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M E M O R A N D U M

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ISSUE: **The Legality of Credit Valley Policy Manual Prohibition Policies on Development and Two-Zone Concept Development Permissions in Mississauga**

This memorandum is intended to address the legality of Policy 7.5 g) i contained within the Credit Valley Conservation Authority Policy Manual dated April 2010. This policy specifically prohibits filling in the "flood fringe" area in a Two - Zone Concept if such is needed to meet the maximum permitted flood depth of 0.8 m or specified flood velocity levels. The problematic policy reads as follows:

> S. 7.5 g) i. "*Under no circumstances is the placement of fill to meet these criteria permitted.*"

Legislation v. Policy

There are some basic legal principles that are relevant to this issue:

i. All Conservation Authorities ("CA") such as the Credit Valley Conservation ("CVC") is a creature of statute and can have no greater powers than those granted by the enabling legislation being the *Conservation Authorities Act* R.S.O. 1990 Chapter c.27 ("CA Act");

ii. Regulations are "Law" as they are approved by either the Lt. Governor In-Council (i.e. Cabinet) or by a Minister of the Crown, if so authorized by legislation. Policy documents, unless they are approved by a regulation are not "Law" and cannot exceed the requirements of a statute or a regulation and cannot be elevated in their application to the same level as "Law". To do so is an error in law to be corrected by a Court, if not by an administrative tribunal.

iii. Subsection 28 (1) of the CA Act allows a CA to make regulations, subject to the approval of the MNR. However, the Lt. Gov. in Council may make regulations governing the content of regulations made by a CA in which case any regulation made by a CA must comply with a regulation made by the Lt. Gov. in Council. [CA Act. Ss. 28(6) and (7)].

a. *Conservation Authorities Act*

Relative to the flooding issue, ss. 28(1) (c) of the CA Act authorizes a CA to make a regulation "prohibiting, regulating or requiring the permission of the Authority for development…. *If in the opinion of the Authority, the control of…flooding…may be affected by the development."* (my underlining). The underlined words are the limitations on the power of the CA to prohibit development of lands within their jurisdiction and their ability to pass regulations. Accordingly, in my opinion, the CA cannot simply pass a regulation containing a circumstance where a blanket prohibition on development is authorized. The regulation must comply with Act and allow for the exercise of discretion to determine if the proposed works will negatively "affect the control of flooding."

b. Ontario Regulation 97/04

Pursuant to ss. 28 (6) of the CA Act the Lt. Gov. in Council in 2004 made Ontario Regulation 97/04. This regulation authorized CAs to make regulations prohibiting development in many scenarios; however, the power to prohibit was subject to the same limitation contained in ss. 28(1) that the CA may grant permission "*if in the Authority's opinion the control of …flooding would not be affected by the development."*.

c. Ontario Regulation 160/06

Pursuant to Ontario Regulation 97/04 the CVC made Regulation 160/06. Subsection 2 contains a similar list of situations where the CVC can refuse permission for development; however such prohibitions are subject to the discretionary power in ss. 3(1) which provides:

> "*The Authority may grant permission for development in or on the areas described …if, in its opinion, the control of flooding….will not be affected by the development."*

Obviously this is the same limitation in the prohibition powers as contained in ss. 28 (1) (c) of the CA Act and O. Reg. 97/04.

d. Common Law

The case law, in my opinion, is well established that a discretionary power must be exercised on a case by case basis, otherwise there is no ability to exercise a discretion. The above legislative requirements clearly require the exercise of a discretion. Accordingly, any policy document, which is not law, and which contains an absolute prohibition on the exercise of such a discretion is contrary to law and unenforceable.

e. CVC Policy Document

The CVC April 2010 "Watershed Planning and Regulation Policies" document dated April 2010 is not "Law". There is nothing prohibiting a government agency adopting a policy document. Indeed for practical purposes it is helpful and necessary. However such a document is not approved by Regulation. It's approval by the CVC Board is not appealable

to an appellate tribunal. It is not "Law" and therefore its provisions cannot exceed the CA Act or the applicable regulations thereunder. A blanket prohibition on development which is contrary to the discretionary powers mandated by the legislation and regulations is unenforceable and illegal. The statutory test "*whether the control of flooding will be affected by the development"* is the guiding factor. The issue is whether the proposed development and the methods for floodproofing will "affect the control of flooding". The factors to be considered in undertaking that test can be prescribed in the policy manual. However they must also be considered in light of any applicable policies made by MNR.

This prohibition is to be considered in conjunction with other policies:

1. S. 5.4.3 provides the General Policies for development in the Riverine Flood Hazards limits. In the Two-Zone Concept, demonstrates that lands in the *"Flood Fringe"* are within the Regulatory Floodplain and the "*Flooding Hazard Limit".*

2. Residential Hi-rise development will fall within the definition of "*Development 1*" (page 70) with regard to the provisions of the *Conservation Authorities Act*. "*Development 2*" policies, by definition, relate to matters under the *Planning Act*. In an effort to understand the difference between *Development 1* and *2* policies, the CVC Policy document deals with them in separate sections. Section 6 deals with the CVC's requirements as a commenting agency on *Planning Act* applications, such as a rezoning application and Section 7 deals with CVC granting permits for development permission. The last sentence at the bottom of page 40 makes it clear that when the CVC gives comments on *Planning Act* applications it does so consistent with the requirements for a permit application and the guidelines in Section 7 and Development 1 applications. For the purpose of this memo I am considering *Development 1.* requirements relative to a rezoning Application.. This is an important point, because CVC will be commenting on a application as if the proponent was seeking a development permit. Their position on the rezoning application must be consistent with their position when a proponent makes the formal development permit application. Obviously, this authorizes the proponent to process the CVC development permit application concurrently with the rezoning application and to seek a consolidated hearing if an appeal is necessary.

3. At page 31-32 the Two Zone *"Flood Fringe"* is described as:

   > "the portion of the *floodplain* that could potentially be safely developed or altered with no adverse impacts.
   >
   > *Development (1, 2)* and *site alteration* may be permitted within the *flood fringe,* subject to satisfying specific conditions."
   >
   > "In addition to the above, the *two zone concept* is not intended to be considered on a lot by lot basis, but on a watershed or by major reach basis considering several community related and technical criteria as outlined by the Province including local need, changes in land use, administrative capability, constraints to the provision of services, frequency of flooding, physical characteristics of the valley, impacts of proposed (1,2) (flood levels at the site and downstream), feasibility of *flood proofing* and ingress and egress." (my underlining)

4. Policy 5.4.3.1 e) at page 33 reconfirms that in the Two Zone area:

"CVC may permit *development (1,2)* and *site alteration* in the *flood fringe* , subject to site specific conditions addressing floodproofing, vehicular and pedestrian access, natural heritage protection and land use permissions."

5. In paragraphs 3 and 4 above it is important to note a significant distinction. In para 3. the analysis is not on a "lot by lot" or "site specific" basis whereas it is in para 4. Para 3 relates to the establishment of the Two Zone Concept whereas para 4 relates to lands already designated within the Two Zone "*flood fringe*" sub area.

6. Para 3 also describes what may be done to a specific site by using defined words and phrases:

- "*site alteration*" as defined (page 76) includes "*grading, excavation and the placement of fill that would change the landform and natural characteristics of a site."*

- *"floodproofing"* as defined (page 72) "*means a combination of measures included into the basic design and/or construction of buildings and structures or properties to reduce or eliminate flood hazards…and flood hazards along watercourses".* (my underlining)

  Note: My underlining above is intended to note that *floodproofing* relates to the land ("*properties*") and not just the building and the standard is not necessarily to eliminate but simply to *"reduce"* the flood hazard. Furthermore, the permitted options are not exclusive, but include the option of combining various permitted techniques.

- The permitted options are described in the definition of "*Flood proofing*" (page 72) to include:

  i. ***Dry Passive floodproofing*** which "includes the use of fill, columns or design modifications to elevate openings in the building or structure at or above the *flood hazard."*

     Note: *"flood hazard"* is defined (page 71-72) as the 100 year flood. Accordingly, pursuant to this policy one could fill the entire site or part of the site to the regulatory flood line while using other techniques such as inhabited buildings on stilts.

  ii. ***Dry Active floodproofing*** would allow the installation of water tight doors, seals or flood walls to prevent water entering the buildings or structures. This would apply to the inhabited space and the parking structure.

  iii. ***Wet floodproofing*** would allow for a building or parking structure to be built and designed to allow flood waters to pass freely through areas that are uninhabited, unfinished and have no electrical or mechanical service panels.

     Note: In my opinion the aforesaid policies allow for a combination of all options to develop in the *flood fringe*. The issue is what are the acceptable flood risks that allow such options to be used?

7. As noted above, the measurements of acceptable public risk for the *"Dry floodproofing"* option are contained within the development permit provisions of Section 7 at page 64, in ss. 7.5 g)i where flood depths are restricted to 0.8 m and flood velocities of 1.7m/ps (based on the *flood hazard*). However, what follows is a blanket prohibition on using fill to meet either the velocity or flood depth requirements:

> *"Under no circumstance is the placement of fill to meet these criteria permitted."*

I review this policy hereafter under the heading "Blanket Prohibition":

Blanket Prohibition

8. Such a blanket prohibition policy obviously runs afoul of the statutory and regulatory requirements imposing a legal obligation to exercise a discretion applying a site by site analysis to determine whether such filling would negatively "affect the control of flooding." The policy itself contains no rationale for such a prohibition on filling. The statutory and regulatory phrase "control of flooding" clearly suggests that the analysis requires a determination of whether or not such filling would negatively affect flooding of upstream or downstream land owners. It is this type of analysis that an engineer would normally undertake when he/she produces a proposed fill area based on preliminary modeling. In my opinion such an approach is in accordance with the legal requirements of the CA Act and O. Reg.97/04 and 160/06.

MNR Policies

9. As a further checks and balance on this point I reviewed MNR policies to determine if such contained a similar blanket prohibition and reviewed other CA policy manuals for the larger CAs.

10. The MNR policy manual dealing with development in "flood fringe" areas under the Two - Zone Concept requires a site specific analysis to determine upstream and downstream impacts. Appendix 2, s. 2.7 speaks to development that causes "adverse impacts", namely "danger to public health and safety and property damage" being prohibited. The policy speaks to a general rule that flow depths in excess of 1m and/or flow velocities in excess of 1 m/ps would create "significant hazards" which are therefore not acceptable. As to the use of "Flood proofing" techniques the policy in Appendix 6, identifies similar "active" or "passive" (i.e. "wet" and "dry" techniques). "Dry" includes filling. At page 27 the policy notes that 0.8 flow depth and a velocity of 1.7m/ps is a "low risk" and clearly establishes that 0.8 m of flow depth is the acceptable standard. However, the policy contains no prohibition on filling to meet that criteria.

Other CA Policy Manuals

11. My review of the other major CA's to determine whether or not they contained policies in Two Zone *flood fringe* areas prohibiting filling to meet flood depth and/or velocity requirements. The other CAs considered were:

    a. Toronto and Region CA;

    b. Grand River CA;

    c. Nottawasaga Valley CA;

d. Lake Simcoe CA

e. Conservation Halton

f. Niagara Region CA

12. The results of this analysis are as follows:

i. Toronto, Grand River, Nottawasaga and Halton have Two-Zone concepts. Lake Simcoe and Niagara have only One- Zone policies;

ii. In none of the Two-Zone policy documents are there blanket prohibitions on filling to meet the flood depth and/or velocity guidelines;

iii. Halton does not, per se, have a Two Zone general policy; however they have special policy areas where they provide policies for development in a *flood fringe* area. In the Millgrove area there is a prohibition against filling to meet flood depth/velocity guidelines; however, in the other *flood fringe* special policy areas, there is no such prohibition. Accordingly the prohibition is clearly a site specific requirement and not a blanket prohibition for all lands under the Halton CA jurisdiction, as is the case with CVC.

iv. Toronto has a prohibition against such filling for new development. However it relates to a One-Zone area and is therefore not relevant.

v. Lake Simcoe and Niagara do not have a Two-Zone concept; but significantly have no blanket prohibition of filling to meet flood depth/velocity requirements. Niagara has a prohibition on filling (in a One-Zone area) for filling for parking lots, access roads and driveways to meet a flood depth requirement of 1 foot. However, since the policy is not in a Two-Zone area it is not relevant for my purposes.

Conclusion

The research to date reveals the all CA policy manuals,other that of the CVC, have all complied with the legislative and regulatory requirements to study all applications for development permits in Two-Zone Concept areas that involve issues of flooding, on a case by case discretionary basis. As a matter of public safety and legitimate concerns for danger to neighboring lands, neither the MNR, nor the Province, by their legislative and regulatory powers, found it necessary to impose a blanket prohibition for filling in Two-Zone areas to meet safety standards for flood depth or velocity. Accordingly, in my opinion the CVC policy prohibition creates a policy in excess of the requirements of the CA Act, O.Reg's 97/04 and 160/06. Such a policy precludes the exercise of a discretion on a case by case basis as mandated by the aforesaid Act and Regulations and is therefore contrary to law and unenforceable.

Both the Act and the said Regulations allow for either a single solution or a combination of "Dry" and "Wet" engineering solutions to meet public safety and property damage concerns. It is those concerns which must be addressed when proposing the type of *floodproofing* to be recommended for development in order to meet the statutory and regulatory requirement to demonstrate that the proposed development will not negatively affect the "control of flooding."

I am awaiting a decision of the Superior Court dealing with exactly this point on “law v. policy” which is expected to be released shortly. I will do a further Memo on this issue once the Decision is released.

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