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MAPLE LAKE ESTATES AND LSRCA'S SUBDIVISIONS-IN-WETLANDS POLICY RESPONSE TO LSRCA STAFF REPORT

prepared for
North Gwillimbury Forest Alliance
October 22, 2013

The North Gwillimbury Forest Alliance (NGFA) asked its planning consultant, Anthony Usher, MCIP, RPP, to review the October 9, 2013 Lake Simcoe Region Conservation Authority (LSRCA) staff report regarding the Authority's Watershed Development Policy 11.4.1.2. My comments, conclusions, and recommendations are as follows.

At its September 27, 2013 meeting, the LSRCA Board resolved that: "the deputation by Mr. Jack Gibbons regarding the North Gwillimbury Forest Alliance Delegation materials be received; and further that the matter be referred to staff for a Staff Report to the October 25, 2013 Board of Directors' meeting."

The delegation materials referred to, and included in the Board agenda for September 27, were:
- the May 13, 2013 letter to the Authority of six groups including NGFA, regarding Maple Lake Estates,
- my September 12, 2013 report to NGFA regarding the Authority's subdivisions-in-wetlands Policy 11.4.1.2.

The May 13, 2013 letter addresses Policy 11.4.1.2, but also makes several other requests (1 to 4 on the third page of the letter) regarding public notice of and input into any potential application for a *Conservation Authorities Act* Section 28 permit on the Maple Lake Estates property. The staff report does not, however, address or respond to requests 1 to 4. I supported these requests as reasonable and appropriate in the circumstances, and still do.

The staff report addresses only Policy 11.4.1.2. I will review and respond to the staff report in the context of my previous report.

Staff Rationale for Policy 11.4.1.2

The staff report explains that the purpose of this policy was to provide transition provisions for the implementation of Regulation 179/06, which took effect May 4, 2006. There is no question that Regulation 179/06 resulted in a considerable expansion of LSRCA's regulated area, particularly with respect to wetlands. I appreciate receiving this explanation. Certainly, there can be a place for appropriately worded transition policies as part of implementing major policy changes.

The staff report also notes that "As the policy only applies to lands with previous planning approvals, it recognizes that our Conservation Authority would have already reviewed and addressed issues such as natural hazards and natural heritage issues".

The staff report also describes the transition policies of eight other conservation authorities.

I will address each of these components of the staff explanation.

Transition Policy?

There are normally two essential elements to a transition policy:

- It is designed to exempt from new law or policy, often subject to conditions, applications preceding the date of change in law or policy, or further development consequent on planning approvals preceding that date.

- It is clearly tied to that date of change in law or policy, and applies only to matters deemed to precede that date.

Transition policies that apply to a broad range of development applications (for example, sections 74, 74.1, and 75, *Planning Act* or the transition policies in the 2010 York Region Official Plan) are normally identified as such, and clearly tied to a date, and it is these that I will refer to as transition policies in this report.

Other policies that allow further modest development associated with a lot, use, or structure that legally existed prior to a change in law or policy - for example, permitting a single detached dwelling on a vacant lot of record in a wetland despite a broader prohibition on wetland development - are, as the staff report suggests, a form of transition policy, although they are not normally identified as such. They are still normally tied to a date, though, such as a zoning bylaw permission associated with an existing use, coupled with a definition of an existing use as one that legally existed before the date the bylaw came into force.

LSRCA's Policy 11.4.1.2 is very clear: any application for a Section 28 permit within a registered plan of subdivision in a provincially significant wetland will be granted, regardless of:

- when the subdivision was draft-approved or registered, whether before or after May 4, 2006,
- what type of development or interference is proposed,
- what impact the proposal would have on the wetland,
- the nature and extent of LSRCA input and review prior to draft approval,
- the policy regime in place at the time of draft approval,
- any other criteria.

Policy 11.4.1.2 certainly applies very broadly; it is what I characterized in my first report as a "blanket exemption", not from the requirement for a Section 28 permit, but from the application of all current policy. However, it is not identified as a transition policy. Nor is it tied to any date. For those reasons, I had no idea it was intended to be a transition policy until I read the staff report. In fact, the word "transition" never appears in LSRCA's Watershed Development Policies.

Previous Planning Approvals?

Certainly, Policy 11.4.1.2 applies only to lands with previous planning approvals. That does not necessarily mean that, as asserted by staff, LSRCA would have already addressed relevant issues, particularly natural heritage.

It is safe to assume that a plan draft-approved in 2006 or later would have been addressed by LSRCA with respect to natural heritage issues, reasonably consistent with current policy, as both the present Provincial Policy Statement (2005) and Regulation 179/06 were in place.

However, as one turns the clock back, it becomes less and less certain that LSRCA would have addressed natural heritage issues, particularly wetland protection, in a manner that we would recognize today, because conservation authorities did not have the same mandates to do so.

If we turn the clock back far enough, we get to the mid-1980s, when the original planning applications for Maple Leaf Estates (as it was then known) were reviewed. Neither LSRCA nor the Province had any mandate to protect wetlands. The 1987 Ontario Municipal Board decision approving the Georgina Official Plan amendment to enable Maple Leaf Estates does not mention any environmental issue other than Lake Simcoe water quality, and does not include the word "wetland". (This is consistent with my recollection as an expert witness at that hearing.)

The Maple Leaf Estates decision does indicate that LSRCA had reviewed the application, but does not indicate with respect to what. The original developer's subdivision agreements with the Regional Municipality of York and Town of Georgina mention LSRCA only with respect to erosion and sediment control during construction, and drainage and grading plans.

In short, there is no evidence, nor does it seem probable, that LSRCA reviewed Maple Leaf Estates as proposed almost 30 years ago with respect to what we would now term "natural heritage issues", particularly wetlands protection. Of course, Policy 11.4.1.2 would apply to any Section 28 permit being sought by the present owner of what is now known as Maple Lake Estates - either for development as originally approved, or, it would appear, for development as potentially modified through Official Plan and zoning bylaw amendments provided there was no new plan of subdivision.

Other Authorities' Policies

First, lest staff or Board think that I cherry-picked the conservation authorities whose policies I compared with LSRCA's, I did not.

I was not prepared to review the policies of all 36 operating authorities. I picked the five authorities whose jurisdictions are geographically closest to LSRCA's, which I referred to as "nearest neighbour authorities", and went from there. I did not consult any other authorities' policies.

It is true, as suggested in the staff report, that Credit Valley is not a "neighbouring authority" in the sense that its watershed does not abut LSRCA's, but the Credit Valley jurisdiction is clearly among the five closest to LSRCA's. I also wanted to make sure that I was presenting enough comparators, reasonably balanced to the east, south, and west.

As noted in my first report and the staff report, none of these five authorities provides any unconditional exemptions for development in wetlands, and permit only small-scale development under very limited conditions.

With regard to transition policies in these five authorities' documents:

- CLOCA's transition policy is quoted in my first report, and clearly discourages exemption for previous planning approvals outdated from a policy perspective.

- None of the other four authorities has any policies identified as transition policies.

The staff report also refers to the policies of three other authorities, Cataraqui Region, Grand River, and Niagara Peninsula, and I am grateful for this additional information.

- Cataraqui Region has no policy identified as a transition policy.

  Without reviewing the entire CRCA policy document, I accept staff's description that it allows new development in wetlands under very limited conditions.

- Grand River has no policy identified as a transition policy.

  I assume that the policy referenced by staff is policy 8.4.3 in GRCA's policy document - if so, staff do not clearly or correctly describe it. The policy says that development in an approved plan of subdivision or condominium description within a wetland *may* be permitted *if*:
  - GRCA supported the planning approval,
  - the development "met the GRCA policies in effect at the time of draft plan approval",
  - the development is modified in accordance with current GRCA policies,

"wherever possible".

- Niagara Peninsula has a transition policy (not mentioned in the staff report), but only with respect to Section 28 permit applications submitted before its 2006 regulation came into effect.

  Without reviewing the entire NPCA policy document, I accept staff's description that it allows new development in wetlands under very limited conditions.

  However, the staff report also describes a NPCA policy referring to prior planning approvals in wetlands. That description is a direct quote from the preamble to section 3.24.1.b in NPCA's policy document. The quote may be taken out of context, though.

  - Like LSRCA's Policy 11.4.1.2, it is unclear whether this NPCA policy is intended to be a transitional policy applying only to pre-2006 applications, or a continuing policy.

  - The quoted policy does not say that a Section 28 permit will automatically be granted where there is some prior planning approval, only that the following policies restricting development in wetlands do not apply to any such permit application.

  - The question then remains what policies do apply to a permit application in a wetland where there is a prior planning approval (the document could be clearer, and discussion with NPCA staff would be required for clarification).

  - It appears to me, though, that the policies of section 3.24.2 regarding existing lots of record in wetlands would then apply. These policies clearly distinguish between development of a single detached dwelling on a vacant lot of record, and larger-scale development. It is clear that for the latter, NPCA may review the permit application on the basis of current policies, may require an environmental impact study, and will not approve development "where any and/or cumulative [sic] impact from development will prove to have a negative impact on the wetland and/or its function".

I cannot agree with staff that "Both Niagara Conservation and the Grand River Conservation Authority have a similar policy as LSRCA in respect to registered lots of record [within wetlands]".

Staff Recommendation

Staff's recommendation to change "will" to "may" in Policy 11.4.1.2 would certainly be an improvement. Whereas the present policy would provide blanket approval, the

proposed policy would appear to allow a determination as to whether the tests of Section 28(1) of the *Conservation Authorities Act* and Section 3(1) of Regulation 179/06 would be met, regardless of the existence of a registered plan of subdivision.

I am perplexed, then, by staff's suggestion that this change is "slight". If by "slight" staff mean that it's a one-word change, fair enough. If they mean that the change is insignificant, then the improvement is only cosmetic.

Is a Transition Policy Needed?

Staff's sole justification for the existing Policy 11.4.1.2, and for continuing it with a one-word change, is the need for a transition policy, as they advocate on page 2 of their report.

Again, by "transition policy", I refer to the kind of clearly identified and dated, broad-range transition policy that staff appear to be advocating in their report. I am not referring to modest-development policies such as allowing single detached dwellings on pre-existing vacant lots of record in wetlands subject to appropriate criteria.

As I described earlier, Policy 11.4.1.2, whether the current or proposed wording, does not meet the usual criteria for a transition policy.

On page 7 of my first report, I listed five points suggesting there was no justification for Policy 11.4.1.2.

Staff have not disproved any of these points. They have brought forward policies from three additional conservation authorities, which in my view only further support my contention regarding other authorities.

Now that I understand that Policy 11.4.1.2 is intended to be a transition policy, I revisited the documents cited in my first report.

- The *Conservation Authorities Act* does not have any relevant transition requirements. Regulation 179/06 does not have any transition requirements.

- Neither the 2008 Conservation Ontario Guidelines nor the 2010 MNR Policies and Procedures suggest that conservation authorities adopt any transition policies, either with regard to the implementation of the 2006 Section 28 regulations, or otherwise.

- I have reviewed the policy documents of neighbouring and other conservation authorities for any transition policies and have provided the results above.

This raises the question of whether LSRCA needs any transition policy for wetlands, in addition to the allowances it already makes for vacant lots of record (Policy 11.4.2.1) and

replacement of structures (Policy 11.4.4).

LSRCA could have made a policy similar to Niagara Peninsula's, that Section 28 permit applications predating May 4, 2006 would be treated under the old rules, but chose not to.

Seven and a half years later, it seems doubtful how much genuine public interest need there would still be for such a policy, or for any policy that would attempt to provide special treatment for developments that received planning approvals prior to Regulation 179/06. Surely most applicants that are the legitimate objects of transition policies, those that are caught by unforeseen changes in law or policy midway through a development process they are actively pursuing, have by now worked their way through the process.

My Recommendations

My recommendation remains as in my first report, **to delete Policy 11.4.1.2**.

However, if the LSRCA Board still believes that based on the unique circumstances and conditions of the Lake Simcoe watershed, some policy is required, then my recommendation would be to modify Policy 11.4.1.2, as follows. Now that I understand that Policy 11.4.1.2 was intended as a transition policy and that staff believe such a policy is still required, I have sought to reflect aspects of the staff report, and have otherwise modified this proposal somewhat from the wording in the May 13, 2013 letter and my first report.

> **Notwithstanding Policy 11.4.1.1, the LSRCA may grant approval for development on lots within a registered Plan of Subdivision, provided that:**
>
> **(i) the Plan consists of conventional residential lots and blocks;**
>
> **(ii) the Plan was registered after May 4, 1998;**
>
> **(iii) the Plan was draft-approved before May 4, 2006;**
>
> **(iv) the Plan was circulated to the LSRCA, and the LSRCA provided comments and conditions pursuant to Watershed Development Policies Section 8.2;**
>
> **(v) the Plan conformed with the Watershed Development Policies in effect at the time of draft approval;**
>
> **(vi) the application is reviewed in accordance with the current Watershed Development Policies; and**
>
> **(vii) the proposed development is determined to satisfy the tests of Section**

3(1) of Regulation 179/06.

To briefly explain this recommendation:

- The preamble is as recommended by staff, with a grammatical change to make it work better with the conditions below.

- (i) and (iv) are as recommended in my first report, with the addition of "blocks" to (i) for clarification.

- (ii) and (iii) reflect LSRCA's intent that this be a transitional policy. (iii) ensures it applies only to matters preceding Regulation 179/06. (ii) is also tied to Regulation 179/06: any plan registered before May 4, 1998 could have been deemed not to be a registered plan on the coming into force of the regulation, as per section 50(4) of the *Planning Act*.

- (v) and (vi) reflect aspects of the Grand River Conservation Authority's policy 8.4.3 cited by staff and described above, and Central Lake Ontario Conservation Authority's transition policy described in my first report.

- (vii) reflects the staff report's assurances about applications meeting the "five tests".

* * *

This concludes my report. I will be pleased to discuss it further with NGFA, or LSRCA if NGFA so wishes, at any time.

[original signed and stamped by]

Anthony Usher, MCIP, RPP
October 22, 2003