

Leo F. Longo
Direct: 416.865.7778
E-mail:llongo@airdberlis.com

March 25, 2013

File No. 112062

BY EMAIL

Mayor Robert Grossi
and Members of Council
Town of Georgina
26557 Civic Centre Road
Keswick, ON L4P 3G1

Attention: Patricia Nash, Acting Town Clerk

Dear Mayor Grossi and Council Members:

**Re: North Gwillimbury Forest Alliance
ICBL Request
Town Staff Report No. PB-2013-0032**

As you are aware, we are retained by the North Gwillimbury Forest Alliance to act on its behalf in the above-captioned matter.

My involvement at the on-going Elliot Lake Inquiry requires my continued attendance there. Consequently, my law firm partner Patrick Harrington will be in attendance at this evening's Council meeting to address this letter and the above-captioned Staff Report. He will also speak to my previously-submitted February 19, 2013 letter in connection with Staff Report No. PB-2013-0010.

The purpose of this letter is to provide a response to that Staff Report, and in particular:

- the March 15, 2013 letter found therein from the Town's Solicitor, Mr. Bigioni, to the Town's Director of Planning and Building; and
- the February 14, 2013 letter found therein from the Region's Directors of Long Range and Community Planning to the Town's Director of Planning and Building.

This letter relies upon, but will not repeat, the planning policies and opinions expressed by Mr. Anthony Usher in his various letters submitted to the Town that address our client's request for an Interim Control By-Law ("ICBL").

Town Solicitor's Comments

The Town Solicitor's recent letter defines the ICBL issue as follows:

The central issue in this matter remains the effect of the 2010 York Regional Official Plan (the "YROP"), and specifically whether it would require that the MLE lands be rezoned to prevent their development in accordance with the existing approvals already in place. If it does, then Messrs. Longo and Usher would be correct, and the Town would have to amend its own Official Plan to follow suit (in default of which the Region could itself do so). In those circumstances, it might make sense to pass an interim control by-law like the one requested by the NGFA. If the YROP does not require that development of the MLE lands be prohibited, however, then it would be a misuse of the authority conferred upon the Town by Section 38 of the *Planning Act* to pass an interim control by-law to prohibit the development of those lands.

While we disagree with how Mr. Bigioni's letter subsequently characterizes our client's position. Generally speaking, this extract concisely describes the issue presently before Council as well as its potential outcomes. The outcomes hinge primarily upon the correct interpretation and application of the new YROP policies, which recently came into effect upon OMB approval.

We agree that the entire YROP must be considered when interpreting its provisions. We have never suggested otherwise. However, there are certain YROP policies that are directory and therefore have primacy over other policies that are more permissive. YROP's environmental protection policies are directive and have therefore led us to the opinions we previously articulated and continue to advance.

Let us consider what the YROP principally does respecting the MLE lands in relation to this ICBL request. The following three OP Maps apply to the MLE Lands:

Map 1 – Regional Structure - "Towns and Villages"

Map 2 – Regional Greenlands System

Map 4 – Key Hydrologic Features – "Wetlands"

Map 5 – Woodlands – "Woodlands"

That the Regional Greenlands System is not depicted on the MLE Lands (save for a small portion) is to be balanced with policy 2.2's preamble, which states as follows:

Key natural heritage features and key hydrologic features can exist within the Regional Greenlands System or outside of the System. Key features within the System are subject to the policies in Section 2.1 and 2.2. Key features outside of the System shall be protected subject to the policies of Section 2.2. [emphasis added]

The above-cited preamble makes it crystal clear – *key natural heritage features* and *key hydrologic features* exist both inside and outside of the Region's Greenlands System. Features that are within the Greenlands System are protected pursuant to policies 2.1 and 2.2 of the YROP. Features that are outside of the Greenlands System are protected pursuant to policy 2.2 only. Being designated as part of the Regional Greenlands System is therefore not a prerequisite to protection – *key natural heritage features* and *key hydrologic features* are required to be protected regardless of where they are found.

The level of protection for features outside of the Greenlands System is prescribed by policy 2.2 and it is to this policy that the Town must look to determine what is now permitted to be developed on the features present on the MLE lands and elsewhere within the North Gwillimbury Forest

Policies Related to Map 4 – Wetlands

The YROP has the following preamble to its policies 2.2.35 - 2.2.42 related to "Wetlands":

Wetlands

Wetlands are essential natural elements of the Regional ecosystem, providing environmental, economic and social benefits. These lands, which are seasonally or permanently covered by shallow water or where the water table is close to or at the surface, are characterized by hydric soils and hydrophytic or water tolerant plants. Among other functions, wetlands control and store surface water to assist in flood control and groundwater recharge. Wetlands also act as sediment traps to improve water quality and act as habitat for a wide variety of plant and animal species.

The Province has enacted a policy statement under the *Planning Act* that prohibits development in provincially significant wetlands. Other wetlands that have not been identified as provincially significant, but which have been formally evaluated by the Ministry of Natural Resources, also exist within the Region. Map 4 shows the general location of all evaluated wetlands, as well as identified wetlands within the Oak Ridges Moraine, Greenbelt and *Lake Simcoe watershed*. More detailed information, as well as more recent wetland evaluations are available from the Province. [emphasis added]

Policy 2.2.35 thereafter states:

35. That notwithstanding policy 2.2.4 of this Plan, development and site alteration is prohibited within evaluated wetlands and all identified wetlands within the *Lake Simcoe watershed*, on the Oak Ridges Moraine and within the Greenbelt Natural Heritage System, as shown on Map 4 of this Plan. Due to the scale of the mapping in this Plan, smaller wetlands may not be visible. More detailed mapping is available from York Region. [emphasis added]

Policy 2.2.4 permits development and site alteration within *key natural heritage features, key hydrologic features* and their *adjacent lands* subject to a satisfactory environmental impact study or environmental assessment. Policy 2.2.35 removes that development permission in the case of all wetlands. In other words, where a wetland is identified on Map 4 of the YROP, there can be no development or site alteration on those lands. This prohibition is unequivocal, mandatory, and, as noted in the preamble to section 2.2, applies to all wetlands outside of the Regional Greenlands System.

Moreover, in the case of the MLE lands, we are dealing with not just an evaluated “wetland”, but a provincially significant wetland.

Compare the directory language of policy 2.2.35 and its preamble to the preamble provided for “Towns and Villages” under YROP:

Towns and Villages

York Region has a tradition of tightly knit villages that each have their own unique sense of place and identity, with mainstreets and places to work, live and play. Each Town and Village in York Region will have a role to play in accommodating growth.¹

Some Towns and Villages act as Local Centres that serve the needs of the surrounding rural settlements, the Agricultural Area and the Rural Area. Historic streetscapes and mainstreet areas within Towns and Villages should be retained and enhanced.

The “Towns and Villages” policies are permissive of development, subject to certain secondary planning and servicing requirements. These policies do not require that development take place; rather they allow it subject to certain prerequisites.

In our respectful opinion, in balancing the YROP policies, the wetland policies are to prevail, being more specific, declaratory and prohibitory. The correct interpretation and application of the YROP is that any wetland in any designated area cannot be developed. If the YROP intended to allow wetlands to be developed anywhere in the entire Region, it could have easily provided so by exempting certain designations or sites from its mandatory prohibition. It did not. To hold otherwise would be to entirely disregard policies 2.2.35 – 2.2.42 of the YROP – policies which Georgina is now statutorily obligated to implement into its own planning regime.

¹ One might be forgiven to pause in passing and wonder how the MLE lands, vacant and undeveloped for three decades, could even remotely fit within this description. Nevertheless, the MLE lands were designated as such in both the 1994 YROP and the 2010 YROP.

Policies Related to Map 5 – Woodlands

The YROP has a similarly detailed preamble to its policies 2.2.43 - 2.2.52 related to "Woodlands", which provides in part:

Woodlands

Woodlands are significant components of York Region's natural systems and provide a variety of important environmental, social and economic benefits. These benefits include clean air and water, erosion prevention, water retention, provision of wildlife habitat, recreation and the sustainable harvest of woodland products.

At the time of settlement by Europeans, woodlands covered 90% of the Region. Woodland cover has dwindled to 22.5% today. Because much of the remaining woodland cover is fragmented and lacking in interior habitat areas, maintaining and enhancing significant woodlands and integrating them into the Region's communities is extremely important. [emphasis added]

Policy 2.2.44 thereafter provides as follows:

44. That notwithstanding policy 2.2.4 of this Plan, development and site alteration is prohibited within significant woodlands and their associated vegetation protection zone except as provided for elsewhere within this Plan.

Once again, we see the YROP's policy permission for development within key features (policy 2.2.4) being rendered inapplicable to a specific key feature. Like wetlands, there is no ability to develop within a *significant woodland*. This prohibition is unequivocal, mandatory, and, as noted in the preamble to section 2.2, applies to all significant woodlands outside of the Regional Greenlands System.

Based on our client's assessment, all of the woodlands found on the MLE lands would qualify as *significant woodlands*.

In summary, based on the foregoing, and considering the YROP policies in their entirety, we submit that the YROP prohibits development on over 90% of the MLE lands. Section 27 of the *Planning Act* requires that Georgina's Official Plan and Zoning By-Law conform with the policies of the new YROP. While the Town is reviewing how best to do that, we submit that an ICBL should be passed to halt inappropriate development on the MLE lands and elsewhere within the North Gwillimbury Forest until such time as the Town's planning regime is brought into conformity with the new YROP.

Regional Planning Directors' Comments

The Region's letter addresses only two specific YROP policies respecting Greenbelt Plan transition to the exclusion of other more significant, relevant and applicable Regional OP policies.

First, the Region's letter fails to mention the enhanced environmental policy thrust of the new YROP. This includes efforts to achieve a more sustainable Region and maintain its natural heritage legacy. These goals and objectives are evident to anyone who reads the new YROP.

Second, the Region's letter fails to mention that approximately 90% of the MLE lands are now designated wetland and/or *significant woodlands* in the YROP, which prohibits any development thereon. In short, for reasons that are not explained in the letter, the Region completely ignores the policies cited above, which apply and could not be more clear.

Third, the YROP does not exempt nor transition the MLE lands from the application of its new environmental policies. Policy 8.4.16 of the YROP specifically states that all official plans and zoning by-laws, and amendments thereto, shall be brought into conformity with the YROP. The only exception is provided for in policies 8.4.17 through 8.4.20. The MLE lands are not described in policies 8.4.17 – 8.4.20; therefore the official plan policies and zoning permissions for these lands are subject to and must be brought into conformity with the YROP's environmental policies.

The Region's letter does not suggest or rely upon any of the matters contained in pp. 9 - 10 of Mr. Lenters' recent Staff Report as applying to or forming the basis of their opinions. Further, with respect, YROP policies 8.4.24 and 8.4.25 as cited by the Region are not applicable or relevant to the current situation as:

- (i) they do not "trump" or make inapplicable policy 8.4.16, which requires conformity;
- (ii) they only pertain to a local municipality doing a Greenbelt Plan conformity exercise, not the section 27 *Planning Act* conformity requirement currently facing the Town [and one of the bases for our client's ICBL request];
- (iii) in the alternative, at their highest, the two policies simply give the Town the choice that its official plan and zoning by-law may continue to recognize any pre-2004 approval without the need of conforming to the Greenbelt Plan. They do not require the Town to maintain such approvals. The Town can choose not to.


Based upon the YROP wetlands and woodlands policies cited above, Town Council's choice is clear. Surely the time has come for Council to study whether what we now know about the importance and significance of the North Gwillimbury Forest, including its wetlands and significant woodlands. Such study would definitively show whether a change to designation and zoning of the MLE lands, which were initiated three decades ago and have remained unexamined and unaltered since then, is warranted. While undertaking a conformity review of the Town's Official Plan and Zoning By-Law with the new YROP,

Council can and should enact an ICBL to halt inappropriate development within the North Gwillimbury Forest until the Town's new planning regime can be implemented.

Thank you for your consideration of this submission and our client's ICBL request. I urge Council to make the decision that will support the protection and preservation of the unique natural asset that is the North Gwillimbury Forest, its wetlands and its significant woodlands, for future generations to enjoy. As noted, Mr. Harrington will be in attendance this evening to discuss this opinion with Council and answer any questions that you might have.

Yours truly,

AIRD & BERLIS LLP



Leo F. Longo
LFL/PJH/ek

- c. Michael Bigioni, Town Solicitor (by email)
- Harold Lenters, Town Director of Planning (by email)
- North Gwillimbury Forest Alliance - Jack Gibbons
- Anthony Usher, Anthony Usher Planning Consultant

14339272.2