

MAPLE LAKE ESTATES AND LSRCA'S SUBDIVISIONS-IN-WETLANDS POLICY

prepared for

North Gwillimbury Forest Alliance

September 12, 2013

The North Gwillimbury Forest Alliance (NGFA) asked its planning consultant, Anthony Usher, MCIP, RPP, to review the policies of the Lake Simcoe Region Conservation Authority (LSRCA), as they would apply to a possible application for permits under Section 28 of the *Conservation Authorities Act* in connection with the potential development of Maple Lake Estates as currently approved. In particular, I have looked at one of LSRCA's policies, regarding existing plans of subdivision in provincially significant wetlands, in the context of the policies of the Province, Conservation Ontario, and other individual conservation authorities. My comments, conclusions, and recommendations are as follows.

Background

One of the existing approvals on the Maple Lake Estates property is plan of subdivision 65M-2903, draft-approved in 1988 and registered in 1992. This plan created two lots: the first, a standard rural residential lot on Woodbine Avenue of about 8,000 square metres (2 acres), and the second, the remaining approximately 200 hectares (500 acres) on which the proposed manufactured dwelling community would be located. The plan also created various perimeter blocks to be conveyed to the Town of Georgina and Regional Municipality of York.

The primary purpose of the subdivision plan was to provide a vehicle for subdivision agreements that were subsequently concluded with the Town and Region and which, among other things, required the conveyance of the blocks. The subdivision plan did not create any lots for the purpose of the approved development.

About three-fifths of the Maple Lake Estates property lies within the Paradise Beach-Island Grove wetland, identified as a provincially significant wetland (PSW) by the Ministry of Natural Resources (MNR) in 2004. Over four-fifths is inside, entirely surrounded by, or within 30 m of the PSW. For *Planning Act* purposes, the Provincial Policy Statement prohibits development or site alteration on all provincially significant wetlands in Southern Ontario.

About nine-tenths of the Maple Lake Estates property lies within LSRCA's regulated area, because it is within 120 m of the PSW. Any application for a Section 28 permit within the regulated area would be subject to LSRCA's Watershed Development Policies (most recently revised March 2012).

Policy 11.4.1.1 prohibits all development and interference within PSWs. However, Policy

11.4.1.2 states, "Notwithstanding Policy 11.4.1.1, the LSRCA will grant approval for development on lots within registered Plans of Subdivision [within PSWs]." I have discussed Policy 11.4.1.2 with LSRCA staff. They understand it to constitute a blanket exemption, regardless of the age of the subdivision if not yet developed, or the nature or circumstances of the subdivision.

There is no other such blanket exemption for registered plans of subdivision within the Watershed Development Policies.

Section 28 and the Regulations

Under Section 28 of the *Conservation Authorities Act* as amended in 1998, and Regulation 97/04 implementing the relevant portions of the 1998 amendments, each authority is authorized to make a development regulation for its area of jurisdiction. Each such regulation, titled Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses, includes a provision whereby a conservation authority may permit development in a provincially significant wetland (or other regulated area) "if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development" (LSRCA's Regulation 179/06, Section 3(1), based on Section 28(1) of the *Act* and Regulation 97/04).

In that regard, the 2008 Conservation Ontario Guidelines document that I explain below states that,

"It is important to note that CA Section 28 permission, if granted for work, does not exempt the applicant from complying with any or all other approvals, laws, statutes, ordinances, directives, regulations, etc. that may affect the property or the use of same. Alternatively, complying with or obtaining all other approvals, laws, statutes, ordinances, directives, regulations, etc. does not exempt the applicant from obtaining permission under Section 28 of the *Conservation Authorities Act*." (p. 12.)

In my opinion, Regulation 179/06 and its companions do not support blanket exemptions. In every instance, a determination must be made as to whether the tests of Section 28(1) of the *Act* and Section 3(1) of the Section 28 regulation are met. This is further supported by the above quote from the Conservation Ontario Guidelines document, as well as the interpretation of the *Act* and regulations found on page 22 of that document.

Conservation Ontario Guidelines

Between 2006 and 2008, MNR and Conservation Ontario collaborated on the development of guidelines intended to assist conservation authorities in developing their own policies (such as LSRCA's Watershed Development Policies) to govern the exercise of their authority under Section 28 of the *Conservation Authorities Act*.

A final draft version of Guidelines to Support Conservation Authority Administration of the "Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation", dated April 21, 2008, was endorsed by Conservation Ontario on April 28, 2008, and then submitted to MNR for approval. For reasons unknown, MNR has since then neither approved the document, nor refused it, nor proposed any changes.

Conservation Ontario issued the document to all conservation authorities on June 21, 2008, with a covering letter stating that "In the interim [until MNR approval], **CA staff are encouraged to consider the Draft Guideline relative to administration of your regulatory program** [emphasis in original]".

On August 12, 2013, Bonnie Fox, Manager, Policy and Planning, Conservation Ontario confirmed to me that the preceding remains Conservation Ontario's position and that "[in] the interim, this is the best advice we can provide CAs".

Of particular interest in the Conservation Ontario Guidelines document are the following.

- ▶ The document does not advocate or encourage unconditional exemptions of any kind, beyond those specifically provided for in the *Conservation Authorities Act* (e.g., Section 28(11)).
- ▶ The document discusses normal circumstances where a conservation authority is involved in the plan review process and "needs to ensure the requirements under the Regulation process can likely be fulfilled at the time an application under the Regulation is received". The document rightly notes that although the policy decision as to whether the proposed development should be approved is made through *Planning Act* processes, if a planning application looks like it will not meet the tests of *Conservation Authorities Act* Section 28, then the conservation authority should not support its *Planning Act* approval (p. 13).
- ▶ The document then goes on to say:

"Alternatively, it is also recognized that there may be historic planning approval decisions that were made in the absence of current technical information which would now preclude development. In these situations, innovative efforts may be necessary to address the site constraints and accommodate the development or *approval should not be granted.*" (p. 13 - emphasis added.)
- ▶ The document's suggested policy guidelines for wetlands do not include anything like LSRCA's Policy 11.4.1.2.
- ▶ The document's wetlands guidelines would generally prohibit, with very limited exceptions, any development in or within 30 m of wetlands, whether PSW or

otherwise. They would permit a single detached dwelling on a vacant lot of record subject to conditions, but only in adjacent regulated areas, not in wetlands (pp. 92-96).

In my opinion, there is nothing in the Conservation Ontario Guidelines document that supports LSRCA's Policy 11.4.1.2.

MNR Policies and Procedures

MNR issued Policies and Procedures for Conservation Authority Plan Review and Permitting Activities in May 2010.

This document states in much the same words as the 2008 Conservation Ontario Guidelines document, that the policy decision as to whether a proposed development should be approved is made through *Planning Act* processes, and that conservation authority concerns with an application should be conveyed at the *Planning Act* approval stage (p. 13).

The document also states, again in much the same words as the Conservation Ontario Guidelines:

"It is recognized that there may be historic planning approval decisions that were made in the absence of current technical information which could now preclude development under the CA Act regulations. Where possible, if an issue remains unresolved, the CA should work with the proponent and the municipality to pursue a resolution." (pp. 13-14 - emphasis added.)

The 2010 Policies and Procedures document does not provide any specific policies for wetlands or other feature types. However, nothing in the document requires or encourages unconditional exemptions of any kind, beyond those specifically provided for in the *Conservation Authorities Act*.

In my opinion, there is nothing in the MNR Policies and Procedures that requires or supports LSRCA's Policy 11.4.1.2.

Policies of Nearby Conservation Authorities

I looked at the regulatory and plan review policy documents, equivalent to LSRCA's Watershed Development Policies, for LSRCA's five nearest neighbour authorities.

Central Lake Ontario

CLOCA issued its Policy and Procedural Document for Regulation and Plan Review in April 2013. Its policies for wetlands are generally similar to those in the 2008 Conservation

Ontario Guidelines document, with somewhat greater flexibility in some cases (for example, a single detached dwelling may be permitted on a vacant lot of record within a wetland, subject to conditions).

Of particular interest is the following transition policy:

"The Plan Review policies will generally apply to all applications that have been received by CLOCA and which [sic] Authority staff has not yet provided written comments. It is CLOCA's intent to not use the policies within this Chapter to raise new concerns with approved draft plans of subdivision and secondary plans for which CLOCA had not previously identified concerns. *This, however, does not preclude Authority staff from applying policies in the [Policy and Procedural Document] to applications in which Authority staff had previously provided written comments which are contrary to those contained in the [Policy and Procedural Document].* In such cases Authority staff must be of the opinion that updated comments are critical to meeting the objectives of the [Policy and Procedural Document], the [Provincial Policy Statement] policy(s) and/or watershed plan policy." (p. 85 - emphasis added.)

CLOCA does not have any policy similar to LSRCA's Policy 11.4.1.2.

Credit Valley

CVCA issued its Watershed Planning and Regulation Policies in April 2010. This document's policies for wetlands are generally similar to those in the Conservation Ontario Guidelines.

CVCA does not have any policy similar to LSRCA's Policy 11.4.1.2.

Kawartha Region

KRCA's Plan Review and Regulation Policies were most recently revised in August 2013. This document's policies for wetlands are generally similar to those in the Conservation Ontario Guidelines, with somewhat greater flexibility in some cases (for example, a single detached dwelling may be permitted on a vacant lot of record within a wetland, subject to conditions).

Of particular interest is the following policy:

"New development will not be permitted within a wetland, *regardless of previous approvals provided under the Planning Act* or other regulatory process (e.g., Building Code Act), except as outlined [in this section]." (p. 130 - emphasis added.)

KRCA does not have any policy similar to LSRCA's Policy 11.4.1.2.

Nottawasaga Valley

NVCA's Planning and Regulation Guidelines document, August 2009, is explicitly modelled on the Conservation Ontario Guidelines. NVCA's policies for wetlands are very similar to those in the latter document.

NVCA does not have any policy similar to LSRCA's Policy 11.4.1.2.

Toronto and Region

TRCA's Valley and Stream Corridor Management Program was issued in 1994, well before the 1998-2006 period in which the present *Conservation Authorities Act* regulatory regime with respect to wetlands came into effect, and is of little relevance here.

However, TRCA is now circulating for public review its January 2013 draft of The Living City Policies for Planning and Development. This document's policies for wetlands are generally similar to those in the Conservation Ontario Guidelines, with somewhat greater flexibility in some cases (for example, development may be permitted on a vacant lot of record that is partly within a wetland, subject to conditions).

TRCA does not have any proposed policy similar to LSRCA's Policy 11.4.1.2.

Summary

The regulatory and plan review policy documents for LSRCA's five nearest neighbours are unanimous on the following points:

- ▶ They do not allow or encourage unconditional exemptions of any kind, beyond those specifically provided for in the *Conservation Authorities Act*.
- ▶ They only allow development in wetlands under very limited conditions, and development in adjacent regulated areas under limited conditions.
- ▶ As indicated, they do not include any exemption policy for wetlands that is in any way like LSRCA's Policy 11.4.1.2.

Also, some of the documents go out of their way to emphasize that past planning approvals do not guarantee current regulatory approvals, and that in certain circumstances, current regulatory approvals may not be appropriate even though historic planning approvals are in place.

Conclusions and Recommendations

I am unable to find any justification for Policy 11.4.1.2 of LSRCA's Watershed Development Policies:

- ▶ It is not required or supported by the *Conservation Authorities Act* or Regulation 179/06, and it appears to be contrary to their intent that in every instance, a determination must be made as to whether the tests of Section 28(1) of the *Act* and Section 3(1) of the regulation are met.
- ▶ It is not supported by the 2008 Conservation Ontario Guidelines.
- ▶ It is not required or supported by the 2010 MNR Policies and Procedures.
- ▶ There is no policy in any way similar in the companion policy documents of LSRCA's neighbouring authorities.
- ▶ There is no apparent need for such a policy within the context of the Watershed Development Policies document.

On May 13, 2013, NGFA and five other organizations submitted a letter to LSRCA regarding Maple Lake Estates. One of the requests in this letter was:

"That the LSRCA immediately revise Section 11.4.1.2 of its Watershed Development Policies with respect to Section 28 permits in PSWs within registered Plans of Subdivision, so that such policy only applies to such plans that:

"(i) consist of conventional residential lots;

"(ii) were circulated to the LSRCA, and the LSRCA provided comments and conditions pursuant to Watershed Development Policies Section 8.2; and

"(iii) were draft-approved within the three years prior to permit application."

At the time, I supported this recommendation. However, that was before I had conducted the more in-depth research described in this report.

Therefore, my recommendation to LSRCA is as follows:

- ▶ **Amend the Watershed Development Policies to delete Section 11.4.1.2.**

However, if LSRCA believes that based on the unique circumstances and conditions of its watershed, some policy is required to speak to the issue of Section 28 permits in PSWs within existing subdivision plans, then my recommendation would be:

- ▶ **Amend the Watershed Development Policies to modify Section 11.4.1.2, consistent with request 5 in the May 13, 2013 letter from NGFA and other organizations (quoted above).**

* * *

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
September 12, 2013