



April 8, 2018

Mayor and Council
London City Council
300 Dufferin Avenue
PO Box 5035
London, Ontario N6A 4L9

Attn: Planning and Environment Committee

Re: Medway Valley Heritage Forest ESA

His Worship Mayor Matt Brown,

We represent Lower Medway Valley Ratepayers Group Inc. (“LMVRG”). LMVRG has asked us to provide a legal opinion regarding the interpretation of s.80.15(5) O. Reg. 191/11 of the *Accessibility for Ontarians with Disabilities Act, 2005*, (“AODA”) as it relates to expanding access to the Medway Valley area by the installation of bridges along the Medway Creek, and our opinion regarding the precautionary principle, as it may apply.

The Medway Valley Heritage Forest Environmentally Sensitive Area (“ESA”) is a unique element of the City of London’s natural heritage system. Surrounded by urban development, the valley contains rare remnant species from the Carolinian forest and provides habitat to at least nine listed as threatened or endangered under the *Endangered Species Act*. Additionally, as cited in the 2016 Committee on the Status of Endangered Wildlife in Canada recovery strategy, the largest sub-populations of False Rue-anemone in Canada are found within the Medway Valley Heritage Forest ESA. This invests London with a profound conservation responsibility, which is your obligation under the Ontario *Endangered Species Act*. Council will very likely violate these important obligations with the approval of these bridges.

LMVRG has retained an expert, the former Environmental Commissioner of Ontario, Mr. Gord Miller MSc., a world-renowned biologist and ecologist. He believes that the proposal may pose a significant risk to Medway Valley Heritage Forest ESA, its species at risk, ecological integrity, and natural features.

Our brief conclusion is as follows:

- a) It is the opinion of Mr. Gord Miller, that the False Rue-anemone colony may be put at risk by the bridges;
- b) Based on Mr. Miller's opinion, the City of London may be exempt from complying with AODA, and therefore
- c) is not required to provide the bridges per the AODA; and
- d) The City of London should decide to either modify the Plan or defer a decision until a more sensitive ecological alternative can be presented and debated.

Expanding access to the public is proposed by installing two bridges across the Medway Creek (at locations referred to as A and D in the CMP) to increase access to the trail system. It is stated by the Conservation Master Plan that since the bridge would constitute redevelopment of recreational trails, they would be subject to accessibility standards required under O. Reg. 191/11 of the *Accessibility for Ontarians with Disabilities Act, 2005*. While this is true, an exemption and compromise solution is preferable.

After consultation with the LMVRG and Mr. Miller, it appears that a redesign of the trail that avoids the stream crossings and colonies of False Rue-anemone is technically feasible and would not detract from the user's experience. In fact, a more progressive approach to trail management would see the LMVRG, local field naturalists, disability community and Council work together to present a more intensive interpretation and orientation program that would maximize public interest in this nationally significant natural heritage area without the risk.

Having participated in numerous land use conservation plans, there is no doubt in our mind that this is the least intrusive, most beneficial and by far the most cost effective solution for the entire city.

Section 2.3 of the Guidelines for Management Zones and Trails in ESAs (2016), Policy for Trail Planning and Design states:

Trails to permit access for persons with disabilities, consistent with these guiding principles and AODA requirements, will be provided where this can be achieved while protecting the ecological integrity and ecosystem health of the ESA.

Mr. Gord Miller has reviewed the issues at hand and provided LMVRG with his assessment.

These guiding principles clearly state that the focus of management of this ESA is ecological function, ecological integrity and protecting the natural features. Further, the CMP document itself acknowledges that trail

development is a risk to natural heritage features. Creating any additional risk to endangered species like False Rue-anemone would violate the guiding principles.

To my reading of the analysis to date such certainty has not been ascertained. The review of the possible river crossings merely considered whether there was a significant ecological feature present at the location (answer “no” for both A and D although D was initially not recommended). There was no mention of consideration of the change in volume and nature of traffic on the newly linked trails and how might this impact adjacent colonies of species at risk (neither was such an analysis in the terms of reference). In my opinion the absence of such information is fatal to the decision to proceed with the linkages and the bridges should not be built. [emphasis added]

Based on Mr. Miller’s review, it is our opinion that Council should re-evaluate the Plan and look for an alternative solution.

The uncertainty and lack of information regarding impacts to natural heritage features should not be used as a reason for proceeding. Further, s.80.15 O. Reg. 191/11 of the *Accessibility for Ontarians with Disabilities Act, 2005* provides exceptions to the requirements for recreational trails and beach access routes, and states:

Exceptions to the requirements that apply to recreational trails and beach access routes are permitted where obligated organizations can demonstrate one or more of the following:

- (5) There is a significant risk that the requirements, or some of them, would adversely affect water, fish, wildlife, plants, invertebrates, species at risk, ecological integrity or natural heritage values, whether the adverse effects are direct or indirect.¹

Inexplicably, the Conservation Master Plan omits both an explicit reference to this critical exemption and a discussion of its applicability. To deny this important consideration is to present only half of the legal and policy regime Council must consider before rendering its decision.

In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, the Supreme Court of Canada spoke of the “Precautionary Principle” as part of International Law:

¹ *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11, O. Reg. 191/11 s.80.15(5)

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.²

While recognizing that you generally support access to parkland and greenspaces, however, the decision of Council jeopardizes the largest sub-populations of False Rue-anemone in Canada.

In order to protect this population of False Rue-anemone, our Client is seeking at least deferral of Council's decision so that a less intrusive and more accommodating alternative can be devised and discussed. We would be much obliged if the Committee would provide our office with a copy of the legal opinion that has been referenced numerous times to justify the bridges but has never been seen.

We would respond immediately when in receipt of this opinion. In closing, it would be somewhat surprising to learn that the opinion: a) does not reference Council's discretion to invoke the aforementioned exemption; or, b) recommends against invoking the exemption, in absence of concrete proof that the natural heritage features are protected (per Mr. Miller's concerns); and, c) omits a careful and common sense reading of the AODA that clearly demonstrates why refusing two bridges (which prohibits access for all citizens) triggers a liability under the Act.

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

Yours truly,



David R. Donnelly

² 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001, SCC 40, para 31.