AIRD & BERLIS LLP
Barristers and Solicitors

Leo F. Longo
Direct: 416.865.7778
E-mail: llongo@airdberlis.com

January 3, 2014

**VIA EMAIL**

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

**Attn: Ms. Gayle Wood, C.A.O. and Secretary-Treasurer**

Dear Ms. Wood,

**Re: Watershed Development Policy 11.4.1.2**
**North Gwillimbury Forest Alliance**
**Legal Opinion**

This is further to our November 29, 2013 letter and December 13, 2013 deputation to the Board of Directors respecting the deletion of LSRCA Watershed Development Policy 11.4.1.2 as requested by the NGFA.

It was hoped that we would have received and reviewed Mr. Olah's legal opinion and any additional LSRCA staff report prior to the deadline for submitting this letter. Unfortunately, neither has been provided to date.

The purpose of this letter is to elaborate upon our earlier letter and deputation. In addition, we attach hereto a further report (January 3, 2014) of Mr. Usher.

We intend to attend the January 17, 2014 special meeting of the Board of Directors to present and augment this submission and to speak to the LSRCA counsel's legal opinion and any further staff report submitted respecting this matter.

**Repeal of Policy 11.4.1.2**

The basis for our client's requested repeal of Policy 11.4.1.2 was set out in our November 29, 2013 letter.

We reiterate our opinion that the current policy is unlawful and that the repeal of this "subdivisions-in-wetlands" loophole is necessary and appropriate to make the LSRCA Watershed Development Policies consistent with and conform to:

1) the Provincial Policy Statement, 2005; Policy 2.1.3;

2) York Region's new Official Plan; Policies 2.2.35-2.2.42;

3) section 28(1)(c) of the *Conservation Authorities Act*;

4) sections 2(1)(d) & (e) of O.Reg. 179/06;

5) section 3(1) of O.Reg. 179/06 as the LSRCA would be exercising its permitted legislative discretion not to allow development within a provincially significant wetland and its 120m buffer; and

6) the Watershed Development Policies of many other neighbouring conservation authorities.

As noted in our previous letter, there is no legal impediment which prevents the requested repeal of Policy 11.4.1.2. There is no over-arching policy consideration that militates against the requested repeal of Policy 11.4.1.2.

**An Alternative Course of Action – The Required Revisions to Policy 11.4.1.2**

If the LSRCA is not convinced or prepared to repeal Policy 11.4.1.2, it is our opinion that any transition policy requires two significant components to make it lawful, meaningful and balanced.

First, any policy that purports to allow the Authority the discretion to allow development within a provincially significant wetland and its 120m buffer must incorporate the criteria as set out in section 3(1) of O.Reg. 179/06; i.e. it will only be considered if, in the LSRCA's opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development.

Second, there should be additional context established as to when and under what circumstances the Authority would be willing to even consider an application under such a transition policy.

In his report of October 22, 2013, Mr. Usher recommended substantial revisions to Policy 11.4.1.2 in the event that the LSRCA Board was not prepared to repeal the policy. He provided a brief explanation of the rationale for those revisions. We commended these revisions to the Board in our previous letter, in the alternative the Board was not prepared to repeal the policy altogether.

In light of discussion at the December 13, 2013 Board meeting, including suggestions that the revision might be specifically designed to target the plan of subdivision registered on the Maple Lakes Estates property in 1992, we felt it would be appropriate to provide a more fulsome explanation of the proposed alternative policy and address concerns about its structure and content.

The alternative policy recommended by Mr. Usher and supported by this letter is provided in ***bold face italics***.

> ***Notwithstanding Policy 11.4.1.1, the LSRCA may grant approval for development on lots within a registered Plan of Subdivision, provided that:***

This preamble is as recommended by LSRCA staff in their October 9, 2013 report, with two changes:

- changing "registered Plans of Subdivision" to singular, to agree with the seven criteria; and
- adding "provided that" as a lead-in to the criteria.

***(i) the Plan consists of conventional residential lots and blocks;***

The purpose of criterion (i) is to ensure that this policy is only applied in a situation where there had been an informed and considered prior policy decision to permit relatively intensive community development and to divide the subject lands accordingly. Such a policy decision having been made and not rescinded, the only remaining opportunity to protect the wetland would be whenever the Authority and its staff considered a s. 28 permit application.

The least dense "conventional" residential subdivision would be an estate residential subdivision, typically consisting of 2 ha lots (which generally are no longer permitted).

The Maple Lake Estates subdivision was, as described in Mr. Usher's September 12, 2013 report, a most unusual subdivision created for unique reasons. It consisted of two lots, one of 0.8 ha and one of about 200 ha. Certainly criterion (i) would exclude it. However, this criterion would also exclude any number of other possible subdivisions, also for good planning reasons. As an example, a still-undeveloped industrial subdivision consisting of 10 ha lots might no longer represent good planning and could afford considerable opportunities for protecting the wetland.

***(ii) the Plan was registered after May 4, 1998;***

Criterion (ii) is tied to the coming into effect of O. Reg. 179/06 on May 4, 2006.

Section 50(4) of the *Planning Act* allows local municipalities to deem subdivision plans no longer to be subdivision plans if they have been registered for at least eight years. This power is normally used only if the subdivisions have not been developed.

At the time Regulation 179/06 came into effect, local municipalities could have chosen to deem any undeveloped subdivision plans in wetlands that had been registered on or before May 4, 1998 no longer to be plans of subdivision, and could have justified doing so on the basis that the plans no longer represented good planning in light of the Regulation. They could not have done this (until more time had elapsed) with plans registered after May 4, 1998.

While in general the municipalities do not seem to have done this, Section 50(4) combined with Regulation 179/06 still raises the question of how long prior undeveloped approvals should be given transitional privileges. Mr. Usher's and our submissions have made clear that the

*Conservation Authorities Act* and Regulation 179/06 did not impose any transition provisions on the coming into force of the 2006 regulations, nor did the Province or Conservation Ontario advocate any transition policies, nor do most conservation authorities have any such policies.

Almost eight more years have passed since Regulation 179/06 took effect. At the very least, it is time to limit any transitional privileges and ensure they do not last forever. For good planning reasons, criterion (ii) would exclude the Maple Lake Estates plan - as well as every other subdivision registered more than 16 years ago and still undeveloped.

> ***(iii) the Plan was draft-approved before May 4, 2006;***

Staff in their October 9, 2013 report say the intent of Policy 11.4.1.2 was to be a transition policy. Criterion (iii) would clarify and confirm that this is the purpose of the policy, to apply only to approvals prior to Regulation 179/06. This criterion would not exclude the Maple Lake Estates plan.

> ***(iv) the Plan was circulated to the LSRCA, and the LSRCA provided comments and conditions pursuant to Watershed Development Policies Section 8.2;***

The purpose of criterion (iv) is to ensure that at a minimum, LSRCA had some say about the subdivision plan. Other conservation authorities that do provide some recognition of prior planning approvals require this: see the transition policies of Central Lake Ontario and Grand River authorities, as most recently described in Mr. Usher's report of January 3, 2014.

LSRCA did review the Maple Lake Estates plan, and may have provided comments and conditions. However, although the original version of the Watershed Development Policies was in effect at that time, we are unaware whether it included Section 8.2.

> ***(v) the Plan conformed with the Watershed Development Policies in effect at the time of draft approval;***

The purpose of criterion (v) is to ensure that at a minimum, LSRCA's standards in effect at the time were met. The transition policies of the Grand River Conservation Authority require this, as most recently described in Mr. Usher's report of January 3, 2014.

We do not have the information to judge whether this criterion would exclude the Maple Lake Estates plan.

> ***(vi) the application is reviewed in accordance with the current Watershed Development Policies; and***

The purpose of criterion (vi) is to ensure that at a minimum, and given the 2006 regulation, changes in policies, and passage of time, there is some re-review of proposed development in the subject subdivision based on current policies. The transition policies of the Grand River

authority require this, and the policies of the Central Lake Ontario authority strongly suggest it, as most recently described in Mr. Usher's report of January 3, 2014. As well, as Mr. Usher describes in his report of September 12, 2013, both Ministry of Natural Resources and Conservation Ontario policies open the door to such re-review.

In any case, this criterion simply confirms and formalizes the assurance of staff in their October 9, 2013 report, that any application "will be offered an objective technical review in respect of LSRCA watershed development policies".

Since the owner has not submitted any application, whether this criterion would exclude Maple Lake Estates is moot, and in any case would be up to staff.

> ***(vii) the proposed development is determined to satisfy the tests of Section 3(1) of Regulation 179/06.***

Criterion (vii) simply confirms and formalizes the assurance of staff in their October 9, 2013 report, that any application "will be offered an objective technical review in respect of the 'Five Tests' for which applications under [Regulation 179/06] are subject to".

Since the owner has not submitted any application, whether this criterion would exclude Maple Lake Estates is moot, and in any case would have to be initially determined by staff.

In conclusion, it may be argued that the seven criteria taken together create a complex regime. Fair enough...but allowing for any development in a provincially significant wetland should only be permitted as a last resort and only under very limited circumstances. The over-riding mandate of the Authority is the preservation and conservation of such important natural resources...not their destruction.

Our more detailed examination of the recommended alternative to repeal of Policy 11.4.1.2, and Mr. Usher's further examination of the policies of other Conservation Authorities in his January 3, 2014 report, demonstrate that there is neither legal need, nor policy rationale, nor planning merit for continuing any such "transition" policy.

In his latest report, Mr. Usher also addresses concerns raised by Board members about the Holland Marsh and Lagoon City, and questions raised about Castle Glen Estates in Grey County, and his responses demonstrate that none of these pose any obstacle to repeal of Policy 11.4.1.2.

For the reasons outlined above, we submit that, as an alternative to repealing it should the LSRCA not wish to do so, Policy 11.4.1.2 be revised as follows:

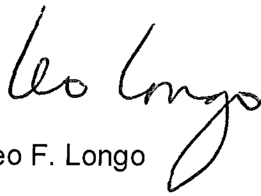
> *Notwithstanding Policy 11.4.1.1, the LSRCA may grant approval for development on lots within a registered Plan of Subdivision, provided that:*
>
> *(i) the Plan consists of conventional residential lots and blocks;*

*(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.*

In due course we look forward to receiving and commenting upon Mr. Olah's legal opinion and any additional LSRCA staff report.

Yours truly,

AIRD & BERLIS LLP



Leo F. Longo

LFL/ek

c. Jack Gibbons, NGFA
Anthony Usher

16099016.1