

February 19, 2013

File No. 112062

BY EMAIL AND REGULAR MAIL

Mayor Robert Grossi
and Members of Council
Town of Georgina
26557 Civic Centre Road
Keswick, ON L4P 3G1

Attention: Patricia Nash, Acting Town Clerk

Dear Mayor Grossi and Council Members:

**Re: North Gwillimbury Forest Alliance
ICBL Request
Town Staff Report No. PB-2013-0010**

I have been retained by the North Gwillimbury Forest Alliance ["NGFA"] to act on its behalf in the above-captioned matter.

Thank you for deferring your consideration of the above-captioned staff report in order to allow me to provide a response to it, and in particular, the January 18, 2013 letter found therein from the Town's Solicitor, Mr. Bigioni, to the Town's Director of Planning and Building.

The Staff Report concluded "...for the reasons provided by the Town Solicitor in his correspondence, it is recommended that Council not pass an ICB affecting Polygon 3 (Maple Lake Estates...)".

This opinion letter will directly address the legality and appropriateness of the NGFA-requested Interim Control By-Law ["ICBL"] being passed and applying to Polygon 3, the lands known as Maple Lake Estates ["MLE"].

Director of Planning and Building's Comments

The Staff Report cautions that the use of an ICBL must be justified and defensible and then quotes an extract from a noted legal text that states:

"The review of the official plan every five years does not constitute such justification."

In response, I would first ask Council to note that the NGFA's ICBL request is not based initially upon or as a result of the municipality undertaking its five year review [which is undertaken by the Town pursuant to section 26 of the *Planning Act*].

The NGFA's request is that an ICBL is justified under the current circumstances due to the combination of other statutory provisions, new planning policy and judicial reasoning.

Of primary significance is the fact that relevant provisions of the new York Region Official Plan are now in full force and effect [as of July 11, 2012].

The new Official Plan's environmental policies [especially policies 2.2.35 – 2.2.52] and Maps 4 and 5 unequivocally protect significant wetlands and woodlands.

Subsection 27(1) of the *Planning Act* provides:

"The council of a lower-tier municipality **shall amend every official plan and every by-law** passed under section 34, or a predecessor of it, **to conform with a plan** that comes into effect as **the official plan of the upper-tier municipality.**" [emphasis added]

If the Town does not do so by June 11, 2013, the Region has the right to make such amendments; see subsection 27(2) of the **Planning Act**.

Hence the rationale and justification for the ICBL is initially founded upon:

1. the new York Region OP's enhanced environmental policies and Maps 4 & 5;
2. the statutory requirement that the Town must amend its OP and Zoning By-Law in conformity with the new Regional OP: and
3. the statutory power of the Region to intervene and amend the Town's OP and Zoning By-Law.

That the Town is engaged in a five year review is not the fundamental basis for NGFA's request.

We note that on October 22, 2012 Town Council resolved and authorized staff to "**commence a review** of the Town of Georgina Official Plan **in accordance with** Section 26 and **Section 27** of the Ontario Planning Act" [emphasis added]. Our client's ICBL request builds upon that resolution and focusses on the Polygon Areas mentioned in Mr. Usher's report attached to Mr. Gibbons's December 31, 2012 letter to Council.

The NGFA ICBL request is also founded on court decisions which have concluded that a new, in effect, upper tier official plan, in and by itself, cannot operate so as to alter or affect existing zoning that permits uses not allowed by the new OP; see the Court of Appeal decision in *Saïd v. Maurice Duval Excavation Inc.* (2006), 53 O.M.B.R. 257 (Ont. C.A.).

Until the new OP is implemented, current zoning permissions prevail notwithstanding they are contrary to and do not conform with such OP. This is not in the public interest and is a situation that an ICBL can effectively address and prevent while the aforesaid review is being undertaken.

Town Solicitor's Comments

The Town Solicitor's letter commented upon one matter; the advisability of passing an ICBL affecting the MLE lands.

After some general introductory comments respecting the nature of and procedures related to ICBLs, the Town Solicitor opines that:

1. the requirements of Section 38 of the *Planning Act* must be carefully followed;
2. the Town must be able to substantiate the planning rationale behind the ICBL;
3. the Town's review of its OP "to bring it into compliance with" the new Regional OP is not, in itself, enough to justify the passing of an ICBL; and
4. the effect of the new Regional OP does not prevent the development of the MLE lands "as currently approved".

On the first two points, I have no disagreement with Mr. Bigioni, save and except that, for the reasons set out in this letter, I believe that an ICBL applying to the MLE lands fully satisfies both points raised.

I disagree with his third point for four reasons.

First, he either ignores or fails to appreciate that approximately 90% of the MLE lands are now designated wetland and/or significant woodlands in the new Regional OP which prohibits any development thereon.

Second, his opinion does not address the statutory distinction between a section 26 five year review and the necessity for the Town's OP to conform with the new Regional OP pursuant to section 27.

Third, he cites no judicial authority for his opinion.

Finally, judicial authority actually supports the opposite view and the position of our client.

In the Divisional Court decision of *Joia Investments Inc. v. Collingwood Town*, [2003] O.J. No. 5497, the unanimous court upheld an Ontario Municipal Board decision [(2002), 44 O.M.B.R. 473, 39 M.P.L.R. (3d) 78] which dismissed an appeal challenging the Town's enactment of an ICBL. The Court endorsed the findings of the OMB in approving of the use of an ICBL and stated the following:

"12 In considering the issue, the Board asked itself the following question at p. 3 of its decision:

Is it appropriate, on an interim basis, to interfere with property rights under an older zoning by-law and official plan when a newer upper tier plan has been approved and implements newer provincial policy?

In this case, the Board answers yes.

13 The Board found at p. 4 of its decision that the Town was actively endeavouring to bring its own planning documents into conformity with the official plan of the County of Simcoe, and therefore sought to "consider the suitability of the zoning and ensure that proposed projects are compatible with long-range planning objectives of the Town and County."

14 The Appellant [Joia] argues that however laudable that objective may be, it could not be accomplished with an interim control by-law without the commissioning of new studies or reviewing existing studies where, as here, the Town simply intended to bolster its already-arrived at conclusion.

15 **Having heard the evidence, the Board concluded at p. 4 that it was in the "public interest to exercise the greatest of caution where an identified provincially significant wetland may be at risk of inappropriate development"** and at p. 5 that it was "reasonable for the Municipality to carefully consider the appropriateness of land use boundaries impacted by provincially significant wetland areas covering the EP and RU areas."

16 We are satisfied that in the exercise of its discretion in this case, the Board did not err in upholding the interim control by-law. The Appellant submitted that the purpose of requiring a study or review of land use policies before enactment of an interim control by-law was to prevent abuse, namely the depriving of an owner of established land use rights.

17 We are satisfied that on the facts of this case, the Board was correct in concluding that the potential did not arise in this case. The Board concluded at p. 6 of its decision:

On all of the evidence presented, the Board finds that the Town has conducted itself in a responsible way in the circumstance. **They are in the midst of an intensive, open public planning process endeavouring to bring their land use policies into conforming with the [County Official Plan] offering a different vision especially related to environmentally sensitive lands. The Board finds this to be an important time of planning transition within the community.** Avoiding reckless or hasty development decision during this crucial period is paramount.” [emphasis added]

The fact situation in the *Joia* case is strikingly similar to the present situation faced by Georgina in needing to implement the new Regional OP environmental policies. Initiating a study to determine how the Town’s OP and Zoning By-Law can be amended to conform to these new Regional OP environmental policies would constitute a legitimate and appropriate “study of a specific planning issue”.

Mr. Bigioni’s final point is based upon a flawed interpretation of the new Regional OP policies and an *a priori* assumption that it is “extremely unlikely that a planning study would result in the conclusion that either the current designation in the Town’s Official Plan or the existing zoning provisions applicable to these [MLE] lands should be changed to prohibit their development”.

I disagree with his fourth and final point for three reasons.

First, this determines the outcome of the study before it has even been undertaken!

Second, the new Regional OP does not exempt nor transition the MLE lands from the application of its new environmental policies to such lands. OP Policy 8.4.16 provides:

That all official plans and zoning by-laws and amendments thereto shall be brought into conformity with this Plan, except as provided for in policies 8.4.17 through 8.4.20 of this Plan.

The MLE lands are not mentioned in policies 8.4.17 – 8.4.20; therefore the official plan policies and zoning permissions for these lands are subject to and must be brought into conformity with the new OP’s environmental policies.

Third, what Mr. Bigioni does not raise or consider in reaching his conclusion quoted above is that the current MLE OP designation and Zoning By-law were approved 25 years ago. The planning policy framework back then was so different than it is today.

Since that time, amongst other matters, the following significant planning policy instruments have been created which specifically address the protection and preservation of significant environmental features:

1) the *Planning Act* has been revised several times, including the addition of the following provisions:

34. (1) Zoning by-laws may be passed by the councils of local municipalities:

Natural features and areas

3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,

- i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,
- ii. that is a significant corridor or shoreline of a lake, river or stream, or
- iii. that is a significant natural corridor, feature or area.

2) a Wetlands Policy Statement under section 3 of the *Planning Act* came into effect in 1992, followed by the Comprehensive Set of Policy Statements in 1995 and three versions of the Provincial Policy Statement [1996, 1997 and 2005];

3) the Region's initial OP was approved in 1994; and

4) the pertinent provisions of the new Regional OP came into effect July 11, 2012.

Surely the time is now to study whether any or all of these developments, especially the last-mentioned one, might warrant a change in the designation and zoning of the MLE lands that were initiated three decades ago and have remained unexamined and unaltered since then.

It is my understanding that this matter will be considered by Council at its meeting of March 25th. I hope that my schedule will permit me to be in attendance that evening to discuss this opinion with Council and answer any questions that you might have.

February 19, 2013

Page 7

Yours truly,

AIRD & BERLIS LLP



Leo F. Longo

LFL/ek

- c. Michael Bigioni, Town Solicitor (by email)
Harold Lenters, Town Director of Planning (by email)
North Gwillimbury Forest Alliance - Jack Gibbons
Anthony Usher, Anthony Usher Planning Consultant

14108783.1

