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September 26, 2014

Our File No. 112062

VIA EMAIL g.wood@lsrca.on.ca

Board of Directors
Lake Simcoe Region Conservation Authority
120 Bayview Parkway, Box 282
Newmarket, Ontario L3Y 4X1

Attn: Gayle Wood, C.A.O.

Dear LSRCA Directors:

**Re: Draft Watershed Development Guidelines
Guideline 8.3.2**

**North Gwillimbury Forest Alliance
Legal Opinion**

We are counsel to the North Gwillimbury Forest Alliance ["NGFA"].

This letter provides our legal opinion respecting the deletion of draft LSRCA Watershed Development Guideline 8.3.2 as is being requested by the NGFA.

Currently-Worded Proposed Guideline 8.3.2

As currently drafted, the Watershed Development Guideline 8.3.2 provides:

8.3 Development and Interference with Wetlands

When reviewing applications under Ontario Regulation 179/06 for development and interference within a wetland, the following guidelines shall apply:

8.3.1 New development and/or new interference in any way shall be prohibited within all wetlands;

8.3.2 Notwithstanding Guideline 8.3.1, the LSRCA may grant approval for new development within a Provincially Significant Wetland, provided that:

(a) no reasonable alternative location exists outside the wetland; and

(b) the property is within an existing settlement area as defined by the municipal Official Plan for that municipality as of the date of adoption of these Guidelines;
And

(c) the property is part of a registered plan of subdivision; and

(d) the property is appropriately designated and zoned for the proposed development; and

(e) the development proposal is designed to minimize the impact on the balance of the wetland feature.

NGFA is requesting that this Guideline 8.3.2 be deleted.

Anthony Usher, MCIP, RPP has had been retained by NGFA to examine Guideline 8.3.2 and related guidelines and provide his professional assessment respecting same. Please see his letter dated September 26, 2014 submitted concurrently.

A summary of our legal opinion is set out below.

LSRCA's Legislative Mandate – Conservation Authorities Act

Section 20 of the *Conservation Authorities Act*, R.S.O. 1990, c. C.27 sets forth the objects of the Authority:

The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals. [emphasis added]

To assist in attaining those objects, section 21(1) of the *Act* grants the Authority the following power:

For the purposes of accomplishing its objects, an authority has power,

(a) to study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed;...[emphasis added]

The Authority also has the power to make regulations pursuant to Section 28(1) of the *Act*:

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

(a) restricting and regulating the use of water in or from rivers, streams, inland lakes, ponds, wetlands and natural or artificially constructed depressions in rivers or streams;

(b) prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing

channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland;

(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; ...[emphasis added]ⁱ

Note that there is no fetter on the legislative capacity of the Authority to prohibit development in wetlands in order to achieve the conservation and restoration of land.

Based upon this broad legislative mandate and powers, it is our opinion that the currently-worded Guideline 8.3.2 is contrary to the stated statutory purpose and objective of securing the conservation and restoration of land as set out in the *Act*.

LSRCA's Legislative Mandate – O.Reg. 179/06

Section 2(1) of O.Reg. 179/06 provides:

Subject to section 3, no person shall undertake development or permit another person to undertake development in or on the areas within the jurisdiction of the Authority that are, ...

(d) wetlands; or

(e) other areas where development could interfere with the hydrologic function of a wetland, including areas within 120 metres of all provincially significant wetlands, and areas within 30 metres of all other wetlands. [emphasis added]

These prohibitions are subject to a legislative discretion that is provided for in Section 3(1) of the Regulation:

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.

It is our opinion that the currently-worded Guideline 8.3.2 is contrary to the stated statutory purpose and prohibition set out in O.Reg. 179/06 subsections 2(1)(d) & (e) and fails to satisfy or consider the statutory conditions expressed in subsection 3(1).

In addition, it is our opinion that Section 3 is purposely permissive and not mandatory. That is, the LSRCA is free to choose as a policy that, notwithstanding Section 3, it will simply not grant any permission in any of the areas referred to in Section 2(1)...including wetlands and areas within 120m of provincially significant wetlands. The motivation and rationale for such a policy would be readily apparent; these are areas that the Authority believes ought to be conserved and restored for the benefit of existing and future generations, consistent with the definition of

“conservation of land” proposed by Conservation Ontario and adopted in the Glossary of the proposed Guidelines.

Simply put, the Authority is not obligated by Section 3 to consider any development within such areas.

The Authority has the unfettered power to make a policy decision and choose its policy direction. Neither our client nor private landowners can judicially challenge a policy decision of the Authority when same is within its jurisdiction, properly considered and made in good faith.

Currently-Worded Guideline 8.3.2 is Illegal

In our opinion, Guideline 8.3.2 as currently worded is simply illegal and bad policy. It is inconsistent with and contrary to the following:

- 1) sections 20, 21(1)(a) & 28(1)(c) of the *Conservation Authorities Act*;
- 2) sections 2(1)(d) & (e) of O.Reg. 179/06;
- 3) section 3(1) of O.Reg. 179/06 as the guideline fails to consider and incorporate any of the listed conditions; and
- 4) Draft LSRCA Watershed Development Guideline 8.3.1.

All of the above prohibit development in significant wetlands.

Proposed Guideline 8.3.2 is contrary to the goals, objectives and policies of the legislation and regulation under which the LSRCA operates.

As will be elaborated upon below, *Planning Act* approvals are not to factor into an Authority's decision as to whether to issue a section 28 permit. However, provincial and regional planning policies are relevant matters that can be considered by an Authority when exercising its permit-granting jurisdiction.

In our opinion, Guideline 8.3.2 is inconsistent with and fails to conform to the following:

- 1) the Provincial Policy Statement, 2014; Policy 2.1.4ⁱⁱ; and
- 2) the York Region's new Official Plan; Policies 2.2.35-2.2.42ⁱⁱⁱ.

The Proposed Guideline 8.3.2 Criteria

As mentioned earlier, the currently-worded Guideline 8.3.2 provides:

8.3.2 Notwithstanding Guideline 8.3.1, the LSRCA may grant approval for new development within a Provincially Significant Wetland, provided that:

- (a) no reasonable alternative location exists outside the wetland; and

(b) the property is within an existing settlement area as defined by the municipal Official Plan for that municipality as of the date of adoption of these Guidelines; and

(c) the property is part of a registered plan of subdivision; and

(d) the property is appropriately designated and zoned for the proposed development; and

(e) the development proposal is designed to minimize the impact on the balance of the wetland feature.

Proposed criteria (b), (c) & (d) all relate to *Planning Act* approvals: official plan designations, zoning by-laws and plans of subdivision.

As you Directors are aware, *Planning Act* approvals are not a relevant consideration in exercising the Authority's jurisdiction under the *Conservation Authorities Act*.

For ease of reference, note the following which was delivered by the Mining and Lands Commissioner in her March 20, 2002 speech to the Urban Development Institute.

"Attention is drawn to the underlying premise of the Conservation Authorities Act. It recognizes that there is an inherent inability in certain lands to withstand encroachment and development. The question in an application or appeal, and based upon the facts of the case, is whether the land in question has any of those characteristics, and to what extent, so as to determine whether the requested permission may be allowed, allowed with conditions or refused. At the most extreme end of the considered risks, certain lands are simply too flood prone, with the attendant potential risk to a loss of life and property. For others, the impact on certain types of necessary natural ecosystem resources and their functions is too extreme. In such cases, there are no mitigating measures available to permit the requested activity.

By the provisions of the Conservation Authorities Act, a CA has over those lands within its jurisdiction, the power to outright prohibit, regulate or grant permission to a private property owner the right to develop his or her land as he or she sees fit. For the purpose of an application under Section 28, Official Plan designations or zoning are not relevant. Just to be clear, lands having a certain designation for municipal planning purposes such as residential, industrial or commercial, does not mean that a permission under Section 28 must follow as a forgone conclusion." [emphasis added]

We would also reference the Deputy Mining and Lands Commissioner's decision in file no. CA008-01 cited as *Rinaldi v. Lake Simcoe Region Conservation Authority*; http://files.ontario.ca/environment-and-energy/mining-decisions/mnr_e002037.pdf.

In this decision, the Deputy Commissioner asked the following two questions:

“Does the fact that the lots are registered and could and do receive municipal services have any bearing on the decision of the Tribunal?; and

Do the planning issues under the *Planning Act* have any relevance to the decision of the Tribunal?”

At pages 34-36 of the decision, the Deputy Commissioner answers both questions in the negative.

It is stated “just because the [subdivision] plan was registered did not guarantee him any development rights”.

Further, dealing with the inapplicability of the *Planning Act* considerations and approvals, it is stated;

“Conservation Authorities do not consider, nor do they have the power to consider, the relative merits of competing interests. Their mandate is to determine the impact of a proposal on the very limited capacity of land within their jurisdiction and based upon the degree of severity, to allow or refuse permission”.

The LSRCA has an independent jurisdiction to exercise its power under the *Conservation Authorities Act* to achieve the purposes set out under that *Act*. Development approvals under the *Planning Act* should have no bearing on decisions made by this Authority.

Establishing proposed criteria 8.3.2 (b), (c) & (d) is in direct contravention to the legislation and decisions cited above. You should reject these criteria without hesitation.

Criterion 8.3.2 (a) is simply too subjective and vague and ought not to be supported. It raises numerous questions respecting the meaning of certain words and the potential application of this criterion.

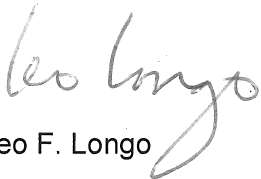
Remaining criterion 8.3.2 (e) misses the mark of what the Authority is directed in provincial legislation and policy to consider. Above-cited subsections 20 and 21(1)(a) of the *Act* address the goals of conservation and restoration of watershed natural resources. In addition, subsection 28(1)(c) of the *Act* and 3(1) of O.Reg. 179/06 set out the 5 “tests” that must be weighed when considering an application to permit any development within a wetland or wetland buffer area. Proposed criterion (e) mentions none of the legislated 5 “tests”.

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For all of the foregoing reasons, we are of the opinion that proposed Guideline 8.3.2 is unlawful and bad policy.

Yours truly,

AIRD & BERLIS LLP



Leo F. Longo

/LFL

cc. Policy Review policyreview@lsrca.on.ca
Jack Gibbons, NGFA
Anthony Usher

Endnotes:

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i Section 28(25) defines certain terms used in the above citation:

In this section,

"development" means,

- (a) *the construction, reconstruction, erection or placing of a building or structure of any kind,*
- (b) *any change to a building or structure that would have the effect of altering the use or potential use of the building or structure, increasing the size of the building or structure or increasing the number of dwelling units in the building or structure,*
- (c) *site grading, or*
- (d) *the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere;*

"hazardous land" means land that could be unsafe for development because of naturally occurring processes associated with flooding, erosion, dynamic beaches or unstable soil or bedrock;

"pollution" means any deleterious physical substance or other contaminant that has the potential to be generated by development in an area to which a regulation made under clause (1) (c) applies;

"watercourse" means an identifiable depression in the ground in which a flow of water regularly or continuously occurs;

"wetland" means land that,

- (a) *is seasonally or permanently covered by shallow water or has a water table close to or at its surface,*
- (b) *directly contributes to the hydrological function of a watershed through connection with a surface watercourse,*
- (c) *has hydric soils, the formation of which has been caused by the presence of abundant water, and*
- (d) *has vegetation dominated by hydrophytic plants or water tolerant plants, the dominance of which has been favoured by the presence of abundant water,*

but does not include periodically soaked or wet land that is used for agricultural purposes and no longer exhibits a wetland characteristic referred to in clause (c) or (d). [emphasis added]

ii **2.0 Wise Use and Management of Resources**

Ontario's long-term prosperity, environmental health, and social well-being depend on conserving biodiversity, protecting the health of the Great Lakes, and protecting natural heritage, water, agricultural, mineral and cultural heritage and archaeological resources for their economic, environmental and social benefits.

Accordingly:

2.1 Natural Heritage

2.1.1 Natural features and areas shall be protected for the long term.

2.1.4 *Development and site alteration* shall not be permitted in:

- a) *significant wetlands* in Ecoregions 5E, 6E and 7E1; and
- b) *significant coastal wetlands.*

iii The York Region Official Plan has the following preamble to its policies 2.2.35 - 2.2.42 related to "Wetlands":

Wetlands

Wetlands are essential natural elements of the Regional ecosystem, providing environmental, economic and social benefits. These lands, which are seasonally or permanently covered by shallow water or where the water table is close to or at the surface, are characterized by hydric soils and hydrophytic or water tolerant plants. Among other functions, wetlands control and store surface water to assist in flood control and groundwater recharge. Wetlands also act as sediment traps to improve water quality and act as habitat for a wide variety of plant and animal species.

The Province has enacted a policy statement under the *Planning Act* that prohibits development in provincially significant wetlands. Other wetlands that have not been identified as provincially significant, but which have been formally evaluated by the Ministry of Natural Resources, also exist within the Region. Map 4 shows the general location of all evaluated wetlands, as well as identified wetlands within the Oak Ridges Moraine, Greenbelt and *Lake Simcoe watershed*. More detailed information, as well as more recent wetland evaluations are available from the Province. [emphasis added]

Policy 2.2.35 thereafter states:

35. That notwithstanding policy 2.2.4 of this Plan, development and site alteration is prohibited within evaluated wetlands and all identified wetlands within the *Lake Simcoe watershed*, on the Oak Ridges Moraine and within the Greenbelt Natural Heritage System, as shown on Map 4 of this Plan. Due to the scale of the mapping in this Plan, smaller wetlands may not be visible. More detailed mapping is available from York Region. [emphasis added]