COURT FILE NO:

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE GREENSPACE ALLIANCE OF CANADA'S CAPITAL

Moving Party

- and -

CITY OF OTTAWA, 1374537 ONTARIO LTD.
and FINDLAY CREEK PROPERTIES LIMITED

Respondents

NOTICE OF MOTION
FOR LEAVE TO APPEAL COSTS ORDER

The Greenspace Alliance of Canada's Capital will make a motion to the Court of Appeal for Ontario in writing, 36 days after the service of the moving party's motion record and factum or on the filing of the moving party's reply factum, if any, whichever is earlier.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing because it is an appeal to the Court of Appeal which requires leave of that court, pursuant to section 61.03.1(1) of the Rules of Civil Procedure.

THE MOTION IS FOR leave to appeal the order of the Divisional Court made on December 10, 2008, awarding costs in the amount of $4,876.30 plus G.S.T. to the City of Ottawa, and costs in the amount of $25,000.00 all inclusive to 1374537 Ontario Ltd. and Findley Creek Properties Limited.

THE GROUNDS FOR THE MOTION ARE:

1. Pursuant to sections 6(1) and 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, Greenspace Alliance of Canada's Capital (Alliance) is applying for leave to appeal from a costs award made against it by the Divisional Court. The Alliance is a non-profit public interest environmental group litigating an issue of public interest, namely, the protection of environmentally-sensitive wetlands. It raised legal issues that are not frivolous, and which are of public importance. As a result, the Divisional Court ought not to have awarded costs against the Alliance.

2. Divisional Court made errors of law, as well as errors of mixed fact and law in awarding

costs against the Alliance. First, the Divisional Court misinterpreted the case law regarding awards of costs against public interest litigants. Second, it incorrectly applied the case law on costs to the Alliance, notably by misconstruing the legal meaning of "public interest litigant" and "public interest litigation". Third, the Divisional Court erred in its finding that there were "no overriding public interest matters at stake" in this litigation, and in failing to consider other relevant factors to a determination of whether a matter is public interest litigation. In sum, the Divisional Court erred in not finding that the Alliance is a public interest litigant involved in public interest litigation. As a result, the Court erred in exercising its discretion to make a cost award in favour of the respondents.

3. The present case satisfies the test for granting leave to appeal as articulated in *Sault Dock Co. Ltd. v. City of Sault Ste. Marie*, *[1973] 2 O.R. 479*. First, the Divisional Court was sitting as a court of original jurisdiction, as it was the first court to undertake a judicial review of an Ontario Municipal Board decision regarding the legality of a City of Ottawa zoning bylaw. At stake on judicial review were two important jurisdictional issues related to the Ontario Municipal Board's decision. One related to procedural fairness and the need for disclosure of information relevant to the OMB hearing. The other related to the interpretation of section 3(5) of the *Planning Act*, R.S.O. 1990, Chapter P.13, a statutory provision that had previously been adjudicated upon by the Divisional Court prior to being amended in 2006. Thus, the matter before the Divisional Court was worthy of adjudication.

4. Second, the case involves a matter of public importance that goes beyond the interests of the litigants, namely, the need to ensure that public interest environmental groups have access to the courts. Furthermore, the Alliance submits that the Divisional Court's finding that the judicial review before it was moot should not necessarily lead the Court of Appeal to conclude that the Alliance was not appropriately litigating a matter of public importance.

5. Third, the case involves the clarification or propounding of some general rule or principle of law, namely a clarification of the principles that should guide a court when it exercises its discretion to award costs in cases involving public interest litigants.

6. By granting leave to appeal, the Court of Appeal may bring clarity to at least three important areas of uncertainty and conflicting jurisprudence in Ontario law concerning public interest cost awards: (a) the reconciliation of the different frameworks for determining costs in public interest cases set out in *Incredible Electronics v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 and *St. James' Preservation Society v. Toronto* (2006), 272 D.L.R. (4th) 149; (b) the interpretation of the criteria for awarding costs in a case involving a public interest litigant as set out in *Incredible Electronics* and *St. James*; and (c) the affirmation of the principle that public interest litigants should not have costs awarded against them when the criteria in *Incredible Electronics* and *St. James* are met.

7. At stake in this case is the ability of public interest environmental groups like the Alliance to continue to litigate in the public interest on environmental issues of public importance. The costs award made by Divisional Court against the Alliance impairs this ability, and will have a negative impact on public interest advocacy in Canada.

8. For these reasons, the Alliance submits that the Court of Appeal ought to exercise its discretion to grant leave to the Alliance to appeal the decision of the Divisional Court on the issue of costs.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- Order of the Divisional Court made December 10, 2008
- Reasons of the Divisional Court issued December 10, 2008
- Reasons of the Divisional Court made October 2, 2008
- Request for Review Decision of the Ontario Municipal Board made September 12, 2007
- Decision of the Ontario Municipal Board made June 18, 2007
- Amendment to the Ontario Municipal Board decision made June 27, 2007
- Affidavit of Erwin Dreessen made June 13, 2008
- Selected extracts from the judicial review application, motion to quash and mootness motion

December 19, 2008

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William Amos (LSUC #53183V)

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