John Lindsay
35 Copernicus Street, Office 107
Ottawa, ON K1N 6N5

April 9, 2010

SENT VIA E-MAIL

Ontario Municipal Board
655 Bay Street
Suite 1500
Toronto, ON M5G 1E5

Attention: Chair Michael Gottheil

Dear Sirs / Mesdames:

RE: Notice of Request Pursuant to Section 43, Ontario Municipal Board Act
OMB Case No. PL 090687

This is written on behalf of Friends of the Greenspace Alliance ("FGA"), one of the appellants in this appeal. This is a request for a review of the Board's order of March 12, 2010 (the "Order"), in which the Board dismissed in part, the FGA appeal. Specifically, the FGA appeal was dismissed insofar as it relates to "the lands subject to the City of Ottawa's Official Plan Amendment No. 77 south of and including the Abbott Street road allowance". The Order arose from a motion (the "Motion") brought by Abbott – Fernbank Holdings Inc. and CRT Development Inc. (the "Moving Parties"). On behalf of FGA, for the reasons set out below, we request that the Board:

A. If necessary and appropriate, order that a motion be scheduled to consider whether to exercise the Board's powers under section 43 of the Ontario Municipal Board Act in respect of the Motion; and

B. With or without the oral hearing of such a motion, order a rehearing of the Motion.

It is FGA's submission that the Order is based on mistakes of fact and law which, had they not been made, would have resulted in the dismissal of the Motion.

Background

The Board is presently seized of a review on behalf of Kizell Management Corporation of an order of the Board dated January 13, 2010. The time and place of the hearing of this review has yet to be determined. The background of the appeals, including the above appeal, is sufficiently set out in the parties' letters relating to the existing review, namely the letters dated February 10, 2010, March 3, 2010 and March 15, 2010. However, it will be helpful to summarize the basic concerns raised by FGA in its appeal and in the expert statements and affidavits that have been filed in connection with the appeal as previously constituted.

The first concern relates to stormwater. The Environmental Management Plan ("EMP") forming part of OPA 77 specifically authorizes two stormwater management ponds to be constructed to a 10-year storm event standard rather than the conventional 100-year storm event standard. Both of these ponds are located in the Carp River drainage area of the lands covered by OPA 77. In contrast, all the stormwater ponds in the portion of those lands that drain into the Jock River have all been specified to a 100-year standard. FGA takes the position that the application of the 10-year standard is incorrect and will give rise to an unacceptable level of flooding risk. This position is supported in the experts' statements and affidavits filed by FGA. The approval of OPA 77, whether by dismissal of this appeal, or otherwise, will result in approval of the 10-year standard for the ponds in question. It has been suggested by various respondents that there is no reason for concern; detailed designs to be proposed later can be reviewed. However, no one has set out how, in what circumstances, and by whom, the 10-year design criterion can be reviewed if it is not reviewed in this appeal. FGA submits that there is no mechanism for review of that criterion beyond the present appeal. Whether or not specific designs subject to that criterion will be reviewable is of no comfort. This aspect of the appeal relates to the Kizell motion and review application.

As far as stormwater is concerned, the appeal raises no issues in relation to the Jock River drainage area.

The second concern relates to wastewater. The Master Servicing Study ("MSS") that forms a part of OPA 77 proposes that, in relation to wastewater, all the lands subject to OPA 77, including the Carp River and Jock River drainage areas, will feed into sewers that will feed into a single trunk sewer that will drain into the existing Hazeldean Pumping Station ("HPS"). The HPS, as stated in the decision under review, is presently subject to other studies relating to its capacity to serve its existing drainage area. These studies arise from past serious flooding events in Glen Cairn, most recently, on July 24, 2009. FGA's concern is that the EA process required in making that decision (to run a single pipe to HPS) was not done properly. The EA process does not allow "piece mealing" of the project. An assessment of the project (disposing of waste in Fernbank) includes the pumping station, and the EA should have included an environmental assessment of HPS before deciding to pump all the waste there. By approving of OPA 77 as it relates to the Jock River lands, the Board is relying on the EAs of HPS (that are not yet complete) to approve an EA that should have included assessment of HPS in the first place. The Board member, without any evidence, has in effect decided that the yet to be complete EAs of HPS will conclude that HPS can handle all of the waste. However, as above, it is FGA's understanding that if this appeal, insofar as it relates to wastewater, is dismissed, then the principle of draining all wastewater from the OPA 77 lands into a single drain feeding into HPS will have been established. It is not apparent how, when or by whom that principle could be reviewed, even though specific wastewater designs subject to the overriding principle may be reviewable.

To be clear, FGA is not asking the OMB to decide now where the wastewater should go; it is simply asking the OMB to set aside the decision that it necessarily will all go to the HPS. That decision should not be finalized until all the relevant studies have been completed and taken into account.

As an aspect of these general concerns, FGA questions whether or not the integrated planning and environmental process used by the City in relation to OPA 77 was properly or correctly applied. However, FGA does not question in principle, in this appeal, the use of an integrated process.

FGA is a public interest body. It has itself no financial, corporate or other interests in OPA 77 or this appeal. It is concerned that serious potential issues of stormwater / wastewater flooding resulting from above noted design principles embodied in OPA 77 should be reviewed, and should be reviewed at a time when it is possible to review the overriding design principles, rather than design details within those principles. FGA further takes the view that the integrated process used for OPA 77 and its underlying documents, principally the Community Design Plan ("CDP"), the MSS and the EMP, should have been carried out on a watershed / sewershed basis, and should have taken into account other undertakings in adjacent areas, principally in Glen Cairn and Kanata West. In the case of Glen Cairn this is because of existing flooding problems; in the case of Kanata West, this is because this is downstream in the Carp River Valley and is at risk of future wastewater and stormwater problems. FGA submits that these matters are essentially planning issues because they involve questions regarding the public health and safety and environmental impacts of inadequately planned and designed infrastructure. In the decision that Kizell is seeking to review, Board Member Denhez expressly found that "the correct geographical area for a planning process of this kind, and its timetable, are quintessential planning questions". (Decision, January 13, 2010, p. 3.)

With respect to wastewater, one further important point must be noted. There is no doubt that, if the appeal relates to wastewater at all, the Jock River lands are not severable. This is because all the wastewater, both from the Carp River watershed and the Jock River watershed, is proposed to be collected into a single drain leading to the HPS, as noted above. This point is expressly acknowledged in the Board's decision of March 12, 2010, at page 10, in the following terms:

> "The HPS is the identified destination for the Jock watershed wastewater under the MSS."

However, the Member did not appear to fully appreciate the implications of that recognition, as will be set out below.

The Board Order

A summary of the Board's conclusions is contained at page 3 of its decision, and reads as follows; FGA's position on these conclusions is added in square brackets:

> "1. The FGA appeal dealt, overtly and specifically, with concerns that might lead to "consequent increased flooding risk in the Carp River Valley". It did not visibly profess to deal with anything else.
>
> [This was not incorrect, as far as it went. But the Member failed to appreciate the scope of the term "flooding risk". This oversight was the basis of the Member's acceptance of the Motion.]
>
> 2. By statute, parts of the OPA which were not the subject of appeal have already come into effect, independently of the volition of the parties or even the Board, which has no choice but to acknowledge that OPA 77 is in force in the Jock watershed – save and except only those OPA factors in the Jock watershed which lead to "consequent increased flooding risk in the Carp River Valley", under appeal.
>
> [Correct in law, but irrelevant if the Notice of Appeal in fact covered wastewater generated in the Jock River sewershed.]

3. On the latter point, the Board notes the FGA's concerns about routing Jock watershed wastewater through the Hazeldean Pumping Station; but the problem is that its appeal – even if *interpreted* to extend to those concerns, would then suffer from overt duplication and redundancy, for two reasons:

   a) There are already not one but two Environmental Assessments underway, involving that very subject;

   b) Furthermore, the proper upgrading of the HPS has already been incorporated as a precondition for Fernbank development, in the OPA's relevant documents themselves. "The Hazeldean Pumping Station has to be upgraded before any development can proceed in the Fernbank Community".

[These parallel studies are irrelevant to FGA's rights to pursue this appeal: this is an error of law.]

4. The question of the Jock watershed (including wastewater and the HPS) therefore *adds* no planning ground on which the Board could refuse that part of the OPA."

   [This conclusion is incorrect in view of the errors noted above. Moreover, sub-paragraph 17(45) (a) (i) of the Planning Act does not require an "added" planning ground, merely an "apparent land use planning ground".]

Summary of Reasons for this Request

We now summarize the errors of fact and law that the FGA relies upon as the basis for this review request.

1. **Effect of the stated issues**

In a series of orders, the Board has redefined the issues for the purposes of the hearing of the appeal. The most recent such order is the order embodied in the decision of January 13, 2010, which is the subject of Kizell's review request. However, that statement of issues replaced the statement of issues embodied in the order of October 21, 2009. No appeal or review requests have been filed by any party in respect of the October 21, 2009 order. Therefore, if the Kizell Review application is successful insofar as it relates to the issues list, the issues will be governed by the October 21, 2009 Order. The wording of that order is set out at pages 9 and 10 of the Board's decision of January 13, 2010. In paragraphs 1 and 2 the issues list of October 21 specifically refers to "wastewater". The Board member in the decision under review erred in law in not giving full effect to that order which will govern the appeal if the Kizell Motion is successful.

In that connection, it is important to note that all parties' expert statements in chief and in reply had been filed and served as of December 7, 2009. They addressed the issues as defined in the October 21, 2009 Order, including the wastewater issue. As of that date, all parties therefore had accepted that wastewater, and therefore the Jock River drainage area, were in issue, and had prepared their cases on that basis.

In the alternative, FGA will also address the revised issues list in the Order of January 13, 2010, now under review.

2. **Criteria governing sub-paragraph 17 (45) (a) (i) motion**

As set out in detail in the submissions filed in respect of the Kizell review request, FGA takes the position that a motion under the above provision is governed by the principles set out in Hunt v. Carey, namely that appeal cannot be dismissed under this provision unless it is "plain and obvious" that the Notice of Appeal has not disclosed "any apparent land use planning ground", and that, in considering such a motion, the Board should consider only the Notice of Appeal itself, and should not take into account any extraneous evidence. If the Member had applied Hunt v. Carey, he could not have granted the Order. It was an error of law not to apply the Hunt v. Carey principles.

3. Misconstruction of "Flooding".

In the decision under review, the Board member recognized that the FGA appeal dealt with "consequent increased flooding risk in the Carp River Valley" (page 3 paragraph 1). He also recognized that Notice of Appeal expressly stated that the City is already currently engaged in litigation "arising from flooding issues in the above watersheds" (Decision, page 9), but dismissed that statement as a "parenthetical allusion". In doing so, the Board Member made a serious mistake of fact, namely he overlooked the fact that the term "flooding issues", at least in the watersheds in concern, extends to flooding by both wastewater and stormwater. If he had recognized that this term includes wastewater and stormwater issues, he could not have struck out the appeal in relation to the Jock watershed irrespective of grounds 1 and 2 above. This relates to the Member's conclusion 1 as referred to above.

4. Mistaken reliance on extraneous matters

Notwithstanding his misunderstanding of the term "flooding", the Board Member recognized that appeal raised concerns relating to increased flooding in the Carp River Valley as a result of drainage issues in the Jock watershed (see in particular his finding to that effect in the first full sentence of page 13 of the Decision). However, he said that those concerns would not support the appeal, because of other, collateral environmental assessments and considerations, referred to in paragraph 3 on page 3 of the Decision and

developed at greater length at pages 10 – 12. FGA has a right of appeal under subsection 17 (24) of the Planning Act. The fact that there may be other proceedings / studies / assessments that might bear on one or other of the aspects of the appeal is not, in law, a ground for dismissing the appeal. This is a further basis for setting aside the Order that is independent of grounds 1 – 3, above. This relates to the Member's conclusion 3 as referred to above.

We will now enlarge on the above summaries of the reasons for this request.

1. Effect of the stated issues

If the Kizell review application is successful insofar as it relates to the issues list, the issues will then be governed by the October 21, 2009 Order. As noted above, that Order specifically refers to "wastewater" in characterizing the issues. As is noted above, the wastewater issue necessarily extends to the Jock River drainage lands. The October 21, 2009 Order was not appealed or made the subject of a review request. It would therefore govern the appeal if the Kizell review application is successful, and if no further modification of the list of issues is made. At present, there is no proposal for any further modification. In that scenario wastewater would therefore by Board Order constitute an issue at the hearing on the merits. The exercise of the Board's discretion under sub-paragraph 17 (45) (a) (i) was clearly in error since it was based on a statement of issues that had become academic as a result of the Board's own Order. This is an important point, as it is, to the undersigned's understanding, quite common for the Board to redefine the issues in appeals of this type. The FGA submits that if a party wishes to attack a Notice of Appeal as not raising planning issues, it should do so before participating in a process to redefine the issues. It is particularly the case when, as in the present case, all parties agreed on the issues set out in the October 21, 2009 Order. It is true that this agreement was subject to a reservation as to relevance, as pointed out by the deciding Member at pages 9 and 10 of the Decision under review, but the reservation as to relevance does not mean that wastewater is not an issue; it simply means that the

Respondents may present arguments as to the relevance of that issue in relation to the final disposition of the appeal.

In the alternative, if the January 13, 2010 restatement of the issues is sustained, we point out that the latter restatement, although it does not specifically refer to wastewater, repeatedly refers specifically to "flood risk". As pointed out in ground 3, below, flooding in Fernbank and its adjacent lands includes flooding by wastewater and stormwater. Therefore the same conclusion applies if the January 13 issues list is sustained.

2. Criteria governing sub-paragraph 17 (45) (a) (i) motions

As set out in detail in the submissions filed in respect of the Kizell review request, FGA takes the position that a motion under the above provision is governed by the principles set out in Hunt v. Carey, as referred to above. It is clear that sub-paragraph 17 (45) (a) (i) is based on the standard wording of similar provisions of the rules of the courts of all or most of the jurisdictions in Canada, derived originally from an English rule first promolgated in the 19th century. Sub-paragraph 17 (45) (a) (i) is a statutory provision governing the consideration by the Board of motions of this type. It leaves no room for the application of any discretion regarding the interpretation of the rule. The SCC in Hunt v. Carey is quite clear that its construction of rules of this type applies to all similar rules in Canada. Therefore, the Hunt v. Carey criteria are applicable in cases like the present, irrespective of the approach taken by the Board in prior cases.

In the decision under appeal the Member made the following finding, as set out in the first full sentence on page 13 as follows:

> "They [the lands south of and including the Abbott Street allowance] were therefore never subject to the appeal, except to the single extent that those OPA provisions for the Jock watershed might represent a "consequent increased flooding risk in the Carp River Valley".

He therefore recognized that, at the very least, the Notice of Appeal brought in the Jock watershed insofar as it raised a flooding risk in the Carp River Valley. It therefore could not have been clear and obvious that the Notice of Appeal did not extend to the Jock watershed. Furthermore, any consideration by the Member in his decision to other pending proceedings regarding the HPS was irrelevant and inadmissible, pursuant to the Hunt v. Carey criteria. Therefore, if the Hunt v. Carey criteria are applied, the Order sought to be reviewed could not have been granted.

3. Misconstruction of "Flooding"

As noted above, flooding in Glen Cairn has always been characterized as including wastewater and stormwater. This is generally known, and there has in fact been waste-water and stormwater flooding in Glen Cairn. This is recognized, for example, in a preliminary report cited by the Member in the Decision at page 6, in the following terms:

> "The high operating levels at some of the stations caused water levels to rise in major trunk sewers further exacerbating sanitary sewer backups. This was particularly the case at the Hazeldean Pumping Station causing flows to back up in the Stittsville and Glamorgan collectors. Phase 3 of the investigation will look into the inlet and overflow performances at the Hazeldean Pumping Station and opportunities for improvements as warranted....
>
> (The Glamorgan area) was the most severely affected by the July 24, 2009 rainfall. Based on information reported, the majority of basement flooding resulted from sanitary sewer backups...There are a number of factors that appear to have contributed to flooding and sewer backups in this area. Due to the excessive extraneous flows, the Hazeldean Pumping Station operated beyond its rated capacity and the high water level at the station caused flows to backup in the Stittsville and Glamorgan collectors. This would have exacerbated the sewer backups in the Glamorgan area."

Clearly, “flooding”, in the present context includes wastewater flooding and stormwater flooding.

Further evidence in support of this point is the fact that all the Respondents agreed to Order of October 21, 2009, which specifically referred to wastewater. All the Respondents and their counsel were presumably well aware that wastewater flooding in this area of the city had been a concern. The Motion is an attempt by the Moving Parties to negate the implied concession regarding wastewater that was inherent in their consent to the October 21 Order.

4. Mistaken reliance on extraneous matters

Notwithstanding his misunderstanding of the term “flooding”, the Board Member recognized that appeal raised concerns relating to increased flooding concerns in the Carp River Valley as a result of wastewater drainage issues in the Jock watershed (see in particular his finding to that effect in the first full sentence of page 13 of the Decision as quoted above). However, he said that those concerns would not support the appeal, because of other, collateral environmental assessments and considerations, referred to in paragraph 3 on page 3 of the Decision, developed at greater length at pages 10 – 12. FGA has a right of appeal under subsection 17 (24) of the Planning Act. The fact that there may be other proceedings / studies / assessments that might bear on one or other of the aspects of the appeal is not, in law, a ground for dismissing the appeal. This is a basis for setting aside the Order that is independent of grounds 1 – 3, above.

If someone has a right in law to pursue a particular remedy in a particular tribunal, the fact that others may be looking into related issues in other proceedings does not disentitle the party to that legal right. There is nothing in the Planning Act, the OMB Act, or any other relevant statute and regulation that deprives FGA of its right of appeal given under subsection 17 (24) of The Planning Act, just because there may be some other proceedings pending that might have some impact on some of the aspects of its appeal.

As a matter of law, this is simply irrelevant. It was a fundamental error of law for the Member to rely on these collateral proceedings in granting the Motion. If any one of the grounds 1 through 3 above is accepted as justifying a reversal of the Order under review, the fact that these other proceedings are pending does not justify a contrary conclusion, as a matter of law.

For all of the above reasons, we respectfully request the Board to rehear the motion. The issues raised above are serious and fundamental and we submit that it is in the interest of the public that these points be considered seriously by a panel of the Board, and further, that the serious issues regarding the wastewater and stormwater management design principles approved by OPA 77 be reviewed by this Board in a hearing of this appeal on the merits.

Finally, with regard to the arrangements for the rehearing, if a rehearing is ordered, we suggest that it would be appropriate to have the rehearing of the present motion heard by the same panel, and at the same time and place, as the rehearing of the Kizell Motion. This would make obvious sense in terms of efficiency and practicality, since the background of both motions is the same, the same notice of appeal is involved, the same previous Orders will be discussed, and many of the same issues are common to both reviews.

We now provide some additional information that is required in connection with review requests.

The requestor's full name, address, telephone, fax number and e-mail address as follows:

Friends of the Greenspace Alliance
240 Sparks Street
PO Box 55085
Ottawa, Ontario

K1P 1A1

Telephone: N/A
Fax: N/A
E-mail: saveourgreenspace@rogers.com

The name and address of the Requestor's representative, John Lindsay, are as above. His telephone, fax and e-mail are as follows:

Telephone: (613) 695-5555
Fax: N/A
Email: lindsay_john@hotmail.com

Copies of the documents that support the Request are attached, namely copies of the following:

1. Notice of Appeal, July 22, 2009
2. Board Order, October 7, 2009 and Attachments A and B thereto.
3. Board Order, October 21, 2009
4. Board Order, January 13, 2010 (was redated as of January 14).
5. Submissions re Kizell's Request for review of January 13, Order:
    a) Kizell's letter of February 10, 2010
    b) FGA's response of March 3, 2010
    c) Kizell's response of March 15, 2010-04-01
6. Board Order, March 12, 2010 (Order sought to be reviewed)
7. Board Order, March 26, 2010 (ordering rehearing of Kizell's motion to dismiss).
8. The SCC's decision in Hunt v. Carey

FGA has not sought leave to appeal to Divisional Court.

A cheque for $125.00 payable to the Minister of Finance is being forwarded by mail with a hard copy of this letter.

April 9, 2010

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A David Morrow
Of Counsel for FGA