AIRD BERLIS

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July 19, 2017 File No. 112062

BY EMAIL AND REGULAR MAIL

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

Attention: Michael Walters, Chief Administrative Officer

Dear Mr. Walters:

Re: Your June 23, 2017 Letter to Tony Usher, RPP

DG Group Section 28 Permit Application – Maple Lake Estates

As you are aware, we are counsel to the North Gwillimbury Forest Alliance. In the past, I and our client have made deputations to your Board of Directors respecting the protection of the North Gwillimbury Forest and its associated wetlands.

The purpose of this letter is to respond to your June 23, 2017 letter to Mr. Usher. In particular, we wish to address your assertion that "under provincial privacy legislation, [section 28] permit applications are protected and therefore not open for public review or comment".

I – Public Review of Submitted Materials

We are of the opinion that any section 28 application and supporting documentation are public documents and accessible for viewing at any time by the public. For the LSRCA to contend otherwise is contrary to:

(i) its own permit application form;

(ii) provincial privacy legislation;

(iii) fairness and transparency.

Furthermore, the "standard operating practices" for conservation authorities mentioned in your letter and documented in *Policies and Procedures for Conservation Authority Plan Review and Permitting Activities* published in May, 2010 [especially section 7] make no

mention of any limitation of the public's right to access a section 28 permit application and its supporting materials and commenting upon same.

(i) LSRCA's Permit Application

The LSRCA publishes a Permit Application Package for anyone wishing to apply for a section 28 permit. That current application package lists under the heading "Terms and Conditions" the following:

> "5. This application and supporting documents will be considered as public documents and available to the public on written request under the *Freedom of Information and Protection of Privacy Act* [sic]."

On the signing page of the application, the following applicant acknowledgement appears:

> "I acknowledge that this application and supporting documents will be considered as public documents and available to the public upon written request under the *Municipal Freedom of Information and Protection of Privacy* (the Act). I understand that any and all personal information gathered by the LSRCA will be used only for the express purpose(s) of the application for which it has been provided, and will not be divulged to any third party, private or public, without prior written consent, as provided for in the Act."

Other than "personal information"[i], all information contained in a permit application and all supporting documentation is said to be considered as public and available. There are no other caveats or limitations respecting the public accessibility of same.

Your suggestion, that it is only once a decision has been made by the LSRCA that application documentation may be made public through a freedom of information request, is both contrary to the LSRCA's application form package and untenable with no legal foundation. In addition, the LSRCA website's information about freedom of information requests [http://www.lsrca.on.ca/about/foi_request.php] makes no reference to such a temporal restriction on the public accessibility of LSRCA records.

(ii) Provincial Privacy Legislation

Your letter does not cite any specific provincial privacy legislation, regulation or Information and Privacy Commissioner [IPC] or judicial decision in support of your assertion that "provincial privacy legislation" provides that section 28 permit applications are not open for public review until after a decision has been made. We submit that this lack of specifying any specific authority or decision for your assertion is perhaps understandable as no such statutory authority or decision exists.

The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended ["MFIPPA"] does not exempt section 28 permit applications and supporting documentation from the general proposition and purpose of the Act that the public has a right to access information under the control of a public institution in accordance with the principle that information should be available to the public. Subsection 4(1) of the Act provides:

> "Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious."

No exemptions listed under sections 6 to 15 of the Act apply to a section 28 permit application and its supporting documentation.

Simply put, no MFIPPA provision or any regulation promulgated pursuant to that Act support the assertion you have made. Other than the restriction on the release of "personal information" [a matter not the subject of your letter or this response], provincial freedom of information legislation requires that this section 28 permit information be available to the public as of right. Furthermore, no statutory authority or decision exists for the proposition that section 28 permit applications and supporting documentation may only become publicly available once a decision has been made on the application.

(iii) Fairness and Transparency

Your letter states that the public are welcome to attend any Board of Directors hearing concerning a permit application; however that same public is not allowed to know what the hearing is about as the public is not allowed access to the very application and supporting documentation on which the hearing is being held! How is the public to trust or have confidence in such a Kafkaesque situation?

Your letter implies that making a section 28 permit application public before a decision has been made:

- "would contravene certain laws" [without naming any];
- "could create an apprehension of bias" [without stating in whom or on what basis]; and
- "could cause significant delay and disruption" [without providing any reason or proof].

These assertions are simply both unsupported and unwarranted.

In summary, the public has a right to access at any time section 28 permit applications and any documentation filed in support of such applications. As noted above, making available such materials only after a final decision has been reached is untenable and unlawful.

II – Public Comment on Submitted Materials

While any "hearing" at the Board of Directors might only involve the applicant, there is no restriction on the materials the Board might have access to in considering an application. This material may include anything that is relevant and pertinent to the matter under consideration. So long as such material, including public comment, is also made available to the applicant before the hearing, no bias or unfairness results; see s. 2.1(b) of your "Hearing Guidelines and Procedures".

You liken the section 28 application process to the building permit process. Yet you must not be aware that there are no restrictions as to with whom the Chief Building Official may consult before he or she makes a decision or as to what material he or she might rely upon in considering whether to issue a permit. In addition, any person "aggrieved" by a CBO's decision [including a third party] has the right to appeal.

In the recent Ontario Court of Appeal decision in Gilmour v. Nottawasaga Valley Conservation Authority, 2017 ONCA 414 dealing with a section 28 permit application, the Court noted:

> The NVCA is required to act in a manner consistent with the PPS in exercising any authority that affects a planning matter: *Planning Act*, s. 3(5).

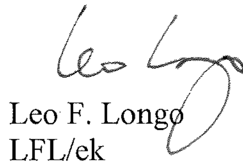
The Provincial Policy Statement prohibits development or site alteration in significant wetlands and woodlands (s. 2.1). Our client is entitled to provide submissions to staff and the Board of Directors in that regard...and those submissions may be relied upon in reaching any section 28 decision if found to be relevant and cogent.

Please reconsider your position forthwith and make the DG Group's MLE lands section 28 permit application and supporting material publicly available. Further, we specifically request that the Authority acknowledge that it is open to receiving and considering public comments on DG Group's application.

Would you please add this letter as an agenda item on the July 28, 2017 Board of Directors meeting.

Yours truly,

AIRD & BERLIS LLP



Leo F. Longo
LFL/ek

cc: Jack Gibbons, NGFA
Tony Usher
Mayor and Members of Council, Town of Georgina

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[i] MFIPPA defines "personal information" as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;