COMMUNICATION – C6
ITEM 1
Special Committee of the Whole
July 8, 2020

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June 15, 2020

Sent via email to: clerks@vaughan.ca

Mayor Bevilacqua and Council
City of Vaughan
2141 Major Mackenzie Drive
Vaughan, ON L6A 1T1

Dear Mayor Bevilacqua and Council,

Re: Board of Trade Golf Course
OP.19.014, Z.19.038 and 19T-19V00Z

Donnelly Law ("we" or "the Firm") represents Keep Vaughan Green ("KVG") regarding the development applications concerning the Board of Trade Golf Course located at 20 Lloyd Street, Vaughan ("Subject Lands").

We write to put Council on notice that KVG strongly opposes Council's consideration of a request to send a Resolution of Council to the Minister of Municipal Affairs and Housing seeking a Minister's Zoning Order ("MZO") under section 47 of the *Planning Act*, R.S.O. 1990, c. P.13.

Specifically, having invested thousands of hours and hundreds of thousands of dollars in pursing their legitimate opposition to the development under the *Planning Act*, it would be an act of extreme bad faith to turn around and destroy this record of participation by writing to the Minister seeking a special favour for a developer, without any input from the local residents.

Residents have a reasonable expectation that Council will act in a transparent, inclusive and respectful way towards residents, per the Vaughan Accord. This letter will put Council on notice that circumventing the normal planning processes would be a blatant violation of the Accord, and raises serious questions concerning why some but not all developers in Vaughan receive this special treatment.

Board of Trade Golf Course Proposal

KVG invested substantial time and resources into preparing to address Mayor and Council concerning the original development application for approximately 660 units at the Board of Trade Golf Course site. That original development proposal for the Subject Lands was withdrawn by the proponent without notice on May 8, 2018. That same day, our firm wrote the City seeking an Interim Control By-law to ensure that future revisions of the development would be studied carefully, and that residents would not be rushed to complete its own technical reviews.

The revised application and technical studies was deemed complete by the City of Vaughan on February 4, 2020. The application is for an Official Plan Amendment, Zoning By-law Amendment and a Draft Plan of subdivision for the lands located at 20 Lloyd Street, Vaughan. The applications seek to facilitate the development of 475 single detached residential units, 124 townhouse residential units, and 2 mixed use blocks for apartment buildings with a unit count of approximately 616 units, totalling 1,215 units.

Keep Vaughan Green previously retained Mr. Gordon Miller, B.SC. Hon. M.Sc, former Environmental Commissioner of Ontario, to review the original development proposal associated with the Board of Trade Golf Course. Mr. Miller opined that the river valley located on the subject lands provides linkage and connectivity to the upland features, and importantly the river ultimately knits the natural area and core feature into one high value natural heritage system. The east branch of the Humber River links up with Boyd Park and the Kortright Centre. This natural heritage system is at the heart of Vaughan's riverine ecology. It is Mr. Millers opinion that the development has the potential to disrupt the entire Natural Heritage System of Vaughan.

Keep Vaughan Green also retained a hydrogeologist, Dr. Ken Howard, to review the hydrogeological studies conducted in support of the previous proposal. Dr. Howard found the documents to be "seriously deficient," in that they fail to address the proposed development's potential impact upon the natural environment and local hydrogeological conditions.

Specifically, in the 2017 Geohydrology and Geotechnical Reports by McClymont & Rak Engineers Inc. ("MCR"), MCR utilized only 13 boreholes, and ignored well data for the site available from the Ministry of the Environment and Climate Change. As a result, MCR failed to identify key aquifers beneath the site.

MCR also failed to identify groundwater flow directions, potential Groundwater Dependant Ecosystems, and did not calculate a water balance for current or post-development conditions.

Further, no surface water samples were collected, and the water quality of both surface water and groundwater was essentially ignored in the MCR reports. All leading Dr. Howard to conclude that a substantial amount of work needs to be performed that is essential to a complete evaluation of the actual impacts from the development.

The loss of this golf course will cause an enormous, unplanned loss of open space, which was never contemplated or planned. For the past number of months, KVG has been working diligently to address these new technical studies, all of which will be wasted if Council takes the unprecedented and unprincipled step of requesting an MZO i.e. a favour, for this developer.

The Law

In our respectful submission, any attempt to undermine the ability of residents to continue their opposition to these development applications under their rights afforded to them under the *Planning Act* e.g. MZO request, is an act of bad faith by Mayor, Council and Staff that supports them. Damages will be easy to quantify, given the substantial investment of KVG in the process to date.

In the Court of Appeal case of *Equity Waste Management of Canada Corp. v Halton Hills (Town)*, 1997 CarswellOnt 3270, [1997] O.J. No. 3921, the Town of Halton Hills passed an ICBL covering 1,000 acres of land, 60 acres of which Equity Waste Management of Canada Corp ("Equity") had obtained approval from the planning department to build a waste composting facility on. Equity argued that the council had acted in bad faith by passing the ICBL to appease a group of residents.

The Court of Appeal noted that:

> Interim control by-laws reflect "the Legislature's belief that a balancing of interests between the municipality and individual land owners should be built into the planning process in order to protect against over-development contrary to the public interest": Pepino and Watt, "Interim Control By-Laws and the Ontario Municipal Board" (1988), Insight at p. 3. Before the enactment of s. 37 [now s.38], the balancing of interests between the existing rights of a land owner to build and the intention of a municipality to change its zoning was assessed within the principle of *Ottawa (City) v. Boyd Builders Ltd.*, [1965] S.C.R. 408 (S.C.C.). But interim

> control by-laws differ from zoning by-laws in important ways. An interim control by-law permits a municipality to temporarily freeze development. Municipalities no longer have to show a previous intention to rezone to defeat the rights of landowners to use their land.[1]

The Court of Appeal in *Equity* found that the Council had not acted in bad faith by adopting the ICBL:

> Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.[2]

In other words, the Court looked to see if Council had acted fairly, without bias in favour of one private interest over the public interest.

In *Pedwell v Pelham (Town)*, 2003 CarswellOnt 1701, [2003] O.J. No. 1774, Mr. Pedwell used a testamentary devise to avoid requirements of the *Planning Act* in order to sub-divide land. Upon discovery of this loophole, the Town passed an ICBL prohibiting non-farm development in agricultural areas, and later passed a Zoning By-law Amendment increasing the minimum lot size in the area to frustrate Mr. Pedwell's development plans.

The trial judge accepted as fact that:

1. Mr. Judge [Chief Building Official] took direction from other town officials to delay the granting of the building permits, and, but for the intervention of these persons the building permits would have been granted in the normal course before the interim control by-law was passed on February 5, 1990, subject to health unit approval.
2. At the direction of town officials, Mr. Judge wrote a misleading letter to Tim Pedwell on January 24, 1990 giving the impression that the delay in issuing the building permits was for evaluation of the impact on planning policies and legislation by the town solicitors and planners. In fact, by that time the decision had been made to use the interim control by-law to block the development.

3. The interim control by-law itself was targeting only the Pedwell development even though on its face it appeared to have broad application.

[…]

[1] *Equity Waste Management of Canada Corp. v Halton Hills (Town)*, 1997 CarswellOnt 3270, [1997] O.J. No. 3921 ["*Equity*"] at para 49.
[2] *Ibid* at para 61.

6. The Town did not give notice to Mr. Breitkreuz or the Pedwells of the intent to renew the interim control by-law or the intent to pass Zoning Amendment By-law 1455 even though they knew of their direct interest in those by-laws.

[…]

9. The Town deliberately avoided the prospect of a public hearing where the Pedwells would have had the opportunity to present their side of the issue.

10. The Zoning Amendment By-law that was eventually passed itself violates the Regional Official Plan, which states that the maximum lot size is one acre. The real purpose behind the by-law was to frustrate the Pedwell plan.[3]

Based on the above findings, the trial judge found that the Town acted in bad faith by passing the ICBL. On appeal, the Court of Appeal reviewed the trial judge's reasoning and held:

> [The trial judge] was concerned about the process adopted and the evidence that convinced him that the Town's purpose was to target a development that its officials knew to be legal. There was evidence to support his findings in that respect. As in this court's decision in *Hall v. Toronto (City)* (1979), 23 O.R. (2d) 86 (Ont. C.A.), at 92it was open to the trial judge to find that there was "a singular absence of frankness and impartiality, which are the usual indicia of good faith" and a "deplorable lack of frankness and a calculated disregard of the appellant's right to make the best use of his property in accordance with the existing by-laws".[4] [emphasis added]

The Court of Appeal cases of *Equity* and *Pelham* confirm findings of bad faith in cases of obvious wrongdoing on the part of the municipality or its staff, such as deliberately misleading an applicant that was subject to an ICBL. Specifically, courts are sensitive to the rights of landowners who are forced to deal with municipalities not acting impartially, frankly or in good faith.

Finally, in a recent case involving the Government of Ontario, in *Nation Rise Wind Farm Limited Partnership v. Minister of the Environment*, 2020 ONSC 2984, the Ontario Superior Court held:

[3] *Pedwell v Pelham (Town)*, 2003 CarswellOnt 1701, [2003] O.J. No. 1774 ["*Pelham*"] at para 53.
[4] *Ibid* at para 73.

> Both the past practice of the Minister and the proposed procedure outlined by the Minister in this case gave rise to a legitimate expectation on the part of all parties that they would have the right to notice of the issues that were of concern and the opportunity to meaningfully address those issues.[5]

It seems the courts appreciate that residents or corporations do have rights arising from legitimate expectations that their cases will be dealt with fairly.

City of Vaughan Website & Accord

What is being proposed by a MZO, for a favoured developer, is unprecedented in Vaughan history. In our opinion, if Council advocates for one MZO, it must advocate for every Vaughan developer (many of whom are residents too) with a *Planning Act* application. To do otherwise is to betray the legitimate interests of other business interests, exposing the City to greater legal liability.

The Vaughan website guarantees to residents:

> Before shovels hit the ground or any concrete is poured for new buildings, the City of Vaughan undertakes a detailed review which includes a public step-by-step process in advance of any projects being approved. This allows members of the community to share their concerns or comments about proposed developments. [emphasis added]

These promises would be rendered meaningless in the context of a Council request for an MZO.

In addition, a hastily arranged request to the Minister for an MZO, without public consultation, would be inconsistent with these additional provisions of the Vaughan Accord:

- Provide stable, transparent and effective governance, focused on achieving excellence, and to set this standard for all City goals and objectives;

- Act constructively, with mutual respect, and with respect for all persons who come before us;

[5] *Nation Rise Wind Farm Limited Partnership v. Minister of the Environment*, 2020 ONSC 2984, para 133.

- Provide and promote, through effective communication, meaningful and inclusive citizen engagement. [6]

To reiterate, neither Council nor Staff has ever raised the prospect of an MZO that would destroy their right to a fair hearing.

Analysis

The case law and Accord raise four primary issues that should stop Council from acting against residents by requesting an MZO.

First, Ontario courts have held that bad faith will arise when Council exercises its power to serve private purposes at the expense of the public interest. Destroying residents appeal rights and jumping a favoured developer to the front of the development application queue for the purpose of building yet another sub-division in Vaughan cannot, even in the wildest of circumstances, be spun as being in the "public interest".

Second, it is a well established legal principle that residents have procedural rights under the *Planning Act*, e.g. notice, public meetings, an open vote of Council, right of appeal, etc. Some or all of these rights will be violated in the Minister grants a request of Council for an MZO – making Vaughan morally, politically and legally liable.

Third, courts in Ontario don't favour governments that change the rules in mid-stream. KVG is already heavily invested in the *Planning Act* process, who will compensate them if their appeal rights are wiped out by an MZO?

Finally, both the City's website and Accord guarantee residents a measure of engagement and respect concerning planning decisions that strongly encourage residents to participate. An MZO would of course render all this consultation with Council meaningless.

Conclusion

The critical matter for Keep Vaughan Green is the betrayal of trust. KVG has mobilized, hired experts and legal counsel, made submissions to Council, conducted numerous meetings, written thousands of letters and generally participated in the statutory and non-statutory public participation processes established in the *Planning Act* and by practice. Not once, ever, has Staff,

[6] https://www.vaughan.ca/council/vaughan_accord/Pages/default.aspx, accessed June 2, 2020

Mayor or Council advised the public that it would be seeking an MZO for the Subject Lands.

By encouraging the public for several years to participate in planning decisions that affect their community via various *Planning Act* processes e.g. open house, public meeting, writing letters, hiring experts, etc., Council raised a legitimate expectation in the minds of residents that the process would "play out" fairly.

The singular question that needs to be asked is this: would these citizens, investing pre-tax dollars, waste a minute of their time or a nickel of their hard-earned money, if Council had informed them at the outset that all of their efforts could be washed away by Council's endorsement of a Minister's Zoning Order? The answer, of course, is "no".

As a result, it is the expectation of KVG that Council will communicate directly with residents: there will be no MZO in this case.

Please do not hesitate to contact me at 416-572-0464, or by email to david@donnellylaw.ca, cc'ing alexandra@donnellylaw.ca should you have any questions or concerns.

Yours Truly,

David R. Donnelly

cc. Keep Vaughan Green
Hon. Steve Clark, Minister of Municipal Affairs and Housing