

December 18, 2007

Ontario Ministry of Natural Resources
Whitney Block
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Toronto ON M7A1W3

by Fax: 416-314-2159

Attn: Mr. Charlie Lauer
MNR Deputy Minister (Acting)

Re: Request for Investigation by Conflict of Interest Commissioner
Acting MNR Kemptville District Planner – Carp River Restoration Class EA

Dear Mr. Lauer:

On November 24, 2007 I wrote to the Ministry of Natural Resources (MNR) Southern Region Regional Director requesting an investigation be undertaken about a possible contravention of the *Public Service of Ontario Act* (or its predecessor, the *Public Service Act*). The matter involves a former MNR (Acting) District Planner in the Kemptville District Office and the role he played in a review capacity on behalf of MNR on a channelization project that was completed by a consulting firm managed by his wife.

I received a letter from the MNR Kemptville District Manager on December 10, 2007, whom the Regional Director asked to investigate the matter. The following excerpt from the response letter indicates that no contravention of the *Public Service of Ontario Act* was found by the District Manager:

“I have reviewed the activity of the employee with regard to the above-noted project, specifically, Mr McGirr’s letter of October 23, 2006, in which he conveyed to the City of Ottawa that MNRs concerns with regard to the “ponds and water temperature” associated with the Restoration Plan had been satisfied. MNRs role in this circumstance was that of commenting agency not approval agency. In this circumstance, I am of the opinion that Mr McGirr was acting in accordance with the Public Service Act.”

I was quite surprised by the outcome of the District Manager’s investigation, and followed-up with the Environmental Commissioner’s Office (ECO) about the finding. The Legal Counsel of the ECO responded to my submission indicating that they have no jurisdiction over such matters, but indicated that there is an Ontario Conflict of Interest Commissioner (COIC) whom I should contact.

I have since reviewed the COIC website and have found that there is a process in-place whereby such investigations are to be turned over to the office of the COIC by the appropriate Deputy Minister – as opposed to having the District Manager where the employee worked conduct the investigation.

According to Section 6 of Ontario Regulation 381-07 (Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)) under the *Public Service of Ontario Act, 2006*:

Giving preferential treatment

6. (1) When performing his or her duties to the Crown, a public servant shall not give preferential treatment to any person or entity, including a person or entity in which the public servant or a member of his or her family or a friend has an interest. O. Reg. 381/07, s. 6 (1).

(2) When performing his or her duties to the Crown, a public servant shall endeavour to avoid creating the appearance that preferential treatment is being given to a person or entity that could benefit from it. O. Reg. 381/07, s. 6 (2).

The Acting MNR District Planner represented the MNR in 2005-2006 in its review of the Carp River Restoration Project, a Class EA being undertaken by the City of Ottawa and the Kanata West Owners Group. An Ottawa based consulting firm that is managed by the MNR Planner's wife undertook the Class EA. During his review role on the project, the MNR Planner advised the approval agency of the Class EA – the Ministry of Environment's Environmental Assessment and Approvals Branch (MO EAAB) – about the compliance of the undertaking with respect to the *Lakes and Rivers Improvement Act* and Natural Hazard Policies of the Provincial Policy Statement (under Section 3 of the *Planning Act*).

The MNR has published Technical Guidelines that document location approval requirements under the *Lakes and Rivers Improvement Act*. The Guideline states:

The following hydraulic characteristics of the natural river channel shall remain the same in the proposed channel:

- 1) travel time (not to be decreased); and
- 2) the stage storage and stage discharge relationships of the natural river and its flood plain are to be maintained (evaluated in 0.3 m elevation increments from the channel bed to the flood level per Provincial Natural Hazards Technical Guide, 2002).

These criteria maintain a flood plain area in the channelized reach identical to that of the original watercourse. The strength of these criteria is that they are straightforward to apply and easily verified by the approving agency. However, their strict application may be inhibiting. Exceptions may be considered where the following objectives of the criteria are met:

- 1) the cumulative impacts of all future works in the watershed are quantified through sub-watershed studies and are considered insignificant;
- 2) there are no downstream impacts (i.e., channel outlets to one of the Great Lakes);
- 3) the discharge storage relationship of the water course is maintained on an incremental basis for all floods from the 2 year return flood to the flood per provincial standards for defining natural hazards; and
- 4) routing calculations are provided which conclusively demonstrate that there would be no increase in downstream peak flows and total storage has been maintained or increased.

In his review of the project, the MNR Planner did not require the hydraulic characteristics of the river to remain the same. Instead, he elected to consider exceptions to the criteria – in particular setting aside the need to maintain the stage storage and stage discharge relationships of the natural river and its floodplain. I do not take issue with consideration of the exception criteria – I take issue with the fact that the MNR Planner did not even require adherence to any of the exception criteria. In consideration of the circumstances outlined below, it appears that the actions of the MNR Planner may have involved preferential treatment, and hence raise concerns about a breach of Section 6 of the *Public Service of Ontario Act*.

Examples of preferential treatment:

- 1) I had raised concerns with the MNR Planner about failure of the Class EA Consultant to consider the cumulative impacts of all future development on the Carp River channelization project – the impact of future urbanization of the Fernbank Community was not considered in the analysis (and subsequently it was found that the cumulative impact of the Carp Road Corridor Community Design Plan had also not been considered in the analysis);
- 2) I had brought to the MNR Planner’s attention that in 1909 a ruling of the Ontario Court of Appeal involving the Carp River Municipal Drain established the legal precedent for Ontario that drainage must continue to a “sufficient outlet”. In 1909, in an agricultural watershed, the OCA ruled the point of sufficient outlet was located about 5 km downstream of where the MNR Planner was willing to accept as a point of sufficient outlet in a heavily urbanized watershed 100 years later, in his commenting role on behalf of MNR;
- 3) There is no public record of whether the MNR Planner inquired with the Legal Services Branch for an opinion whether alterations to the mainflow channel could be authorized under the LRIA if the channel cross-section and design of the Carp River has legal status as a Municipal Drain;
- 4) The MNR Planner disregarded the Provincial Natural Hazards Technical Guide regarding the need for calibrated modelling when he based his decision-making about changes to riparian storage volumes on results from non-calibrated modelling that was completed by the firm managed by his wife that superseded the existing regulatory floodplain mapping that had been adopted following the standards of the Flood Damage Reduction Program in 1983;
- 5) Using the results of the non-calibrated modelling as the basis for determining travel times and riparian storage volumes, the MNR Planner supported the proposed Carp River Restoration Class EA in his commenting role on the project. The City has since used the MNR Planner’s support for the Class EA in seeking Approvals of the Class EA from the MOE EAAB, and more recently, as the basis of approving two Zoning Bylaw Amendments allowing development of Carp River floodplain, once subject to Regulations under Section 28 of the *Conservation Authorities Act*.

Notwithstanding the exceptions to the exception criteria outlined above being allowed by the MNR Planner is the fact that the City was proceeding with the Class EA floodplain development proposal on the basis that it was implementing Two Zone floodplain policy, all the while the MNR Planner was reviewing the project on the basis of One Zone floodplain policy. Given that the MNR is purportedly the lead government agency regarding natural hazard policies, it would appear that the MNR Planner failed to resolve this apparent inconsistency with the MOE EAAB by his support for the project.

Furthermore, the Class EA project has been a controversial project from the start - not because of the proposed improvements to the Carp River, but because the undertaking includes the planned development of 28 Ha of floodplain where several hundred homes are proposed to be constructed. The planned development of floodplain is also controversial because it is located in a greenfield development area immediately downstream of a flood damage center that flooded in 1996 and 2002 requiring the City to spend \$7 Million on a remediation of a previous failed floodplain development scheme constructed in the 1970's. To add to my concerns is the risk the floodplain development poses to Highway 417, which bisects the area where the floodplain is proposed to be filled and developed. The two Highway 417 bridge structures currently have only 0.5m of freeboard under 100-year flood conditions, which is less than the required 1.0m of freeboard.

According to the Natural Hazards Technical Guide the MNR views prevention as the preferred method of management of floodplain lands.

It is submitted that the MNR Planner's consent to allowing use of exceptions to exceptions in-place of the standard location approval requirements under the *Lakes and Rivers Improvement Act*, appears to originate from preferential treatment given by the MNR Planner to the consulting firm responsible for the project that was managed by the MNR Planner's wife.

I respectfully request that, in your capacity as Deputy Minister of MNR, the COIC be asked to conduct a prompt and thorough investigation of the actions of the former MNR Planner while representing the MNR in the Ministry's review and commenting role on the Carp River Class EA project for possible contravention of the *Public Service of Ontario Act*.

Yours truly,

Ted Cooper, M.A.Sc., P.Eng.
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cc. Mr. David McRobert, Counsel to the ECO 416-325-3370
Mr. Ray Bonenberg, Southern Region MNR Director 705-755-3233