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June 11, 2015

Board of Directors
c/o Mr. Mike Walters, Chief Administrative Officer
Lake Simcoe Region Conservation Authority
Box 282
Newmarket, Ontario
L3Y 4X1

Dear Directors:

Re: Maple Lake Estates - Potential Section 28 Application - Conservation of Land Test

On behalf of my client the North Gwillimbury Forest Alliance, I am writing further to my May 5, 2015 letter about how the LSRCA might deal with a potential application by Maple Lake Estates Inc. (MLE) for a Section 28 permit. As CEO Mike Walters has said, for a permit to be issued, any such application would have to meet the "five tests" of Regulation 179/06, whether submitted before or after June 1.

On the assumption that the Authority has received or will be receiving such an application, I would like to provide the Board with my opinion on the "conservation of land" test, which will be key to staff's assessment, and staff's or the Board's decision, on any such application.

Under Regulation 179/06, the Authority may grant permission in the 95% of the MLE site that is regulated, if "in its opinion, the . . . conservation of land will not be affected by the development".

There are two accepted definitions for "conservation of land", one directly from the Mining and Lands Commissioner (MLC), and one interpreted from MLC decisions by the Province and Conservation Ontario.

1. ". . . includes all aspects of the physical environment, be it terrestrial, aquatic, biological, botanic or air and the relationship between them." (Mining and Lands Commissioner, 611428 Ontario Limited and Metropolitan Toronto and Region CA, 1994, p. 63.)

In this decision, the Commissioner goes on to say, "Therefore, notwithstanding the fact that the term was not used [when this *Conservation Authorities Act* provision was enacted], 'ecosystem', not having yet been coined, 'ecosystem' is found to be included in the definition of 'land' as used in 'conservation of land'." This definition was upheld in a 1996 Court decision.

2. "The protection, management, or restoration of lands within the watershed ecosystem for the purpose of maintaining or enhancing the natural features and hydrologic and ecological functions within the watershed." (Draft Guidelines to Support Conservation Authority Administration of the "Development, Interference with Wetlands and Alterations to Shorelines

and Watercourses Regulation", Ministry of Natural Resources and Conservation Ontario, April 2008, p. 17. This definition was based on an analysis of MLC cases to date, as described in Appendix E to the Guidelines.)

Both definitions are provided in the Glossary to your new Watershed Development Guidelines. The latter definition is provided in the Watershed Development Policies in effect till May 31, 2015. Staff will obviously rely on one or both definitions in conducting their assessment.

However, any permit application will likely be decided by the Board as noted in my May 5, 2015 letter, and there is also the possibility that it could be finally determined by the MLC. Therefore, it is important to consider how the MLC has dealt with the "conservation of land" test, as a guide to the Board in its own decision-making, and as information on how this application might eventually be disposed of. Naturally, the MLC uses as its starting point, the definitions established in its own jurisprudence.

The 611428 Ontario case of 1994 already mentioned, and Derek Russell and Toronto and Region CA, 2009, are generally considered to be the two landmark cases on the subject.

The Russell case postdated the Ministry of Natural Resources-Conservation Ontario report, but only further confirmed its conclusions regarding the "conservation of land" definition. The MLC in Russell reviewed 611428 and other previous cases, and essentially upheld the 611428 definition of "conservation of land" (pp. 23-24 of Russell decision).

The MLC identified two key issues in its decision to uphold TRCA's refusal of the Russell permit application, one of which was the "conservation of land" test.

The Russell case involved the proposed development of a single dwelling, below top of bank on a ravine lot in the City of Toronto. This 4,900 m² lot was already zoned for residential development. The proposed development footprint was 230 m² for the dwelling, plus 139 m² for exterior hard surfaces, and the applicant was proposing a ravine stewardship plan for the rest of the property. The MLC concluded this would not meet the "conservation of land" test.

I have reviewed the MLC's cases since Russell, and there appear to be three in which the "conservation of land" test was an issue.

- ▶ In 3437400 Canada Inc. and Niagara Peninsula CA, 2010, the MLC upheld the CA's refusal of a permit for a driveway prior to development of a single dwelling, on valley lands in the Town of Grimsby. The MLC appears to have concluded this would not meet the "conservation of land" test, although in the end it decided primarily on the basis of the Authority's policy document (pp, 20, 26).
- ▶ In Ken Fox and Grey Sauble CA, 2011, the MLC upheld the CA's refusal of a permit for filling and grading prior to development of a single dwelling, on a Georgian Bay shoreline lot in the Municipality of Meaford. The MLC appears to have concluded this would not meet the "conservation of land" test, although in the end it decided on other grounds (pp. 39-40).
- ▶ In Manousos Doulaverakis and Toronto and Region CA, 2012, the MLC upheld the CA's refusal

of a permit for a two-story deck attached to an existing single dwelling, below top of bank on a ravine lot in the City of Toronto. The MLC concluded this would not meet the "conservation of land" test (pp. 11-13).

There do not appear to be any Court decisions that would vary the conclusions of the MLC in Russell or subsequent cases.

Therefore, the MLC has found in all four relevant recent cases, that a single dwelling, or development associated with a single dwelling, would affect "conservation of land" on regulated lands with important natural heritage and ecosystem values. In all four cases, the MLC upheld CA refusals of permits.

As Board members are aware, the 200 ha MLE property is 58% provincially significant wetland. Wetlands, areas enclosed by wetlands, and lands within 30 m of wetlands occupy 91% of the site, and significant woodland, 89%. Thirty per cent of the entire Paradise Beach-Island Grove provincially significant wetland lies within the MLE property, as does 13% of the entire North Gwillimbury Forest woodland that extends from Keswick to Sutton. Certainly, the MLE property is no less important to the Lake Simcoe watershed ecosystem, than the properties in the MLC cases are to their watershed ecosystems.

Any application for a permit for MLE would be to allow the current planning approvals to proceed. As Board members know, these are for a serviced residential community of 1,073 single-detached dwellings, plus a golf course and other recreational facilities - several orders of magnitude greater in scale, than anything the MLC dealt with in the cases I've described.

Therefore, it is my professional planning opinion that on the basis of MLC jurisprudence, and a plain reading of the "conservation of land" definitions in the Watershed Development Guidelines that rely on that jurisprudence, ***a permit to enable MLE could not possibly be shown to not affect the "conservation of land"***. I cannot conceive how LSRCA professional staff or Board members could conclude otherwise.

Yours sincerely,

[original signed by]

Anthony Usher, MCIP, RPP

cc. Rob Baldwin