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Ms. Carolyn O'Neill
Great Lakes Office
Ministry of the Environment, Conservation and Parks
40 St. Clair Ave. West
Toronto, Ontario
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and

Mr. Alex McLeod
Natural Resources Conservation Policy Branch
Ministry of Natural Resources and Forestry
300 Water Street
Peterborough, Ontario
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Dear Ms. O'Neill and Mr. McLeod:

Re: Amendments to *Conservation Authorities Act* and regulations - Environmental Registry Nos. 013-5018 and 013-4992

I am submitting the following comments on behalf of my client, the North Gwillimbury Forest Alliance (NGFA), whose mission is to protect the 1,418 ha North Gwillimbury Forest in the Town of Georgina, one of the 10 largest forests in the Lake Simcoe watershed.

Within this forest lies the 200 ha Maple Lake Estates property, which is undeveloped but is subject to long-ago planning approvals to build a 1,073 unit residential and recreational development in a provincially significant wetland. Ninety-five per cent of the property is within the regulated area of the Lake Simcoe Region Conservation Authority. The Authority issued a Section 28 permit for these lands in July 2018. As a result of my client's concerns about this potential approval and how Authority policies might affect its issue, my client and I have had extensive dialogue with the Authority over the last six years, and as a result have become deeply interested in the broader legal and policy context which is the subject of your proposals.

On behalf of NGFA, I participated in the 2015-16 review of the *CA Act*, and made submissions to the Ministry of Natural Resources and Forestry (October 16, 2015 and September 6, 2016). The purpose of this letter is to reiterate and update our previous recommendations, as well as to comment on other matters of concern in the current proposals. These comments, while informed by NGFA's and my experience with Maple Lake Estates, are not specific to that matter, and I offer them in the interests of good policy and good planning generally.

The NGFA and I therefore recommend the following. Comment and rationale are provided below each recommendation.

1. **Add to Bill 108 an amendment to the *Planning Act* to determine, or through other means clarify, that conservation authorities (CAs) are subject to sections 3(5) and 3(6) of that Act, and that planning-related decisions of CAs are "exercise of . . . authority that affects a planning matter" under section 3(5).**

The purpose of this recommendation is to ensure that when a CA grants a section 28 permit, or otherwise exercises its authority on a planning-related matter (for example, adopting a new policy to guide the issue of permits), it acts consistently with the Provincial Policy Statement (PPS) and in conformity with Provincial plans. Most section 28 applications can be characterized as "minor" (see recommendation 3); by and large, they do not raise any PPS or Provincial plan issues, and would not be affected by this change.

It is not clear, based on my own extensive review including discussion with knowledgeable counsel, whether a CA is actually a "local board" for purposes of sections 3(5) and 3(6) of the Planning Act. As well, a CA no longer appears to be a "board, commission or agency" of the Province for purposes of those sections. Therefore, it is not clear whether in making decisions or providing comments on planning-related matters, CAs are subject to *Planning Act* requirements. Even if they are, it is not clear whether CA decisions re policies, permits, etc. constitute "exercise of . . . authority that affects a planning matter" for purposes of section 3(5).

To the best of my knowledge, none of these unclear points was ever adjudicated until very recently. In *Gilmor v. Nottawasaga Valley Conservation Authority*, 2017, the Court of Appeal ruled that the CA "is required to act in a manner consistent with the PPS in exercising any authority that affects a planning matter", without further explanation and without determining what CA approvals would constitute planning matters. This finding was cited in *435454 Ontario Inc. v. Halton Region Conservation Authority*, 2018, in which the Superior Court appeared to more conclusively rule that a Section 28 permit was a planning matter, at least in that particular case. However, further litigation on this subject is not unlikely, and a clear legislative statement as recommended above would be much preferable.

2. **Add to Bill 108 an amendment to the *CA Act* to define "conservation of land" for purposes of section 28, as proposed in the Ministry of Natural Resources-Conservation Ontario *Draft Guidelines* of 2008.**

In my October 16, 2015 letter, I wrote, "Implementing this 2008 recommendation to define 'conservation in land' in law would provide greater certainty and is long overdue." Given that the previous government did nothing in this regard, we were pleased to see that the present Government is interested in addressing the lack of definition of this important test for Section 28 permits.

However, we are concerned that the Government proposes to define "conservation of land" by regulation rather than in the *CA Act*. The term is in the *Act*, and appears only in sections 28 and 28.1 for the purposes of permit issue, so there is no circumstance under which a regulatory definition might be needed for some purposes and not others. The only reason to define the term in a regulation would seem to be to ensure that the term can be changed in future with less public

consultation and discussion, which is neither appropriate or desirable in my opinion.

Beyond that, of equal or greater concern is the Registry proposal to define "'conservation of land' as consistent with the natural hazard management intent of the regulation". We are in the dark as to exactly what is meant here. The Registry proposal for the regulation does not speak to the "intent of the regulation", beyond that it would serve the same purpose as the existing Section 28 regulations it would replace. It appears that this allusion is intended to refer to the proposed new section 21.1(1) of the *Act*, which would identify the "core mandatory programs and services" of CAs, to use the words in the Registry proposal for the *Act*.

The definition of "conservation of land" proposed in 2008, and used since by many CAs in their policy documents, is,

> "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."

We can only assume the Government's intent is to somehow limit the purpose of "conservation of land" to eliminating or reducing flooding, erosion, and dynamic beach hazards.

The *Act* as currently in force cites the "five tests" as the basis for regulating development permission (section 28(1)(c)), and then the individual CA regulations cite those tests as the basis for granting permits. The unproclaimed section 28.1(1)(a) would incorporate those permit-granting tests into the *Act* itself. The Registry posting for the regulation indicates the Government still intends to proclaim that section, as part of the proposed changes.

Section 28.1(1)(a) says, "An authority may issue a permit to a person to engage in an activity specified in the permit that would otherwise be prohibited by section 28, if, in the opinion of the authority . . . the activity is not likely to affect the control of flooding, erosion, dynamic beaches or pollution or the conservation of land".

Bill 108 does not propose to amend any of the above.

Flooding, erosion, and dynamic beach hazards, the components of natural hazard management, are three of the tests for a permit. It is a generally understood principle of legislative drafting and judicial interpretation that different words mean different things. In other words, the Legislature meant something different by including "conservation of land" as a test, than by including "flooding, erosion, [and] dynamic beaches" as three other tests. Indeed, the Legislature set "conservation of land" grammatically apart from the three natural hazard types. Therefore, to narrow the meaning of "conservation of land" to natural hazards alone would appear be contrary to the words and intent of the *CA Act*.

The "conservation of land" test has been included in *CA Act* regulations since 1960 (Ministry of Natural Resources-Conservation Ontario *Draft Guidelines*, 2008), and that test has been embodied in the *Act* itself since 1964 (the 1994 Mining and Lands Commissioner decision cited below).

Over half a century, a definition of "conservation of land" has evolved through policy planning by

CAs and the Province and jurisprudence from the former Mining and Lands Commissioner and the Courts.

In a landmark 1994 decision, 611428 Ontario Limited and Metropolitan Toronto and Region CA, the Mining and Lands Commissioner found that "conservation of land" ". . . includes all aspects of the physical environment, be it terrestrial, aquatic, biological, botanic or air and the relationship between them." In this decision, the Commissioner went on to say, "Therefore, notwithstanding the fact that the term ['ecosystem'] was not used [when 'conservation of land' was introduced in 1964], 'ecosystem', not having yet been coined, 'ecosystem' is found to be included in the definition of 'land' as used in 'conservation of land'."

The 2008 definition we recommend was developed by a committee of experts from the Ministry of Natural Resources, Conservation Ontario, and individual CAs, based on extensive and thorough review, including a detailed analysis of the jurisprudence up to that date.

What is generally considered the second of the two landmark decisions of the Mining and Lands Commissioner involving "conservation of land", Russell and Toronto and Region CA, 2009, came down after the 2008 *Draft Guidelines*. That decision further confirmed the report's conclusions regarding the "conservation of land" definition, and essentially upheld the definition of "conservation of land" in the 1994 decision.

Anyone proposing any significantly different definition should be obliged to explain why that definition represents better science and better public policy, and better conforms with the intent of the *CA Act*.

3. For the purposes of decision-making and public involvement (see recommendations 4 and 5), amend the Section 28 regulations, and if necessary add to Bill 108 an amendment to the *CA Act*, to distinguish between "major" and "minor" applications. A "major" application would meet one or more of a list of criteria, which could include:

- **Permit length over 24 months, a distinction that has already been recognized in section 3(3) of the individual Section 28 regulations.**

- **Magnitude of the development, analogous to (though not necessarily the same as) the definitions of "major development" in the Oak Ridges Moraine Conservation Plan and Lake Simcoe Protection Plan.**

- **Currency of the CA's involvement in any prior planning approval. This could be phrased along the lines of the following:**
  - **the proposed development would also require *Planning Act* approval, but such approval has not been given; or,**
  - **the proposed development was specifically enabled by a *Planning Act* division of land and/or zoning bylaw amendment/development permit, but the latest of these approvals was given five years or longer before the Section 28 permit application.**

Most Section 28 permit applications are routine, with the impacts of the development to be enabled

either minimal, or already thoroughly addressed through CA involvement in a recent planning approval process. A small minority are not. The present "one-size-fits-all" permits process does not meet current standards of openness, transparency, and public involvement for that small minority.

4. **Amend Regulation 681/94 under the *Environmental Bill of Rights, 1997,* to include proposals to issue Section 28 permits, at least for "major" applications, as Class II proposals for instruments under that Act.**

The effect of prescribing applications under the *Environmental Bill of Rights* would be that:
- they would be posted on the Environmental Registry, and
- anyone would be able to apply to the Mining and Lands Tribunal for leave to appeal the granting of a permit.

5. **Amend the Section 28 regulations and if necessary add to Bill 108 an amendment to the *CA Act,* and/or amend Ministry of Natural Resources and Forestry policies and procedures, so that the following would be required for a "major" application:**

   - **Notice of the complete application and at which Board meeting it will be considered mailed to each owner within 120 m of the subject lands (if necessary, two separate mailings), and posted on the CA website.**

   - **Availability of the application materials for inspection at the CA office under reasonable conditions, and by posting on the CA website.**

   - **Consideration of and decision on the application at an open Board meeting (no delegation of decision to staff).**

   - **Availability of the staff report and any applicant response for inspection at the CA office and by posting on the CA website, once they have been provided to the Board.**

   - **Provision for the public to make written submissions prior to the Board meeting, that will be circulated to the Board.**

   - **Provision for the public to make oral submissions at the Board meeting, under reasonable conditions including reasonable time limits.**

It is important to note that third parties have no right to appeal a CA's approval of a section 28 permit - and that neither recommendations 4 nor 5 would change that, although recommendation 4 would allow applications for leave to appeal approvals of "major" applications.

It is my understanding that nothing in the *Act* currently prevents a CA Board, when deciding an application, from notifying the public and receiving and considering public submissions provided that there is no inference these actions confer standing. However, some CAs have a different opinion, so clarification, and direction when it comes to major applications, would be desirable.

It appears from Order-in-Council 1149/2018 transferring administration of most *CA Act* responsibilities to the Ministry of Environment, Conservation and Parks that the references above and

in recommendation 6 to Ministry of Natural Resources and Forestry policies and procedures are still correct, but if not, I stand corrected.

6. **Amend the Section 28 regulations and if necessary add to Bill 108 an amendment to the *CA Act*, and/or amend Ministry of Natural Resources and Forestry policies and procedures, so that the following would be required for all applications:**

   - **Posting a notice on the subject lands, similar to that required for a building permit, tree removal, etc.**

   - **Posting on a CA website page, that would list all applications and their disposition.**

This would provide transparency consistent with today's best practices for any legal permission involving lands and resources, without unreasonably encumbering the large majority of applicants whose applications are "minor".

7. **Amend the *CA Act*, or otherwise direct CAs, so that compensation cannot be considered as part of the approval for a Section 28 permit to enable development that would adversely affect a regulated wetland, unless the wetland is not provincially significant or the development would otherwise be permitted under the Provincial Policy Statement or a Provincial plan (for example, infrastructure).**

Some CAs permit compensation in their policy documents, without explicitly limiting it to the circumstances recommended above. In my opinion, to apply compensation policies to development in a provincially significant wetland, other than where it would otherwise be permitted under the PPS, would be completely inconsistent with the intent of the PPS. That this is the Province's policy intent is further supported by the 2017 Wetland Conservation Strategy for Ontario.

* * *

There are two other matters we would like to mention.

- We compliment the Government on those elements of the Registry proposal for the regulation, that would impose various requirements regarding CA permitting policies, and require CAs to notify the public of changes to their regulated areas.

- We compliment the Government on ensuring that the Lake Simcoe Region CA's special responsibilities under the *Lake Simcoe Protection Act, 2008* would be prioritized under section 21.1(2) of the *Act*. Given current concerns around (at least perceived) reductions in Provincial funding to CAs, it is essential that there be no reduction in Provincial funding to Lake Simcoe Region CA to undertake these particular Provincially mandated responsibilities.

I hope our comments will assist the Ministries and Legislature in this important task.

Yours sincerely,

[original signed by]

Anthony Usher, RPP