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Midhurst Landowners' Group
c/o Group Trustee
Ms. Kim Beckman
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5th Floor, 99 Spadina Avenue
Toronto, ON M5V3P8

May 27, 2014

Dear Ms. Beckman:

RE: TOWNSHIP OF SPRINGWATER – POWER TO RECONSIDER MIDHURST SECONDARY PLAN

The Midhurst Landowners Group has requested my opinion with respect to the powers of the Council of the Township of Springwater in addressing the following Notice of Motion before it, dated April 22, 2014:

“THAT Resolution C 288 201[3] adopted on September 17, 2013 regarding Council not reconsidering any previous decision relating to the approval of the Midhurst Secondary Plan (MSP), be reconsidered.”

Specifically, in the context of the circumstances described in the information and documents which you have provided to me, you have asked that I consider the following two questions:

1. Does the Council of the Township of Springwater have the power to give consideration to whether or not to reconsider its previous decision to adopt the Midhurst Secondary Plan? and
2. Does the Township Council have the legal authority to rescind or revoke its adoption of the MSP?

You have since advised that the mover of the Motion has withdrawn the Notice of Motion. I understand that you still wish to receive my opinion letter, as requested above.

BACKGROUND: RELEVANT FACTS

The following summary of relevant facts is based on a number of documents which you have provided to me, including: “Summary – Legal Advice on the Midhurst Secondary Plan – WeirFoulds LLP”, “Midhurst Secondary Plan History”, and “Chronology for Midhurst Secondary

Plan, Environmental Assessment and Implementing Applications”, copies of which latter two documents are attached as “Appendix A” and “Appendix B” to this opinion letter.

The series of meetings and decisions leading to the adoption by the Council of the Township of Springwater of the Midhurst Secondary Plan involved a long, detailed and comprehensive planning and consultative process, dating back to 1982, when the Council of the Township of Vespa, a since-amalgamated predecessor to the Township of Springwater, adopted its Official Plan establishing Midhurst as a Settlement Area, designated for growth. I further understand that the boundary of the settlement area that exists today was established by the Province in 1998, when it approved the Springwater Official Plan. The approved Official Plan contained policies requiring the preparation of a secondary plan for the Midhurst Settlement Area.

On November 3, 2008, The Township adopted the Midhurst Secondary Plan (OPA 38), through its enactment of By-law No. 2008-106. The Township submitted OPA 38 to the County of Simcoe for its approval on November 12, 2008. The County approved a modified version of OPA 38 on October 12, 2011. OPA 38 was then appealed to the Ontario Municipal Board by the Minister of Municipal Affairs and Housing. As well, five individual stakeholders appealed OPA 38 on a site-specific basis. The Midhurst Ratepayers’ Association did not appeal OPA 38.

On November 28, 2012 the Ontario Ministry of Municipal Affairs and Housing withdrew part of its appeal of the Midhurst Secondary Plan (OPA 38).

As a result of the Ministry’s partial withdrawal, the Secondary Plan was approved for approximately 2,450 hectares out of the total approximately 2,900 hectares within the settlement area. The remaining 456 hectares are maintained under appeal at the Ontario Municipal Board, together with a very limited number of related policies.

On August 2, 2013, the Ontario Municipal Board, in relation to an appeal of the County of Simcoe Official Plan filed by the Midhurst Ratepayers’ Association (“MRA”), to seek relief from the Board with respect to the boundary of the Midhurst Settlement Area, dismissed the appeal on the grounds that the notice of appeal disclosed no apparent planning ground upon which the plan or part of the plan that was the subject of the appeal could be approved or refused by the Board.

In its decision, the Board stated as follows:

“It is clear to the Board that the MRA’S target is the MSP [Midhurst Secondary Plan]. It is also clear, that the MRA, having missed the opportunity for whatever reason, to appeal the MSP within the statutory time period, is now attempting to come in through the back-door. The MSP (OPA 38) is not before the Board. It is now in force. The Settlement Boundary has been established, and the County, as well as many others, have relied on this 1998 boundary in the planning of infrastructure and subsequent land use. To undo what has been arrived at in an open and democratic process would be unfair to all those who have relied upon it. The MRA, whose desire to retain the environment as its members now experience it, the Board well understands have missed its opportunity to do so.”

Subsequent to the partial withdrawal of the MMAH's appeal of the Secondary Plan, the Growth Plan Regulations were amended in 2013 by (a) expressly recognizing the "Midhurst Settlement Area" as set out in the Midhurst Secondary Plan, which partially came into effect on November 28, 2012, and (b) prescribing a special protocol for considering development applications within the Midhurst Settlement Area.

I. THE FIRST AND SECOND PROPOSALS TO RECONSIDER COUNCIL'S APPROVAL OF OPA 38

On September 17, 2013, the Township Council held a Special Meeting to discuss the Midhurst Secondary Plan. At that meeting, the Council adopted "RESOLUTION 288 2014", by which it was:

"RESOLVED THAT this Council shall not further reconsider any previous decision relating to the approval of the Midhurst Secondary Plan."

At that Special Meeting, the Council was advised that "any decision to consider rescinding the Midhurst Secondary Plan would involve a proposed Official Plan amendment, which would have to follow the process set out under the *Planning Act* and the Township's Official Plan."

Staff also informed the Council that "the Township's professional staff are not in a position to provide independent opinions to support a planning rationale for such a change in policy direction, and therefore the Township is unable to satisfy the requirements envisioned by the planning process for an Official Plan amendment of this nature and magnitude."

The Council at that Special Meeting, also "received advice from the Township's solicitor regarding the potential legal implications for the Township resulting from initiating actions to rescind the Midhurst Secondary Plan, including potential claims for damages against the Township and members of Council exceeding \$100,000,000 (100 million) and a summary of the legal opinion regarding the MSP is to be summarized and made public."

The more recent Notice of Motion (April 22, 2014), quoted above, proposes a reconsideration of the previous decision of the Council, made at the Special Meeting of September 17, 2013 described above, not to further reconsider any previous decision relating to the approval of the Midhurst Secondary Plan.

You have advised me that there have been considerable activity and expenditures made by those with an interest in land in the Township, and by the Township itself, and other public agencies including the County of Simcoe, Nottawasaga Valley Conservation Authority, and various Provincial ministries, pursuant to decisions made and policies effected, in Council's adoption of the Midhurst Secondary Plan.

II. THE LEGAL POWER OF THE COUNCIL TO CONSIDER THE NEW MOTION TO RECONSIDER

(1) PRINCIPLES OF APPLICABLE LAW

The issue of whether or not it is in order for the Council of the Township of Springwater to give consideration to whether or not to reconsider its previous decision to adopt the Midhurst Secondary Plan, involves important fundamental principles of general municipal law, and also is subject to legislation enacted by the Council itself, in the form of its Procedure By-law enacted under the delegated authority conferred upon the Council by section 238 of *the Municipal Act*, 2001, which requires it to enact such a by-law.

Firstly, I shall deal with the general principles of law which are of assistance in answering this question. They are as follows:

- the legislative and administrative powers conferred upon a municipal council by the Ontario Legislature through its enactment of statutes such as the *Municipal Act* and the *Planning Act*, are intended to enable elected councils to exercise powers of self-government, to the full extent of the scope of such enabling authority;
- here, the Council's creation of the Midhurst Secondary Plan was implemented under powers conferred by the *Planning Act*, through a process governed by that Act, and subject to the approval of the County Council, and to the ultimate supervision of the Ontario Municipal Board; (I do not express, in this opinion letter, any opinion with respect to the requirements of that Act or the validity of the Secondary Plan or the planning process followed to date);
- generally, the fact that a statute provides a right of appeal from a decision of a municipal council, and the commencement of such an appeal process, do not in themselves stay the operation of the by-law appealed from, in the absence of a provision to that effect in the Provincial legislation, the voluntary suspending by the council of the operation of its by-law pending disposition of the appeal, or an order of a Court of competent jurisdiction staying the by-law or its taking of effect;
- a municipal council does not have the legal power to remove or restrict its legal powers granted by statute; in other words, the council cannot utilize its general or procedural powers to fetter its jurisdiction to exercise its discretion and legislative powers of decision-making;
- at the same time, it is neither unusual nor unreasonable for those whose rights are subject to approval through the planning process, to make substantial expenditures, relying in good faith on the anticipated and reasonably-expected operation of the planning process, the fair and proper dealing with development applications, and rights acknowledged by legislation and the law applied to its interpretation by the Courts;
- here, the mover of the motion has not included in his motion any suggestion of its grounds or intended purpose. It is also unclear or unknown whether or what circumstances may have changed since the initial decision to adopt the Secondary Plan five years ago, and consequently whether it is really an issue of "reconsideration", as opposed to consideration of a new matter. I conclude that in these circumstances, the notice of motion should be treated as an invitation to the Council to rescind, repeal or amend all or part of the Secondary Plan, a process which, in itself, even assuming the Council's right to reconsider, dealt with

below, would be the required subject-matter of the process mandated by the *Planning Act* with respect to amendment of the Township's Official Plan and/or Secondary Plan;

- at the very least, the question of whether or not there were any changed circumstances, would have to be satisfactorily addressed, before the Council would be in a position to decide whether or not to entertain the Notice of Motion;
- there is also no information available to suggest that staff and legal advice, and the information provided to the Council, during its last "reconsideration" of the Midhurst secondary Plan, in September, 2013, upon which the Council relied in its decision not to reconsider its decision, is no longer equally valid and applicable in Council's consideration of the new Notice of Motion, inviting the Council to decide again, less than 8 months later, whether to re-open its consideration and debate of the Secondary Plan, or to repeal or amend it;
- to the extent that the Council may have enacted by-laws, if any, or taken any other action on the basis of the policies contained in the Midhurst Secondary Plan, including, without limitation, the commencement and continued processing of the Municipal Class Environmental Assessment process and the processing of implementing planning applications, the rights of parties affected by such by-laws or actions could be infringed upon or damaged by Council's re-opening consideration of the merits of the Plan itself, with possible grounds for claims of liability for such losses, against the Township, and possibly one or more Members of its Council;
- It might also be argued, although there are no Court decisions to this effect, that the initiation of Council consideration of rescinding or amending the Midhurst Secondary Plan, in the context referred to above, and in which the process has partially completed the appeal cycle, with appeal proceedings pending before the Ontario Municipal Board, could be seen as an act of bad faith by the Council.

The absence of Court decisions on this point is not, of course, surprising, given that it is unheard of for a municipal council to take this kind of action on a motion to reconsider, especially in the course of what is required by law to be a deliberative and consultative planning process.

The issue of "bad faith" is a matter of great seriousness, with potential for not only fatal impact on Council decision-making, but also potential litigation against the municipal corporation and members of its council, and resulting liability. "Bad faith" is, under both statutory and common law, grounds for quashing a municipal by-law that would implement the Notice of Motion, if adopted.

What is "bad faith"? This issue has been the subject-matter of many decisions by the Courts, including the Supreme Court of Canada. For instance, in the 2004 decision of that Court in *Enterprises Sibeca Inc. v. Frelighsburg*, the Court concluded that the concept of bad faith can encompass not only acts committed deliberately with intent to harm, but also acts so remarkably inconsistent with the relevant legislative context, that a court cannot reasonably conclude that they were performed in good faith.

The Ontario Court of Appeal, in its 2007 decision in *Grosvenor v. East Luther Grand Valley (Township)*, held that A finding of "bad faith" did not require any wrongdoing or personal advantage on the part of any of the council members, but only that council had acted unreasonably and arbitrarily in the circumstances and without the degree of fairness, openness, and impartiality required of municipal government.

The same Court, in its 2004 decision in *Brantford (City) v. Konakov*, held that the doctrine of unreasonableness permitting a Court to declare a municipal by-law to be invalid, may be exercised where it can be shown that the by-law was enacted in bad faith, such as where it discriminates in a manner unrelated to a valid planning purpose.

An allegation that a municipal council and/or one or more of its members has acted in bad faith in the course of decision-making, is among the most serious of claims, potentially implying knowing wrong-doing and breach of statute, and possibly forming the basis for court proceedings, and possible findings of personal liability, against the municipality and members of its council.

Here, the Motion demonstrates, not only the absence of any proper planning purpose as a basis for Council's reconsideration of its Secondary Plan, but also offers no suggestion of any valid reason why the Township Council should now re-open a valid planning decision which it made following a lengthy and comprehensive consultative and legislative planning process completed such a short time ago.

(2) THE PROVISIONS OF THE TOWNSHIP'S PROCEDURE BY-LAW

You have advised me that the Springwater Procedures Manual, constitutes the Township's procedure by-law, duly enacted by the Council by by-law. I will refer, in the following discussion, to the Manual as the "Procedure By-law".

Section 14.11 of the Procedure By-law deals specifically with the issue of a "Motion to Reconsider".

While this provision authorizes a Member of Council to introduce a motion to reconsider a previously approved motion of the Council, such authority is also the subject of a number of limitations set out in that provision:

- (a) "A motion to reconsider suspends any action on the motion to which it applies until it has been decided";
- (b) "If the action approved in the main motion cannot be reversed, the motion cannot be reconsidered." (I would think that this limitation would apply in respect of any part of the original motion, as well as to any provision of the Midhurst Secondary Plan, which is legally incapable of being undone , changed or re-instituted);
- (c) "The following motions cannot be reconsidered:

- (iv) a Motion to Reconsider”;
- (f) “The original motion cannot be brought forward for reconsideration more than once unless the substance of the motion has been materially changed”.

These provisions, similar or parallel in form and intent, to the procedure by-laws of most Ontario municipalities, have very clear and positive objectives: to ensure finality and predictability in the deliberative and legislative process of decision-making by the council; to discourage the wasting of time by the council in repeated debating and decision-making relating to the same subject-matter; to encourage the council to ensure that the relevant information and reports which it requires to debate and decide any particular issue, are complete and available for its consideration, in order to avoid the unnecessary re-opening of the matter at a later time to support the public interest and public confidence in the integrity of the decision-making process of its elected municipal government; and to protect individuals and other governmental and private parties who act in reliance upon the decisions of the council.

Here, I would conclude that the proposed Notice of Motion is precluded by the provisions of Section 14.11 (c) iv and (f), outlined above. Otherwise, Section 14.11 (a) of the Procedure By-law would appear to lead to the result that a Member could suspend the operation of OPA 38, and the By-law which adopted it, by simply putting a 2-line Notice of Motion on the Order paper.

Review of Robert’s Rules of Order (incorporated by Section 2.2 of the Township’s Procedure By-law “where a procedure has not been established in this Manual”), demonstrates that a motion to reconsider is anticipated to involve an attempt, fairly soon after the Council has made a decision in a matter, to re-open debate. This is presumably done on the basis of a point not considered, a change of mind by one or more Members who voted with the majority in the original Council vote, or a change in the facts or circumstances which formed the context for the original decision. A proposal to reconsider made long after the decision has been made, particularly in the circumstances of this case, should be taken as nothing less than a motion to rescind or amend the status quo remaining (i.e. the adoption of the Secondary Plan here in question and its confirmation by by-law after the original decision had been made, with no changed circumstances.

It would also appear likely, on the basis of the foregoing, and the preambles to the Council’s decision of September 17, 2013, that it may well be that all or part of OPA 38, and the By-law adopting it, together with actions taken and circumstances arising following and on the basis of its enactment, may make all or parts of the main motion incapable of reversal.

Finally, the mover of the Motion has made no effort to address the issue of whether or not the substance or circumstances which formed the context of the original adoption of OPA 38 by the Council have changed, or why and how the concept of “reconsideration” should be applied to, not just a simple straight-forward operational decision, but to the legislative outcome of a lengthy and comprehensive planning process governed by specific legislation and principles, as well as subject to an approval and appeal process.

I would conclude, on the basis of the foregoing provisions of the Procedure By-law referred to above, and the words of the proposed Notice of Motion alone, that the Council cannot entertain this motion for reconsideration.

Consequently, if I were present at the meeting of Council where this Notice of Motion is presented for introduction, I would advise the Member chairing the meeting, that the Notice of Motion should be ruled out of order, on the basis of the provisions of the Procedure By-law, referred to above, and for the following reasons:

1. the Notice of Motion sets out no grounds or suggested purpose for Council's reconsideration of its previous decision not to reconsider this issue;
2. the Notice of Motion makes no reference to any change in circumstances following the adoption by the Council of the Secondary Plan, which would make it appropriate for the Council to now reopen the matter;
3. the Council should, before deciding whether to spend its time to consider this issue again, review the advice which it received at its meeting held on September 17, 2013, which, in my opinion, continues to apply and be relevant to the new motion to reconsider.

Although the Procedure By-law, in Sections 2.1 and 17.6 authorizes the Council to entertain a motion to suspend its Rules of Procedure, such a decision also should be made only on proper grounds, where circumstances have arisen, and be shown to exist, which would justify a departure from existing procedures established by By-law, and similar in principle to those of municipal councils across the Province.

III. THE POWER OF THE COUNCIL TO RESCIND OR REVOKE OPA 38

The municipal planning process, as established by Provincial legislation, as implemented and applied by municipal councils and the Ontario Municipal Board, and interpreted and clarified by Court decisions, involves a consultative and deliberative process, such as that followed by the Township Council in its adoption of its Midhurst Secondary Plan, a process of approval by the County Council, and the full opportunity for parties such as the Midhurst Ratepayers Association, and others, to appeal the approval of the Plan, to the Ontario Municipal Board.

Consequently, I was surprised to see, in this case, an attempt to carry out an "end run" around the planning process, by means of this Notice of Motion, by which the Council would be asked to re-open a decision which it made following its due compliance with, and reliance upon, such a process.

I have never before come across a situation where a municipal council, having duly adopted an official plan or official plan amendment, was then asked to "reconsider" that decision and its adoption by by-law, (i.e. re-open and consider amending or rescinding the plan), through a simple "Motion to Reconsider". Here, the proposal is particularly egregious, coming so soon after Council's adoption of the Secondary Plan, and its having decided, only eight months ago, to reject the last request that it do so.

In my more than forty years' experience in the practice of municipal law, I have not come across any previous attempt to have a municipal council start an entirely new planning process, purported to be, but not, authorized by the *Planning Act*, for the purpose of rescinding its previously-adopted secondary plan, particularly given the timing of the adoption and its support for the approval of the plan such a short time ago.

These circumstances and the factors outlined above in my discussion of the concept of "bad faith", raise serious and substantial issues affecting the potential validity of municipal decision-making, particularly in this heavily-circumscribed area of municipal planning law, and also support for possible litigation against the municipal corporation and the Members of its Council, with potential for municipal liability.

I agree with the conclusions of Mr. Kussner, as set out in the Summary of his legal advice, as follows:

"As a legal matter, a rescission or revocation of the Midhurst Secondary Plan would entail a further amendment to the Official Plan, just as the Secondary Plan itself was adopted as an amendment to the Official Plan. This would mean that any proposed rescission or revocation would have to follow the notice, public consultation and public meeting requirements laid out in the Planning Act and in the Official Plan itself."

"...An Official Plan Amendment would be subject to the approval of the County. It would also be subject to anybody's statutory right to appeal whatever decision is made by the Township and/or the County to the OMB."

The fact that the Township's Procedure By-law refers to the reconsideration of a "motion" suggests that the Council's power to reconsider its previous decision, and the possibility of its making a different decision or amending the original one, should not be applied to enable it to re-open its Official Plan or Secondary Plan, both of which constitute acts of legislation and the establishment of policies on behalf of the Township, reached through an extensive and comprehensive process governed by the *Planning Act* and related enabling legislation.

The proposed Notice of Motion would appear to constitute yet another attempt at a collateral attack on the adoption by the Council of its OPA 38, and an attempt to avoid pursuing the applicable planning process established by and under the *Planning Act* applicable to proposed amendment or repeal of one or more provisions of the Township's Official Plan. To comply with this motion could lead to allegations of bad faith by the Council, and possibly involve litigation and potential substantial liability against the Township in favour of those who legitimately relied upon the Township's adoption of OPA 38, in ordering their business affairs and investment, estimated at over 100 million dollars, as set out above.

These problems were addressed in the previous legal advice received by the Township, as set out in the Summary referred to above, and with which I would respectfully agree.

CONCLUSIONS

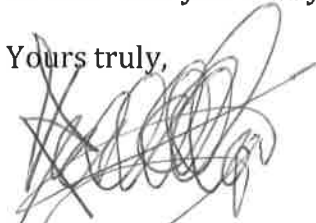
For the reasons stated above, it is my opinion that the proposal in the Notice of Motion would involve an impermissible reconsideration of a matter previously reconsidered, due to it being prohibited by the provisions of the Township's Procedure By-law and, for the reasons cited above, including the advice received by the Council when the same issue was last before it in September, 2013. Accordingly, I would, if such a Notice of Motion were brought before the Council, recommend that the proposed reconsideration be ruled out of order by whomever is chairing the meeting, and/or the Council, and not entertained or adopted by the Council.

Specifically, my response to the two questions set out at the commencement of this opinion letter, are as follows:

1. The Township is precluded, by the provisions of its Procedure By-law, and on the grounds set out and discussed above, from giving consideration to the proposal in the Notice of Motion that it reconsider its previous decision not to reconsider its decision to adopt the Midhurst Secondary Plan; and
2. That the Township Council does not have the legal power, through a motion to reconsider as proposed in the Notice of Motion, to rescind or revoke the Midhurst Secondary Plan. Such a process would entail a further amendment to its Official Plan, which could be considered only through the notice, public consultation and public meeting requirements laid out in the *Planning Act* and in the Official Plan itself.

I trust that the foregoing will be of assistance to you. I will be pleased to discuss this matter further with you at any time.

Yours truly,



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