede the general provincial policies that inevitably complicate local land use decisions. The Moraine Strategy forwarded three ways for the province to implement its recommendations, all of which would attach legal effect to the policies enacted therein. The specific merits of each are discussed below with particular attention paid to Moraine-specific legislation.

4.5.1 Moraine-specific PPS

Several municipalities and Regions on the Moraine have indicated that if it is to be adequately and confidently protected, the province must produce a Moraine-specific PPS based on the 1994 Strategy.¹⁴⁸ As the above discussion highlighted, the PPS approach has the capacity elevate the protection of the Moraine to a more focused and responsive level. Without a return in the language of section 3 to that seen in Bill 163, however, any PPS will lack the grounds to consistently enforce the commitment to its details. Accordingly, it will lose its prescriptive ability, providing little more contribution to protection of the Moraine than the present policy framework.

A Moraine PPS would be the easiest to implement into the present planning framework. The cautionary note to this consideration is the One Window Planning Strategy. Strengthened section 3 may diminish in importance without the MNR or MOEE to ensure that the criteria of Strategy-based PPS is met by municipalities. That responsibility has been left with the Regions on the

¹⁴⁷ Strategy, *supra* note 42.

¹⁴⁸ Regions, *supra* note 53.

Moraine. It is questionable whether the Regions would be as diligent or as capable as either of these ministries. Certainly, they do not have the same depth or scope of ecological expertise.

4.5.2. Provincial Plan under the OPDA

A Moraine Plan under the OPDA is the least advantageous provincial course of ecological protection of the Moraine. Under the authority of the OPDA, the province can designate a planning and development area for which a Land Use Plan will be formulated under the full control of the province.¹⁴⁹ Conservative MPP Steve Gilchrest introduced a private member's bill in 2000 and 2001 to do just that. His latest effort would have created a Land Use Plan for the Moraine under the OPDA, with a development freeze of a year until it was in place.¹⁵⁰

In the 1970's, the OPDA was used to protect 'Parkway Belts' in the GTA, with significant lessons for its utility to the large-scale preservation of land on the Moraine. The Parkway Belt Land Use Plan took its shape in 1973 as the *Parkway Belt Planning and Development Act* [hereinafter the *Parkway Act*]¹⁵¹ to provide for, and protect, open space land buffers between communities in the rapidly expanding GTA. The integrity of the *Parkway Act* suffered from a lack of provincial dedication to its objectives. Amendments to the Land Use Plan were obtained by landowners upon application to, and approval by, the Minister of Municipal Affairs. Due to considerable landowner pressure, amendments became the rule rather than the exception. The Parkway Belts soon became a patchwork of inconsistent and non-conforming uses.¹⁵² Ultimately by the early 1980's, as provincial priorities moved on, the *Parkway Act* was repealed.

As an instrument of the OPDA, the *Parkway Act* largely failed in its objective to prevent development in open-space areas. Taking the foregoing as instructive, it is clear that the use of the OPDA would engender a heavy

¹⁴⁹ OPDA, *supra* note 131 s.2.

¹⁵⁰ Bill 17, *An Act to Ensure Responsible and Acceptable Development and to Protect the Natural Heritage of the Province of Ontario*, 2nd Sess., 37th Leg., Ontario, 2001 (did not advance past 1st reading 26 April 2001).

¹⁵¹ *Parkway Belt Planning and Development Act*, S.O. 1973 c.53.

¹⁵² S. Robinson, *The Rise and Fall of the Ontario Parkway Belt* 2000 58(2) U.T. Fac. L. Rev. 157.

dependence on provincial dedication to a Moraine Land Use Plan. Notably, Gilcrest's Bill 17 would have been administrated by Cabinet, making as, if not more, vulnerable to politicization. Moreover, it's effectiveness would be too vulnerable to the pressures of a development industry that enjoys considerably more access to the Minister than the organizations that advocate stewardship of the Moraine. Though nothing is immune from changes in government philosophy, at least significant changes to the integrity of Moraine-specific PPSs would have to be undertaken in a more sweeping publicly observable manner, then in a series of backroom agreements and subtle statutory amendments which characterized the breakdown of the Parkway Belts.

4.5.3 Moraine-specific Legislation

Moraine-specific legislation is the most effective means to protect the ecological integrity of the Moraine on a long-term basis. As a statute, it would represent the steadiest and most comprehensive enunciation of provincial direction possible. The potential specificity and the diversity of legal tools that could be adopted in crafting a statute would 'provide the opportunity to carefully tailor the strongest possible' protection of the Moraine."¹⁵³ A number of private members' Bills were introduced into the Ontario Legislative Assembly in 2000 to address the Moraine. Notably, none of them overly deferential to the overriding tension between property rights and environmental protection. The Bills introduced by Liberal MPP Mike Colle and NDP MPP Shelley Martel demonstrate the range of statutory protection possible on the Moraine.

Martel's Bill 71 was drafted to provide stronger provincial policy leadership on the Moraine in order to "strengthen the position of municipal councils trying to protect land in the face of intense development lobbying."¹⁵⁴ Referred to as the

¹⁵³ R. Lindgren, *Protecting the Oak Ridges Moraine: What's the Strategy?* (May-June 1994) 21 Intervenor 22.

¹⁵⁴ Ontario, Legislative Assembly, *Private Members' Public Business* (1 June 2000) at 1009 (Ms. Martel).

Oak Ridges Moraine Green Planning Act, 2000,¹⁵⁵ it addresses key weaknesses of the present policy framework via two specific objectives. First, it proposes to place a development freeze on the Moraine until such time as the permissive language of section 3 of the *Planning Act* is amended and a legally mandatory and Moraine-specific PPS is devised. The second objective of the Bill aims to incorporate certain ecological considerations integral to the ecological health of the Moraine into the general planning framework. Two schedules attached to the Bill, addressing watershed protection and wetlands protection, nostalgically borrow some of the language from the former PPS A. In the end, there is relatively little in Bill 71 that addresses the ecology of the Moraine in any specific or comprehensive manner or that takes any explicit measures for the Moraine beyond the development freeze. Though Martel's bill passed second reading in June 2000, it has been continually by-passed at the standing committee on general government.¹⁵⁶ A nearly similar bill was introduced by NDP MPP Marilyn Churley on April 30, 2001¹⁵⁷. It would have frozen development on the Moraine until new PPS could be formulated and the language of section 3 made binding. It would also have increased the timelines of appeal to the OMB.

Going well beyond Martel and Churley's rather cobbled efforts, Colle's Bill 115, the *Oak Ridges Moraine Conservation, Protection and Promotion Act, 2000*,¹⁵⁸ represented the height of what could realistically be achieved for the Moraine through statutory means. It established a statutory regime focused

¹⁵⁵ Bill 71, *An Act to Freeze Development on the Oak Ridges Moraine and to amend the Planning Act to Increase and Strengthen the Protection of Natural Areas across Ontario*, 1st Sess., 37th Leg., Ontario, 2000 (passed second reading June 1 2000).

¹⁵⁶ Conservative MPP Steve Gilchrest who had his own Moraine-specific bill before the legislature gave his approval on second reading in June 2000. He admonished his fellow members to vote for the Bill and "get on with the task of saving this important element of our natural heritage for future generations." The Bill passed second reading on a sparsely attended afternoon, but has been by-passed by the standing committee on general government, headed by Gilchrest. Ontario, Legislative Assembly, *Private Members' Public Business* at 1010 (1 June 2000) (Mr. Gilchrest).

¹⁵⁷ Bill 29, *An Act to Freeze Development on the Oak Ridges Moraine and to Amend the Planning Act to Increase and Strengthen the Protection of Natural Areas Across Ontario*, 2nd Sess., 37th Leg., Ontario, 2001 (did not advance past 1st reading 30 April 2001).

¹⁵⁸ Bill 115, *An Act to Conserve and Protect the Oak Ridges Moraine by stopping Urban Sprawl and Uncontrolled Development and Promoting Recreational, Commercial and Agricultural Activities that are Environmentally Sustainable*, 1st Sess., 37th Leg., Ontario, 2000 (did not advance past 1st reading 25 September 2000) [hereinafter Bill 115]. It enjoyed the support of the Federation of Ontario Naturalists and STORM.

exclusively on the Moraine. The Bill purported to create a new level of planning authority for land use decisions taken on the Moraine modeled on the provincial *Niagara Escarpment Planning and Development Act* (NEPDA).¹⁵⁹ The NEPDA has as its statutory purpose the maintenance of a continuous natural environment on the Escarpment and the restriction of development to only that compatible with the Escarpment's environment.¹⁶⁰ To this end the NEPDA authorizes the independent, though government appointed, Niagara Escarpment Commission (NEC) to review land use applications through a distinct planning process and with specific criteria neither of which are found in the general provincial planning framework. Environmental groups note that, since its inception in 1973, the NEPDA has worked "reasonably well to safeguard the Escarpment environment."¹⁶¹

In a similar manner, Bill 115 would require the Minister to establish the 'Oak Ridges Moraine Bioregion' and create an independent statutorily determined body to oversee land use decisions on, and prepare a plan for, the Bioregion.¹⁶² In the meantime, development would be frozen. Effectively, the Bill aims to ensure that a large-scale development freeze is forever in effect on the Moraine. The purpose section of the Act reads virtually identically as the purpose section of the NEPDA:

2. The purpose of this Act is to provide for the maintenance of the Oak Ridges Moraine and land in its vicinity as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment.¹⁶³

Notably, among the key objectives to be achieved in the Bioregional Plan is the protection of significant natural features, processes and linkages of the natural

¹⁵⁹ *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2, as amended.

¹⁶⁰ *Ibid.*, s.2.

¹⁶¹ R. Lindgren, *John Snobelen Gets the Keys to the Niagara Escarpment* (Septmeber 1997) 22 Intervenor 14 at 14 [hereinafter Lindgren 1997].

¹⁶² Bill 115, *supra* note 158 s.4, s.5. The 'Oak Ridges Moraine Commission' would consist of members from municipal and regional councils, conservation authorities and the Greater Toronto Services Board.

¹⁶³ *Ibid.*, s.2.

environment and the co-ordination of planning approaches among the ministries and municipalities within the Bioregion.¹⁶⁴

A Moraine Bill modeled on Colle's proposal would provide the opportunity for the most comprehensive and detailed approach to the Moraine in two ways. Most obviously a Plan would be legally binding, with a devoted planning process more sturdy against development industry challenge. In the highest court decision to date on the NEPDA, Bellingham J. interpreted its application and the implementation role of the NEC broadly in recognizing that the NEPDA effectively overcame the inherent difficulties of environmental regulation: Environmental legislation, by its very nature, contemplates serious conflict between private users and public interest. The establishment of the NEC and the legislation itself... provides the machinery to balance those competing concerns.¹⁶⁵

Second, the stated purpose and objectives of the Bill would compel the formulation of a Plan that incorporates many of the key principles of landscape ecology at the scale of the entire Moraine across several jurisdictions. As such, a Plan would more closely align to the appropriate scale of the principles of landscape ecology. Moreover, within the Bill's purposes there is nothing to discourage large-scale preservation of ecologically benign lands by municipalities and the Commission.

As was the case under the OPDA, it should be cautioned that statutory regimes are not immune from philosophical changes in government policy. For instance, under the Conservative government devotion to the NEPDA has waned. Control over the Escarpment was shifted to the MNR, whereupon dramatic cuts to the budget and staffing to the Niagara Escarpment office were

¹⁶⁴ *Ibid.*, s.8(d); s.9(2)(c); s.9(2)(a)(ii). The Bill also promotes the notion that the Moraine should serve as a site of eco-tourism as well as recreational and cultural activities. It provides that the Commission may fund such initiatives and Conservation Authorities.

¹⁶⁵ *United Aggregates Ltd. v. Niagara Escarpment Commission* (1995), 17 C.E.L.R. (N.S.) (Ont. Gen. Div.) 229 at 232

instituted and regulations were enacted making it considerably easier to obtain development permits for aggregate extraction activities.¹⁶⁶

Ultimately, a statutory expression of a strong policy framework need not be as elaborate as that which Colle forwarded. A supervisory body for the Moraine, though desirable, is may not be viewed as politically or economically feasible in Ontario at the present. At a minimum a statutory land use planning framework that incorporated Moraine-specific ecological considerations, but without the supervisory body could achieve many of the same ends. If municipalities and regions are given the planning tools in addition to clear protection objectives then it should be left to them to make the necessary application decisions. For those progressive Moraine municipalities, such a statutory regime would provide a more confident and defensible position and therefore give municipalities more confident control of the planning process and their own agendas. Aside from interpretation issues, particularly regarding the designation of land by municipalities, developers' main grievances would be aimed at the province rather than at municipal planning departments.

4.6 Provincial and Regional Involvement in Local Planning Decisions

Since 1995 the Conservative government has initiated dramatic legislative changes to the division of many provincial – municipal responsibilities. In terms of planning, significant responsibilities were transferred to the municipalities as the provincial role was diminished. It is not clear whether municipalities have the experience and resources necessary to exercise this new authority. One commentator stated, “at this point it is unclear whether Ontario municipalities have really gained responsibilities or just additional costs.”¹⁶⁷ The overall burdens of the downloading, in addition changes in the legal structure of the planning framework have not liberated municipalities' planning decisions in the ecological context, rather they have encumbered them.

¹⁶⁶ Lindgren 1997, *supra* note 161.

¹⁶⁷ Tindal, C. & Tindal, S., *Local Government in Canada*. 5ed (Toronto: Thomson Learning, 2000).

4.6.1 *The One-Window Planning Service*

The fundamental realignment of provincial and municipal roles that has occurred since 1995 to clarify and separate provincial and municipal responsibilities has reduced the province's participation in local planning decisions. The provincial retrenchment in conjunction with the emasculated policy framework has dramatically reduced the provincial role in the planning framework. The changes were made to streamline the planning process and give municipalities greater decision-making independence.¹⁶⁸ However, in divesting certain ministries of involvement in the planning process and by vesting the relatively under qualified municipalities and approval authorities with greater decision-making authority for protecting and defending ecological interests, the province has denied municipalities key structural supports to make decisions to protect land from development.

Bill 20 introduced changes to the *Planning Act* that fundamentally reduced the provincial role in planning. The new 'One-Window Planning Service' has changed the role of the province from overseer of the process and site-specific products of municipal planning decisions to one of guidance, or 'advisory services,' through up-front consultation on planning matters.¹⁶⁹ Instead of concerning itself with site-specific matters it is focused on engineering a planning system whereby its role is restricted to guidance via provincial policy and up-front involvement.

To achieve the change, the scope of provincial hands-on involvement has been reduced. Previously, municipalities had to notify up to seven ministries when undertaking plan changes.¹⁷⁰ These ministries, each with their own expertise and applicable policies, would review municipal plans to ensure that

¹⁶⁸ Ontario, Ministry of Municipal Affairs and Housing, *Land Use Planning System in Ontario: Achieving the Vision* (2000) online: Ministry of Municipal Affairs and Housing <www.mah.gov.on.ca/business/plansys/contents-e.asp> (date accessed: 5 February 2001) [hereinafter *Vision*]; Bill 20, *supra* note 120.

¹⁶⁹ *Ibid.* The province has retained the authority to establish and protect provincial interests through PPSs.

¹⁷⁰ The Ministries of: Agriculture, Food and Rural Affairs; Environment and Energy; Natural Resources; Citizenship, Culture and Recreation; Transportation; Northern Development and Mines; Municipal Affairs and Housing.

their concerns were sufficiently addressed. For instance, the MNR would review plans to ensure that the ecological policies, standards and legislation it was responsible for were properly incorporated into a plan. Now consultation is funneled solely through the MMAH for efficiency and simplicity. As the single point of contact with municipalities, it now represents the other six ministries traditionally involved in planning matters, but now completely shut out of the planning process, unless the MMAH seeks their input. Similarly, the MMAH is the only ministry that can initiate OMB appeals of plans

The historic concerns of the MOEE or MNR are now supervised by a ministry with no familiarity of, or experience in, ecological matters, though it does have an Environmental Services Branch. Clearly, it now has to make judgments in areas where it has little relevant experience - identifying provincial ecological interests up-front. Further, there has been no effort to ameliorate the effect of the One-Window approach by shifting qualified staff from the disaffected ministries to the MMAH.¹⁷¹ The MMAH has stated that it is undertaking partnership initiatives with other ministries in order to improve its ecological capabilities.¹⁷² In light of the strategic budget cutting that has befallen these ministries, the quality of experience and resources left to share are questionable.

The ecological implications of these changes are troubling, because the MNR and MOEE have been denied the opportunity to ensure that their own ministry standards and expertise are being matched by municipalities. Further, neither is able to ensure that even the diminished ecological aspects of the PPS or provincial interests expressed in the *Planning Act* are being respected. In effect, the province has removed a confirmatory check in the planning process that progressive municipalities could rely on to justify their ecological measures. Further, if the province's ecological policies were ever to become more demanding, the MOEE and MNR are no longer in a position to provide technical and scientific support or advice to progressive municipalities. Not surprisingly,

¹⁷¹ CELA Brief No. 277, *supra* note 137.

¹⁷² Vision, *supra* note 168.

both the MNR and MOEE substantially reduced their land use planning budgets and activities after 1996.¹⁷³

The province, has in effect with the One-Window approach, offloaded ecological responsibility in the planning process. The result is a void of ecological responsibility in the legal structure governing local planning decisions. When combined with a weak policy framework that provides no ecological direction or support, it is clear that municipalities have been denied an important tool to implement meaningful ecological protection. Were Richmond Hill to devise a new OPA it would be on its own in the ecological sphere, unable to point to the input of provincial ecological advice and expertise.

4.6.2 *The Regional Role*

Regional ecological policies do not fortify or cure the provincial policy framework's inherent weaknesses, rather they are handicapped by the same weak ecological policy framework. In addition, their responsibilities under the *Planning Act* as approval authorities do not make up for the recent provincial retrenchment in local planning decisions.

Municipal government in many parts of Ontario, including the GTA, is two-tier. Upper-tier Regional municipal governments preside over several smaller lower-tier local governments. For instance, the Region of York is made up of several local municipalities, including Richmond Hill. The Regional governments have various planning responsibilities with respect to the province and the lower tier municipalities. Most prominently, under the *Planning Act*, a municipality's OP must conform to its Region's OP policies.¹⁷⁴ To give effect to this, Regional governments have approval authority over local municipal OPs whereby they approve local OPs, and sometimes OPAs, in place of the province. Regional approval authorities can approve, modify or refuse a plan in its entirety or any

¹⁷³ M. Winfield & G. Jenish, *Ontario's Environment and the 'Common Sense Revolution': A Second Year Report* (1997) Canadian Institute for Environmental Law and Policy: Toronto.

¹⁷⁴ *Planning Act*, *supra* note 4 s.27(1).

part or parts thereof.¹⁷⁵ Accordingly, a Regional OP acts as a macro-level planning policy co-ordination instrument. The recent change in the provincial role in planning decisions has used this legal arrangement to increase the role and responsibility of the Regions with regard to lower tier municipal planning decisions.

4.6.2.1 *Municipal Plan Review*

To fill the void of provincial planning responsibility, approval authorities have been forwarded by the province as the defender of provincial interests and policies. Municipal Plan Review (MPR) is a key aspect of the One-Window approach. Under MPR, the Regions, as municipal approval authorities,¹⁷⁶ are responsible for identifying provincial interests and “ensuring their land use planning decisions have regard to the PPS, and that provincial interests are adequately protected.”¹⁷⁷ In order to achieve this, they utilize the scope of their approval authority in section 17(34) of the *Planning Act* as above.

The success of MPR depends largely upon approval authorities’ ability to protect provincial interests.¹⁷⁸ However, no new grounds of support for innovative ecological measures are opened by the Region’s MPR role. Their approval authority does not give them license to demand stricter ecological protections than the *Planning Act* and PPS require. Similarly, the Guidelines, not authorized under the *Planning Act*, do not have to be reviewed for by the approval authority. Rather, the Regions are limited to ensuring the loose provincial policy framework is adhered to in intent, but not law, by municipalities. Moreover, the OPAs of certain large municipalities, including Richmond Hill, are exempt from review. Thus, the Regions’ approval authority is of little practical effect, if there are not environmental policies to be adhered to, or their reviews are limited to OPs.

¹⁷⁵ *Ibid.*, s.17(34)(a), (b).

¹⁷⁶ *Ibid.*, s.17(2). Regional council is the approval authority.

¹⁷⁷ V. Cotic, *Bill 20: Taking Stock on the Road to Change*. 107 *Municipal World* (Dec 1997) 21.

¹⁷⁸ The MMAH is taking initiatives to better prepare approval authorities for the task of reviewing local plans for provincial concerns (Vision, *supra* note 168).

There are also compelling grounds to suggest that the Regions are scarcely better prepared for the task than the MMAH. The approval authorities arguably do have greater experience than the MMAH with the full breadth of provincial interests due to their own OP exercises. However, with nowhere near the same devoted scientific and ecological expertise, experience and access to resources, as the traditionally involved ministries, it is uncertain how effectively they could, solely, defend the present policy framework, let alone stronger ecological policies. Where amongst Regional priorities such a mobilization of resources would fall is a legitimate question given the strains occasioned by provincial downloading. Finally, if a Region went further than the policy framework's parameters and demanded of a municipal plan stronger ecological measures, it would open itself to developer challenge in a similar manner as the lower tier municipalities (see section 5 for elaboration). Accordingly, an apparent layer of planning support for progressive local municipalities is, in the end, illusory. For the foreseeable future the Regions are unable to fill the void of expertise or planning support once provided by the MOEE and MNR. The shift towards greater responsibility for local municipalities and approval authorities would not be as troubling if the policy framework that informs the legal structure were less vague in terms of its ecological prescriptions. Thus, in offloading review authority to approval authorities, the province is significantly weakening the legal structure's ability to foster ecological protection of municipal lands.

4.6.2.2 *Role of Regional OPs*

York Region has the greatest land area on the Moraine within its boundaries of any Region in the GTA, at 33 percent.¹⁷⁹ Population estimates suggest that 90,000 York residents lived on the Moraine in 1998.¹⁸⁰ Theoretically, were its OP able to compel local municipalities towards more comprehensive ecological

¹⁷⁹ Regions, *supra* note 53. The Moraine accounts for 21 percent of Durham's total land area and 15 percent of Peel's.

¹⁸⁰ *Ibid.* York's population is approximately 10 times that of neighbouring Peel and Durham.

decisions for the Moraine, it could fulfill an important role in ensuring the coordination of ecological land use policy. However, Regional OP policies provide no further grounds to compel or support a municipality to take more comprehensive ecological protection measures because they are also bound by the permissive and uncertain provincial policy framework.

Regional OPs are broad expressions of policy primarily concerned with achieving macro level jurisdictional co-ordination and consistency, and not with imposing ecological detail on municipalities.¹⁸¹ Under the *Planning Act*, a municipality's OP must conform to its Region's OP policies, though practically such a determination is made by the Region.¹⁸²

With no grounds in provincial policy to be more ecologically assertive and due to their general, template-like nature, Regional OPs have little, if any room, to compel or support comprehensive lower tier ecological policies. The inherent generality of York Region's OP could not be argued to have 'led' the more comprehensive OPA 200 and could not therefore be construed as having brought the objectives of landscape ecology any nearer Richmond Hill.

The importance of the Regions' role in the policy framework is further constricted by the ease of legal challenge to municipal decisions. Appeal of a municipal decision to the OMB occurs long before it would come before the Region for final approval. In this manner the OMB effectively usurps the role of the approval authority by imposing virtual finality through its decisions, as was the case in OPA 129.¹⁸³ Such a reality would not be altered by a stronger policy framework, but the frequency of appeal might. Accordingly, the answer to a more ecologically comprehensive policy framework does not rest at Regional level OPs.

¹⁸¹ Chapter 2 of the Region of York's OP, entitled 'Sustainable Natural Environments,' sets out broadly worded policies on various natural features including the Moraine. Section 2.5 simply recognizes the Moraine as a significant and sensitive landscape and requires that land use changes merely comply with the *intent* of the already discretionary Guidelines. There is nothing more detailed or prescriptive in York's OP than there was in OPA 200. York (Region of) *Official Plan of the Region of York* (17 October 1994).

¹⁸² *Planning Act*, *supra* note 4 s.27(1).

¹⁸³ *Ibid.*, s.17(36).

In sum, the provincial planning framework is designed to achieve more local autonomy in land use decision-making and it utilizes the Regions to this end. However, for those municipalities seeking to make more ecologically sensitive decisions, the Regional OPs provide negligible support for innovative ecological land use decisions, let alone large-scale preservation measures. The provincial policy framework weakens both municipal and Regional innovation and reduces the relevance of the latter's approval authority.

4.6.2.3 Revisiting the Regional Role

How might the policy and operational framework of the Regions be improved on the Moraine? Ultimately, the solution lies, as above, in a comprehensive PPS addressing the Moraine, or with Moraine-specific legislation. Concerned about the state of the policy framework governing the Moraine, the Regions of York and Durham and Peel came together in a Joint Initiative in 1998 to consider the best means to a long-term strategy for the Moraine. Their objective was to provide lower tier municipalities on the Moraine with the ecological planning tools to protect the Moraine. Notably, Richmond Hill remained cool throughout to the idea that the provincial policies needed to be enhanced or that the Regions should be the source of such a change.¹⁸⁴

The fundamental assumption uniting the Regions was that the present Guidelines and PPS offer no assurance of long-term protection for the ecological integrity of the Moraine. The exercise came to the conclusion that a strong provincial policy direction was needed as opposed to a Regional policy approach expressed in unified Regional OPs for the same reasons stated above. A Moraine-specific PPS of legal effect would not change measurably the present planning framework, but it would necessitate greater involvement from the Regions. It would enlarge the scope and ecological importance of the Regions' role as approval authorities. The Joint Initiative recommended that the province be requested to develop a Moraine-specific PPS, yet undercut this finding and

¹⁸⁴ Durham Region, Regional Municipality of Peel and Region of York, *The Oak Ridges Moraine: Process Towards a Long Term Strategy: Appendix 6* (15 September 1999).

the weight of their report by the conclusion that the present wording of section 3 of the *Planning Act* is sufficient.¹⁸⁵

It was agreed that a Moraine-specific law would ensure the greatest protection of the Moraine. At the same time, it would take most of the responsibility for ensuring the ecological integrity of the Moraine, out of the hands of the Regions, making certain of their planning roles redundant.¹⁸⁶ Though this may not be in the Region's interest, it remains the best means to achieve protection of the Moraine as a whole. For the sake of certainty and consistency, statutory measures would not be weakened if they were to largely by-pass the Regions.¹⁸⁷

5. Legal Structure of the Planning Framework: Tools and Powers of the Municipalities

The operation of the present planning framework is in large part the outcome of the present state of provincial-municipal division of planning responsibilities. This is seen clearly in the context of municipal planning powers under the *Planning Act*. The legal structure has placed municipalities in a position subordinate to the province. It also couples with the policy framework to dampen ecological decision-taking by municipalities. It compels municipalities to take land use decisions where they otherwise may not have, places them in a weak position in relation to the OMB, and ultimately fails to encourage comprehensiveness in their decisions to protect land from development.

5.1 Municipal Subordination

Municipal powers have always been defined by their subordination to the provinces as authorized by the *Constitution Act, 1867*¹⁸⁸ and realized by the

¹⁸⁵ Regions, *supra* note 58.

¹⁸⁶ *Ibid.*

¹⁸⁷ Colle's Bill 115 proposed that the Planning Body for the Moraine would include members from Regional municipalities.

¹⁸⁸ *Constitution Act, supra* note 23 at s.92(8).

*Baldwin Act, 1849*¹⁸⁹ which established the model of municipal organization and scope of duties that largely prevails today in the Ontario *Municipal Act*.¹⁹⁰ The *Constitution Act, 1867* established two important principles relevant to local governance that are relevant to municipal planning. First, municipalities are created at the pleasure of the legislature and subject to its will. Second, all the authority and powers a municipality exercises are derived solely from the province. The Courts have narrowly interpreted municipal powers. Unless a power is specifically granted to a municipality by the province it can not be exercised.¹⁹¹ In Ontario, the *Planning Act* lays out in detail the specific planning powers of municipalities.

Ontario has consistently increased its role in, and control over, municipal affairs. Its greatest gains coming during the depression to relieve municipalities' financial woes and after World War Two in order to ensure minimum standards of service amidst unprecedented growth. As a result, municipal and provincial activities became progressively intertwined, leaving little trace of municipal autonomy. This situation applied to planning as well.

In 1912 Ontario enacted its first planning legislation, modeled on British legislation. Its application was initially confined to the outermost developing areas of the province's largest cities. Two principles of this legislation that remain today are the requirement of a 'general plan' and close scrutiny of local planning by the province. As in other areas, the province was intimately involved in areas of municipal jurisdiction. Generally, there was little professional experience in municipalities, few planning models to rely on, other than some generic nineteenth century utopian models, such as the Garden City, and fewer legislative tools.¹⁹² However, planning soon began to extend into the regulation of private land with the advent of subdivision controls and zoning by-laws. Subdivision controls, whereby the municipality could review plans for

¹⁸⁹ *Municipal Act, 1849.*

¹⁹⁰ *Ontario Municipal Act, R.S.O. 1990, c. M.45, as amended.*

¹⁹¹ *Ottawa Electric Light Co. v. Ottawa, (1906), 12 O.L.R. 290 (C.A.).*

¹⁹² G. Hodge, *Planning Canadian Communities: An Introduction to the Principles, Practice and Participants* (Toronto: Nelson Canada, 1998) [hereinafter Hodge].

development of private land quickly became the dominant planning activity of municipalities in the 1920s and particularly after World War Two.¹⁹³ Similarly, zoning by-laws which could address specific land uses emerged during this period, initially to ensure the health and safety of urban areas and the property values of more affluent areas.¹⁹⁴ After World War Two municipal planning in Ontario was re-visited. The 1946 *Planning Act* was a consolidation of 40 years of planning experience and created the framework that largely prevails in today's statute. Its main features provided for the following: the creation of planning units (often municipalities); OPs and their legal effect; subdivision control; zoning by-laws; the quasi-judicial appeal function of the OMB and; the involvement of the public in the planning process.¹⁹⁵ By 1967, nearly all sizable municipalities in Ontario had professional planning staffs, 75 percent of the province's population was covered by OPs and the number of professional planners employed in the public sector had exploded from 30 in 1951 to over 600 in 1967.¹⁹⁶

As described in 4.5 and 4.6, since 1995 significant planning responsibilities have recently been transferred to the municipalities, while the provincial role has been diminished.¹⁹⁷ These changes in addition to changes in the legal structure of the planning framework have thrown obstacles in front of progressive-minded municipalities to make innovative ecological land uses less likely.

¹⁹³ *Ibid.*

¹⁹⁴ C. Tindal, *supra* note 167.

¹⁹⁵ Hodge, *supra* note 192.

¹⁹⁶ *Ibid.*, at 131-132.

¹⁹⁷ Also of note, currently proposed changes to the *Municipal Act* are designed to further broaden municipal rule-making authority from 'cannot do' to 'can do,' thereby reducing the necessity of provincial grants of specific powers. Municipalities would be given the law-making powers of a 'natural person' to be 'interpreted broadly' in their 'areas of authority.' Precisely how large a grant of authority this would represent remains uncertain, but it would be exercised in thirteen spheres of jurisdiction one of which is the 'natural environment.' See Ontario, Ministry of Municipal Affairs and Housing. *A Proposed New Municipal Act: Draft Legislation (including explanatory notes)*. www.gov.on.ca/MBS/english/publications/pubonweb/min_list.html#15 (accessed 12 February 2001) sections 8 and 9. The final draft is expected for 1st reading in late 2001.

5.2 *The Effects of the Planning Act*

Nowhere is the relatively weak position of the municipality clearer than in the *Planning Act*. Certain provisions of the *Planning Act* channel OPs and OPAs in a pro-growth direction, despite an increase in municipal decision-making powers which would suggest that municipalities have the freedom to resist this influence. This is acutely significant because the OP is the primary policy tool a municipality has to articulate and defend policies and objectives for its future well being. What follows is an examination of how these provisions in the *Planning Act* infuse a pro-growth orientation into municipal land use decisions that militates against large scale preservation of lands from development.

The *Planning Act* is pro-growth, placing municipalities under ceaseless pressure to accommodate growth demands. Only those municipalities who face relatively light development pressure can escape the weight of the legal structure governing land use decisions. It is of course prudent to ensure that municipalities anticipate and adjust to growth pressures of all sorts, but certain of the *Planning Act's* provisions effectively impose the timing and rationality of growth.

Section 26, when read with the policy framework, imposes a subtle statutory pressure on municipalities to accommodate growth. Section 26 obligates municipalities to review their OPs for the necessity of revision at least every five years with regard for provincial policy.¹⁹⁸ Importantly, the provincial policy statement (PPS) that accompanies the present *Planning Act* has a decidedly pro-growth, or economic, orientation. The first of the three principle that precede the PPS is illustrative:

Ontario's long term economic prosperity, environmental health and social well-being depend on:

2. managing change and promoting efficient, cost-effective development and land use patterns which stimulate economic growth and protect the environment and public health¹⁹⁹

¹⁹⁸ *Ibid.*, s.26(1). Ss. 26(3) states that a municipality's approval authority could also compel it to undertake a review.

¹⁹⁹ PPS 1997, *supra* note

Moreover, the PPS also compels a municipality to maintain at all times at least a 10 year supply of land designated and *available* for new residential development.²⁰⁰ There is an implicit orientation towards growth in the policies that is placed in priority to ecological considerations in the review process. A municipality cannot choose to forego this process, nor can its OP. Accordingly, growth pressures exist a municipality *must* plan to accommodate.

Most municipalities, particularly in the GTA, re-visit their OPs more often than every 5 years due to private OPA requests, whereby a ‘person’ or ‘public body’ requests a council to make an OPA (for a review of factors involved in the OMB’s presence in the planning framework see Figure 1).²⁰¹ This request right carries an automatic and exclusive right to appeal to the OMB. Appeals can be perfunctorily launched if there was a refusal to consider the request by council or approval authority, or on all or any part of a decision rendered contrary to that person’s expectations.²⁰² All they must establish at the OMB is that the proposed amendment represents good planning. Thus, a landowner could challenge a municipality’s or approval authority’s action on their own request, but concerned or affected groups could not. As was the case in Richmond Hill, the municipality is dislodged from its own agenda and automatically placed on the defensive from entities with a distinct interest in the status quo – hardly a scenario that fosters confident and progressive ecological land use decisions.

If a revision or amendment of an OP is undertaken, changes are more broadly open to challenge. Under the *Planning Act* persons and public bodies, but not unincorporated associations, are able to directly appeal a council-initiated alteration to the OMB.²⁰³ ‘Person’ includes a corporation while ‘public body’ is defined in ss.1(2) to exclude all Ministries, except for the MMAH. Thus, the MNR and MOEE are excluded from challenging any OPAs that fails to meet their

²⁰⁰ *Ibid.*, s.1.2.

²⁰¹ *Planning Act*, *supra* 4 s.22. Most often this is done by landowners wishing to have their land re-zoned for development.

²⁰² *Ibid.*, s.22(7)(a),(c) and (e). The former was the route taken by the developers challenging the prolonged lead up to OPA 200.

²⁰³ *Ibid.*, s.17(24); (36), (40)

standards, unless the MMAH permits their involvement.²⁰⁴ Further, unincorporated groups, such as most ratepayers organizations or environmental organizations, are prevented from challenging revisions, unless a member of these groups appeals as an individual. Accordingly, most often the litigation threat arises from the development industry rather than an 'environmental constituency.'²⁰⁵ Thus, the pro-growth philosophy of the *Act* and the policy framework is reinforced by fact that producers are best positioned to challenge municipal decisions.

Shortened timelines in the *Planning Act* and the squeezed resources occasioned by downloading pressures have also reduced municipalities' ability to respond to developer demands or to take innovative ecological measures. Appeals to the OMB can be launched as-of-right by a proponent and relatively quickly, as demonstrated above. Bill 20 included strict timelines for OP revisions and OPAs in order to promote economic development through a more efficient and streamlined approach to planning.²⁰⁶ This logic aligns with the approach of the OMB which has held that municipalities must 'play the game,' even if it was not in their plans to do so.

For the municipality to take the position that the subject application should not be approved until the municipality conducts the required municipal-wide analysis to determine how much and where.... is not acceptable. The Board agrees... that the omission of policy making has never been a fair or appropriate way to regulate development.²⁰⁷

Figure 1 demonstrates a municipality has 45 days to hold a public meeting concerning a requested OPA before the right to appeal arises and only a further 45 days within which to respond to the request.²⁰⁸ If council does render a

²⁰⁴ *Ibid.*, s.1(3). In the OMB hearing concerning the Corridor lands, the MMAH did ask the MNR to contribute to the province's position.

²⁰⁵ It should be acknowledged that many environmental groups have been incorporated, including many of those active on the Moraine, such as Save the Oak Ridges Moraine Coalition (STORM).

²⁰⁶ Vision, *supra* note 168.

²⁰⁷ *863935 Ontario Inc. v. Durham (Regional Municipality)*, [2000] O.M.B.D. No.675 (O.M.B.), online: QL (OMB) [hereinafter 863935].

²⁰⁸ *Planning Act*, *supra* note 4 s.22(7)(a) and (c).

decision the right to appeal rises only 20 days after notice of the decision.²⁰⁹ The truncated processing timelines have been made that much less manageable in growing municipalities, such as Richmond Hill. Richmond Hill's chief planner, Janet Babcock, has declared that "her [Planning] department has been overwhelmed by the combination of the downloading of planning responsibilities and the large number of housing proposals under consideration."²¹⁰

Municipalities that rubber stamp development applications will attract considerably less pressure, whereas progressive municipalities may be discouraged from the diligence innovative approaches to planning require. It is hard to imagine how a municipality could research and devise something greater than OPA 200 in response to an OPA request in such constrained circumstances.

Once in the process of OP revision or amendment a municipality facing growth pressures, such as Richmond Hill, it would be challenged, according to the above interpretations, to justify no development, or even the significant protection of lands that landscape ecology demonstrates is needed on the Moraine. Arguably, were ecological policies more supportive then the effects of the legal structure would fade in importance.

5.2.1 A Note on Zoning

Zoning by-laws, unlike policy-based OPs or OPAs, enable a municipality to directly regulate land uses with the force of law. Zoning by-laws apply to specific areas and give effect to policies in the OP. A municipality's authority to pass zoning by-laws provides no additional grounds beyond the policies in an OP for the protection of large-scale lands from development in the manner prescribed by landscape ecology.

Subsection 34(1) covers a broad eclectic list of things for which zoning by-laws may be passed, ranging from the raising, location and nature of building to

²⁰⁹ *Ibid.*, s.22(7)(e).

²¹⁰ McAndrew, B., *Showdown at the Oak Ridges Moraine*. The Toronto Star (12 February 2000) H1, H8.

the establishment of pits and quarries. Subsection (1) 3.1 and 3.2 (i) to (iii) address natural features, stating that a municipality may pass a zoning by-law,

3.1 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures on land that is contaminated, that is a sensitive ground water recharge area or head-water area or on land that contains a sensitive aquifer.

3.2 For prohibiting *any* use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,

- i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,
- ii. that is a significant corridor or shoreline of a lake, river or stream, or
- iii. that is a significant natural corridor, feature or area.²¹¹
[emphasis added]

The inclusion of the word ‘any’ suggests that the authority the municipality exercises over the shape of development is quite broad. However, what appears to be a broad grant of law-making authority in the *Act* for protecting the environment is not for two reasons. First, ‘any’ in this context has been interpreted to not include the prohibition of the use of land for any purpose, which is akin to the effects of ecological protection.²¹² Second, the key decisions that would allow restrictive environmental zoning by-laws to take effect are made at the policy level, in OPs and OPAs, long before zoning by-laws are considered. Zoning by-laws are enacted to address specific lands, thereby giving local effect to the broader policy auspices of the OP. They cannot operate in reverse. They cannot create new basis of protection in an area that is not contemplated in the OP policies addressing that land.²¹³ Zoning by-laws must conform to an existing OP because they are to give effect to the OP.²¹⁴ Thus, a patchwork of zoning by-laws cannot be assembled to cover an area of land, thereby achieving large-

²¹¹ *Planning Act, supra* 4 s.34 3.1, 3.2 (i) – (iii).

²¹² *R. v. King* [1971] 1 O.R. 441.

²¹³ *Cox Construction v. Township of Puslinch* (1982), 36 O.R. (2d) 618.

²¹⁴ *Planning Act, supra* note 4 s.24(1).

scale land preservation where an OP does not authorize such protection measures.

In summary, the approach to development and the level of provincial involvement that the legal structure of the planning framework provides is unhelpful and undesirable. A municipality's authority remains in a subordinate position, scripted by the *Planning Act* and *Municipal Act* and undercut by inadequate provincial ecological policies. Increased municipal authority is undoubtedly beneficial in certain contexts, but without the tools or requisite support to exercise that power to specific planning ends, it is in the ecological context an empty promise. The overall pro-growth orientation of the *Act* is long standing and entrenched, making dramatic changes unlikely. Consequently, the effects of the legal structure could best be addressed by more comprehensive provincial ecological policies.

6. Ontario Municipal Board

The ultimate decision from the OMB hearings on the Corridor will be a litmus test for the perceived role and effectiveness of the OMB in the legal structure of the planning process. Moreover, the decisive public judgment of the effectiveness of the planning framework, and particularly its policies, will be rendered on the strength of that decision.

The OMB has an imposing presence in the legal framework of the planning process. The tone of its decisions enables it to have a tremendous impact on the course of municipal land use decisions. Further, the ease of development industry appeal to the OMB regularly places municipalities in awkward and defensive positions. Although its role as arbitrator of land use conflicts is clear cut, the ecological nature of its decisions are often complex and the ecological and the legal and policy framework it interprets is vague. As a result, its decisions are often inconsistent, but more often that not they tend to reflect the pro-growth orientation of the planning framework. For progressive municipalities the OMB imposes a chill on the measures that they could take

towards large-scale preservation of land. This was made clear in the preparation of OPA 200 and over the course of London's OPA 88.

This section explores on three fronts the reasons behind the chilling influence of the OMB in the planning process. The analysis outlines first the role, accessibility and powers of the OMB. Next, it attempts to ascertain the effect of the *Planning Act* and of the policy framework in the OMB's evaluation of land use conflicts. Third, OMB jurisprudence regarding the open space designation of private property is reviewed as a means of demonstrating the inherent difficulty of achieving large-scale preservation of lands at the OMB, and therefore in the planning process in general. In the end, the analysis returns to the Corridor to summarize the implications that the OMB has for the Moraine.

The sheer number, variety and inconsistency of OMB decisions makes isolating consistent reasoning difficult, particularly as the focus of contentious ecological land uses becomes more specific. The scope of this paper cannot accommodate the comprehensive analysis that would begin to make sense of the OMB's decisions in this area. Moreover, secondary materials addressing these issues are sorely lacking.²¹⁵ Where general observations are made they are based on a survey of a considerable number of OMB decisions.

6.1 Role, Accessibility and Powers

Created by Ontario in the 1930's to hear the conflicts that arise from municipal land use decisions, the OMB is a quasi-judicial administrative tribunal that is relatively independent of government. Its members are appointed by Cabinet from among various professions related to planning, including the law, natural sciences, business, consulting as well as the planning sector. That its members are appointed by Cabinet has at various times in its history raised concerns over the politicization and impartiality of the Board.²¹⁶ The *Ontario*

²¹⁵ Based on author's own research experience and from conversations with Professor Tony Williams of Osgoode Hall Law School who conducts a course in the Law of Land Use Planning.

²¹⁶ Beyond flagging the issue, this paper will not enter the debate or speculate on its potential implications.

*Municipal Board Act*²¹⁷ [hereinafter OMBA] is the source of the OMB's jurisdiction and powers. Additional powers are granted in related legislation, including the *Planning Act*. Thus, the OMB looms over municipal decisions taken under that statute.

The OMB is an administrative body, but its hearings are quasi-judicial in conduct. Generally, they resemble judicial hearing, except often more than one OMB member presides, there is often more than two parties and there is less formality and fewer procedural rules. Often participation in hearings is extended beyond those parties subject to the hearing, to interested parties, such as a developer whose interest would be affected by an outcome, or concerned environmental groups.²¹⁸ Boards, such as the OMB, are meant to make conflict resolution more rapid and responsive than it would be through the courts by using members with relevant experience. Sometimes, however, the sheer number of complex issues and interests in any given hearing can overwhelm this objective.

The nature of OMB hearings varies. Planning issues, or even municipal plans, can be referred to the OMB by the Minister of Municipal Affairs and Housing where in his or her opinion a provincial interest in section 2 of the *Planning Act* is, or is likely to be, affected by an OP and a council has refused to amend it in the manner requested by the Minister.²¹⁹ In addition where the Minister proposes an amendment any person can request the Minister to request an OMB hearing.²²⁰ In such cases the OMB renders a decision with regards to the issue posed by the Minister. The likelihood that a Minister would pursue a hearing in order to secure stronger ecological measures is remote in light of the present planning framework.

Direct appeals to the OMB are more common and are relatively straightforward. Figure 1 displays factors important to the launch of an appeal at

²¹⁷ OMBA, *supra* note 13.

²¹⁸ At the OMB hearings addressing the Corridor there were several parties, including several directly affected developers, indirectly affected developers, the Region of York, the Town of Richmond Hill, the MMAH, STORM and SRVS.

²¹⁹ *Planning Act*, *supra* note 4 s.23(1).

²²⁰ *Ibid.*, s.23(2).

the OMB. Sections 17 and 22 of the *Planning Act* provide broad general rights of appeal from municipal OP decisions. Section 17 provides for the appeal of all or part of a municipal council OP decision, if it is exempt from approval, and for the appeal of all or part of an OP decision, or lack thereof, by an approval authority.²²¹ These appeal rights exist for 'persons' and 'public bodies,' but not unincorporated organizations. 'Public bodies' as defined in subsection 1(2) of the *Planning Act* now excludes, for the purposes of appeal, all provincial ministries except for the MMAH, unless the MMAH designates otherwise. As argued earlier, this administrative change limits the accessibility of the appeals process for environmental concerns. The MOEE and MNR, often the most able environmental proponents to launch appeals, have been removed from the process. Add to this the incorporation requirement for environmental and citizen groups and the permitted appeals provided for in section 17 demonstrates a disposition towards the organized - the development industry.

Privately requested OPAs, by landowners for example, create an automatic and exclusive right of appeal for that landowner arising from the treatment of the OPA request.²²² Concerned environmental groups, for instance, cannot appeal a municipal decision on an OPA request. Appeals can be perfunctorily launched if there was a refusal to consider the request by a council or an approval authority, or on all or any part of a decision rendered contrary to that person's expectations or if the council refuses to adopt the proposed amendment.²²³ The latter route was used by the developers with lands in the Corridor. Both the development industry and the Town of Richmond Hill prepared for OPA 200 in the full expectation that the former would likely take the matter before the OMB. Accordingly, the Town compromised its intentions for the Corridor and was forthright in acknowledging that the presence of the OMB was the primary reason. To this end its accessibility to landowners allows municipal agendas to be superseded by private requests.

²²¹ *Ibid.*, s.17(24); (36), (40).

²²² *Ibid.*, s.22(7).

²²³ *Ibid.*, s.22(7)(a),(c) and (e).

The criteria needed to sustain an appeal at the OMB do not measurably narrow the scope of appellants, or discourage resourceful landowners. No explicit criteria of appeal are specified in the *Planning Act*. All that is required for a hearing is that an application demonstrates a land use planning ground.²²⁴ Accordingly, the OMB can dismiss those rare applications that are not in good faith, or are frivolous or vexatious.²²⁵

The legal effect of OMB decisions is a prominent reason that municipalities evaluate many of their land use decisions in terms of the OMB. Positioned at the back end of the planning process, the OMB has been given authority as the final land use decision-maker. Every decision of the OMB is final.²²⁶ In spite of this, it does have the authority to re-visit its own decisions “where it wrongly assessed the planning evidence... or failed to apply good planning policy.”²²⁷ Conceivably, this could make decisions vulnerable to deep-pocketed interests who can afford to attempt to convince the OMB that there are grounds for re-visitation. At the least it does nothing to remove any uncertainty concerning the effect of OMB decisions.

Under the OMBA and *Planning Act*, OMB decisions are legally binding on municipalities, as they are to all parties to a hearing.²²⁸ However, the effect a decision has as precedent on future OMB decisions is questionable. Certainly, OMB decisions demonstrate little consistency in the logical approaches or principles they apply (see below). Wayward decisions can be challenged. The OMB has authority to determine all questions of fact or law, but its decisions on law are not immune from judicial review, with a less than strongly worded privative clause in section 36 of the OMBA. Applicants, to get leave to appeal, must demonstrate good reason to doubt the correctness of the decision.²²⁹ Thus, judicial review is one avenue available to municipalities or environmental

²²⁴ *Ibid.*, s.17(45)(a)(i).

²²⁵ *Ibid.*, s.17(45)(a)(ii), (iii).

²²⁶ OMBA, *supra* note 13 s.96(4).

²²⁷ *Ibid.*, s.43, *St. Catherines (City) v. Faith Lutheran Social Services Inc.* 4 M.L.P.R. (2d) 225 (1991).

²²⁸ *Ibid.*, s.37; *Planning Act*, *supra* s.17(50).

²²⁹ *Mod Aire Homes v. Bradford* (1990), 72 O.R. (2d) 683.

organizations that has operated in their favour as a check on the OMB, though it is just as accessible, and not as painfully expensive, to developers.

Finally, municipalities are hesitant to run the risk of defending ambitious plans because of the breadth of decision-making powers the OMB enjoys. The OMBA gives the OMB broad rule and order-making capabilities to compel a party to act in a specified manner in accordance with the *Planning Act*.²³⁰ In addition, there are the powers granted by the *Planning Act* itself. Under subsection 17(50) the OMB can approve all or part of a municipal plan, modify it and approve it or refuse to approve all or part of a plan.²³¹ Subsequent to Bill 20, the OMB can no longer return a plan to a municipality for changes, but must render a final decision concerning the plan according to its powers in subsection 17(50). Done in the name of expediency, this administrative change further concentrates decision-making authority at this the back end of the planning process.

The OMB has the authority to alter with legally binding effect, in just about any manner, a municipal plan. In light of those powers, it is not surprising that Richmond Hill forged ahead with OPA 200 despite significant environmental opposition. Without the document as a template, the OMB would have had carte blanche to apply its own determination of planning for the Moraine or that of the developers affected. Thus, the OMB's role in the planning process, its accessibility, the legal effect of its decisions and the breadth of its decision-making powers constrain municipal enthusiasm and opportunities for straying too far from the status quo of development patterns, while providing ample opportunity for developers to prod or litigate the municipal agenda in their favour.

6.2 The OMB and the Role of Provincial Policy and the Planning Act

Essential to understanding the practical effect the OMB has on the planning process, as opposed to its statutory role, is the guise through which it evaluates municipal land use conflicts. The OMB exercises its powers and position, limited only by the uncertain conceptual grounds of 'good planning' criteria – a illusive

²³⁰ OMBA, *supra* note 13 s.37(c), (d); s.48.

²³¹ *Planning Act*, *supra* note 4 s.17(50).

term that finds neither a definition in the *Planning Act* nor any consistent articulation in OMB cases. However, it is this conception that determines in any given case whether the OMB would either facilitate or discourage large-scale land preservation. It draws much of the context of good planning from the pro-growth provisions of the *Planning Act* and particularly the weak provincial ecological policy framework.²³² That being said, the OMB has never bound itself to the policy framework, thereby accentuating the uncertainty its decisions foster. What is needed to strengthen the role of the OMB in the planning process is an improved ecological policy framework which is made more binding in OMB decisions by specific provisions in the *Planning Act*.

6.2.1 *The Effect of the Provisions of the Planning Act*

‘Good planning’ is an amorphous and variable concept that the OMB applies to evaluate municipal land use conflicts. The concept appears in a great range of OMB decisions, with little explanation regarding its actual meaning, save consistent referral to the *Planning Act* and the policy framework. The *Planning Act* exists to regulate land development and it is the statute that involves the OMB in local land use conflicts. A purpose of the *Planning Act*, is to “promote sustainable economic development in a healthy natural environment...”²³³ Innocuous enough, but of the 16 provincial interests in section 2, seven could be portrayed as pro-growth and only three could be cast as ecological. Further, as was discussed earlier, several provisions create an implicit obligation on municipalities to develop where growth pressures exist. Thus, more than regulate development the *Planning Act* facilitates growth. A subtle but important difference, because the OMB takes its fundamental interpretive cues from the thrust of this statute, no matter how measurably policies may change.

²³² T. Williams, Lecture in Law and Use Planning Law class (13 February 2001).

²³³ *Planning Act*, *supra* note 4 s.1.1(a).

6.2.2 *The Effect of Provincial Policy*

In recent years, the policy framework and wording of section 3 of the *Planning Act* have been amended to project a much more pro-growth philosophy than under Bill 163. As the section 4 argued, this has resulted in considerably less legal support for innovative ecological measures, therefore, the infusion of strong ecological considerations into municipal land use decisions has become an uncertain endeavour.

OMB adherence to the policy framework in its evaluation of land use conflicts is an uncertain determination, particularly for progressive municipalities. A purpose of the *Planning Act* is to “provide for a land use planning system led by provincial policy.”²³⁴ Yet, a substantial reason for the trepidation of municipalities is the presumption that the OMB has no more obligation to follow the policy framework’s few weak ecological policies than do the municipalities. The *Planning Act* requires that municipalities ‘shall have regard for’ the PPS. For its purposes, the OMB has contemplated the effect this language should have on its own deliberation, stating in *Re Ottawa Carleton (Regional Municipality) Official Plan, Amendment 8* (1991), 26 O.M.B.R. 132 that:

Statements of government policy ... must be regarded by the board. *The board is not bound to follow them*; 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 reasonable consistency in principle.²³⁵ [emphasis added]

Not surprisingly, provincial policies play an unpredictable and confusing role in OMB decisions. A survey of OMB decisions in Richmond Hill over the 1990s noted that there where there was reference to the consistency of development proposals with provincial policies, it was often done with little

²³⁴ *Ibid.*, s.1.1(b).

²³⁵ *Re Ottawa Carleton (Regional Municipality) Official Plan Amendment 8*, (1991) 26 O.M.B.R. 132 at 180-182. See also *Juno Developments (Parry Sound) Ltd. v. Parry Sound (Town)* (1997), 35 O.M.B.R. 1.

reference to any particular policies or how the proposals were in compliance with them.²³⁶

The OMB has indicated on several occasions that there are definitive upper limits to what the policies will permit. A finding in *Re London (City) Official Plan Amendment No.88* [1999] O.M.B.D. No. 602 concerning proposed improvements to the ecological measures in an OPA by a local citizen's groups is demonstrative:

...the Board must reject them as the Board believes that they go beyond that which is necessary in terms of applicable legislation and regulation; they go beyond that which due regard for provincial planning policy requires.²³⁷

Thus, the permissive language of section 3 of the *Act* not only releases municipalities from closely following provincial policies, but it has also been often interpreted by the OMB to demand of them little more than cursory consideration. The OMB may have taken too casual an approach to the relevance of provincial policies. *Concerned Citizens of King (Township) v. King (Township)* [2000] O.J. No.3517 (*Concerned Citizens*) addressed an application for judicial review arising from a recent OMB decision imbued with ecological considerations of the Moraine ecological that approved King Township's OPA 54 to allow dramatic growth. Filed at the Ontario Superior Court of Justice, it was the first time an Ontario court had considered the OMB's interpretation of provincial planning policy. In doing so, the court signaled that more prominence be given to the PPS. Campbell J. addressed a passage in the decision where the OMB had quoted a party as having stated that the OMB need 'only' have regard for the PPS and the court further noted that the decision mentioned the PPS only twice:

The question is whether ... the OMB must seriously, conscientiously, and carefully consider the provincial policy guidelines or whether it is sufficient simply to pay lip service to them.... It diminishes the importance of the provincial policies to

²³⁶ P. Draycott, *Planning Decisions in the Town of Richmond Hill: An Analysis of Ontario Municipal Board Decisions from 1990 to 2001* (research paper submitted for course in Land Use Planning Law, Osgoode Hall Law School) [hereinafter Draycott].

²³⁷ *Re London 88*, *supra* note 143.

say that one need "only" have regard to them... The judgment as a whole raises the question, whether the Board erred in failing adequately to have regard to provincial policies.... To "have regard to" falls somewhere on the scale that stretches from "recite them then ignore them" to "adhere to them slavishly and rigidly."²³⁸

By granting the application for review on this issue, the court essentially concluded that provincial policies demanded more than superficial consideration by the OMB. While this may not be a decisive change in support of greater ecological protection in the present policy framework, if the future were to include more comprehensive ecological policies, it would be necessary that they have an appropriately persuasive impact on the OMB. Otherwise, large-scale ecological protection will remain largely out of reach of the planning framework.

6.2.3 OMB Inconsistency

The OMB's rather loose adherence to the planning framework has an effect beyond giving greater weight to the purpose and provision of the *Planning Act*. Without the anchor of more binding and guiding provincial policies, the OMB gravitates away from the larger contextual issues present in many land use conflicts and gets caught up in site specific details. OMB hearings concerning disputed ecological land use designations often boil down to ecological head counting exercises where opposing interests use the adversarial setting to compete for persuasive effect before the OMB.²³⁹ For instance, the hearings on the Corridor gave the distinct impression that if the OMB was going to protect the Moraine from development, it was going to be in an incremental and black and white manner. Thus, the loose policy framework has allowed the OMB to establish an inconsistency in its decision-making approaches and conclusions, save for its long-standing pro-development proclivities.²⁴⁰

²³⁸ *Concerned Citizens*, *supra* note 1 at paras. 18-19.

²³⁹ Author's observations from having attended a series of OMB hearings, including those concerning the Corridor, and having read numerous OMB cases addressing ecological designations.

²⁴⁰ Draycott, *supra* note 236.

Due to the complexity of many land use decisions it is inevitable that the OMB would arrive at inconsistent decisions without greater adherence to provincial policies. The role of stare decisis is diminished for the OMB. For every strong ecological decision the OMB takes, there is another weak decision that can be pointed to. Two examples are illustrative. On the positive side, in a recent decision affecting the Lower Rouge, the OMB ruled that a landowners proposed high-rises would have an unacceptable adverse impact on the health of the Lower Rouge corridor by severing a natural link between a wetland complex and a nearby stream corridor. In doing so, the OMB rejected the landowner's claim that wildlife could use an adjacent railway and hydro-corridor instead of the natural corridor in dispute.²⁴¹

On the negative side is the decision in *Re York (Regional Municipality) Official Plan Amendment No. 129* [1996] O.M.B.D. No. 1596 various developers appealed against Richmond Hill's refusal to enact zoning by-laws relating to their development proposals in an areas covered by OPA 129.²⁴² The property was characterized by lowland and wetland features which the MNR insisted be kept from development on the basis of provincial policies. The development proposal failed to protect the area requested by the MNR, though the developer asserted that a different part of the site, amounting to 20 percent of the total site, would be dedicated as a protected area. The OMB held that the developer's plans conformed generally to the provisions of OPA 129 and constituted good planning for this site, despite the contrary opinion of the MNR. In a similar vein, a recent decision was made to include lands immediately adjacent to provincially significant wetlands in the lots of a plan of subdivision according to dubious reasoning and despite opposition from the conservation authority in question:

the Conservation Authority reviewed with the Board a number of examples where residential development had been permitted in proximity to wetlands. Photos indicated lawn mowing to the edges of wetland areas or actual wetland/pond alteration. From the Conservation Authority's perspective, this is not consistent with the

²⁴¹ *Rouge River Restoration Committee v. Map Realty Ltd* [2000] O.M.B.D. No. 1548.

²⁴² *Re York (Regional Municipality) Official Plan Amendment No. 129* [1996] O.M.B.D. No. 1596 (O.M.B.) online:QL (OMB).

protection of wetlands... Their preferred approach would be to exclude the wetland and buffer from new lot areas... [They] considered the majority of the [landowner's] site to be "adjacent lands" to the wetlands within the Goodwood-Glasgow Wetland Complex and therefore not suitable for development. There were no explicit examples of where these positions had been previously enforced as a condition of development, or where these approaches had achieved improved protection, only that these approaches were preferable. The Board sees no compelling policy or practical reason in this case to impose such restrictions.²⁴³

Often times the inconsistency manifests itself in the same case. *Re London (City) Official Plan Amendment No.131* [2000] O.M.B.D No.77 is demonstrative. On the one hand, in the opposite of the *Rouge* case, the OMB rejected the ecological importance of connectivity where natural areas would include passive recreation uses.

The Board was advised by the landowners' ecologist that "if you want to create a 500 metre wide linkage corridor that's great" but followed with the statement 'to what end, I see no ecological need'.... Linkages are important but they must be balanced against other competing interests.

As an ecologist, she acknowledged that the linkages, although forming connections which might assist in increasing genetic diversity, or migration of wildlife, *were primarily for the benefit of the human parts of the ecological system, to allow movement through natural areas*. The Board fails to see how increasing human interaction with natural systems as part of a recreational system will benefit the natural environment. The Board is not so naive as to think this interaction will not take place, but to encourage it in the form suggested, *does not in the opinion of the Board support Official Plan goals and policies intended to rehabilitate and enhance natural heritage areas.... There was no evidence to establish the necessity of these linkages in order to accommodate things such as genetic migration of flora or fauna.*²⁴⁴ [emphasis added]

The contrast between this and the *Rouge* decisions clearly makes for uncertainty when undertaking to implement efforts like OPA 200, which was based on the

²⁴³ 863935, *supra* note 207.

²⁴⁴ *Re London (City) Official Plan Amendment No.131* [2000] O.M.B.D No.77 (O.M.B.) at para 102 online: QL (OMB) [hereinafter *Re London 131*].

principle of connectivity, much less the implementation of the principles of landscape ecology. On the positive side in the very same decision, the OMB held that its support for London's designation for protection of a forested area and stream tributary

... flows from identifiable natural heritage features in support of Section 2.3.1 of the Provincial Policy Statement, which requires that natural heritage features be protected from incompatible development... In this circumstance the Board must consider the extent to which development may be considered within the woodland feature in order to protect the ecological function... The Board agrees with the City and the residents that there is an important ecological function, worthy of protection from negative impacts, performed by the significant woodland within Northdale Forest. The Board was not satisfied that the developer's ecologist had adequately considered this greater ecological function in coming to his conclusions. The Board agrees with the City's ecologist that the sum of the whole could be greater than the parts.²⁴⁵

A more comprehensive and detailed policy framework would reduce this all too common inconsistency. In the present, and in light of OPA 200, it is clear that the uncertainty of the OMB causes municipalities to be wary and conservative in their ecological designations.

A final reason to consider a more comprehensive and binding ecological policy flows from the site-specific focus, and adversarial nature, of the OMB. Its narrow focus tends to ignore larger factors that the Ontario Court of Appeal held should be taken into consideration in the context of OP s and OPAs. In *Cloverdale Shopping Centre Ltd. v. Etobicoke (Township)* [1966] 2 O.R. 439 the court reasoned, in a decision that is binding on the OMB, that these decisions concern more than just the parties involved:

The decision to be made transcends the interests of the immediate parties.the Board is not deciding a *lis* in the sense that the issue is confined to those for or against the proposal but he or it has to consider the safety, welfare and convenience, *i.e.*, the interests, of the public in the municipalities affected.²⁴⁶

²⁴⁵ *Ibid.*, at para 101.

²⁴⁶ *Cloverdale Shopping Centre Ltd. v. Etobicoke (Township)* [1966] 2 O.R. 439, at 449-450.

Most recently, again in *Concerned Citizens*, Campbell J. held that the OMB had failed to apply larger concerns in a decision with immense consequences for development on the Moraine, stating that such an approach

...feeds the general concern which arises from the reasons for decision as a whole, that they reflect a narrow piecemeal decision reminiscent of bygone days rather than a focus on overall regional concerns in the context of comprehensive and strategic planning that takes into consideration all relevant land use planning concerns, including environmental concerns.²⁴⁷

While a narrow party-centered approach is certainly consistent with the *Planning Act*, more comprehensive ecological policies that are more binding on the OMB would shift some of the OMB's focus towards broader concerns, such as the larger ecological implications of its decisions.

6.2.4 *The Effect of Changes to the Policy Framework*

Despite the inconsistencies of OMB decision-making methods and conclusions it is useful to discern whether significant provincial policy changes have any effect on OMB interpretations. The OMB presides over conflicts that arise in a land use planning system that is supposed to be 'led by policy,' thus the OMB is, at least on paper, guided by the direction of provincial policy. Certainly, leading up to, and during, Bill 163 there were signs that strengthened ecological policies were finding their way into the decisions and consciousness of the OMB, however subtly. A review of OMB cases, and the above cited survey of OMB decisions in Richmond Hill in the 1990s, suggests that during Bill 163, and even before, the OMB tended to draw from provincial policies more so than it does after Bill 20. For instance, the decision in *Re OPA 129* relied heavily on the legally ineffectual Guidelines to justify the ecological measures in OPA 129. Notably, in many cases one of the parties involved had emphasized the importance of the ecological provincial policies to the OMB, perhaps under the belief that the

²⁴⁷ *Concerned Citizens*, *supra* note 1.

tougher language of section 3 of the *Planning Act* made these policies more relevant and persuasive to the OMB. This could be taken as a strong indication that, through whatever means, provincial policy was a more meaningful guide for OMB decisions than it is presently.

If the OMB is drawing less on provincial policies since Bill 20 that should come as no surprise. No matter how rigorously the OMB applies the present provincial policies, there should be little positive ecological impact from its decisions to benefit progressive municipalities in a planning system 'led by' these policies. The PPS, which under section 3 serves as the clearest expression of provincial intent, accords inadequate focus to ecological concerns. OMB cases, including those discussed above, demonstrate that the weight of good planning considerations are shaped by the overall effect of the pro-growth approach of the present policy framework. The OMB would be defying the intent of the *Planning Act* and provincial policies, as well as its own statutorily defined role, if it validated ecological measures that attempted to implement of the principles of landscape ecology on the Moraine.

In fairness, there have been cases where the OMB has given great weight to ecological considerations and made decisions that appear to rely more heavily on the weak ecological aspects of the policy framework than the economic ones. However, in many of those cases the ecological considerations were clearly covered by the ecological policies such as they are.²⁴⁸ It is when disputed ecological designations become less clear-cut, or when corridor designations are being justified that the true weakness of the policy framework in the hands of the OMB is evident.²⁴⁹ Richmond Hill understood this in formulating OPA 200.

6.3 The OMB's Interpretation of Open Space Designations

What of ecologically benign lands? Lands that are not captured under the specific ecological protection categories municipalities devise in their OPs and OPAs. These kinds of lands make up much of the Corridor. The OMB's

²⁴⁸ See *Re London 131*, *supra* note 244 concerning the forest designation.

²⁴⁹ *Ibid.*, concerning the wetland designation, and 863935, *supra* note 207.

approach to open space land designations confirms that in most cases ecologically benign land needs categorical ecological designation to be permanently protected in the present planning framework.

It has been the OMB's consistent position that privately owned lands that are zoned, or rezoned, as open space in OPs, will not maintain that designation unless the municipality takes measures to purchase, that is to say compensate, the owner for the loss in property value that results. In other words, private owners should not be compelled to provide open space to the public. Although, this approach seeks to strike a balance between private rights and the public interest, the presumptions driving these decisions are legal-economic and not ecological. The most often quoted OMB decision in this regard concerned a restricted area zoning by-law, but it has been applied to the circumstances of OP designations.²⁵⁰ In *Re Nepean (Township) Restricted Area By-Law 73-76* (1978), 9 O.M.B.R. 36, Member Chapman held that:

... if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved.²⁵¹

Similarly, in *Re Toronto (City) Interim Control By-law 1995-0550* [1998] O.M.B.D. No. 1267 the OMB stated that

privately owned lands will not be transformed to public purposes such as open-space or park by zoning instruments unless there is a concomitant commitment on behalf of the municipality to expropriate or to acquire the lands in-question.²⁵²

The equivalent logic has been applied in the context of OPs:

that if privately held lands are designated open space... on an Official Plan this does not mean that they shall be permanently zoned open space but that the purpose of such designation is to

²⁵⁰ J. Mascarin, *Confiscation without Compensation – 'Public' Official Plan Designations of Privately Owned Lands* (1992) 9 M.P.L.R. (2d) 43.

²⁵¹ *Re Nepean (Township) Restricted Area By-Law 73-76* (1978), 9 O.M.B.R. 36 at 55.

²⁵² *Re Toronto (City) Interim Control By-law 1995-0550* [1998] O.M.B.D. No. 1267 (O.M.B.) at para. 8 online: QL (OMB). Also known as *Russell v. Toronto*.

give a government body an opportunity of purchasing such lands, and that if such opportunity is declined then the private owner is entitled to a zoning that would allow him to develop his property.²⁵³

The OMB has also applied the right to compensation or re-zoning to situations where the landowner did not object to the open space designation in the first place.²⁵⁴

The above line of logic has been applied to ecologically benign land. Lands that have ecological characteristics that are designated for protection in municipal policies, which are themselves justifiable under the provincial policy framework, can be set aside for protection without the threat of compensation burdening the municipality. In other words, if there is good planning reason, based on sound municipal or provincial policy, for lands to be designated as protected open space then such measures can be justified by the municipality.²⁵⁵ The previously discussed decision in *Re London (City) Official Plan Amendment No. 131* [2000] O.M.B.D No.77 is illustrative:

It is the conclusion of the Board in this hearing that the merit in designating lands open space in the Northdale Forest and tributaries flows from identifiable natural heritage features in support of Section 2.3.1 of the Provincial Policy Statement, which requires that natural heritage features be protected from incompatible development, as well as Section 15.3.1 of the Official Plan and the criteria of Section 15.4.2 for wetlands and 15.4.5 for woodlands.²⁵⁶

Thus, to preserve ecologically benign lands as part of a large ecological preservation effort, a municipality would have to be able to categorize the lands in question as having a specific ecological value covered by municipal policies supported by provincial policies, otherwise they would have to be purchased. Because lands proposed for ecological protection must have certain ecological characteristics, the formulation of municipal ecological policies and the

²⁵³ *J.H. Mooradian Ltd. v. Burlington (Town)* (1972), 1 O.M.B.R. 344 at 345. See also *Re Whitchurch-Stouffville Interim Official Plan* (1983), 16 O.M.B.R. 280.

²⁵⁴ *Re Belleville & Suburban Planning Area Official Plan Amendment 66* (1985), 17 O.M.B.R. 176.

²⁵⁵ *Ontario Hydro v. Toronto (City)* [1996] O.M.B.D. No. 993 (O.M.B.) online: QL (OMB).

²⁵⁶ *Re London 131*, *supra* note 244 at para 102.

determination of a given piece of land's ecological qualifications both become strongly disputed at the OMB. In this sense OPA 200 was sure to cause trouble because it contemplated preservation of larger areas of land, including significant lands as corridors. First, the policies creating the corridors would themselves have come under scrutiny at the OMB for their consistency with the policy framework. Second, the ecological characteristics of the lands designated for corridors would have had to qualify according to one of categories of corridors in OPA 200, no doubt opening the possibility of uncertain disputes over accurate ecological designations. In this light, OPA 200 pushed beyond the limits of provincial policy and its corridor designations would have met considerable skepticism from the OMB's logic of open space designation described above. Thus, it is even less likely that sweeping preservations of ecologically benign land could be undertaken, and defended by a municipality, in the manner prescribed for the Moraine by landscape ecology.

6.4 Looking Forward

It is not an overstatement to assert that the ecological integrity of the Moraine is at stake in the OMB hearings in Richmond Hill. Ultimately, the backend of the planning process, guided, or unguided, by the policy framework that pervades the process, will be the ultimate authority for those activities that will take place in the Corridor. Despite the foregoing there are positives to look towards. The OMB has shown an awareness of the vulnerability of the Moraine's unique ecological character in several cases. Moreover, in *Re OPA 129* the OMB spoke specifically to the important ecological role of the Corridor, stating:

... this band of area is the last remaining undeveloped remnant of the corridor by which plant and animal life can migrate. According to the latest thinking among practical ecologists, corridors and corridor movement are key to sustaining the diversity and richness of life in and among large-scale ecosystems. In the broadest sense this contributes to the health of large parts of the province.²⁵⁷

²⁵⁷ *Re OPA 129*, *supra* note 80 at 140.

The OMB then immediately cautioned that significant study must be undertaken before land uses can be seriously considered there. As has been made clear Richmond Hill's hand for the Corridor was played before it had taken the time it wanted, by developers anxious to build. It should be acknowledged, however, that *Re OPA 129* was rendered during the time of Bill 163.

If this statement was not enough to focus the OMB Members Mills and Beech, who are conducting the hearings on the Corridor, on the importance of this swath of land then perhaps the nature of the decision in *Concerned Citizens* will. There were several grounds of judicial review granted by Campbell J. from a disarmingly pro-growth OMB decision concerning the future development path of King Township. The passage from paragraphs 18 and 19 quoted above, criticizing the narrow approach the OMB took to arrive at its decision which ignored many environmental issues, must resonate with the OMB. Campbell's ruling also intimates that the OMB went out of its way to minimize the relevance of the provincial policy framework.²⁵⁸ The effect of this decision could be significant, as it was the first time that an Ontario court had reviewed the OMB's approach to provincial policies. Perhaps the most significant encouraging factor of all, is the public furor that has accompanied the rise and fall of OPA 200 as the public has become aware of the role and effect of the OMB, but also the vulnerable ecological state of the OMB. Perhaps public pressure, and therefore some political pressure, will cause the OMB to consider a little longer the true implications of their decision for the Corridor.

The problem of uncertainty created by the OMB's presence in the planning process is not wholly the OMB itself, but is to a large degree the marching orders that shape its appraisal of conflicts. The OMB takes most of its cues from the pro-growth *Planning Act* and the complicit accompanying policy framework. Nobody, including the OMB, is bound to follow the policy framework. It has interpreted the policy framework as having little weight, particularly in those cases where the grounds of a municipality's ecological designation or the basis

²⁵⁸ *Concerned Citizens*, *supra* note 1 at paras. 38-58.

of a municipal ecological policy do not fall neatly within the bare provincial ecological policies. What is needed is a more comprehensive set of provincial ecological policies, as argued earlier. However, insofar as the OMB is concerned, it is time that the *Planning Act* mandate that the policy framework be more binding in OMB evaluations of land use conflicts. The two must happen together. This will bring greater consistency and reliability to OMB decisions. The OMB would be compelled to place considerably more investigation and significance on ecological criteria in planning. If only the policy framework were to improve, without a change in the legal obligations of the OMB, it is quite likely the OMB would move only slightly from its traditional pro-growth approach.

Several benefits would accrue to progressive municipalities. Their planning tools and decision-making confidence would be measurably strengthened. The ecological quality and reliability of OMB decisions would improve. With criteria and objectives that must be given heed by the OMB, municipalities can be more confident that the ultimate decision-making authority is being true to provincial policies, with less room to fall vulnerable to the complexity and specificity of the land use issues at hand. In this sense the planning process would secure an additional, and decisive, layer of support for progressive municipalities. Only were this to happen could a municipality confidently integrate many of the principles of landscape ecology into their land use plans.

7. Concluding Remarks

7.1 OPA 200 Re-visited - Lessons for the Planning Framework

The primary objective of achieving a more ecological comprehensive policy framework, is the expectation that it would result in more ecologically sensitive land use decisions. Presumably, the implementation of the key principles of landscape ecology could be better sustained under such a regime. Presumably, OPA 200 would have been defensible and more progressive municipal plans would have been not only possible, but fostered. Viewed through the guise of

landscape ecology, OPA 200 illuminates the shortcomings of the present provincial policy framework governing the planning process

Long before the OPA 200 process the Planning Department in Richmond Hill's held the position that the provincial policy framework, augmented by tacit use of the principles of the Strategy, provided for the successful application of environmental policies to protect the Moraine. They pointed to the successful defense of OPA 129 at the OMB to demonstrate that planning could incorporate more substantial ecological goals. However, that decision appeared to cast OPA 129 as a full reflection of the Guidelines, leaving open the question of whether municipalities could go further:

...this is not a matter simply of importing word for word the language of the Guidelines into the Plan... but rather of translating the principles of the Guidelines into detailed policies tailored to the needs of this planning area.²⁵⁹

Arguably, the improved measures adopted in OPA 200, particularly the natural corridor policies, went beyond what the vague PPS or Guidelines could be said with any certainty to legally support. More comprehensive efforts would chance the same.

Yet, despite going beyond what the framework could support, OPA 200 did not attain some key objectives of landscape ecology. A review of the most general details of OPA 200 reveals as much. Most glaringly, as discussed earlier, it did not authorize protection measures at the scale needed to ensure the ecological integrity of the Corridor or the Moraine.

In fairness, it should be acknowledged that without a Moraine-specific provincial approach there is little reason for Richmond Hill to make land use decisions mindful of the Moraine's needs as a whole – this will just bring developer challenge. Until that occurs, municipalities are limited to partial protection measures that are well below the scope landscape ecology would demand for the protection of the ecological integrity of the Moraine. Thus, to presume that Richmond Hill in its present predicament could approve a future

²⁵⁹ *Re OPA 129, supra* note 80 at 39.

plan that attained all the key objectives of landscape ecology is off the mark. Furthermore, without greater provincial direction, there is little chance of Moraine-wide co-ordination. In such circumstances it is impossible to conceive of how the key principles of landscape ecology could be implemented at an appropriate scale.

7.2 The Necessary Changes

The entire exercise of OPA 200 demonstrates that the province has not given municipalities all the tools needed to set aside sensitive lands from development, let alone large-scale preservation. The pro-growth orientation of the planning framework needs to significantly tempered by ecological considerations. The legal structure inhibits against innovation by subjecting municipalities to pro-growth provisions, reduced response times to developer proposals and the looming presence of the OMB. At the same time changes to provincial – municipal planning roles have overwhelmed Planning Departments with more responsibilities and less resources. With an overhaul of the *Planning Act* far from likely, the most logical and effective place to remedy the present planning framework is in the policy framework. Presently, the policy framework addressing land use decisions on the Moraine is vague and legally ineffectual. When combined with the retreat of provincial hands on involvement in local planning undertaken in the One-Window Planning Strategy and Municipal Plan Review, it is clear that key supportive planning tools for progressive municipalities are absent in the planning framework. The Regions cannot replace the expertise and legal weight of provincial involvement, needed by municipalities seeking to undertake innovative ecological measures.

Ultimately, the long-term protection of the Moraine depends on increased provincial involvement expressed in a much more comprehensive and detailed manner. While this does not presume day-to-day involvement it can be achieved in a significantly strengthened policy framework. Renewal of the planning framework must begin with implementation of many of the recommendations of the Strategy. Accordingly, provincial policies need to be more ecologically

comprehensive and binding in the manner of Bill 163. Moreover, if municipal autonomy is a real objective of the planning process then new provincial policies should enable municipalities to set aside lands that have no 'categorical' ecological value. The protection of ecologically benign land is essential if the ecological integrity of the Moraine is to be preserved in the manner prescribed by landscape ecology.

At a minimum, new policies should take the form of a new Moraine-specific PPS, that is legally binding under section 3 of the *Planning Act*. Legislation implementing a land use plan for the Moraine holds the greatest opportunity for tailored and steady approaches to land use regulation. Either option would give greater ecological criteria and planning cues to the OMB which has traditionally been pro-growth. If just a PPS were to be adopted, then the *Planning Act* needs to be amended to make the new policies more binding on the OMB's deliberation. Without greater direction the OMB will continue to apply inconsistent decision-making approaches and render unpredictable decisions. If the weight of these measures could be achieved the planning process will have done its part to contribute to the future health of the Moraine and the surrounding regions.

Only were this to happen could a municipality defensibly and confidently integrate many of the principles of landscape ecology into their land use plans. Under this scenario something greater than OPA 200 could have been vigorously pursued by a municipality in Richmond Hill's position. Most importantly, large-scale preservation of land would have a chance of surviving through to the end of the planning process. In the present, such a scenario does not apply to the fate of the Corridor lands being decided at the OMB. In its place, the ecological integrity of the Moraine may well in fact be reliant on the cautionary words of Campbell J. in *Concerned Citizens* and the increasing outcry of concerned citizens in Richmond Hill and across the GTA. Until that occurs the bustle one can see to the south of the Moraine, will spread across the Moraine in an uncontrolled and devastating manner, damaging a natural legacy in an irreplaceable manner.