

ISSUE DATE:

**June 29, 2010**



PL090665

Ontario  
Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

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OMB File No. PL090665

Sulphur Springs Development Corp. has appealed to the Ontario Municipal Board under subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from the failure of the City of Hamilton to make a decision respecting a proposed plan of subdivision on lands composed of Part of Lots 48 and 49, Concession 2, former Township of Ancaster, in the City of Hamilton  
Approval Authority File No. 25T 200403  
OMB File No. PL090707

**APPEARANCES:**

**Parties**

**Counsel/Agent\***

City of Hamilton

A. Zuidema and J. Wice

Sulphur Springs Development Corp.

S. Snider

Baldin and Betrame Construction

J. Restivo

Ontario Historical Society

Robert Leverty\*

**MEMORANDUM OF ORAL DECISION DELIVERED BY J. E. SNIJEK ON  
MAY 11, 2010 AND ORDER OF THE BOARD**

Sulphur Springs Development Corp. (the Appellant) has appealed the City of Hamilton's (the City) failure to amend Zoning By-law 6593, to approve plan of subdivision 25T-200403 in order to facilitate the development of 40 single detached dwelling units and six future development blocks.

The Board received a letter from James Harbell requesting Participant status and that status was confirmed by the Board.

The Board received a motion by the City to have the matter deferred sine die pending resolution of the unapproved cemetery.

The City's motion was supported by the Ontario Historical Society.

A number of interested parties registered as Participants. The list is attached as Attachment "1" to this decision.

**Background:**

The Appellant filed its applications for subdivision and rezoning on February 23, 2004.

On March 12, 2004, the City identified three issues to be resolved in order for the development to proceed:

The suspected unapproved Hatt Cemetery  
The Tiffany Falls Environmentally Sensitive Area  
Pre servicing, grading and drainage

(Letter to Sergio Manchia from Charlie McConnell dated March 12, 2004 Exhibit 1 Tab 3B).

The Appellant retained the services of AMICK Consultants Limited (AMICK) to undertake an archaeological assessment. The assessment was completed in March 2005.

AMICK reached the following conclusions:

"This cemetery is clearly much more substantial than a family cemetery. The arrangement of the graves in identifiable segregated areas and groups appears to represent an attempt to preserve the familial relationships of the deceased rather than a basic linear growth pattern based purely on geographic considerations. The quantity of the persons buried at this cemetery and the inferred period of use (circa 1786 – 1824) suggests that this is likely the original cemetery for the Ancaster Community. The Cooley Cemetery is clearly a significant heritage feature of great archaeological and historical interest. As a pioneer cemetery established by the United Empire Loyalists is one of the earliest surviving Euro-Canadian cemeteries in the Province of Ontario." (Exhibit 1 Tab 3C pg. 14).

"Any time human burials are identified the ideal determination with respect to disposition is to leave them as they have been found. However, in reaching these determinations it must be borne in mind that conditions of the burials encountered may have impacts on the living community which can only be addressed by relocating the

deceased. In the case of the Cooley Cemetery; several considerations suggest moving some of the graves within the cemetery may be desirable in order to accommodate all stakeholders. These recommendations are based upon a number of practical considerations without prejudice to any particular group.” (Exhibit 1 Tab 3C pg. 15).

It is recommended that any graves within the septic bed and any likely to collect outflow be relocated on elevated ground to ensure these persons are commemorated in a more dignified and appropriate manner. (Exhibit 1 Tab 3C pg. 15 and 16).

It should be noted that some of the graves suggested for movement are dubious graves which means that they were considered unlikely to represent graves at the time of the field investigation but were marked in order to ensure that graves were not missed for any avoidable reason.” (Exhibit 1 Tab 3C pg. 16).

On November 3, 2005 the Ministry of Government Services (MGS) declared the Cooley Cemetery Site to be an “Unapproved Cemetery” within the meaning of the Cemeteries Act (revised). (Exhibit 1 Tab 3D).

The notice of the designation was given to the landowners Sulphur Springs Development and Baldin and Beltrame Construction.

The effect of the designation is that the cemetery is protected and that nothing can be done unless or until a Site Disposition Agreement has been reached.

A Site Disposition Agreement must include:

A legal description of the cemetery in which the human remains are interred and if appropriate, a statement that the remains will be left where they are interred.

The style and manner in which the human remains are to be disinterred and re-interred if applicable.

The time within which the disinterment and reinterment are to take place if applicable.

The provision being made for the future maintenance of the cemetery in which the human remains are to be located.

The allocation of the costs for carrying out the agreement.

Such other matters as the Parties to the agreement agree upon.

“Failing a negotiated Site Disposition Agreement the Act provides for binding arbitration. If you do not reach agreement within one month please notify my office. For your information Section 72(4) of the Act provides that if I am of the opinion that an agreement may be reached, I may defer referring the matter to arbitration so long as it appears to be a reasonable prospect of an agreement being reached.”

Position of the Parties:

The City supported by the Ontario Historical Society believes that the Site Disposition Agreement should be reached prior to the Board disposing of the matter.

The City points to the location of the “unapproved cemetery” and the Site Disposition Agreement are critical components of the subdivision and without these geographic issues being resolved it is impossible to know what development continuum is being established.

Because of the geographic uncertainty the City raises the possibility of re-litigation. The hearing before the Board would be more focussed and may involve fewer participants if the “unapproved cemetery” is resolved first.

It is difficult for the City to formulate an issues list because of the geographic uncertainty that results from the unapproved cemetery and it is difficult to prove that the proposed development represents “good planning”.

The City states that the Board has no jurisdiction over the Cemeteries Act process.

The position of the Applicant/Respondent and Baldin and Beltrame Construction is that:

The request is wrong in principle.

The request is not “good planning”.

The request is a distraction because other issues must be decided.

The Cemeteries Act process can be dealt with as a condition of draft approval.

There is no stay of proceedings in the Cemeteries Act.

There is an obligation for the Board to conduct a hearing.

Without a land use resolution a Site Disposition Agreement cannot be negotiated.

Board Findings:

The Board does not delay hearings indefinitely without an overpowering reason to delay the disposition of a land use matter.

The Board routinely sets conditions of draft approval that must be addressed prior to the approval.

The Board does not defer its decision to another entity.

**THE BOARD ORDERS** that the motion to Adjourn sine die is denied.

The Parties discussed the timing and length of the hearing. The City proposes a later hearing date near the end of the year. The Appellant responds with a hearing date as soon as possible.

Both Parties agreed on a hearing length of 12 days.

The Ontario Historical Society was a Party to the Motion but has agreed to be a Participant at the hearing.

The City and the Appellant agreed that the hearing dates of October 19, 20, 21, 22, 25, 26, and November 4, 5, 8, 9, 10 and 12. (The City works November 11 and subject to the Board's agreement the Parties are willing to sit on that date). The hearing will commence at 10:00 a.m. in the Council Chambers, Flamborough Municipal Building, 163 Dundas Street East, Hamilton , ON, L04 2H0.  
The Member is not seized.

**AND THE BOARD FURTHER ORDERS** that the Attached Procedural Order shall form the basis of the hearing.

So Orders the Board.

"J. E. Sniezek"

Member Name  
MEMBER

## ATTACHMENT #1

### LIST OF PARTICIPANTS

#### Participants

1. John Hovius  
199 Board Leaf Crescent  
Ancaster, ON, L9G 3M6  
Tel: 905.648.0244
2. Charles Tomlinson  
644 Green Ravine Drive  
Ancaster, ON, L9G 3W2  
Tel: 905.648.7888
3. Eddie Fabbro  
601 Highvalley Road  
Ancaster, ON, L9G 3X1  
Tel: 905.304.9173
4. Mark McQueen  
22 Cottonwood Court  
Ancaster, ON, L9G 2W1  
Tel: 289.239.9565
5. Bob Scime  
597 Highvalley Road  
Ancaster, ON, L9G 3X1  
Tel: 905.648.0186
6. Philip Posgate  
211 Lime Kiln Road  
Ancaster, ON, L9G 3A9  
Tel: 905.648.0390
7. Anita Mannen DesRoches  
171 West 34<sup>th</sup> Street  
Hamilton, ON, L9C 5K4  
Tel: 905.389.7984
8. Dwayne Graham  
209 Longfield Crescent  
Ancaster, ON, L9G 3W4  
Tel: 905.304.3613

9. Marilyn Mannen Rutler  
RR#4  
Oak Hill Drive  
Brantford, ON, N3T 5L7  
Tel: 519.753.0342
10. Bill Gregory  
204 Lime Kiln Road  
Ancaster, ON, L9G 3P6  
Tel: 905.648.0315
11. Glen Whitwell & Faye Earle  
200 Lime Kiln Road  
Ancaster, ON, L9G 3P6  
Tel: 905.304.0993
12. William Rosart  
253 Briar Hill  
Ancaster, ON  
Tel: 905.541.8021  
[wrosart@gmail.com](mailto:wrosart@gmail.com)
13. Sylvia Wray  
807 Centre Road  
RR#2  
Hamilton, ON, L8N 2Z7  
Tel: 905.689.4509  
[Sylvia.wray@sympatico.ca](mailto:Sylvia.wray@sympatico.ca)
14. R. McQueen  
621 Highvalley Road  
Ancaster, ON, L9G 3W7  
Tel: 905.648.5927
15. Linda Deverson  
573 Highvalley Road  
Ancaster, ON, L9G 3X1  
Tel: 905.648.6066
16. Margaret Houghton  
204-121 Hunter Street West  
Hamilton, ON, L8P 1R2  
Tel: 905.524.0805  
[marg\\_houghton@yahoo.ca](mailto:marg_houghton@yahoo.ca)

17. Richard Hatt  
1 Valiant Street  
Box 535  
Fonthill, ON, L0S 1E0  
Tel: 905.892.6100  
[hattrich@sympatico.ca](mailto:hattrich@sympatico.ca)
  
18. Art French, Chair  
Hamilton Municipal Heritage Committee  
c/o City of Hamilton, Clerk's Dept.  
77 James Street North  
Hamilton, ON, L8P 4Y5  
Tel: 905.674.6315  
[afrench@sourcecable.net](mailto:afrench@sourcecable.net)
  
19. Ron Sinclair, President  
Glanbrook Heritage Society  
4280 Binbrook Road  
Binbrook, ON, L0R 1C0  
[glanbrookheritage@yahoo.ca](mailto:glanbrookheritage@yahoo.ca)
  
20. David Johnston, Planner  
Niagara Escarpment Commission  
232 Guelph Street  
Copetown, ON, L7G 4B1  
Tel: 905.877.7815  
Fax: 905.873.7452  
[david.johnston@ontario.ca](mailto:david.johnston@ontario.ca)



## Ontario Municipal Board

Sulphur Springs Development Corp. has appealed to the Ontario Municipal Board under subsection 34(11) of the (Planning Act), R.S.O. 1990, c. P.13, as amended from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 87-57 of the City of Hamilton to rezone lands respecting 237 and 271 Lime Kiln Road from Agricultural "A" Zone and Deferred Development "D" Zone to "R3-" Exception Zone, Institutional "I-" Exception Zone and Public Open Space "O2" Zone to permit the proposed draft plan of subdivision  
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Approval Authority File No. 25T 200403

OMB File No. PL090707

### PROCEDURAL ORDER

1. The Board may vary or add to these rules at any time, either on request or as it sees fit. It may alter this Order by an oral ruling, or by another written Order.

#### **Organization of the Hearing**

2. The hearing will begin on Tuesday, October 19, 2010 at 10:30 a.m. at the Flamborough Town Hall, 163 Dundas Street East (Hwy #5 - Waterdown), Hamilton.

3. The length of the hearing will be about 13 days ending on Friday, November 12, 2010. The Board will not sit on October 27, 28, 29, November 1, 2, 3 and may not sit November 11, 2010.

4. The parties and participants identified at the prehearing conference (*see Attachment #1 for the meaning of these terms*) are listed in Attachment #2 to this Order and the order of evidence is listed in Attachment #3 to this Order.

5. The Issues are set out in the Issues List attached as Attachment #4. There will be no changes to this list unless the Board permits, and a party who asks for changes may have costs awarded against it.

6. Any person intending to participate in the hearing should provide a telephone number to the Board as soon as possible (*preferably before the prehearing conference.*) Any such person who will be retaining a representative should advise the other parties and the Board of the representative's name, address and phone number as soon as possible.

### **Requirements Before the Hearing**

7. A party who intends to call witnesses, whether by summons or not, shall provide to the other parties and to the City Clerk a list of the witnesses and the order in which they will be called. This list must be delivered by no later than Friday, September 17, 2010.

8. An expert witness shall prepare an expert witness statement (see Attachment #1), which shall, among other things, list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in section 11. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Board may refuse to hear the expert's testimony.

9. A Participant listed in Attachment #2 must provide to the parties and to the City Clerk a Participant Statement by no later than Friday, September 17, 2010, or the participant may not give oral evidence at the hearing.

10. Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence, as in section 11.

11. On or before Friday, September 17, 2010, the parties shall provide copies of their expert witness statements to the other parties and to the City Clerk.

12. Parties may provide to all other parties and file with the City Clerk a written response to any written evidence by no later than Tuesday, October 12, 2010.

13. A person wishing to change written evidence, including witness statements, must make a written motion to the Board. (*See Rules 34 to 38, inclusive, of the Board's Rules, which require that the moving party provide copies of the motion to all other parties 10 days before the Board hears the motion.*)

14. Only a Party may call or lead professional (expert) evidence and only a Party may cross-examine witnesses called by others. A Participant may lead lay evidence and make submissions. A Party may be subject to an award of costs but a Participant is not subject to costs.

15. A party who provides a witness' written evidence to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Board at least 7 days before the hearing that the written evidence is not part of their record.

16. Documents may be delivered by personal delivery, facsimile, email, registered or certified mail, or otherwise as the Board may direct. The delivery of documents by fax shall be

governed by the Board's Rules [26 – 31] on this subject. Material delivered by mail shall be deemed to have been received five business days after the date of registration or certification.

**18.** No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Board's Rules 61 to 65 apply to such requests.

**This Member is not seized.**

**So orders the Board.**

## ATTACHMENT #1 TO PROCEDURAL ORDER

### Purpose of the Procedural Order and Meaning of Terms

The Board recommends that the parties **meet to discuss this sample Order before the prehearing conference** to try to identify the issues and the process that they want the Board to order following the conference. The Board will hear the parties' comments about the contents of the Order at the conference.

Prehearing conferences usually take place only where the hearing is expected to be long and complicated. If you are not represented by a lawyer, you should prepare by obtaining the Guide to the Ontario Municipal Board, and the Board's Rules, from the Board Information Office, 15th Floor, 655 Bay Street, Toronto, M5G 1E5, 416-326-6800, or from the Board website at [www.omb.gov.on.ca](http://www.omb.gov.on.ca).

### Meaning of terms used in the Procedural Order:

**Party** is an individual or corporation permitted by the Board to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. If an **unincorporated group** wishes to become a party, it must appoint one person to speak for it, and that person must accept the other responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer, and may have an agent speak for them. The agent must have written authorisation from the party.

**NOTE** that a person who wishes to become a party before or at the hearing, and who did not request this at the prehearing conference, must ask the Board to permit this.

**Participant** is an individual, group or corporation, whether represented by a lawyer or not, who may attend only part of the proceeding but who makes a statement to the Board on all or some of the issues in the hearing. Such persons may also be identified at the start of the hearing. The Board will set the time for hearing this statements. **NOTE** that such persons will likely not receive notice of a mediation or conference calls on procedural issues. They also cannot ask for costs, or review of a decision as parties can. If a participant does not attend the hearing and only files a written statement, the Board will not give it the same attention or weight as submissions made orally. The reason is that parties cannot ask further questions of a person if they merely file material and do not attend.

**Written and Visual Evidence:** **Written evidence** includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material. **Visual evidence** includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing.

**Witness Statements:** *A witness statement is a short written outline of the person's background, experience and interest in the matter; a list of the issues which he or she will discuss and the witness' opinions on those issues; and a list of reports that the witness will rely on at the hearing. An expert witness statement should include his or her (1) name and address, (2) qualifications, (3) a list of the issues he or she will address, (4) the witness' opinions on those issues and the complete reasons for the opinions and (5) a list of reports that the witness will rely on at the hearing. A participant statement is a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which the participant will address and a short outline of the evidence on those issues; and a list of reports, if any, which the participant will refer to at the hearing.*

### **Additional Information**

**Summons:** *A party must ask a Board Member or the senior staff of the Board to issue a summons. This request must be made before the time that the list of witnesses is provided to the Board and the parties. (See Rules 45 and 46 on the summons procedure.) If the Board requests it, an affidavit must be provided indicating how the witness' evidence is relevant to the hearing. If the Board is not satisfied from the affidavit, it will require that a motion be heard to decide whether the witness should be summoned.*

**The order of examination of witnesses:** *is usually direct examination, cross-examination and re-examination in the following way:*

*direct examination by the party presenting the witness;*

*direct examination by any party of similar interest, in the manner determined by the Board;*

*cross-examination by parties of opposite interest;*

*re-examination by the party presenting the witness; or*

*another order of examination mutually agreed among the parties or directed by the Board.*

## ATTACHMENT #2 TO PROCEDURAL ORDER

### LIST OF PARTIES AND PARTICIPANTS

#### Parties

1. Sulphur Springs Development Corp.  
Scott Snider  
Turkstra Mazza Associates  
15 Bold Street  
Hamilton, ON, L8P 1T3  
Tel: 905.529.3476  
Fax: 905.529.3663  
[ssnider@tmalaw.ca](mailto:ssnider@tmalaw.ca)
2. City of Hamilton  
Joanna Wice, Solicitor  
Legal Services Division  
12-21 King Street West  
Hamilton, ON, L8P 4W7  
Tel: 905.546.2424 Ext. 4708  
[Joanna.Wice@hamilton.ca](mailto:Joanna.Wice@hamilton.ca)

#### Participants

1. John Hovius  
199 Board Leaf Crescent  
Ancaster, ON, L9G 3M6  
Tel: 905.648.0244
2. Charles Tomlinson  
644 Green Ravine Drive  
Ancaster, ON, L9G 3W2  
Tel: 905.648.7888
3. Eddie Fabbro  
601 Highvalley Road  
Ancaster, ON, L9G 3X1  
Tel: 905.304.9173

4. Mark McQueen  
22 Cottonwood Court  
Ancaster, ON, L9G 2W1  
Tel: 289.239.9565
5. Bob Scime  
597 Highvalley Road  
Ancaster, ON, L9G 3X1  
Tel: 905.648.0186
6. Philip Posgate  
211 Lime Kiln Road  
Ancaster, ON, L9G 3A9  
Tel: 905.648.0390
7. Anita Mannen DesRoches  
171 West 34<sup>th</sup> Street  
Hamilton, ON, L9C 5K4  
Tel: 905.389.7984
8. Dwayne Graham  
209 Longfield Crescent  
Ancaster, ON, L9G 3W4  
Tel: 905.304.3613
9. Marilyn Mannen Rutler  
RR#4  
Oak Hill Drive  
Brantford, ON, N3T 5L7  
Tel: 519.753.0342
10. Bill Gregory  
204 Lime Kiln Road  
Ancaster, ON, L9G 3P6  
Tel: 905.648.0315
11. Glen Whitwell & Faye Earle  
200 Lime Kiln Road  
Ancaster, ON, L9G 3P6  
Tel: 905.304.0993
12. William Rosart  
253 Briar Hill  
Ancaster, ON  
Tel: 905.541.8021  
[wrosart@gmail.com](mailto:wrosart@gmail.com)

13. Sylvia Wray  
807 Centre Road  
RR#2  
Hamilton, ON, L8N 2Z7  
Tel: 905.689.4509  
[Sylvia.wray@sympatico.ca](mailto:Sylvia.wray@sympatico.ca)
14. R. McQueen  
621 Highvalley Road  
Ancaster, ON, L9G 3W7  
Tel: 905.648.5927
15. Linda Deverson  
573 Highvalley Road  
Ancaster, ON, L9G 3X1  
Tel: 905.648.6066
16. Margaret Houghton  
204-121 Hunter Street West  
Hamilton, ON, L8P 1R2  
Tel: 905.524.0805  
[marg\\_houghton@yahoo.ca](mailto:marg_houghton@yahoo.ca)
17. Richard Hatt  
1 Valiant Street  
Box 535  
Fonthill, ON, L0S 1E0  
Tel: 905.892.6100  
[hattrich@sympatico.ca](mailto:hattrich@sympatico.ca)
18. Art French, Chair  
Hamilton Municipal Heritage Committee  
c/o City of Hamilton, Clerk's Dept.  
77 James Street North  
Hamilton, ON, L8P 4Y5  
Tel: 905.674.6315  
[afrench@sourcecable.net](mailto:afrench@sourcecable.net)



19. Ron Sinclair, President  
Glanbrook Heritage Society  
4280 Binbrook Road  
Binbrook, ON, L0R 1C0  
[glanbrookheritage@yahoo.ca](mailto:glanbrookheritage@yahoo.ca)
  
20. David Johnston, Planner  
Niagara Escarpment Commission  
232 Guelph Street  
Copetown, ON, L7G 4B1  
Tel: 905.877.7815  
Fax: 905.873.7452  
[david.johnston@ontario.ca](mailto:david.johnston@ontario.ca)

**ATTACHMENT #3 TO PROCEDURAL ORDER**

**ORDER OF EVIDENCE**

1. Sulphur Springs Development Corp.
2. City of Hamilton
3. All participants
4. Sulphur Springs Development Corp. in reply

## ATTACHMENT #4 TO PROCEDURAL ORDER

### ISSUES LIST

(Note: The parties agree the fact that an issue has been identified on the Issues List is not meant to imply acceptance of that issue as relevant or determinative).

#### Planning Act

1. Does the proposed development application provide sufficient rationale and justification to show to the decision making authority how the cultural heritage resources, namely the Hatt-Cooley Cemetery, are to be conserved as provided in Subsection 2(d) of the Planning Act, which addresses, among others, features of significant cultural, historical and archaeological interest?
2. Does the proposed draft plan of subdivision meet the tests identified in Section 51(24) of the Planning Act, specifically in the matter of the Hatt-Cooley cemetery?
  - a. the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2;
  - b. whether the proposed subdivision is premature or in the public interest;
  - c. whether the plan conforms to the official plan and adjacent plans of subdivision, if any; and
  - d. the suitability of the land for the purposes for which it is to be subdivided.
3. Does the proposed draft plan of subdivision meet the tests identified in Section 51(24) of the Planning Act, specifically in the matter of protecting the Tiffany Falls ESA?
  - a. the effect of the proposed subdivision on matters of provincial interest as referred to in Section 2;
  - b. whether the proposed subdivision is premature or in the public interest (the development encroaches into the ESA and does not provide a buffer to protect the ESA);
  - c. whether the plan conforms to the Official Plan and adjacent plans of subdivision, if any (specifically, the Regional Official Plan respecting natural heritage);
  - d. the suitability of the land for the purposes for which it is to be subdivided (specifically, the development of the land for lots and streets within an area designated as an ESA in the Official Plan.); and

- e. whether the proposal will allow for the conservation of natural resources or flood control (specifically due to the loss of forest edge and butternut trees).

### **Niagara Escarpment Planning and Development Act and Niagara Escarpment Plan**

4. Does the proposed development application implement the objectives of the Niagara Escarpment Planning and Development Act and Niagara Escarpment Plan, specifically Subsection 8(a) to protect unique ecologic and historic areas by protecting the Hatt-Cooley Cemetery both as a historic area and archaeological site and as an ESA ?
5. Does the development encroach into the Escarpment Protection Area, which includes locally identified Environmentally Significant Areas, such as the Tiffany Falls ESA? (Policy 1.7)
6. Is the development compatible with and does it provide protection for environmentally sensitive areas both inside and adjacent to Urban Areas? (Policy 1.7)
7. Does the development minimize disturbance to wooded areas and protect existing trees? (Policy 2.7)

### **Endangered Species Act**

8. Does the development comply with the Endangered Species Act (2007) by protecting Butternut and its habitat on site?
9. If Butternut is to be removed on site, has a permit been issued by the Ministry of Natural Resources to allow this, as required under the Endangered Species Act?

### **Provincial Policy**

10. Is the proposed development consistent with the policies of the Provincial Policy Statements?  
In particular:
  - a. Does the proposed development allow for the conservation of a significant Cultural Heritage landscape, (i.e. the Hatt-Cooley Cemetery)? (PPS 1997 Policy 2.5.1 and 2005 PPS Policy 2.6.1)
  - b. Would the proposed development maintain the heritage integrity of the site in the event that the significant archaeological resources are to be retained on the property? (PPS 1997 Policy 2.5.2 and PPS 2005Policy 2.6.2)
  - c. Does the proposed development provide for land use patterns which efficiently use land and resources? (PPS 1997 Policy 1.1.2(b)(i) and 2005 PPS Policy 1.1.2(b)(i))

- d. Does the proposed development protect natural features and the ecological function of the area from incompatible development? (PPS 1997 Policy 2.3.1 and PPS 2005 Policy 2.1.1)
- e. Does the proposed subdivision maintain or improve the level of diversity and natural connections between natural features in the area? (PPS 1997 Policy 2.3.3 and PPS 2005 Policy 2.1.2)

### **Region of Hamilton-Wentworth Official Plan**

- 11. Does the proposed subdivision conform to the policies of the Hamilton Wentworth Official Plan (July 2003)? In particular:
  - a. Does the proposed subdivision contribute to the conservation of Regionally significant historical and cultural resources, specifically the Hatt-Cooley Cemetery? (Policy B.9.2)
  - b. Does the proposed subdivision provide an opportunity to incorporate these attributes into the design of the subdivision in a manner that minimizes adverse impacts and encourages maintenance and protection? (Policy B.9.2)
- 12. Does the proposed subdivision conform to the Hamilton-Wentworth Official Plan (July 2003) which provides that natural heritage resources (in this case, the Tiffany Falls Environmentally Significant Area) be preserved and their ecological features and functions are not adversely affected or degraded? (Section C.1.2.2(a))
- 13. Does the proposed development follow the process outlined in the Regional Official Plan for assessment and review of the possible impacts on the ESA? (Section C.1.2.2 (b)) (ESAIEG and staff concerns about the delineation of the ESA boundary and the assessment of impacts on the ESA have not yet been addressed.)

### **Town of Ancaster Official Plan**

- 14. Does the proposed subdivision conform to the policies of the Town of Ancaster Official Plan? Specifically:
  - a. Does the proposed development conform to the Town of Ancaster Official Plan and in particular, Section 2.5, Heritage Conservation of the Official Plan which provides for the conservation of the former Town's heritage and which encourages new development to be sympathetic to existing heritage (2.5.2iv)?
  - b. Does the proposed development conform to the Town of Ancaster Official Plan and in particular, Section 5.3.8, Niagara Escarpment Area of the Official Plan which provides for the conservation of the former Town's heritage?

- c. Does the proposed subdivision conform to the policies of Section 2.1, Environment which provides for the protection and enhancement of natural features?
- d. Does the proposed development conform to the policies of Section 5.2, Environmentally Sensitive Areas, which requires that development not negatively impact ESAs?
- e. Does the proposed subdivision conform to the policies of Section 5.3, Niagara Escarpment Area, which relates to minimizing further encroachment of growth on the Escarpment?
- f. Does the proposed subdivision conform to the policies of Section 4.4.13 to preserve existing trees (i.e. forest edge and butternuts) which is a consideration in the design and layout of the road system?
- g. Does the proposed subdivision maintain the environmental considerations of Policy 1.4.1iii) to maintain the Escarpment and its vicinity free of intensive urban development?
- h. Does the proposed subdivision contribute to the development of a local street system design that enhances the amenity and environmental value of the Urban Area as referred to in Policy 2.4.2.vii)?
- i. Does the proposed subdivision provide for the suitable integration of the proposed road system into the existing road system for the lands within Special Policy Area 10 as indicated in Policy 5.7.7?

### **Proposed Development Plan**

- 15. Does the proposed width and use of the 'No Touch Zone' serve the functions of an ecological buffer in protecting the features and functions of the ESA?
- 16. Is the proposed road design developable in light of a portion of the proposed local road (adjacent to Block 42) which has been omitted from the draft plan?
- 17. Is the proposed design suitable in light of any prevailing municipal requirements, policies, guidelines and laws respecting cemeteries under the City's responsibility?

### **Parkland Dedication**

- 18. Does the proposed Parkland block (Block 47) represent lands which are of value for future parkland and therefore suitable to the City for Parkland Dedication?