

**CITATION:** Laforme v. The Corporation of the Town of Bruce Peninsula, 2021 ONSC 5287  
**DIVISIONAL COURT FILE NO.:** 630/20  
**DATE:** 20210730

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**McWatt A.C.J.S.C.J., D.L. Corbett and Favreau JJ.**

**BETWEEN:** )  
 )  
Thomas Laforme ) Kent Elson and Amanda Montgomery, for  
 ) the Applicant  
Applicant )  
 )  
- and - )  
 )  
Corporation of the Town of South ) Jonathan C. Lisus, James Renihan and  
Bruce Peninsula and Grey Sauble ) Jasmine K. Landau for the Corporation  
Conservation Authority ) of the Town of South Bruce Peninsula  
 )  
Respondents )  
 ) No one appearing for the Grey Sauble  
 ) Conservation Authority  
 )  
 ) **HEARD at Toronto (by videoconference):**  
 ) March 22, 2021

**Favreau J.**

**Introduction**

[1] The applicant, Thomas Laforme, challenges a decision of the Grey Sauble Conservation Authority (the “Authority”) granting a permit to the Town of South Bruce Peninsula (the “Town”) to build a retaining wall next to a road that runs along Sauble Beach (the “Beach”). The applicant also seeks an order preventing the Town from proceeding with the project because it has not obtained a permit under the *Endangered Species Act, 2007*, S.O. 2007, c. 6 or conducted an environmental assessment under the *Environmental Assessment Act*, R.S.O. 1990, c. E.18, and because the project does not comply with section 24 of the *Planning Act*, R.S.O. 1990, c. P.13.

[2] This application was commenced in December 2020. It was expedited so that the case could be decided in time for the Town to complete the project before the piping plover nesting season began (if the Town prevailed). On March 29, 2021, one week following the hearing, this Court quashed the permit granted by the Authority and dismissed the balance of this application with reasons to follow. These are the reasons.

## **Background**

### **Sauble Beach and the road**

[3] Sauble Beach is located within the Town's boundaries on Lake Huron. The Beach is a popular tourist destination, attracting up to 400,000 visitors each year.

[4] The Beach contains sand dunes and rare plants, and is a nesting area for the piping plover, which is classified as an endangered species under the *Endangered Species Act, 2007*. The dunes also protect nearby properties from flooding and storm damage.

[5] Lakeshore Boulevard North is a two-lane road running beside Sauble Beach for about 3.5 kilometres. The Town has a road allowance that extends into the Beach which is used in some areas for angled visitor parking. The Beach next to the parking area consists primarily of dunes with some vegetation.

[6] Over the years, wind has swept sand from the dunes toward the road, onto the parking area. As a result, the parking area has shrunk and some parked vehicles intrude into the road, leading some pedestrians to walk on the road to get around the vehicles. The Town views this as a safety hazard that must be addressed.

### **History of retaining wall project**

[7] In the summer of 2020, the Town decided that the best way to address this safety hazard is to trim the dune back from the parking area and to build a retaining wall.

[8] To move forward with this project, the Town has to comply with regulatory requirements, including obtaining a permit from the Authority as an exception to a regulatory prohibition against further development on the Beach.

[9] The Town submitted a permit application to the Authority on September 10, 2020. In its application, the Town described the work to be performed as including "to remove sand/vegetation from the roadside along the length of Lakeshore Blvd N in order to reclaim original parking platform space for cars to park". The application stated that the Town planned "to remove only that amount which would recreate the parking stalls" and that it intended to "secure any future dune erosion by constructing a retaining wall with precast concrete blocks or large quarry armor stone".

[10] As part of its application, the Town stated that it consulted with the Ministry of the Environment, Conservation and Parks (the "MECP") "who take no issue with our proposal". The Town included an email dated August 28, 2020, from a representative of the MECP, who stated that "while we know Piping Plover nest on beaches associated with dunes and make use of foredune and dune habitat to carry out their life processes, the back area of the dune where the cars park is dense with vegetation and not typically an area used by the Piping Plover". The MECP representative further advised that "as long as the work does not compromise the integrity of the dune ecosystem as a whole and habitat that is necessary to support the life processes for Piping

Plover is not impacted, MECP has no concerns from the perspective of the Endangered Species Act”.

[11] After receiving the application, the Authority’s Environmental Planning Coordinator, Andrew Sorensen, reviewed the project. As part of that review, Mr. Sorensen visited the site with a Town representative. He also had various communications with the Town about the proposal. Mr. Sorensen asked whether some of the sand to be removed could be put back on the Beach. The Town responded that the MECP advised that sand from the roadside should not be backfilled onto the dune due to concerns over contamination. In addition, the Town obtained further advice from the MECP that it passed on to the Authority that it would be ideal to do the work outside the piping plover active season. The Town noted that the MECP continued to have no concerns about the project relating to the piping plover as long as the project “does not compromise the integrity of the dune ecosystem as a whole and habitat that is necessary to support the life processes for Piping Plover”.

[12] Mr. Sorensen prepared a report dated November 12, 2020 recommending approval of the project. At a meeting on November 17, 2020, the Authority approved the permit. (Contents of the report and discussions at the meeting are addressed in the analysis below).

[13] The Authority issued the permit on November 20, 2020. The permit authorizes the Town to build a retaining wall on the road allowance 469 metres long and 0.91 metres high. The permit also contains restrictions on the scope and location of dune excavation and on the extent of vegetation removal.

[14] Following receipt of the permit, the Town started measuring for the project. At that point, Mr. Laforme and other residents and area groups voiced concerns about the project.

### **Overview of disposition and issues raised by the parties**

[15] The applicant challenges the Authority’s decision to issue the permit and the Town’s decision to proceed with the project.

[16] As discussed below, I agree with the applicant that the Authority’s decision to issue the permit was unreasonable. By the Authority’s own admission, the project appears to be inconsistent with the requirement under O. Reg. 151/06 made under the *Conservation Authorities Act*, R.S.O. 1990, c. C.27, that the project have no negative effect on the Beach. Yet, without any apparent legal basis for doing so, the Authority was persuaded that the permit should be issued because of the Town’s public safety concerns. In addition, the Authority had no regard for the issue of whether the project was consistent with a prohibition in the 2020 Provincial Policy Statement on development on dynamic beach hazards. This is contrary to the Authority’s obligations, pursuant to section 3(5) of the *Planning Act*, to ensure that its decisions are consistent with applicable provincial policy statements.

[17] However, I do not agree with the applicant that the Town’s decision to proceed with the project is unreasonable because the Town has failed to obtain a permit pursuant to the *Endangered Species Act, 2007* and failed to conduct an environmental assessment under the *Environmental Assessment Act*. Both these issues engage the Minister of the Environment, Parks and Recreation

as decision maker. The applicant has failed to name the Minister as a respondent nor has he put forward a sufficient record for the Court to intervene on these issues. Similarly, I do not find that the Town's decision to proceed with the project is unreasonable because it is contrary to section 24 of the *Planning Act* which requires development by the Town to be consistent with the Official Plans for the Town and Bruce County. The applicant has not demonstrated any such inconsistencies.

### **Standard of Review**

[18] The parties agree that the applicable standard of review is reasonableness.

[19] In accordance with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 99-101, the principles to be applied in deciding whether a decision is reasonable include the following:

- a. Reasonableness is concerned with justification, transparency and intelligibility. A decision is unreasonable if it is internally incoherent or if it is untenable having regard to the relevant factual and legal constraints.
- b. The party challenging the decision has the burden of showing that it is unreasonable. A court should not set aside a decision based on minor flaws or peripheral shortcomings. To justify a finding of unreasonableness, the flaws or shortcomings must be sufficiently central or significant to the merits of the decision.
- c. The role of the court is to review the decision and not to decide the issue afresh. The focus of the reasonableness inquiry is therefore on the decision making process and the outcome.

[20] In addition, in this case, given that neither the Authority nor the Town issued reasons for their decisions, *Vavilov*, at para. 137, provides that the court should assess reasonableness by looking at the record to understand the rationale for the decision:

Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst; Green; Trinity Western University*. **However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision:** *Baker*, at para. 44. For example, as McLachlin C.J.C. noted in *Catalyst*, “[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw”: para. 29. In that case, not only were “the reasons [in the sense of rationale] for the bylaw . . . clear to everyone”, they had also been laid out in a five-year plan: para. 33. **Conversely, even without reasons,**

**it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.** [Emphasis added.]

### **Preliminary Evidence Issue**

[21] As recognized by the parties, on an application for judicial review, with few exceptions, the court reviews the decision below on the basis of the record that was before the original decision maker: *30 Bay ORC Holdings Inc. et al. v. City of Toronto*, 2021 ONSC 251 (Div. Ct.), at para. 114. As set out in *30 Bay*, at para. 114, exceptions include evidence that sets out general background to assist the court, shows procedural defects in the decision-making process, or shows a complete lack of evidence to support a material finding of fact.

[22] In this case, both sides filed expert evidence in support of their positions regarding the impact of the project on the Beach. This evidence was not before the Authority when it granted the permit.

[23] Both sides conceded that this court cannot rely on this evidence in reviewing the reasonableness of the Authority's decision because the Authority did not have the evidence before it when it decided to issue the permit.

[24] The applicant argues that the court can and should consider the expert evidence in deciding whether the Town acted unreasonably in deciding to proceed without obtaining a permit under the *Endangered Species Act, 2007*, without obtaining environmental approval under the *Environmental Assessment Act* and without considering the impacts of the Official Plans for Bruce County and the Town. In my view, again, it would not be appropriate for the Court to consider this evidence in deciding these issues. They do not meet any of the exceptions to the principle that the court should not consider materials beyond those that were before the original decision maker.

### **Issue 1 – The Authority's decision to issue the permit was unreasonable**

[25] As reviewed above, the applicant argues that the Authority's decision to issue the permit was unreasonable for two reasons:

- a. The Authority failed to apply the relevant test for granting the permit under O. Reg. 151/06 made pursuant to the *Conservation Authorities Act*, which required the Authority to form an opinion that the project would not affect the Beach; and
- b. The Authority failed to ensure the project was consistent with section 3(5) of the *Planning Act*, which, by virtue of section 3.1.2(a) of the 2020 Provincial Policy Statement, prohibits the project because it is in a dynamic beach hazard.

[26] As set out below, I agree that the Authority's application of O. Reg. 151/06 was unreasonable and that the Authority ought to have considered the application of the 2020 Provincial Policy Statement. I address each issue in turn.

**The Authority’s application of the requirement that the Beach not be negatively affected was unreasonable**

[27] I start this analysis by reviewing the statutory scheme and then considering the way in which the Authority arrived at its decision.

*Conservation Authorities Act and O. Reg. 151/06*

[28] Section 0.1 of the *Conservation Authorities Act* provides that the purpose of the Act is “to provide for the organization and delivery of programs and services that further the conservation, restoration, development and management of natural resources in watersheds in Ontario”. The Act provides for the establishment of conservation authorities in different areas of Ontario and sets out their functions and duties.

[29] Section 28 of the *Conservation Authorities Act* provides that:

(1) Subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,

...

(c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development...

[30] The regulation made under this grant of power that applies to the Authority is O. Reg. 151/06. Section 2(1)(c) of the regulation prohibits all development on “hazardous lands”.

[31] Section 3(1) of the O. Reg. 151/06 creates an exception to section 2(1)(c) and provides as follows:

The Authority may grant permission for development in or on the areas described in subsection 2 (1) **if, in its opinion**, the control of flooding, erosion, **dynamic beaches**, pollution or the conservation of land **will not be affected by the development**. [Emphasis added.]

[32] The parties agree that Sauble Beach is a “dynamic beach” within the meaning of s.28(1)(c) of the Act and section 3(1) of the Regulation. They also agree that the proposed retaining wall is a “development” within the meaning of these provisions. Therefore, to grant the Town permission to build the retaining wall, the Authority was required to form the opinion that the dynamic beach “will not be affected by the development”.

[33] The parties disagree on the proper reading of section 3(1) of the Regulation. The applicant argues that section 3(1) prohibits all developments that have an effect on a dynamic beach; the Town argues that the effect must be negative and suggests that the Authority can balance the salutary effects of a proposed development against the negative impacts on the dynamic beach.

[34] It is not the role of this Court to decide this issue, but rather to determine whether the interpretation adopted by the Authority was reasonable. Since there are no reasons from the Authority, the court can consider the Authority's policy statements, the staff report and minutes from the meeting where the Authority discussed and granted the permit.

*Authority's policy*

[35] The Authority has adopted a set of policies for the purpose of guiding the exercise of its powers under the *Conservation Authorities Act* and O. Reg. 151/06 titled "Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourse Regulation" (the "Policies").

[36] A review of the Policies does not suggest that, when deciding to allow a development on the Beach, the Authority is to engage in a balancing exercise, where it balances the salutary effects of the proposed development against the harm to the Beach. Rather, the relevant portions of the Policies focus on avoiding negative impacts to the Beach. In this respect, the Policies' application of O. Reg. 151/06 is consistent with the wording of the Regulation; the Authority can only permit development where it forms the opinion that the development will not have a negative effect on the dynamic beach.

[37] Section 7 of the Policies provides that development will not be permitted in a "Regulated Area", which includes land adjacent or close to the shoreline of Lake Huron. This prohibition is subject to specific exceptions.

[38] Section 8.6 of the Policies deals specifically with the prohibition and regulation of development involving the Georgian Bay shorelines. As a starting point, section 8.6.1 reiterates that development is not permitted on the Georgian Bay shoreline except in accordance with specified policies in that section. The various exceptions set out in section 8.6 of the Policies on their face appear to be narrow and do not appear to include the type of project proposed by the Town in this case. In any event, all exceptions are subject to section 7.1.2 of the Policies. Reading through the list of criteria in sections 7.1.2, it is evident that, whatever development is permitted on the Beach, it is not to have any negative impact on the natural features of the area.

[39] For example, section 7.1.2 provides that development may be permitted where "a) the risk to the public is **not increased**, susceptibility to natural hazards **is not increased** or new hazards created ... g) intrusions on significant natural features or hydrologic or ecologic functions are avoided, and **no adverse impacts** to significant natural features or hydrologic or ecologic functions will occur ... and l) the control of flooding, erosion, dynamic beaches, pollution or the conservation of land is **not adversely affected**" (emphasis added).

[40] The purpose of my review of the Policies is not to interpret and apply them to the project, but rather to determine, as part of a review of the record available to the Court, whether the Town's proposed interpretation of the exception under section 3(1) of O. Reg. 151/06 is consistent with the Policies. As reviewed above, nothing in the Authority's Policies suggests that it is to embark on the balancing exercise advocated by the Town and that, as reviewed below, the Authority appears to have conducted.

*The Authority's decision-making process and decision*

[41] To issue the permit, the Authority was required to form an opinion that the proposed development would not have a negative impact on the dynamic beach. Did it do this? On the record before this court, it is clear that the Authority was aware of potential negative impacts to the dynamic beach, but balanced those impacts against the Town's goal of improving the beach parking to promote public safety. This is evident from both the staff report and the transcript of the Authority's meeting.

[42] The staff report is very brief. It refers to O. Reg. 151/06 and section 8.6.8 of the Policies. The report describes the Town's rationale and the scope of the project. The report notes that the proposed development "requires modification of the dune by excavation, site alteration and the placement of a retaining wall". The report also recognizes some potential negative impacts. For example, the report notes that "this section of dune is the narrowest portion along Lakeshore Boulevard and maintaining existing vegetation on the dune is important particularly in these times of higher water levels". The report also states that it "will be difficult to quantify the effect of anticipated continual removal of the sand (along the base of the wall) and the cumulative impacts on ecology of the dunes". The report concludes that "[i]n an ideal world, there would be no road here and all development would be landward of the Dynamic Beach Hazard". Ultimately, the report contains no rationale for allowing the project other than the Town's goal to improve access to parking.

[43] The Authority's meeting was also relatively brief. The transcript from the meeting shows that Mr. Sorensen presented the project. He started by describing it. He then stated that the project was "technically" not permitted under the Authority's policies but suggested that an exception would be appropriate given that it related to a public road:

Um, going through our policies uh, anything on that side of lakeshore blvd is basically within the dynamic beach hazard um, so it's uh, it's some thing that is technically not permitted under our policies um, however we do recognize that it's a public road and it's a public infrastructure so um, so that's why we're bringing this exception to that policy because basically our policy saying no development on a dynamic beach.

[44] Mr. Sorensen went on to describe the scope of the work involved:

[S]o there will be a little bit of digging into the base of the dunes, some vegetation removal there's a few, a few plants there, it may encroach into the dunes about five to six feet at the most, some spots there won't me [sic] any encroachment but uh, it kind of varies along of the length of that stretch. Um, the town did check with the Ministry of Environment and Conservation Parks in terms of the piping (plovers?) There's not an issue from that standpoint. Um, so that's it in a nutshell. They kind of want to try this to get uh, a bit more area so that cars can park right in without, a with a little bit of space behind the cars so that people aren't walking right on the road path so, so that's kind of it in a nutshell.



[45] Mr. Sorensen was asked a question about whether there had been any consultation with the Lake Huron Coastal Centre, to which he replied that there had been no consultation. In doing so, he acknowledged that they would likely not approve the project and then focused again on the Town's needs:

Uh, that's a good question, I mean from a coastal perspective. I mean the policies are basically no, no development in a dynamic beach hazard, so um, uh, coastal process they're kind of looking at it from the road aspect as opposed to the coastal uh, side of things so um, so they're looking to more to.. more or less, you know at their road as far as.. If you were going to do a coastal analysis it's probably not something that's ideal in this situation but realizing that um.. there is public infrastructure there um, they want to try this approach to see whether it'll meet their needs for their parking. Um, so I mean we could if you want us we can go back and ask for a coastal analysis they could do it, it's gonna cost to town some money, um.

[46] There was one question about the impact of the project on the "beach area", but Mr. Sorenson's response again focused on the road issue:

So can you tell me how significantly this is affecting the beach area then?

...

Um, it's I mean it's gonna it's sand is still going to drift over top of this wall and accumulate so it's um, so it's between the road and the bottom of the dune so it's not.. typically they would plough the sand off that area anyway, so they're always clearing sand out of that area to maintain their parking so it's.. as far as I can tell it's not really going to change the um, the aspects from the road out to the water really.

[47] Then, after a relatively brief discussion, the Authority authorized the issuance of a permit to the Town.

### *Analysis*

[48] As held in *Vavilov*, reasonableness focuses on the reasoning process and the outcome. In determining whether a decision is reasonable, the court is to have regard to the legal and factual constraints. Here, the legal constraint imposed on the Authority is O. Reg. 151/06, which requires the Authority to form the opinion that the development will have no negative impact on the Beach. The Authority must therefore do two things: it must form an opinion on this question, and that opinion must be reasonable. In this case, based on the staff report and the transcript from the meeting, I conclude that the Authority did not form the opinion it was required to form. It decided to make an exception to its policy, but not on the basis that the development would have no negative impact on the Beach. Rather, the rationale for the exception was based on the Town's expressed needs. This was extraneous to the core question: would there be a negative impact?

[49] The Town argues that the Authority's discretion is very broad, as reflected by the requirement in O. Reg. 151/06 that it form an "opinion". I agree. This language gives the Authority

broad discretion and signals that it is not the court's role to second guess the views of the Authority. However, O. Reg. 151/06 does not grant the Authority the power to make an exception because it forms the view that the project is desirable or in the public interest. The Authority is directed to form an opinion that the project would have no negative impact on the Beach, which it failed to do in this case.

[50] The Town urged the Court to consider the Authority's expertise and the fact that Mr. Sorensen conducted a site visit. The argument is that the Authority is very familiar with the Beach and, given Mr. Sorensen's visit to the Beach, he would have well understood the impact of the project on the Beach. There is no doubt that the Authority is familiar with the Beach and that it has the expertise to determine what impact the project would have on the Beach. However, based on the record available to the Court, it is not possible to conclude that the Authority applied the right test in this case in determining that the permit should be granted. Moreover, what was in Mr. Sorensen's mind is not relevant if he did not share it with the members of the Authority. It is not evident from the staff report or the discussion at the meeting that he or the Authority formed the opinion that the project would have no negative impact on the dynamic beach. On the contrary, there seemed to be recognition that there would be a negative impact, but the Authority deferred to the Town's need to protect the parking area. This point is made clear by the discussions respecting possible consultation with the Lake Huron Coastal Centre: Mr Sorensen had not consulted the Centre but presumed its position would be hostile to the development because it was bringing a "coastal" perspective to the issue rather than the Town's perspective respecting public safety around the parking area.

[51] Both sides point to expert evidence and other evidence they say support their view that the retaining wall will or will not have a negative effect on the dynamic beach. As discussed above, the Court cannot review that evidence and determine whether the Town should be permitted to move forward with the project. It will be up to the Authority to make that decision. The Authority can consider this additional information in forming an opinion as to whether the proposed project will have a negative effect on the dynamic beach and, therefore, whether to permit the Town to build the retaining wall. But, ultimately, it will be up to the Authority to decide the issue afresh.

### **The Authority was required to consider the 2020 Provincial Policy Statement**

[52] The applicant argues that the Authority's decision to issue the permit was unreasonable because it was contrary to the Authority's obligation, pursuant to section 3(5) of the *Planning Act*, to consider the portion of the 2020 Provincial Policy Statement that deals with a "dynamic beach hazard". The Town argues that the 2020 Provincial Policy Statement has no application to the decision in this case.

#### *Planning Act and Provincial Policy Statement*

[53] Section 3(1) of the *Planning Act* provides that the Minister under that statute can issue policy statements on "matters relating to municipal planning that in the opinion of the Minister are of provincial interest". Section 3(5) of the *Planning Act* requires that a decision made by various bodies, including a "local board", "in respect of any authority that affects a planning matter" is to be consistent with any provincial policy statement.

[54] Recent case law from the Court of Appeal and this court confirms that a conservation authority is a “local board” for the purposes of section 3(5) of the *Planning Act* and that it is required to act in a manner consistent with provincial policy statements: *Gilmor v. Nottawasaga Valley Conservation Authority*, 2017 ONCA 414, at para. 51; and *435454 Ontario Inc. v. Halton Regional Conservation Authority*, 2018 ONSC 1633 (Div. Ct.), at para. 5.

[55] In this case, the applicant relies on section 3.1.2(a) of the 2020 Provincial Policy Statement, section 3.1 of which deals with “natural hazards”. Section 3.1.1 states that development is generally to be directed away from “hazardous lands” adjacent to the shorelines of the Great Lakes. Section 3.1.2(a) provides that “[d]evelopment and site alteration shall not be permitted within... the dynamic beach hazard”. Section 3.1.4 refers to certain exceptions to this prohibition, but they do not appear to be relevant to the project in this case.

### *Analysis*

[56] The applicant argues that the project, which includes excavation, grading, vegetation removal and building the retaining wall, is a “development” or “site alteration” to a dynamic beach hazard. He argues that the Authority had an obligation to consider the 2020 Provincial Policy Statement dealing with dynamic beach hazards and that it ought to have refused the permit because allowing the project to go forward is inconsistent with section 3.1.2(a) of the 2020 Provincial Policy Statement.

[57] The Town argues that the Provincial Policy Statement does not apply to its retaining wall project because it is not a “development” within the meaning of the *Planning Act*; its project is not a matter of municipal planning but, rather, a matter of road upkeep and maintenance. The Town also argues that, if the 2020 Provincial Policy Statement dealing within dynamic beach hazards applies to this decision, it would render section 3(1) of O. Reg. 151/06 irrelevant because it would remove the Authority’s discretion to grant permits in appropriate circumstances.

[58] Despite these arguments, the Town has presented no authority for the suggestion that the proposed project is not a form of development or site alteration as contemplated by the *Planning Act* and the 2020 Provincial Policy Statement. In my view, given the Court of Appeal’s direction in *Gilmor*, that a conservation authority’s decision must be consistent with provincial policy statements, there is no basis for the Town’s position. In that case, the conservation authority had dealt with the construction of a house in a floodplain. That was a discrete construction project and not a broader matter of municipal planning and yet the Court of Appeal confirmed that the conservation authority’s decision was to be consistent with the applicable provincial policy statement. Here, in the absence of any authority supporting the Town’s position, it is hard to see on what basis the project does not constitute a development or a site alteration. Accordingly, it appears that the Authority should have considered whether its decision was consistent with the 2020 Provincial Policy Statement, specifically section 3.1.

[59] However, I do not agree with the applicant’s position that this Court should find that the 2020 Provincial Policy Statement is a bar to the Authority issuing the permit. It appears from the decision-making process that this issue was never raised by the Town nor did the Authority consider the issue on its own. It is not for this Court to decide whether the issuance of the permit

is consistent or inconsistent with the 2020 Provincial Policy Statement. It is for the Authority to make that decision. The decision is not inevitable. While section 3.1.2(a) states that development or site alteration is not permitted “within” a dynamic beach hazard, the Court is not in a position to determine whether the proposed excavation and retaining wall are to be located “within” a “dynamic beach hazard”. There may also be applicable exceptions or nuances in interpretation that are not readily within the Court’s knowledge. These issues fall within the knowledge and expertise of the Authority and it would not be appropriate for this Court to decide the issue. Again, while the Authority’s decision was unreasonable because it did not consider the application of the 2020 Provincial Policy Statement, it is not for this Court to substitute its decision for that of the Authority on this issue.

## **Conclusion**

[60] The Authority’s decision to issue the permit was unreasonable because of the manner in which it applied section 3(1) of O. Reg. 151/06 and because it failed to consider whether the issuance of the permit was consistent with the 2020 Provincial Policy Statement.

[61] I would note, in closing on this issue, that protection of nesting sites for the piping plover has been a prominent issue for many years on Sauble Beach. The issue has garnered considerable public attention and more than a little local conflict. Protection of the Beach itself, and protection of piping plover habitat, are not one and the same thing. The Beach, as a dynamic beach, is an environmentally sensitive area, and the authority is charged with protecting the Beach itself from negative impacts, a protection that is not limited to beach features related to protecting piping plover habitat.

[62] Finally, I have not directly addressed the issue raised by the applicant about alternatives to the retaining wall project, which are all contested by the Town. The record discloses that the Town has maintained the existing parking area, in the past, by periodically removing sand build-up, an ongoing maintenance expense for the Town. One option would be to continue to maintain the parking area as it has been maintained historically. The applicant also argued that the Town could (i) convert angled parking to parallel parking, (ii) eliminate roadside parking and build new parking facilities somewhere else, on the landward side of the road, or (iii) convert Lakeshore Boulevard into a one lane, one-way street, in the affected area. It is for the Authority, not this court, to consider these points at first instance if, in the Authority’s view, these points are relevant to questions related to the Town’s permit application.

## **Issue 2: There is no basis for this Court to quash the Town’s Decision**

[63] Besides attacking the Authority’s decision to grant the permit, the applicant asks this Court to find that the Town’s decision to proceed with the project is unreasonable for the following three reasons:

- a. The project contravenes section 10 of the *Endangered Species Act, 2007*;

- b. The project contravenes section 15.1.1(1) of the *Environmental Assessment Act*:  
and
- c. The project contravenes section 24 of the *Planning Act*;

[64] In my view, none of these is a proper ground for the Court interference.

***Endangered Species Act, 2007***

[65] Section 10(1) of the *Endangered Species Act, 2007* provides that “no person shall damage or destroy the habitat of ... an endangered or threatened species”. Section 17(1) of the *Endangered Species Act, 2007* gives the Minister the power to grant a permit that authorizes the person to engage in activities prohibited by the Act in certain circumstances. The Act also provides for various forms of enforcement, including by way of a provincial prosecution or an order by the Minister requiring the person to stop engaging in prohibited activities.

[66] In this case, based on his expert evidence, the applicant argues that the Town’s project will harm the piping plover’s habitat and that the Town should be prohibited from proceeding with the project in the absence of a permit.

[67] For its part, the Town argues that the MECP is aware of the project and has decided that a permit is not required. In response to this argument, the applicant takes the position that the Town has not been entirely truthful in its disclosure to the MECP about the potential impact of the project on the piping plover habitat.

[68] In my view, the applicant’s request that the Divisional Court intervene on this issue on the current record misconceives the role of the Court on an application for judicial review. In making this argument, the applicant has not identified a decision made by the Town that is subject to judicial review. As the proponent of the project and as a potential applicant for a permit under the *Endangered Species Act, 2007*, the Town is not exercising a statutory power amenable to judicial review. Rather, it is in the same position as any private citizen who may be required to apply for a permit to carry out a project that may harm or destroy the habitat of an endangered species. Under the *Endangered Species Act, 2007*, the decision maker for issuing a permit and for enforcing the Act is the Minister of Environment, Parks and Recreation. At a minimum, an application for judicial review that seeks to prohibit the Town from proceeding with the project without a permit granted under the *Endangered Species Act, 2007* should name the Minister as a respondent. In addition, based on the conflicting evidence on the record currently before the Court, it would not be possible or appropriate for this Court to determine whether the Town requires a permit. This is a decision to be made at first instance by the MECP, after which the applicant may have avenues of redress by way of judicial review to the Divisional Court. However, based on the current record, there is no legal or factual basis that warrants this Court granting an order prohibiting the Town from proceeding with the project in the absence of a permit under the *Endangered Species Act, 2007*. Judicial review is a discretionary remedy and, without the MECP as a named respondent on this application, the Court should decline to make any decision on this issue on the record currently before the Court.

***Environmental Assessment Act***

[69] The applicant's argument related to the *Environmental Assessment Act* is similar to the argument related to the *Endangered Species Act, 2007*, and it falters for similar reasons.

[70] The applicant relies on section 15.1.1(1) of the *Environmental Assessment Act* that provides that no person can proceed with an "undertaking" unless the person complies with the environmental assessment process under the Act. Depending on the scope of the "undertaking", different projects are subject to different levels of scrutiny. In this case, the applicant argues that, given the nature of the project, it falls under Schedule B or C of the Act, which would require a full review process, including extensive public consultation.

[71] The Town argues that this project is exempt from section 15.1.1(1) of the *Environmental Assessment Act* because it falls within the scope of certain types of municipal projects exempted by the Minister pursuant to an Order-in-Council. Specifically, the Town argues that this project can be categorized as falling within the scope of the Town's routine road maintenance. Alternatively, even if some degree of consultation is required, the Town argues that it has met its public consultation obligations under Schedule B by receiving comments from members of the public and through its application for a permit to the Authority.

[72] The *Environmental Assessment Act* is a complex statutory scheme enforced by the MECP. In this case, there is no evidence that the applicant raised the issue of an assessment with the MECP, there is no decision from the MECP on the issue of whether an assessment is required and the MECP has not been named as a respondent to this proceeding. As with the issue of the *Endangered Species Act, 2007*, the Town is the proponent. It is not clear how this court's jurisdiction to grant the relief sought by the applicant is engaged in the absence of a decision or refusal to make a decision by the MECP. Again, without the MECP as a named respondent on this application, the Court should decline to make any decision on this issue on the record currently before the Court.

**Section 24 of the *Planning Act***

[73] The applicant argues that this Court should find that the project is prohibited by s. 24 of the *Planning Act*, which requires that public works conform with the official plans of the local municipality. In this case, the applicant states that the Official Plans for Bruce County and the Town apply and that they prohibit the proposed project.

[74] The Town disagrees with the applicant's interpretation of the Official Plans, and essentially argues that, so long as the Authority authorizes the project, the project is consistent with the relevant Official Plans.

[75] I agree with the Town that the wording of the relevant provisions of both Plans are not as definitive as described by the applicant. For example, s. 5.8.6.3 of the County of Bruce Official Plan says that the Plan's policy is "to discourage any form of development in Great Lakes Shoreline Hazard areas" and that "[d]evelopment will generally be directed to areas outside the regulatory shoreline". In addition, as the Town points out, the Town's plan defers to the Authority for permission to construct any structure in the area of the shoreline.

[76] Ultimately, the Town has determined that its proposed project is consistent with the County of Bruce and the Town's Official Plans. It is again not clear to me how this determination is amenable to judicial review as the exercise of a statutory power. However, assuming that it is, there would be no utility in granting a remedy. In deciding whether it can proceed with the project, the Town relies on the Authority's issuance of the permit. Given that the Authority will be required to reconsider its decision in accordance with these reasons, the Town's compliance with the Official Plans will ultimately depend on the outcome of the Authority's decision.

**Conclusion**

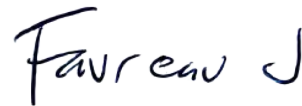
[77] For the reasons in this section, I decline to order any of the relief requested by the applicant related to the Town's alleged failure to comply with statutory requirements before proceeding with the project.

**Order**

[78] For the reasons above, the permit issued by the Authority is quashed and the balance of the application for judicial review is dismissed. The issue of the permit is remitted back to the Authority to be decided anew in accordance with these reasons.

[79] At the conclusion of the hearing, the parties advised that they did not have an agreement on costs because Mr. Laforme sought to be protected from a costs order on the basis that he is a public interest litigant. Given that Mr. Laforme has achieved substantial success on the application, the Court does not have to decide this issue. Mr. Laforme seeks approximately \$100,000 in costs. In my view, \$75,000 all inclusive payable to Mr. Laforme is a fair amount given his substantial success on the application.

I agree:



Favreau J.



McWatt A.C.J.S.C.J.

I agree:



D.L. Corbett J.

for

CITATION: Laforme v. The Corporation of the Town of Bruce Peninsula, 2021 ONSC 5287  
DIVISIONAL COURT FILE NO.: 630/20  
DATE: 20210730

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**McWatt A.C.J.S.C.J., D.L. Corbett and Favreau JJ.**

**BETWEEN:**

Thomas Laforme

Applicant

**– and –**

Corporation of the Town of South  
Bruce Peninsula and Grey Sauble  
Conservation Authority

Respondents

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**REASONS FOR JUDGMENT**

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**Favreau J.**

**Released:** July 30, 2021