Elson Advocacy

August 11, 2020

Board of Directors
Lake Simcoe Region Conservation Authority ("LSRCA")
120 Bayview Parkway
Newmarket, Ontario
L3Y 3W3
c/o t.barnett@lsrca.on.ca

Dear Board Members,

Re: Maple Lake Estates Inc. - Unlawful LSRCA Permit to Destroy North Gwillimbury Forest Wetlands

I am writing on behalf of the North Gwillimbury Forest Alliance (NGFA) regarding the permit issued on June 18, 2020 by LSRCA staff authorizing the destruction of the provincially significant wetlands on the Maple Lake Estates Inc. property at the heart of the North Gwillimbury Forest. As outlined in the below legal opinion, this permit was issued by LSCRA without lawful authority and based on a number of fundamental legal errors. The North Gwillimbury Forest Alliance therefore asks that the Board annul the permit and help to save these cherished forests and wetlands.

Background

As you know, this matter concerns important wetlands located in the North Gwillimbury Forest. In the mid 1980s, a number of development approvals were granted to build a particular residential retirement community on these lands. However, neither the original developer, nor the subsequent acquirer Maple Lake Estates, acted on these approvals. In the intervening period, most of the lands were formally identified as provincially significant wetlands, and important changes were made to provincial and regional planning legislation and instruments to protect lands so identified.

Despite these important changes, the current developer is now apparently seeking to develop the land, which would destroy provincially significant wetlands. For the developer to do so, it requires a permit from the LSRCA under s. 28 of the *Conservation Authorities Act* and Ontario Regulation 179/06. On July 4, 2018, the LSRCA issued such a permit for the period of July 4, 2018 to July 3, 2020.

On June 18, 2020, the LSRCA issued a further permit for the same work for the period of June 18, 2020 to June 18, 2022. This permit is the subject of this legal opinion and letter.

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The Permit is Unlawful

For the reasons outlined below, the permit is unlawful, null, and void.

1. No authority to issue permit extension

LSRCA staff have indicated to the NGFA that the June 18, 2020 permit was for all practical purposes an extension of the permit issued in 2018. However, the LSRCA does not have the authority to issue these kinds of permit extensions. The 2018 permit was issued for 24 months under s. 9(a) of the regulation, and these permits cannot be extended.[1] Furthermore, the 2020 permit was issued by staff (i.e. a "designate") without informing the Board. Even if this was the kind of permit that could be extended, only the LSRCA Board itself could issue said extension because designates are expressly prohibited from approving extensions that would result in the permission having a period of validity greater than 24 months.[2]

LSRCA staff advised the NGFA that the extension was provided through a "replacement permit." In essence, the developer made another permit application identical in substance to the 2018 application, which resulted in the second permit with terms that were identical to the 2018 permit. This unlawfully circumvents the clear restrictions in Ontario Regulation 179/06 discussed above. LSRCA staff had no authority in law to issue the permit as they purported to do. The permit is therefore null and void.

2. Failure to consider relevant factors and criteria

The LSRCA could have considered whether to issue a second permit to the developer, but only if the proper process was followed and the relevant factors were examined. However, it is clear that there was no consideration of the relevant factors in relation to the 2020 permit application. Again, LSRCA staff have acknowledged that the 2020 permit was issued as a replacement permit without considering the merits of the application or applying current law or policies. This is also clear from the timing. The new permit application was received on June 11, 2020 and the permit was issued a mere seven days later.

For example, LSRCA staff did not consider the recent decision of the Local Planning Appeal Tribunal ("LPAT"), which makes it abundantly clear that further development approvals for these lands "need to be consistent with the PPS [Provincial Policy Statement]."[3] Nor did they consider the LPAT's refusal to review that decision.[4] As in 2018, LSRCA staff also did not consider the current LSRCA Watershed Development Guidelines, which do not allow for development in provincially significant wetlands in these circumstances.[5]

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[1] *O. Reg. 179/06*, s. 9; note: the 2018 permit was issued by a designate and designates can only issue these permits for up to 24 months pursuant to s. 6(4).
[2] *O. Reg. 179/06*, s. 9(11) ("A designate under subsection (10) shall not grant an extension of a permission for any period that would result in the permission having a period of validity greater than 24 months.").
[3] *NGFA v. Town of Georgina*, Case No. PL161206, para. 39.
[4] Decision of Associate Chair Marie Hubbard, May 14, 2020.
[5] LSRCA, *Guidelines for the Implementation of Ontario Regulation 179/06, Development, Interference with Wetlands and Alteration to Shorelines and Watercourses Regulation*, June 1, 2020, s. 8.3; In contrast, the 2012 guidelines used by LSRCA staff for the purposes of the 2018 permit approval, state that "the LSRCA will grant

Because the LSRCA did not consider the relevant factors and criteria, the decision to issue the June 18, 2020 permit was unreasonable and would be quashed if challenged through a judicial review.

3. Contrary to law and the Provincial Policy Statement

The issuance of the permit was also contrary to law. The permit would allow the destruction of provincially significant wetlands. However, the *Provincial Policy Statement* states that development and site alteration "shall not be permitted" in provincially significant wetlands such as this.[6] Decisions by the LSRCA to grant these kinds of permits are required by law to be consistent with the *Provincial Policy Statement*.[7] This is unequivocal, and has been confirmed by the Divisional Court and the Court of Appeal, with leave to appeal denied by the Supreme Court of Canada.[8]

Therefore, the granting of the permit was contrary to law and would be quashed if challenged through a judicial review.

4. Procedural fairness

The North Gwillimbury Forest Alliance was completely excluded from the decision to grant this permit. It was not even notified, let alone allowed to submit comments or make a deputation. This was contrary to the common law duty of fairness in light of the tremendous importance of the decision to the NGFA, the previous requests that the NGFA made to be involved, and the nature of this decision as one of great public importance.[9] Furthermore, this lack of fairness had real impacts. For example, it appears that LSRCA staff was not aware of a number of important factors discussed in this letter, including the outcome of the developer's request to review the LPAT decision. Had they known, the outcome may have been different.

5. Misapprehension of the law and appropriate legal test

As the issuance of the 2020 permit was for all practical purposes an extension of the 2018 permit, if falls prey to the same fundamental legal errors made in granting the earlier 2018 permit.

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approval for development on lots within registered Plans of Subdivision." This section was removed in the current version.

[6] *Provincial Policy Statement, 2020*, Order in Council No. 229/2020, Effective May 1, 2020, s. 2.1.4.

[7] Planning Act, s. 3(5).

[8] *Gilmor v. Nottawasaga Valley Conservation Authority*, 2017 ONCA 414, at para. 51 (leave to appeal to SCC denied, SCC No. 37705); *435454 Ontario Inc. v. Halton Regional Conservation Authority*, 2018 ONSC 1633 (Div. Ct.), paras. 5-6.

[9] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

(a) Error in believing the LSRCA had no choice but to issue the permit

For example, the LSRCA incorrectly believed it had no choice but to issue the permit because the developer had been granted prior development approvals.[10] This is an error of law. There is no doubt that the LSRCA is exercising its own jurisdiction and is required to consider the relevant factors and considerations regardless of previous development approvals.[11] Development approvals do not mean that permission under section 28 must follow as a foregone conclusion.[12] The LSRCA made a legal error in believing that its own discretion was fettered such that it was required to grant approval. Indeed, an analogous argument was made by the developer in the recent LPAT case in relation to amendments to the Town of Georgina's Official Plan, and was soundly rejected by the Tribunal.[13]

(b) Error in treating guidelines as a mandatory rule and in applying the wrong guidelines

The LSRCA also treated its 2012 development guidelines as binding on its decision. This is another legal error. The LSRCA is required to apply the legal test set out in Ontario Regulation 179/06. To the extent that it treats its guidelines as a mandatory rule fettering its consideration of the relevant factors, it has made a legal error.[14]

This error is particularly problematic in this case because the *wrong* guidelines were considered. In relation to the 2018 permit, LSRCA staff advised the Board as follows:

> *The planning status established the legal right for the Maple Lake Estates development. LSRCA's policies clearly state that the Authority will issue a permit for previously registered plans of subdivision.*[15]

Those statements were based on the outdated 2012 guidelines. The guidelines in force at the time the applications were made for both the 2018 and 2020 permits *do not* state that the Authority will issue a permit for previously registered plans of subdivision. This provision was intentionally removed by the LSRCA Board, effective June 1, 2015. Instead, the current guidelines prohibit development approvals in wetlands subject to exceptions that do not apply

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[10] See e.g. LSRCA Staff Report No. 10-18-BOD, March 16, 2018, p. 5.
[11] *Rinaldi v. Lake Simcoe Region Conservation Authority*, File No. CA 008-01, H. Dianne Sutter, Deputy Mining and Lands Commissioner, February 3, 2003 ("Just because the plan was registered did not guarantee him any development rights."); *611428 Ontario Limited v. Toronto and Region Conservation Authority*, Appeal No. CA 007-92, L. Kamerman, Mining and Lands Commissioner, February 11, 1994; ("In fact, it must be recognized that, notwithstanding a designation on an Official Plan which would be favourable to development, a proposal must still obtain the permission of the conservation authority for lands within its jurisdiction."); Linda M. Kamerman, Mining and Lands Commissioner, *Edited Speaking Notes for Speech to Urban Development Institute*, June 11, 2002 ("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 purposes 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 permission under section 28 must follow as a foregone conclusion.").
[12] *Ibid*.
[13] *NGFA v. Town of Georgina*, Case No. PL161206.
[14] *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority*, 2012 ONSC 1503 (Div. Ct.), at paras. 32-36.
[15] LSRCA Staff Report No. 10-18-BOD, March 16, 2018, p. 5.

here.[16] The legal error of treating guidelines as a mandatory rule is amplified by the fact that the wrong guidelines were relied on for both permit approvals.

(c) Misapprehension and misapplication of the conservation of land test

Furthermore, the LSRCA incorrectly applied the conservation of land test applicable to decisions such as this. Most importantly, its review of this test was undermined by the incorrect legal conclusion that it had no choice but to approve the permit and that it was required to follow its 2012 guidelines. This is clear from the following passage in the relevant staff report:

> The planning status established the legal right for the Maple Lake Estates development. LSRCA's policies clearly state that the Authority will issue a permit for previously registered plans of subdivision. The Maple Lake Estates development as approved cannot avoid impact/s on the ecological function of the regulated wetland. Therefore, the conservation of land test can only be satisfied through mitigation and offsetting approaches.[17]

That statement is not true. The conservation of land test could be satisfied by denying the permit.

Furthermore, a section 28 permit cannot in law be granted to destroy a provincially significant wetland and replace it with a subdivision on the basis of any kind of land swap or ecological offsetting.[18] The *Provincial Policy Statement* clearly prohibits development in provincially significant wetlands in Southern and Central Ontario, except in certain situations which do not apply here.[19] It provides no exception for offsetting of any kind.[20] As discussed above, it is binding on the LSRCA.[21] This is therefore determinative of the question. Furthermore, the developer put forward no legal precedent suggesting that the conservation of land test could be satisfied through any kind of offsetting.

Furthermore, even if offsetting could in theory meet the relevant legal criteria, the developer did not meet its burden to establish that the offsetting it specifically proposed would be sufficient to replace the ecological functions of the wetlands being destroyed. The application and supporting documents did not contain the necessary evidence. For example, the developer's Environmental Impact Statement found that the development would cause significant, unavoidable impacts on the wetlands. It *did not* conclude that those negative impacts could be adequately mitigated by offsetting or that the conservation of land will not be affected by the development.

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[16] LSRCA, *Guidelines for the Implementation of Ontario Regulation 179/06, Development, Interference with Wetlands and Alteration to Shorelines and Watercourses Regulation,* June 1, 2020, s. 8.3; In contrast, the 2012 guidelines used by LSRCA staff for the purposes of the 2018 permit approval, state that "the LSRCA will grant approval for development on lots within registered Plans of Subdivision," and this section was removed in the current version.

[17] LSRCA Staff Report No. 10-18-BOD, March 16, 2018, p. 5 (emphasis added).

[18] Although different legal rules apply to unavoidable public utility infrastructure projects (e.g. pipelines), those rules would not apply to a subdivision.

[19] *Provincial Policy Statement, 2020*, Order in Council No. 229/2020, Effective May 1, 2020, s. 2.1.4 ("Development and site alteration shall not be permitted in: a) significant wetlands").

[20] *Ibid.*

[21] See footnotes 7 and 8 above and the accompanying text.

Indeed, the specific offsetting proposed by the developer is clearly insufficient because it does not in fact involve actual ecological offsetting. The developer's proposed offset has two components. The first component is merely to transfer certain property that is mostly farmlands into public ownership. This proposed ownership transfer will create zero ecological benefits. Furthermore, these farmlands are already located in the Greenbelt Protected Countryside and are therefore already off-limits to significant development in any event. The second component (recommended in the developer's Environmental Impact Statement) is to pay LSRCA to plant trees offsite at locations of the Authority's choosing. The ecological benefits will be trivial compared to the loss of the provincially significant wetlands. Furthermore, neither of these proposed offsetting components were actually set out as conditions in the permit granted to the developer.

Therefore, the granting of the permit was unreasonable and undermined by fundamental legal errors.

Request to annul permit

The permit issued on June 18, 2020 is invalid for each of the independent reasons set out above. Any one of those reasons would be sufficient for a court to quash the decision through a judicial review application.

However, the LSRCA Board has the authority to annul the decision instead and should do so. Although permits can be cancelled in certain circumstances, it is not necessary to analyze whether those circumstances are present because the permit was null and void from the outset, as set out above. The LSRCA Board merely needs to acknowledge this and advise the developer. The developer would then be free to submit a further application to be considered on its merits by the LSRCA. Although we believe the LSRCA would be bound to reject this application due to the conflict with the PPS and other reasons, the proper process would be for this fresh application to be submitted, duly considered, and decided-on.

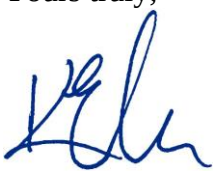
Furthermore, if the LSRCA Board acts quickly, the developer cannot claim that any hardship resulted from the short period during which it believed its permit was valid when in fact is was null and void. In contrast, the alternative course of action – allowing the void permit to stand – could result in significant financial and legal risks.

Annulling the permit would also support the Town of Georgina in relation to the steps it is taking to implement the LPAT's decision regarding the designation of the subject lands in the Official Plan and bring its zoning bylaw into conformity therewith. Authorizing the destruction of the provincially significant wetlands at issue puts unnecessary pressure on those processes. If no section 28 permit was in place, there would be no concern that the developer might begin work to develop the land prior to the zoning changes coming into force.

The bigger picture policy issues are important in addition to the legal issues discussed above. The destruction of a large provincially significant wetland in the heart of the North Gwillimbury Forest would not be in the public interest. Also, the proposed "offsetting" is not reasonable. The

LSRCA would receive some farmland and some tree-planting money in exchange for the destruction of a wetland. Furthermore, this farmland is in the Greenbelt Protected Countryside and therefore is already subject to significant development protections. If there was indeed no other choice, that would be a different question. However, there is another choice – the LSRCA was and is under no obligation to grant a permit merely because the proponent received previous planning approvals.[22] The LSRCA could have and should have said "no." And now it can and should annul the permit.

Yours truly,



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[22] *Rinaldi v. Lake Simcoe Region Conservation Authority*, File No. CA 008-01, H. Dianne Sutter, Deputy Mining and Lands Commissioner, February 3, 2003 ("Just because the plan was registered did not guarantee him any development rights."); *611428 Ontario Limited v. Toronto and Region Conservation Authority*, Appeal No. CA 007-92, L. Kamerman, Mining and Lands Commissioner, February 11, 1994; ("In fact, it must be recognized that, notwithstanding a designation on an Official Plan which would be favourable to development, a proposal must still obtain the permission of the conservation authority for lands within its jurisdiction."); Linda M. Kamerman, Mining and Lands Commissioner, *Edited Speaking Notes for Speech to Urban Development Institute*, June 11, 2002 ("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 purposes 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 permission under section 28 must follow as a foregone conclusion.").