Trees & Forests Advisory Committee
Draft Statement Concerning the Tree Conservation Bylaw

Working Group Members: Amber Cantell, Sylvia Curtis-Norcross, Craig Linton, Calvin McCallum, Jack Winkler

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Overview:

The core mandate of the Trees and Forests Advisory Committee (TFAC) is to provide advice to ***maximize the retention of existing trees, woodlands and natural areas.*** As one of the few pieces of municipal policy that deals directly with trees on non-City lands, the Tree Conservation By-law is a key and necessary part of the policy framework which protects our natural heritage system, and a vital tool for helping to achieve the City's goals for our urban forest, as described in the draft Urban Forest Strategy, as well as the broader environmental goals of the most recent Official Plan. This is particularly true when one considers the low woodland coverage in London (7.8%) (UFORE Draft Report, 2010) and our canopy cover (25%), far below the 32% canopy cover proposed in the draft Urban Forest Strategy report (2012).

In December 2012, the Environmental and Ecological Planning Advisory Committee (EEPAC) submitted an initial set of comments concerning the Tree Conservation Bylaw to Planning Committee. While like EEPAC, TFAC is interested in further exploring the possibilities a city-wide private tree bylaw would create, especially in terms of protecting some of our largest and rarest trees, we feel it is important that the current by-law be updated in the meantime to ensure that those trees we are already trying to protect are receiving the best protection possible and in a manner that is clear and intuitive to landowners contractors, and consultants.

Speaking broadly, we recommend agreement with EEPAC's in principal, and wish to stress below some of those we see as most important to a bylaw update. In addition, there are some recommendations we would suggest modifying (p. 4), as well as a few which our committee has reservations about (p. 8). Finally, we have also provided some new recommendations of our own (p. 10).

In general, our goal has been to make recommendations that meet our mandate of maximizing tree retention while doing our best to ensure that those recommendations are fair to both private landowners and the greater public. We believe that there is potential for the Tree Conservation Bylaw to help reduce divisiveness by creating an expectation that our city's woodlots are permanent property features so that owners can purchase or choose not to purchase homes adjacent to these areas in good faith. Given that the vast majority of homes throughout the city do not offer adjacent natural areas, we believe there is benefit in creating this market diversity (in addition to the many health, environmental and societal benefits of trees and forests).

Similarly, we acknowledge that landowners should have the right to expect to gain a livelihood from a non-ESA woodland or woodlot through periodic logging, provided it is done in a sustainable manner, consistent with best practices and (where applicable) not impacting any criteria for which a woodlot was deemed significant, with an overall goal of maximizing the environmental services and ecological resources trees can provide.

In particular, we would express our *strong* support for the following recommendations from EEPAC:

1. Recommendation 1b, to add the concept of "Critical Root Zone" to the bylaw so as to prevent standards that deal only with drip line (which can easily be reduced by pruning the tree). We would recommend reference be made to Methany and Clark's 1998 *Trees*

and Development: a Technical Guide to Preservation of Trees During Land Development (Champaign, Illinois: International Society for Aboriculture) in the development of the definition.

2. We consider Recommendation 1d, to reference Schedule B-1 as well as Schedule A in the definition of an "Environmental Protection Area" **crucial** to ensuring that those features on Schedule B-1 are given the protection that was intended for them.

3. Recommendation 2a, ensuring that tree companies share responsibility with landowners for ensuring the correct permits are in place prior to cutting. Some of our members have noted instances where contractors have made cuts without the landowners knowing; as such, a strong educational component for landowners on a municipal "Urban Forestry" website would also be beneficial.

4. Recommendation 2b, to develop a tree bylaw which would specify *"that trees of specific size or species or age, regardless of their location across the City (i.e. outside EPAs) shall not be injured, destroyed or removed without a Permit."* We would note, however, that in the event that this is done, part of that bylaw should ensure that exemptions (for example, where a tree is actively interfering with a drain or water line, or has become an obvious safety risk) are clearly specified. We also feel that such a bylaw, if created, should be phased in over time and preceded by a public education campaign in order for it to be well-received.

5. Recommendation 4c calling for greater standardization of (possible) permit conditions, as well as the call for a checklist of materials to be submitted with permit applications (recommendation 3a). This will help to prevent unnecessary delays in the permitting process while helping to ensure the quality of the application.

6. Recommendation 3f, which recommends including an increase in water temperature as a possible form of water pollution.

7. All the recommendations in section 7 (*"stop work or cancel permit"*), which recommend ensuring the City has the ability to issue stop work orders under various possible scenarios.

8. Recommendation 11b, that penalties sh*ould outweigh the value of t*he lumber.

9. Recommendation 13b *("Need to ensure that trees planned for retention were in fact retained"*). We feel that follow up is a thread that should be woven throughout the bylaw, and the expense for this must be factored into fees, fines, and feasibility. We would further recommend that the individual to do the follow-up assessment be different from the one who created the initial list of trees to be cut, and preferably, City staff.

10. Recommendation 14 a, which seeks to ensure not every dead or dying tree is removed from a site, so as to preserve snags onsite for their habitat value.

11. EEPAC recommendation 16b: *"Protection of Woodlands- All woodlands greater than 1 ha should be protected by the tree conservation bylaw. The value of woodlands have been clearly established and it is counterproductive to introduce a tree cutting bylaw that does not protect all woodlands. This approach has already been implemented in other jurisdictions (e.g. York and Durham Regions). The City of London Significant Woodland Evaluation Guidelines also clearly recognize that woodlands less than 4 ha may be significant for multiple reasons."*

We would expand upon or recommend modifying the following items:

1. With regards to recommendation 1c (revising the definition of a tree) – the definition should explicitly express that a tree must be living to be injured or destroyed. If all the trees to be removed are already dead (due to natural causes), we would propose they be exempt from permit fees (though not the permitting process), similar to what is done for invasive species.

2. Recommendation 3f, that an applicant should submit hard and digital copies of completed application and ancillary documents. We feel they should only have to submit either a hard copy *or* an electronic copy. In the case of submitting an electronic copy (whether alone or with a hard copy), we would recommend a confirmation e-mail be sent by the recipient staff so both parties know where they are in the application process (if this is not done already).

3. With regards to EEPAC recommendation 3h (that a management plan must be in place before a permit is issued) and 9a (to ensure a restoration plan is in place before a permit is issued) - we would suggest there should be an exemption to these two requirements for a *small* number of trees cut per year for personal use (for example, where a landowner may only be planning on cutting one or two trees for firewood).

4. For recommendation 3i (that "regeneration" information should be included on the permit), it would be necessary to explain what data is being asked for (is it just what species are coming up, or a count of the number of stems per 10 m sq., etc.?)

5. Recommendation 4j *("When harvesting EAB infected ash, the harvest plan should include the destination(s) of the harvest logs. Best practice would include ensuring that EAB infected ash is always sent to a geographical area of higher infestation than the harvest location and certainly not go to an area of lower infestation"*). In the case of EAB, as our entire area is infected, this may be unnecessary, and also perhaps somewhat beyond the City's purview. However, landowners – especially woodlot owners – are likely to understand the importance of not moving diseased lumber to new areas. An emphasis on landowner education here might be the best approach, rather than including it as a part of the permitting process per se.

6. Recommendation 4b (*"Must leave large old trees as seed source and not be prioritized for removal because of their lumber potential."*) – it is not always the very oldest or largest trees that provide the best seed stock. A mix of trees of different sizes (from mid-age up) should be retained.

7. With regards to EEPAC recommendation 4c *("Vigorous pole size and smaller trees should be targeted for retention*") we would recommend adding "after giving consideration to possible crowing and/or density by size class issues".

8. With regards to EEPAC recommendation 4e (to develop a means to ensure cutting does not occur during breeding bird season), we would suggest that it would be simpler to state the time windows when the permit cannot be exercised to avoid bird nesting activities.

9. Recommendation 5g (requesting GPS coordinates for the proposed cut area): it would help to specify whether these coordinates are to be for the corners of the planting area or its centre. We would recommend using corners (and using as many are needed to adequately define the maximum extent of the polygon).

10. Recommendation 6a calls for a one year expiry on permit: we would suggest a 2 year time frame may be more appropriate, as this will provide landowners some flexibility in terms of when to cut if it proves to be a wet year.

11. Recommendation 7ai recommends that incomplete applications be one reason for a stop work order: we would of course hope that a permit would never be issued in such a scenario to begin with. We would recommend adding a note that permits will not be issued for incomplete applications.

12. 8c of EEPAC feedback: ("*Ecological function, diversity, net environmental gain, etc should be stated as objectives of the remediation (as opposed to simply replacing mature trees with the same number of saplings)"*)

    a. We would suggest that the Tree Conservation Bylaw itself should talk more about these broad goals, and to use positive language that really emphasizes its use in achieving the goals that are ultimately set out in the Urban Forestry Strategy.

    b. How will environmental net benefit be quantified? The concept is valuable, but there needs to be clear standards and tools for measurement tied to it in order for it to be at all useful, along with some flexibility for staff in terms of setting requirements regarding how applicants will help achieve it. We would also question whether or not it is really possible to achieve "environmental net benefit" on, for example, a property which is already fully wooded and in good health. In such cases, it would be worth exploring how this idea of "net benefit" might then relate to concepts such as mitigation banking, or working with additional partners who have lands that need planted and who could receive seeds or stock from those wishing to do a cut.

    c. It should be explicitly noted within the bylaw that planting saplings or even a typical (40 – 60 mm) calliper tree in no way comes anywhere close to compensating to what is lost when a mature tree is cut down. If ratios are to be used, they should be based on *area* of land cut (for example, reforesting 6 acres of land for every 1 acre cut), as well as the number and size of trees lost. For number of trees, perhaps some ratio could be created (for example, 1 3- 5' sapling for every cm of tree cut, as measured at stump height). Another option we would recommend being given consideration would be replacing trees on the basis of total diameter cut (for example, if a tree with 26" diameter at breast height (DBH) is cut, but a 26" tree cannot practically be purchased and planted due to size, 26 1" diameter trees could be planted in its stead).

13. Recommendation 9a: *("Need requirement to ensure restoration plan is in place before permit is issued"*). We would recommend adding the word "adequate" before "restoration plan" – in some cases, cuts may be too small to require such a plan (but we would also recommend clear guidelines for when this would be the case, and suggest that the threshold for not requiring a restoration plan be set relatively low).

14. There needs to be more elaboration on what sort of things might be included in the restoration plans referenced in Section 9 of EEPAC's recommendations document. In addition to those items noted by EEPAC, we would suggest such plans potentially include:

    a. Planting requirements (trees, shrubs, forbs)
    b. Removal of invasives (with reference being made to how they will be removed)
    c. Any plant care activities (mulching, watering, tree collars, rodent repellent, etc.)
    d. Any changes in grade
    e. Any requirements concerning either soil movement or amendment
    f. Seed collection
    g. Plant rescues
    h. Destination of new plant material (in the event of off-site restoration being proposed to provide "net environmental benefit")

i. Furthermore, where restoration is required, stock size and aftercare requirements should be included, as these can greatly affect the survival of the plants (and how many should be purchased for planting in the first place).
j. A checklist of options (with room for "other") may be a helpful tool in helping proponents prepare a restoration plan as a part of their permit application.

15. With regards to the measurement, monitoring and reporting requirements following restoration/remediation (See EEPAC recommendations 8f and9b), we would strongly recommend that these should include time limits for completion (both of work and reporting). The point at which the remediation is considered self sustaining and "successful" (based on scientific data) should be clearly defined

16. We would add to the list of recommendations under section 15 (invasive species) that there should be no need for a permit to cut select non-native invasive species (unless City staff feel that this would lead to other problems), and that a list of these exempted species should be included in the bylaw. We would stress that this list should *not* include native woodland species such as willows and cottonwoods, which are often considered too aggressive in a streetscape but which are entirely suitable to a natural area.

We disagree with or have reservations concerning the following items:

1. Recommendation 2c, which states that the *"City should have ability to deny issuance of a permit to persons who have contravened this bylaw*". We would recommend limiting this so as to confine such actions to relatively large scale infractions (or to individuals who have made multiple infractions over the course of a set number of years), so as to avoid over-penalizing (permanently penalizing), for example, a farmer who made a small scale cut in ignorance of the law – the loss of future ability to cut trees with a permit could have substantial impacts on their livelihood. Though we would recommend consultation with the City's legal staff, we suspect that such a permanent ban may need to be something decided by the courts. If this is the case, we would then encourage the City to seek such an ability on a case-by-case basis where it is felt the infraction warrants it.

2. We have some concerns that the amount of data being requested may be excessive for some landowners, especially depending on the number of trees being cut. This is especially the case with recommendation 3e: "*Mapping of proposed cut area should clearly delineate ELC classifications and possibly supply completed ELC sheets*", which we would suggest should likely be limited to ESAs and/or cuts over a certain size. Most foresters are not trained in ELC and training opportunities are very limited (with very long wait lists). Is there a more general way we could request information concerning the character of different stands, or that the amount of data being requested could vary with the proposed size of cut?

   We would recommend further consultation with the City's Forestry staff to ensure what is being requested will not be too onerous on property owners.

3. With regards to 4a (that cutting activities must be *"in accordance with the overall and/or specific management goals (or nature) of the area to be cut. For example, cutting within an ESA should have regard for the features of the area which qualified it as an ESA."*), the City would need to supply this information to the landowner and/or consultant in a timely manner (or ensure that it is readily available through the City website). The same would need to be true for recommendation 3j (that the application include reference to or information from previously issued permits).

4. With regards to EEPAC recommendation 4f (to use scientific names for all trees), the example given recommends the use of full scientific name for hawthorn. Several genera of trees (notably hawthorns and willows) hybridize so easily as to make identification to the species level extremely difficult, and there are only a few specialists in the province

who can do so reliably. A better approach for these genera might be for the permit applicant to confirm they are *not* a species at risk (even if the exact species cannot be determined beyond that). We also note that hawthorns are not generally targeted by loggers because of their small pole size.

5. We do not believe that recommendation 4i ("*Harvest Plan should be clear as to the intended use of the lumber to be harvested since this informs what trees have what degree of value in a near death or dead condition, which in turn informs the best management practice scope of the current harvest*.") provides any environmental benefits to the city – how the landowner wishes to use the lumber should not have a bearing on their ability to get a permit, and as far as selecting the most appropriate types of trees to meet their intended use, this should be the responsibility of the landowner and their contractor.

6. It is felt that the first part of EEPAC recommendation 4l ("*Harvest plan must include identifying the ecosystem trajectory"*) may be unduly onerous on the landowner.

7. Regarding recommendations 5b (public meetings for cuts of a certain size), 12a (for posting permits online) and 12c (for posting additional signage onsite concerning the cut): we have some concerns about the potential for this to pit neighbour against neighbour. Although it is possible that these recommendations will be helpful in some instances (particularly if an illegal cut is occurring), it is likely that doing so will in some cases create undue difficulties for property owners who are simply trying to make a living off their land. If permits will be publicly posted, it should be along with contextual/educational information to explain the process and why cutting is being permitted. If these recommendations (5b/12a/12c) are implemented, we feel that it is important that they be part of a broader Urban Forest online education, information and resource initiative so that citizens will have a better appreciation of when (and when not) permits are granted.

8. 7aiii recommends a stop work order in the event of a permit being issued in error. While we agree with this in principal, some form of compensation to the landowner may be appropriate for costs they may have incurred under the (mistaken) belief that the municipality was going to allow them to proceed through no error of their own. We would recommend a maximum value being set for such compensation.

9. 7aiv recommends allowing a stop work order in the event of *"changed available information or circumstances"*. While there are some scenarios where this would make sense (for example, the discovery of an endangered species on site), the current wording is quite broad and seems to serve as too much of a catch-all.

10. Recommendation 8a (regarding payment for required remedial work, in scenarios where the permit holder has failed to complete it and the City has had to do it instead): "Section 12.1 (2) revised as: Costs include interest calculated at a rate of fifteen (15) per cent *compounded monthly*, calculated for the period". Monthly compounding of interest seems excessive to us – we would be in favour of annual compounding instead.

11. Recommendation 11b, calling for confiscation of lumber in the event trees are cut without a permit. Confiscating property in this manner would suggest that the municipality has some right of ownership over a citizen's land (and lumber), which would likely be "bad optics" and generate considerable ill-will. We would recommend sticking with fiscal penalties (which potentially could include requirements for restoration at the landowner's expense).

12. While we agree in principal with EEPAC recommendation15a *("As invasive alien species are a constantly growing problem in our natural areas, every permit should include management of invasive alien species, including removal, avoidance of new*

introductions, and avoidance and removal of regeneration"), the fact is that landowners are in most cases not responsible for the arrival and establishment of invasive species on their site (or in our country), and many of our woodlots contain an enormous number of these plants. The City of London has considerably more resources than the typical landowner, and yet the municipality still struggles with invasives on the vast majority of our natural heritage lands, despite considerable efforts (and resources directed) at management. As such, we would recommend that any request for invasive species management must be of a reasonable *scale relative to the number of trees requested to be cut*, and not be unduly onerous on (or excessively costly for) a landowner.

We would make the following additional suggestions for improving the Tree Conservation Bylaw:

1. Ecological restoration should be added to the "definitions" section

2. In addition to including the features on Schedule B-1 (Natural Heritage Features) to the "Environmental Protection Areas" (as defined in the by-law), we would recommend adding all "Natural Hazards" listed on Schedule B-2 and/or zoned Open Space 4, as in most cases tree cutting in such areas can both be dangerous and increase the risk of slope failure and/or erosion.

3. We would recommend the City investigate the possibility of using aerial photography to discover large unreported cuts made without permits, as it seems this (illegal large scale clearing of land for development) is the greatest concern among Londoners when it comes to cutting down trees. The below example shows the visual impact of (legal) ash cutting at Helen Mott Show park, and how this can be seen from aerial photos. However, it is believed that the City currently has only 6 months to lay charges, which would forego the use of aerial photography this way. If this is the case, it may be worth lobbying the province for a longer term for pressing charges to make use of this technology for enforcement.

Helen Mott Shaw Park, 2008, prior to cutting of trees for Emerald Ash Borer

Helen Mott Shaw Park, 2012 – note the large number of downed trees as a result of Emerald Ash Borer

4. The City may wish to consider the difference between ***environmental net gain*** (which is driven primarily by the amount of land providing environmental services) and ***ecological net gain*** (which deals with the quality and health of a given site). We consider both goals important to the sustainability of London.

   Mitigation banking may be a potential tool for gaining net environmental gain, provided it is at a ratio that is (preferably considerably) greater than 1:1 on the basis of acreage. But regardless of what approach is pursued, we feel it is essential that there are clear tools for measuring net gain.

5. We would recommend that consideration be given within the bylaw to any requirements that should be set at a higher level for ESAs than other woodlots in Environmental Protection Areas.

6. Reference is often made in forestry documents about “Good Forestry Practices”. It may be helpful to somewhere express examples of “Bad Forestry Practice” which would under no circumstance be permitted.

Legal Questions:

Our membership is unsure of the legality of some issues related to the Tree Conservation Bylaw and the proposed changes from EEPAC, and would like to request legal input, if possible, so as to help guide our discussions on this bylaw and other related topics. Specifically, our questions are:

1) **(With regards to EEPAC recommendation 8d, requesting the levy of additional payments for ecological restoration following tree harvesting for which a permit has been issued)**

We support this item in principal, but would ask to confirm whether or not the municipality has the ability to charge for such a planting? (Or would a court need to impose such a levy?)

This question has arisen because of **Section 394(e)** of the Municipal Act, which states "No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to (…) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources. 2001, c. 25, s. 394 (1); 2006, c. 32, Sched. A, s. 166."

s. 135.7 (a) states, however: "Without limiting sections 9, 10 and 11, a municipality may, in a by-law passed under this section,

(a) require that a permit be obtained to injure or destroy trees"

While **s. 391. (1)** goes on to say "Without limiting sections 9, 10 and 11, those sections authorize a municipality to impose fees or charges on persons,

(a) for services or activities provided or done by or on behalf of it".

2) **(With regards to section 18 of EEPACs recommendations, dealing with the Schedule D Permit Fees, and section 5c, discussing the current Schedule C Security Agreement)**

Given that Section 394(E) of the 2001 Municipal Act says there cannot be a fee with respect to harvesting a natural resource (as discussed above), does the City have the right to charge a fee (and/or request a security) for a tree cutting permit?

3) **(With regards to EEPAC recommendations 11d and 11e, discussing the penalties to individuals acting contrary to the Tree Conservation bylaw)**

Does the Municipal Act specify what penalties a municipality can enact in the event of trees being injured or destroyed contrary to this by-law? Are municipalities free to set whatever penalties they feel appropriate, or are penalties typically decided upon by a court of law?

4) **With regards to EEPAC recommendation 15a, dealing with including the removal of invasive species as a part of the management plan to be required as a part of the permitting process)**

Does the Municipal Act allow a municipality to require the removal of invasive species on private land, in order to protect the environmental well-being of the greater municipality, or is the municipality limited to only regulating the injury and destruction of trees that a private landowner has already stated they wish to cut?

We reference:

- **s. 135. (1)** "Subject to subsection (4) and without limiting sections 9, 10 and 11, a local municipality may prohibit or regulate the destruction or injuring of trees. 2006, c. 32, Sched. A, s. 71 (1)."

- **s. 10. (2)** "A single-tier municipality may pass by-laws respecting the following matters: (…)

    5. Economic, social and environmental well-being of the municipality."

As well as the following sections of the Weed Control Act:

- s. 3. Every person in possession of land shall destroy all noxious weeds on it. R.S.O. 1990, c. W.5, s. 3.

Noting the exception in section 22:

- s. 22. Sections 3, 13, 16 and 18 do not apply to noxious weeds or weed seeds that are far enough away from any land used for agricultural or horticultural purposes that they do not interfere with that use. R.S.O. 1990, c. W.5, s. 22.

And the ability of a municipal to list additional species noted in section 10:

- s. 10. (1) A council of an upper-tier or single-tier municipality that has appointed an area weed inspector or a council of a local municipality that has appointed a municipal weed inspector may by by-law designate as a local weed any plant that is not a noxious weed. 2002, c. 17, Sched. F, Table.

5) **With regards to EEPAC recommendation 10a, calling for remediation and restoration work required as a part of a tree cutting permit to be put on title, so as to prevent the sale of the property leading to a failure to complete the required work.**

We strongly support this recommendation, but again wish to confirm that the municipality has the right to do this.

6) **There is a lack of clarity on whether or not the City, as a Single-Tier Municipality, has the right to regulate "woodlots" or if it is restricted to only dealing with individual trees. Putting aside the fact that woodlots are essentially groups of individual trees, how should the wording in section 135 of the Municipal Act be interpreted?**

We would reference (with emphases added):

- **135. (1)** Subject to subsection (4) and without limiting sections 9, 10 and 11, a ***local*** municipality may prohibit or regulate the destruction or injuring of trees. 2006, c. 32, Sched. A, s. 71 (1).

  Woodlands

- (2) Without limiting sections 9, 10 and 11, an ***upper-tier*** municipality may prohibit or regulate the destruction or injuring of trees in woodlands designated in the by-law. 2006, c. 32, Sched. A, s. 71 (1).

  Restriction

- **(4)** ***If*** an upper-tier municipality by-law in respect of woodlands ***is*** in effect in a lower-tier municipality, the lower-tier municipality may not prohibit or regulate the destruction of trees in any woodlands designated in the upper-tier by-law and any lower-tier by-law, whether passed before or after the upper-tier by-law comes into force, is inoperative to the extent that it applies to trees in the designated woodlands. 2001, c. 25, s. 135 (4).

  Factor to be considered

- **(5)** In passing a by-law regulating or prohibiting the injuring or destruction of trees in woodlands, ***a municipality*** shall have regard to good forestry practices as defined in the *Forestry Act*. 2001, c. 25, s. 135 (5); 2002, c. 17, Sched. A, s. 27 (1).

As well as:

- **8. (4)** Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and ***on any basis*** a municipality considers appropriate. 2006, c. 32, Sched. A, s. 8.