

SECTION 28 (3)

CONSERVATION AUTHORITIES ACT

HEARING GUIDELINES

**October 2005, Amended 2018 re. MLT, Amended 2020 re.
Electronic Hearings**



Ministry of Natural Resources
Ministère des Richesses naturelles

SECTION 28 (3)
CONSERVATION AUTHORITIES ACT
HEARING GUIDELINES
October 2005, Amended 2018 and 2020

Summary of Revisions

Revision No.	Date	Comments	Approval Authority
0	October, 2005	Guidelines prepared as an update to the October 1992 hearing guidelines.	Ministry of Natural Resources and Forestry Conservation Ontario council
1	May, 2018	Housekeeping amendments made reflecting changes to appeal process as a result of the <i>Building Better Communities and Conserving Watersheds Act</i> , 2017 and subsequent Order in Council.	Conservation Ontario Staff
2	September, 2020	Amendments made to incorporate the use of electronic hearings.	Conservation Ontario Council

(Note: Text in red represents the amendments made in 2020)

September 14, 2020

**Re: Interim Update to the SECTION 28 (3) CONSERVATION AUTHORITIES ACT
HEARING GUIDELINES**

The corona virus disease (COVID-19) was declared a pandemic by the World Health Organization on March 11, 2020. During the Provincial state of emergency as a result of the COVID-19 virus, the Provincial government enacted Order in Council 73/20 under s. 7.1 of the *Emergency Management and Civil Protection Act*. While that order was enacted, Provincial limitation periods and procedural time periods were under suspension between March 16, 2020 and September 14th.

With the suspension on limitation periods being revoked as of September 14th and the need for continued social distancing, conservation authorities require alternate means to provide hearings under Section 28 of the *Conservation Authorities Act*. The purpose of this interim update to the Section 28 Hearing Guidelines is to incorporate the use of electronic hearings. The update to the Hearing Guidelines is complementary to an update to the “Conservation Authority Best Management Practices (BMPs) and Administrative By-Law Model” to incorporate electronic Board meetings.

As a reminder, the decision by the Provincial government to enact Order in Council 73/20 under s. 7.1 of the *Emergency Management and Civil Protection Act* will impact the scheduling of CA Hearings under Section 28 as well as the requirement for an applicant to file an appeal with the Mining and Lands Tribunal within 30 days. For any hearings that took place between March 16th and September 14th, 2020 the person who has been refused permission or who objects to conditions imposed on a permission will have 30 days after September 14th to file an appeal to the Mining and Lands Tribunal. For those CAs who have postponed hearings during the emergency period, they should be scheduled as soon as practical, keeping in mind that Administrative By-Laws and Hearing Guidelines may need to be amended to incorporate electronic meetings.

Amendments have been made throughout this document to incorporate electronic hearings. Conservation authorities are advised to review their internal Hearing Procedures to incorporate this update.

Sincerely,



Leslie Rich
Policy and Planning Liaison
Conservation Ontario

May, 2018

**Re: Interim Update to the SECTION 28 (3) CONSERVATION AUTHORITIES ACT
HEARING GUIDELINES**

Subsection 28(15) of the *Conservation Authorities Act* provides that a person who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons may appeal to the Minister of Natural Resources and Forestry. Further to the passage of the *Building Better Communities and Conserving Watersheds Act*, 2017 effective April 3, 2018 this appeal has been assigned to the Mining and Lands Tribunal through Order in Council 332/2018. The Mining and Lands Tribunal is now a part of the Environment and Land Tribunal Cluster (ELTO) of the Ministry of the Attorney General.

By law, the appeal made under subsection 28(15) should be filed directly with the Mining and Lands Tribunal. A copy of the appeal letter to the Minister of Natural Resources and Forestry is unnecessary and can be treated as optional. Conservation authorities should notify appellants that they must file their appeals with the Tribunal within 30 days of their receipt of notice. An appeal may be invalidated if it is not filed with the proper office within that time period. The appellants should also be instructed to copy the conservation authority in their appeal letter.

Further to this updated information, an amendment has been made to **Appendix D “Notice of Decision – Model”** to incorporate the revised contact information for the appeal. Conservation authorities are advised to review their internal Hearing Procedures to incorporate this update. It is anticipated that this “Interim Update to the Section 28(3) Conservation Authorities Act Hearing Guidelines” will provide guidance to conservation authorities related to Section 28 hearings until such time as a new Section 28 regulation is created by the province.

Sincerely,

A handwritten signature in black ink, appearing to read 'Leslie Rich', written in a cursive style.

Leslie Rich
Policy and Planning Liaison
Conservation Ontario

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1.0 PURPOSE OF HEARING GUIDELINES

The purpose of the Hearing Guidelines is to reflect the changes to the 1998 Conservation Authorities Act. The Act requires that the applicant be party to a hearing by the local Conservation Authority Board, or Executive Committee (sitting as a Hearing Board) as the case may be, for an application to be refused or approved with contentious conditions. Further, a permit may be refused if in the opinion of the Authority the proposal adversely affects the control of flooding, pollution or conservation of land, and additional erosion and dynamic beaches. The Hearing Board is empowered by law to make a decision, governed by the Statutory Powers Procedures Act. It is the purpose of the Hearing Board to evaluate the information presented at the hearing by both the Conservation Authority staff and the applicant and to decide whether the application will be approved with or without conditions or refused.

These guidelines have been prepared as an update to the October 1992 hearing guidelines and are intended to provide a step-by-step process to conducting hearings required under Section 28 (12), (13), (14) of the Conservation Authorities Act. Similar to the 1992 guidelines, it is hoped that the guidelines will promote the necessary consistency across the Province and ensure that hearings meet the legal requirements of the Statutory Powers Procedures Act without being unduly legalistic or intimidating to the participants.

2.0 PREHEARING PROCEDURES

2.1 Apprehension of Bias

In considering the application, the Hearing Board is acting as a decision-making tribunal. The tribunal is to act fairly. Under general principles of administrative law relating to the duty of fairness, the tribunal is obliged not only to avoid any bias but also to avoid the appearance or apprehension of bias. The following are three examples of steps to be taken to avoid apprehension of bias where it is likely to arise.

- (a) No member of the Authority taking part in the hearing should be involved, either through participation in committee or intervention on behalf of the applicant or other interested parties with the matter, prior to the hearing. Otherwise, there is a danger of an apprehension of bias which could jeopardize the hearing.
- (b) If material relating to the merits of an application that is the subject of a hearing is distributed to Board members before the hearing, the material shall be distributed to the applicant at the same time. The applicant may be afforded an opportunity to distribute similar pre-hearing material. **These materials can be distributed electronically.**
- (c) In instances where the Authority (or Executive Committee) requires a hearing to help it reach a determination as to whether to give permission with or without conditions or refuse a permit application, a final decision shall not be made until such time as a hearing is held.

The applicant will be given an opportunity to attend the hearing before a decision is made; however, the applicant does not have to be present for a decision to be made.

Individual Conservation Authorities shall develop a document outlining their own practices and procedures relating to the review and reporting of Section 28 applications, including the role of staff, the applicant and the Authority or Executive Committee as well as, the procedures for the hearing itself. Such policy and procedures manual shall be available to the members of the public upon request **and on the Authority's website**. These procedures shall have regard for the above information and should be approved by the Conservation Authority Board of Directors.

2.2 Application

The right to a hearing is required where staff is recommending refusal of an application or where there is some indication that the Authority or Executive Committee may not follow staff's recommendation to approve a permit or the applicant objects to the conditions of approval. The applicant is entitled to reasonable notice of the hearing pursuant to the Statutory Powers Procedures Act.

2.3 Notice of Hearing

The Notice of Hearing shall be sent to the applicant within sufficient time to allow the applicant to prepare for the hearing. To ensure that reasonable notice is given, it is recommended that prior to sending the Notice of Hearing, the applicant be consulted to determine an agreeable date and time based on the local Conservation Authority's regular meeting schedule.

The Notice of Hearing must contain the following:

- (a) Reference to the applicable legislation under which the hearing is to be held (i.e., the Conservation Authorities Act).
- (b) The time, place and the purpose of the hearing. **OR for Electronic Hearings:**
The time, purpose of the hearing, and details about the manner in which the hearing will be held.

Note: for electronic hearings the Notice must also contain a statement that the applicant should notify the Authority if they believe holding the hearing electronically is likely to cause them significant prejudice. The Authority shall assume the applicant has no objection to the electronic hearing if no such notification is received.

- (c) Particulars to identify the applicant, property and the nature of the application which are the subject of the hearing.

Note: If the applicant is not the landowner but the prospective owner, the applicant must

have written authorization from the registered landowner.

- (d) The reasons for the proposed refusal or conditions of approval shall be specifically stated. This should contain sufficient detail to enable the applicant to understand the issues so he or she can be adequately prepared for the hearing.

It is sufficient to reference in the Notice of Hearing that the recommendation for refusal or conditions of approval is based on the reasons outlined in previous correspondence or a hearing report that will follow.

- (e) A statement notifying the applicant that the hearing may proceed in the applicant's absence and that the applicant will not be entitled to any further notice of the proceedings.

Except in extreme circumstances, it is recommended that the hearing not proceed in the absence of the applicant.

- (f) Reminder that the applicant is entitled to be represented at the hearing by counsel, if desired.

It is recommended that the Notice of Hearing be directed to the applicant and/or landowner by registered mail. Please refer to **Appendix A** for an example Notice of Hearing.

2.4 Presubmission of Reports

If it is the practice of the local Conservation Authority to submit reports to the Board members in advance of the hearing (i.e., inclusion on an Authority/Executive Committee agenda), the applicant shall be provided with the same opportunity. The applicant shall be given two weeks to prepare a report once the reasons for the staff recommendations have been received. Subsequently, this may affect the timing and scheduling of the staff hearing reports.

2.5 Hearing Information

Prior to the hearing, the applicant shall be advised of the local Conservation Authority's hearing procedures upon request.

3.0 HEARING

3.1 Public Hearing

Pursuant to the Statutory Powers Procedure Act, hearings, including electronic hearings, are required to be held in public. For electronic hearings, public attendance should be synchronous

with the hearing. The exception is in very rare cases where public interest in public hearings is outweighed by the fact that intimate financial, personal or other matters would be disclosed at hearings.

3.2 Hearing Participants

The Conservation Authorities Act does not provide for third party status at the local hearing. While others may be advised of the local hearing, any information that they provide should be incorporated within the presentation of information by, or on behalf of, the applicant or Authority staff.

3.3 Attendance of Hearing Board Members

In accordance with case law relating to the conduct of hearings, those members of the Authority who will decide whether to grant or refuse the application must be present during the full course of the hearing. If it is necessary for a member to leave, the hearing must be adjourned and resumed when either the member returns or if the hearing proceeds, even in the event of an adjournment, only those members who were present after the member left can sit to the conclusion of the hearing.

3.4 Adjournments

The Board may adjourn a hearing on its own motion or that of the applicant or Authority staff where it is satisfied that an adjournment is necessary for an adequate hearing to be held.

Any adjournments form part of the hearing record.

3.5 Orders and Directions

The Authority is entitled to make orders or directions to maintain order and prevent the abuse of its hearing processes. A hearing procedures example has been included as **Appendix B**.

3.6 Information Presented at Hearings

- (a) The Statutory Powers Procedure Act, requires that a witness be informed of his right to object pursuant to the Canada Evidence Act. The Canada Evidence Act indicates that a witness shall be excused from answering questions on the basis that the answer may be incriminating. Further, answers provided during the hearing are not admissible against

the witness in any criminal trial or proceeding. This information should be provided to the applicant as part of the Notice of Hearing.

- (b) It is the decision of the hearing members as to whether information is presented under oath or affirmation. It is not a legal requirement. The applicant must be informed of the above, prior to or at the start of the hearing.
- (c) The Board may authorize receiving a copy rather than the original document. However, the Board can request certified copies of the document if required.
- (d) Privileged information, such as solicitor/client correspondence, cannot be heard. Information that is not directly within the knowledge of the speaker (hearsay), if relevant to the issues of the hearing, can be heard.
- (e) The Board may take into account matters of common knowledge such as geographic or historic facts, times measures, weights, etc or generally recognized scientific or technical facts, information or opinions within its specialized knowledge without hearing specific information to establish their truth.

3.7 Conduct of Hearing

3.7.1 Record of Attending Hearing Board Members

A record shall be made of the members of the Hearing Board.

3.7.2 Opening Remarks

The Chairperson shall convene the hearing with opening remarks which generally; identify the applicant, the nature of the application, and the property location; outline the hearing procedures; and advise on requirements of the Canada Evidence Act. Please reference **Appendix C** for the Opening Remarks model. **In an electronic hearing, all the parties and the members of the Hearing Board must be able to clearly hear one another and any witnesses throughout the hearing.**

3.7.3 Presentation of Authority Staff Information

Staff of the Authority presents the reasons supporting the recommendation for the refusal or conditions of approval of the application. Any reports, documents or plans that form part of the presentation shall be properly indexed and received.

Staff of the Authority should not submit new information at the hearing as the applicant will not have had time to review and provide a professional opinion to the Hearing Board.

Consideration should be given to the designation of one staff member or legal counsel who

coordinates the presentation of information on behalf of Authority staff and who asks questions on behalf of Authority staff.

3.7.4 Presentation of Applicant Information

The applicant has the opportunity to present information at the conclusion of the Authority staff presentation. Any reports, documents or plans which form part of the submission should be properly indexed and received.

The applicant shall present information as it applies to the permit application in question. For instance, does the requested activity affect the control of flooding, erosion, dynamic beach or conservation of land or pollution? The hearing does not address the merits of the activity or appropriateness of such a use in terms of planning.

- The applicant may be represented by legal counsel or agent, if desired
- The applicant may present information to the Board and/or have invited advisors to present information to the Board
- The applicant(s) presentation may include technical witnesses, such as an engineer, ecologist, hydrogeologist etc.

The applicant should not submit new information at the hearing as the Staff of the Authority will not have had time to review and provide a professional opinion to the Hearing Board.

3.7.5 Questions

Members of the Hearing Board may direct questions to each speaker as the information is being heard. The applicant and /or agent can make any comments or questions on the staff report.

Pursuant to the Statutory Powers Procedure Act, the Board can limit questioning where it is satisfied that there has been full and fair disclosure of the facts presented. Please note that the courts have been particularly sensitive to the issue of limiting questions and there is a tendency to allow limiting of questions only where it has clearly gone beyond reasonable or proper bounds.

3.7.6 Deliberation

After all the information is presented, the Board may adjourn the hearing and retire in private to confer. The Board may reconvene on the same date or at some later date to advise of the Board's decision. The Board members shall not discuss the hearing with others prior to the decision of the Board being finalized.

4.0. DECISION

The applicant must receive written notice of the decision. The applicant shall be informed of the

right to appeal the decision within 30 days upon receipt of the written decision to the **Mining and Lands Tribunal**.

It is important that the hearing participants have a clear understanding of why the application was refused or approved. The Board shall itemize and record information of particular significance which led to their decision.

4.1 Notice of Decision

The decision notice should include the following information:

- (a) The identification of the applicant, property and the nature of the application that was the subject of the hearing.
- (b) The decision to refuse or approve the application. A copy of the Hearing Board resolution should be attached.

It is recommended that the written Notice of Decision be forwarded to the applicant by registered mail. A sample Notice of Decision and cover letter has been included as **Appendix D**.

4.2 Adoption

A resolution advising of the Board's decision and particulars of the decision should be adopted.

5.0 RECORD

The Authority shall compile a record of the hearing. In the event of an appeal, a copy of the record should be forwarded to the **Mining and Lands Tribunal**. The record must include the following:

- (a) The application for the permit.
- (b) The Notice of Hearing.
- (c) Any orders made by the Board (e.g., for adjournments).
- (d) All information received by the Board.
- (e) The minutes of the meeting made at the hearing.
- (f) The decision and reasons for decisions of the Board.
- (g) The Notice of Decision sent to the applicant.

Appendix A

NOTICE OF HEARING

IN THE MATTER OF

The Conservation Authorities Act,
R.S.O. 1990, Chapter 27

AND IN THE MATTER OF an application by

FOR THE PERMISSION OF THE CONSERVATION AUTHORITY

Pursuant to Regulations made under
Section 28, Subsection 12 of the said Act

TAKE NOTICE THAT a Hearing before the Executive Committee of the Conservation Authority will be held under Section 28, Subsection 12 of the Conservation Authorities Act at the offices of the said Authority (ADDRESS), at the hour of , **on the day of , 2020**, [for electronic hearings, include details about the manner in which the hearing will be held] with respect to the application by (**NAME**) to permit development within an area regulated by the Authority in order to ensure no adverse affect on (***the control of flooding, erosion, dynamic beaches or pollution or conservation of land./alter or interfere with a watercourse, shoreline or wetland***) on Lot , Plan/Lot , Concession , (**Street**) in the City of , Regional Municipality of , River Watershed.

TAKE NOTICE THAT you are invited to make a delegation and submit supporting written material to the Executive Committee for the meeting of (**meeting number**). If you intend to appear [For electronic hearings: or if you believe that holding the hearing electronically is likely to cause significant prejudice], please contact (**name**). Written material will be required by (**date**), to enable the Committee members to review the material prior to the meeting.

TAKE NOTICE THAT this hearing is governed by the provisions of the Statutory Powers Procedure Act. Under the Act, a witness is automatically afforded a protection that is similar to the protection of the Ontario Evidence Act. This means that the evidence that a witness gives may not be used in subsequent civil proceedings or in prosecutions against the witness under a Provincial Statute. It does not relieve the witness of the obligation of this oath since matters of perjury are not affected by the automatic affording of the protection. The significance is that the legislation is Provincial and cannot affect Federal matters. If a witness requires the protection of the Canada Evidence Act that protection must be obtained in the usual manner. The Ontario Statute requires the tribunal to draw this matter to the attention of the witness, as this tribunal has no knowledge of the affect of any evidence that a witness may give.

AND FURTHER TAKE NOTICE that if you do not attend at this Hearing, the Executive Committee of the Conservation Authority may proceed in your absence, and you will not be entitled to any further notice in the proceedings.

DATED the ____ day of , _____ **202X**

The Executive Committee of the
Conservation Authority

Per:
Chief Administrative Officer/Secretary-Treasurer

Appendix B

HEARING PROCEDURES

1. Motion to sit as Hearing Board.
2. Roll Call followed by the Chairperson's opening remarks. For electronic hearings, the Chairperson shall ensure that all parties and the Hearing Board are able to clearly hear one another and any witnesses throughout the hearing.
3. Staff will introduce to the Hearing Board the applicant/owner, his/her agent and others wishing to speak.
4. Staff will indicate the nature and location of the subject application and the conclusions.
5. Staff will present the staff report included in the Authority/Executive Committee agenda.
6. The applicant and/or their agent will present their material
7. Staff and/or the conservation authority's agent may question the applicant and/or their agent if reasonably required for a full and fair disclosure of matters presented at the Hearing.¹
8. The applicant and/or their agent may question the conservation authority staff and/or their agent if reasonably required for full and fair disclosure of matters presented at the Hearing.²
9. The Hearing Board will question, if necessary, both the staff and the applicant/agent.
10. The Hearing Board will move into camera. For electronic meetings, the Hearing Board will separate from other participants for deliberation.
11. Members of the Hearing Board will move and second a motion.
12. A motion will be carried which will culminate in the decision.
13. The Hearing Board will move out of camera.
14. The Chairperson or Acting Chairperson will advise the owner/applicant of the Hearing

¹ As per the Statutory Powers Procedure Act a tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

² As per the Statutory Powers Procedure Act a tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

Board decision.

15. If decision is "to refuse", the Chairperson or Acting Chairperson shall notify the owner/applicant of his/her right to appeal the decision to the Mining and Lands Tribunal within 30 days of receipt of the reasons for the decision.
16. Motion to move out of Hearing Board and sit as Executive Committee.

Appendix C

CHAIRPERSON'S REMARKS WHEN DEALING WITH HEARINGS WITH RESPECT TO ONTARIO REGULATION ___/06

We are now going to conduct a hearing under section 28 of the Conservation Authorities Act in respect of an application by _____: , for permission to:_____

The Authority has adopted regulations under section 28 of the Conservation Authorities Act which requires the permission of the Authority for development within an area regulated by the Authority in order to ensure no adverse affect on (the control of flooding, erosion, dynamic beaches or pollution or conservation of land) or to permit alteration to a shoreline or watercourse or interference with a wetland.

The Staff has reviewed this proposed work and prepared a staff report, a copy of which has been given to the applicant and the Board. The applicant was invited to file material in response to the staff report, a copy of which has also been provided to the Board.

Under Section 28 (12) of the Conservation Authorities Act, the person requesting permission has the right to a hearing before the Authority/Executive Committee.

In holding this hearing, the Authority Board/Executive Committee is to determine whether or not a permit is to be issued, with or without conditions. In doing so, we can only consider the application in the form that is before us, the staff report, such evidence as may be given and the submissions to be made on behalf of the applicant. Only Information disclosed prior to the hearing is to be presented at the hearing.

The proceedings will be conducted according to the Statutory Powers Procedure Act. Under Section 5 of the Canada Evidence Act, a witness may refuse to answer any question on the ground that the answer may tend to incriminate the person, or may tend to establish his/her liability to a civil proceeding at the instance of the Crown or of any person.

The procedure in general shall be informal without the evidence before it being given under oath or affirmation unless decided by the hearing members.

If the applicant has any questions to ask of the Hearing Board or of the Authority representative, they must be directed to the Chairperson of the board.

Appendix D

(Date)

BY REGISTERED MAIL

(name)

(address)

Dear:

RE: NOTICE OF DECISION

Hearing Pursuant to Section 28(12) of the Conservation Authorities Act

Proposed Residential Development

Lot , Plan ; ?? Drive City of

(Application #)

In accordance with the requirements of the Conservation Authorities Act, the (name) Conservation Authority provides the following Notice of Decision:

On (**meeting date and number**), the Hearing Board/Authority/Executive Committee refused/approved your application/approved your application with conditions. A copy the Boards/Committee's resolution # has been attached for your records. Please note that this decision is based on the following reasons: (***the proposed development/alteration to a watercourse or shoreline adversely affects the control of flooding, erosion, dynamic beaches or pollution or interference with a wetland or conservation of land***).

In accordance with Section 28 (15) of the Conservation Authorities Act, An applicant who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons under subsection (14), appeal to the Minister who may refuse the permission; or grant permission, with or without conditions. Through Order in Council 332/2018 the responsibility for hearing the appeal has been transferred to the Mining and Lands Tribunal. For your information, should you wish to exercise your right to appeal the decision, a letter by you or your agent/counsel setting out your appeal must be sent within 30 days of receiving this decision addressed to:

Mining and Lands Tribunal
655 Bay Street, Suite 1500
Toronto, Ontario M5G 1E5

A carbon copy of this letter should also be sent to this conservation authority. Should you require any further information, please do not hesitate to contact (**staff contact**) or the undersigned.

Yours truly,

Chief Administrative Officer/Secretary Treasurer

Enclosure