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June 3, 2014

BY EMAIL

Our File No.: 118275

The Corporation of the City of London
City Hall
300 Dufferin Avenue
London, ON N6B 1Z2

Attention: Mayor Fontana & Members of Council

**Re: Mud Creek Subwatershed Study Update
Report and Recommendation from Civic Works Committee
Agenda Item 11 of Civic Works Committee, held May 26, 2014**

Please be advised that Aird & Berlis LLP represents ESAM Construction Limited and Sam Katz Developments Limited. Together, these entities own more than 70 acres of land within the Mud Creek Subwatershed study area.

The purpose of this letter is to request that Council defer any consideration of Agenda Item No. 11 from the Civic Works Committee meeting held May 26, 2014 and for the matter to be sent back to the Civic Works Committee to receive deputations from our client and other interested stakeholders within the immediate vicinity.

This letter is also requesting that Council provide clarification and direction with respect to the status of the Mud Creek Environmental Assessment.

As Council will be aware, our client, along with other stakeholders and landowners in the immediate vicinity, entered into an agreement with the City of London to be a co-proponent for an environmental assessment ("EA") of the Mud Creek area. The agreement and the EA study were authorized by Council in 2007. The EA was funded by the owners in the immediate vicinity to a total cost of \$171,242.50, of which our client contributed \$100,000.00. The Council resolution approving the EA, and a contract for services with Development Engineering to undertake the work, reference the landowners as co-proponents of the study. To date, and despite requests including the filing of a Freedom of Information Request, neither the results of the environmental assessment to date nor the draft report prepared by Development Engineering have been shared with our client.

In July, 2010, Ms. Krichker, the Manager of the Stormwater Management Unit, advised Development Engineering that their specific contract to undertake the EA was being terminated. The reason for the halt to the EA work was to permit the City to undertake an update to the 1995 Mud Creek Subwatershed Study "prior to completing the Municipal

Class EA Study" for the area. It was our client's understanding that the EA study was being halted only so as to permit the Subwatershed Study update to be undertaken as an input into the broader EA process.

Last week, in response to correspondence from our office requesting certain documents and an opportunity to meet with staff in order to discuss the results of the Mud Creek Subwatershed Study update, Mr. John Braam, Managing Director of Environmental and Engineering Services for the City of London, provided our office with correspondence in return. In that correspondence, Mr. Braam advised our office that the Mud Creek Environmental Assessment is no longer underway. This is the first time that my client, a co-proponent of the EA, has been advised that the project has been terminated as opposed to put on hold while the Subwatershed Update was undertaken. In that correspondence Mr. Braam also offers to return the \$171,242.50 contributed by the landowners as co-proponents of the EA.

We would ask that the City provide us with the Council authorization to terminate the Mud Creek Environmental Assessment, as our client was not advised of any such decision.

As noted above, the Mud Creek Environmental Assessment process has been delayed for nearly 5 years in order for this Mud Creek Subwatershed Study update to be undertaken. We have now been advised, for the first time, that in fact the Mud Creek EA was terminated by staff at some point following 2010. While there have been some public meetings as part of the study update process there has been no consultation of the stakeholder landowners in the area, most particularly our client. Additionally, at no point in this process was the termination of the EA process brought to our client's attention.

Moreover, in the event that the Mud Creek Subwatershed Study update now becomes an originating study rather than an input into the EA, it changes significantly the import of this study and its potential impact on our client's property. To have this study go forward and approved by Council as is suggested by staff **without any meaningful consultation** with landowners is unfair and unreasonable in the extreme. Mr. Braam in his correspondence suggests that there were two public meetings that were held in respect of the study. We reiterate again that no direct consultation occurred with our client, a significant landowner within the study area.

Additionally, and perhaps most importantly, there has been **no consultation since staff arrived at a preferred scenario and no opportunity for consultation since the staff report recommending an alternative in the Mud Creek report was released on May 26, 2014. (released May 26, 2014).** This is not meaningful consultation.

The results of the Mud Creek Subwatershed Study update have the effect of potentially freezing or removing from any development scenario a significant portion of our client's land holding of 70 acres and those of other landowners in the immediate area. This is being done with a study which is not appealable under the *Planning Act* and cannot be challenged in the usual planning regime. Our client's consulting engineers have undertaken an initial review of the preferred scenario and have identified issues with both the methodology and result. A copy of Development Engineering's correspondence of

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May 26, 2014 is attached. It is apparent based on Development Engineering's initial review that there is room for further discussion and analysis prior to the City approving a preferred scenario. This underscores our client's view that for the City to have undertaken this work which will have a dramatic impact on stakeholders in the area without any meaningful consultation is patently unreasonable. In our view this approach by the City constitutes an expropriation without compensation of our client's lands.

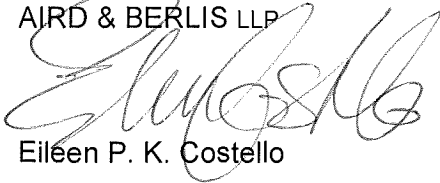
It is for all of these reasons that we are requesting that Council send the report back to the Civic Works Committee, direct staff to meet with interested stakeholders including landowners and the Conservation Authority, and to consider alternative options that are proposed by the stakeholders prior to coming back with a report to Council which evaluates the alternatives being suggested.

Our client's Draft Plan of Subdivision was originally approved over a decade ago. Since that time, our client has been attempting to bring the application forward but have been stymied at every turn by steps taken by City staff. Our client has cooperated fully with the City at every stage, including funding the EA. We have waited, as the City requested, while the Mud Creek Subwatershed Study update to the EA was undertaken. To be told now that the EA is no longer a functioning study and to have the Subwatershed Study Update come forward without any meaningful consultation is not reasonable, does not represent a fair and transparent process, and will not ensure that the City of London and the interested stakeholders in this area continue to work in a cooperative fashion.

We appreciate Council's consideration of this matter and look forward to having an opportunity to review the study with staff in a consultative fashion.

Yours truly,

AIRD & BERLIS LLP



Eileen P. K. Costello

EPKC/ab

Encls.

cc Client
Edward Soldo – Director of Roads and Transportation
John Braam – Managing Director and City Engineer
Berka Krichker – Manager of SWM
Jim Barber – City Solicitor

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May 26, 2014

Project: DEL12-103H

Esam Group
c/o Mr. Steven Ruse
Herefordshire Capital Corporation
10095 Pineview Trail, Campbellville, Ontario, L0P 1B0

Attention: Mr. Ruse

Re: Mud Creek Subwatershed Study Update Review Comments

As per direction from your firm we have undertaken a cursory review of the proposed Mud Creek Subwatershed Update (MCSSU), dated April 2014, prepared by Delcan on behalf of the City of London and the local stakeholders group. The following is a brief summary of some concerns or points which we would suggest require further clarification by the City:

- a) Page 115 (recommendation #8) of the report and page xii of the addendum – outlines the many independent design studies that would be required of private land developers in order to justify development adjacent to Mud Creek in proximity to the floodplain. This appears to effectively “piecemeal” the water resources studies that are typically and traditionally undertaken on a river reach basis (ie. across multiple property boundaries) due to the focus being the water resource. Breaking this up among various developer interests has the potential to result in long delays as different consultants could be involved, with different modelling assumptions, different software packages, etc.
- b) Page viii of the addendum – CN Culvert and Embankment: reference is made to potential blockage of the undersized CNR culvert and the potential for up to 10 metres of backwater (depth behind the railway embankment) to develop. Relative to typical maximum flooding depths included in the City design standards, it would seem odd that this very real risk (defined in the report as the intersection of a hazard with vulnerability) was not considered to be more crucial in the risk assessment decision making process due to potential impacts to Oxford St. (arterial), Proudfoot Lane, and the surrounding development including London Mall, Fleetway, the commercial enterprises west of Proudfoot Lane and the Suncor gas station (Proudfoot and Oxford).
- c) Page ix of the addendum – Promotion of Infiltration: with due respect, it has been our experience that encouraging infiltration in clay subsoils does not provide any appreciable runoff abstraction of engineering significance and tends to result in landowner complaints regarding saturated greenspace areas. Many reputable geotechnical engineering firms have tended to support this observation where sites are developed in an aquitard regime. We would respectfully disagree with the statement in the report that “infiltration to a degree occurs at all soil types, so development site plans should seek to maximize the amount of pervious area”.



- d) Page 34 of the report – Geomorphology: From Parish’s review, the reaches upstream of CNR were identified as a sediment trap, due to backwater conditions, design slopes and other issues. Indication was given in strategy 2 (p.70) that an increased streambed gradient (through a lower CNR culvert downstream) could have beneficial effect on stream geomorphology as was indicated during previous studies undertaken by our firm.
- e) Table 5-1 – Hydrologic Model comparison (1995 v. 2012): it remains our opinion that comparison of peak runoff flows between a 6 hour storm event (1995 model) and a 3 hour storm event (2012 model) is statistically irrelevant for the purposes of engineering comparison.
- f) Page 49 of the report – Model tailwater conditions for HGL analysis: it appears the 100 year flood elevation on the Thames River (234.5m +/- to 235m +/- under CC_UB per Figure 5-2) was used to assess the downstream control on the HGL, despite the fact that the time to peak of the urban Mud Creek basin (+/- 759 ha) would be expected to occur over a period of less than 8 hours relative to the greater Thames River watershed (3040 sq.km., largely rural and being 400 times greater area), which through UTRCA hydrograph data obtained by our office would peak between 7 and 8 days for such a storm event. The engineering criticality of this modelling decision remains in question on the basis of statistical relevance, as it bears upon the project team’s rationale for not replacing the critical CNR culvert with deeper invert due to risk of backwater flooding.
- g) Page 49 of the report – 2012 MCSSU model accounting for sediment accumulation in the creek: if the City’s preference is not to drop the streambed gradient upstream of the CNR embankment, it would seem then that the existing submerged conditions of City storm sewer outfalls at the Oxford St and the Proudfoot Lane culverts would be an acceptable condition to remain under Alternative 1. Under such conditions, as has been witnessed by staff from our firm such as occurred on May 28, 2009, surface flooding within the Oxford Street corridor could be expected to continue due to restricted inlet capacity and minor system surcharge and blockage, without any incidence of channel bank overtopping in the east branch of Mud Creek.
- h) With alternative 1 recommending continued application of PPS SWM controls on individual sites, we would respectfully again suggest that minimum practical orifice sizing across multiple sites (instead of more centralized, regional controls) limits the duration of hydrograph drawdown (limited to several hours rather than 24-48 hours) such that significant peak flow attenuation at the critical downstream CNR culvert may not be realized to sufficiently mitigate flooding impacts upstream of the CNR culvert. The capacity restriction imposed by the CNR culvert remains the critical piece of infrastructure in our view.
- i) The alternative 1 concept of simply lining (structural) the existing CNR culvert (inside existing opening, which has different cross sections through its 80m length) without dropping the Mud Creek streambed profile would do nothing in our view to improve conveyance capacity in the existing Oxford St. and Proudfoot Lane culverts, which when designed decades ago, were clearly sized with a deeper floor elevation to accommodate future improvement in channel flow capacity. In our view, the cleanout of culverts and channel would simply be a short term aesthetic improvement, but the long term infrastructure tailwater problems would remain unsolved and street flooding of Oxford St. and Proudfoot Lane can be expected to continue. If as indicated on page 49 the “sediment levels have increased by up to 2 metres” in the channel since the 1995 study, it



- would seem this accumulation has already posed a significant operation and maintenance issue for City that has apparently gone unresolved over that time period.
- j) We find it interesting that the study did not recommend implementation of a Two Zone Floodplain management policy, which would be subject to UTRCA approval, to formalize the available development limits based upon encroachment scenarios on a river reach basis. With the degree of agency consultation as claimed in the report, and considering the bulk filling concept of alternative 2 was carried forward so far in the SSU process, we would have expected this option should have been considered. Perhaps the pending UTRCA floodline mapping exercise can be leveraged to give due consideration to this alternative management policy, which is recognized under Provincial Policy.
 - k) CNR culvert inspection by CN: the report indicates the CNR culvert was scheduled for structural inspection in late 2013. Does the City now have copy of the results of this review? Have they been requested from CN? It appears from the report, the City is deferring all ownership of the undersized CNR culvert to the Railway authority instead of taking a leadership role in the management of the water resource and land use in this basin. It is anticipated that if future replacement were warranted, CN would likely be in a position to replace "like for like" without giving due regard to its critical conveyance role in this basin, and as issued to date, the MCSSU report makes no recommendation to what an appropriate size should be to provide a sufficient level of service to the Mud Creek east basin (+/- 400 ha).
 - l) As noted through previous discussions with the UTRCA it was expected the MCSSU would provide updated regional floodline mapping. Since it has not the UTRCA has undertaken their own mapping exercise which will hopefully be available by the end of summer. As the area has no positive outlet (that being the CN culvert lowered and sized appropriately along with the upstream channel) water will ultimately backup in the system and flood wider areas thereby increasing the regulatory limits and reducing the amount of developable land area.
 - m) Seems odd that after a 2 year study and so much consultation with UTRCA (over 25 meetings as identified multiple times in the report), that the preferred alternative #2 would be carried so far into the process (incl. bulk filling of low lying lands which is not consistent with OP, UTRCA and provincial policy) that a Jan. 2014 addendum would be required to revise the preferred alternative. From public meeting discussions, we recall UTRCA making their concerns known. How could that much agency consultation occur without having clarified such an option was not appropriate?

It should be noted that due to time restrictions we have only carried out a brief review of the MCSSU to date and would suggest a more thorough review be completed to determine the full impacts on the ESAM lands.

We trust that this is all the information you presently require, should you have any further questions feel free to contact our office.

DEVELOPMENT ENGINEERING (LONDON) LIMITED

J. Thomas, Managing Partner

J.D. Thomas, E.B. Wszol, P.Eng., J. Fleury, C.E.T., R.A. Hern, P.Eng.