

THE CORPORATION OF THE TOWN OF GEORGINA

REPORT NO. CAO-2017-0013

**FOR THE CONSIDERATION OF
COUNCIL**

October 11, 2017

**SUBJECT: LAKE DRIVE SHORELINE JURISDICTION ACTION PLAN -
OPERATIONAL STEP 2**

1. RECOMMENDATIONS:

- 1. That Council receive Report No. CAO-2017-0013 prepared by the Office of the CAO dated October 11, 2017 respecting the Lake Drive Shoreline Jurisdiction Action Plan – Operational Step 2;**
- 2. That as per Action Plan Operational Step 2, Council receive the reporting letter from Ritchie, Ketcheson, Hart and Biggart dated October 2, 2017.**
- 3. That staff be directed to proceed to report on Lake Drive Shoreline Jurisdiction Action Plan - Policy Step 4.**

2. PURPOSE:

The purpose of this report is to provide Council legislative and legal opinion with respect to the Lake Drive Shoreline Jurisdiction Action Plan - Operational Step 2 and to seek Council direction with respect to reporting on Lake Drive Shoreline Jurisdiction Action Plan - Policy Step 4 (see Attachment 1).

3. BACKGROUND:

On July 19, 2017 Council received Report CAO-2017-0004 which outlined the Action Plan recommended to process the proposed Policies A and B as submitted by the Lake Drive Shoreline Jurisdiction Ad Hoc Committee.

On August 9, 2017 Council received Report CAO-2017-0006 with respect to Action Plan - Policy Step 1 and subsequently directed staff to continue to investigate the potential divestiture of the lakeside lands and to commence the additional steps in the Action Plan.

4. ANALYSIS:

Lake Drive Shoreline Jurisdiction Action Plan - Operational Step 2 requires that a report be submitted to Council which contemplates legislative and legal matters to

be addressed in order to proceed with the sale or lease of the lakeside lands. Attachment 2 provides this assessment.

5. RELATIONSHIP TO CORPORATE STRATEGIC PLAN:

This report addresses the following strategic goal:

Goal 4: Provide Exceptional Municipal Services “Organizational and Operational Excellence”

Action 4.15: Continue the collaborative efforts for resolution of Lake Drive shoreline jurisdiction issues.

6. FINANCIAL AND BUDGETARY IMPACT:

None.

7. PUBLIC CONSULTATION AND NOTICE REQUIREMENTS:

There are no public consultation or notice requirements associated with this report.

8. CONCLUSION:

In support of Strategic Plan Action Item 4.15, staff recommend that a further report specific to Lake Drive Shoreline Jurisdiction Action Plan - Policy Step 4 be prepared and submitted to Council.

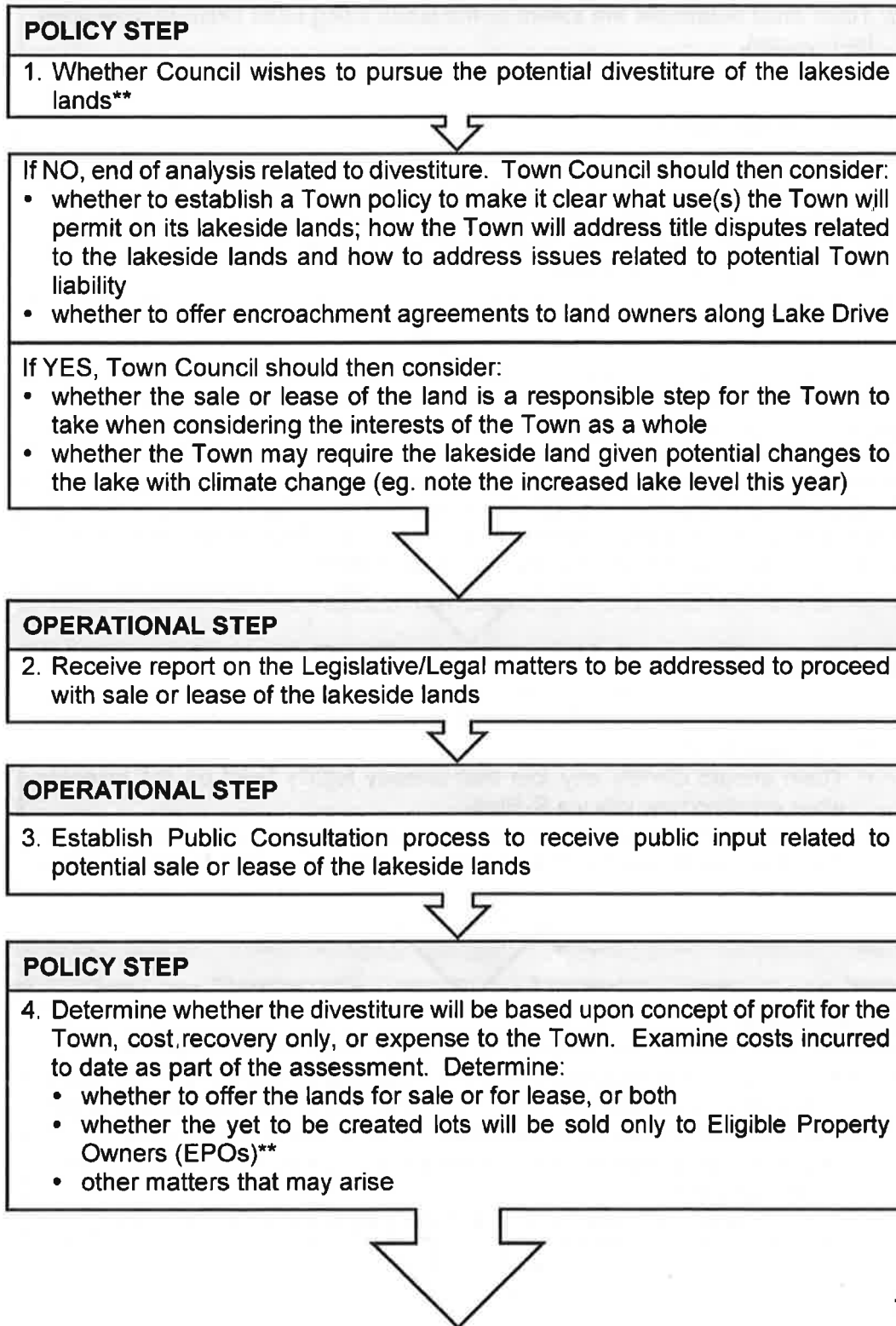
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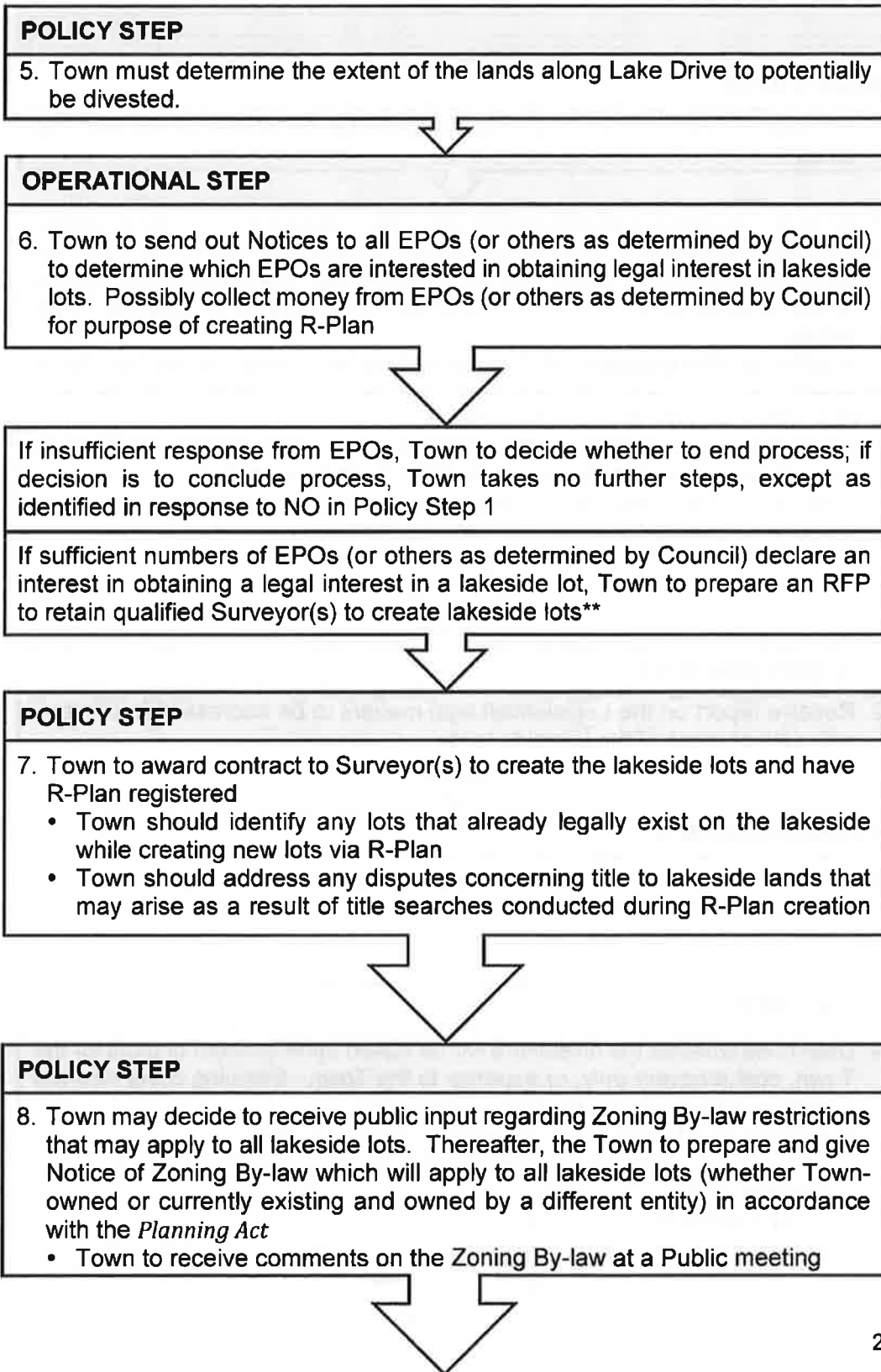
Winanne Grant, B.A., AMCT, CEMC
Chief Administrative Officer

Attachment 1 – Lake Drive Shoreline Jurisdiction Action Plan
Attachment 2 – Correspondence from Ritchie Ketcheson Hart and Biggart dated October 2, 2017 and entitled LEGISLATIVE AND LEGAL MATTERS REGARDING SALE OR LEASE OF LAKESIDE LANDS NORTH AND EAST OF LAKE DRIVE, GEORGIA

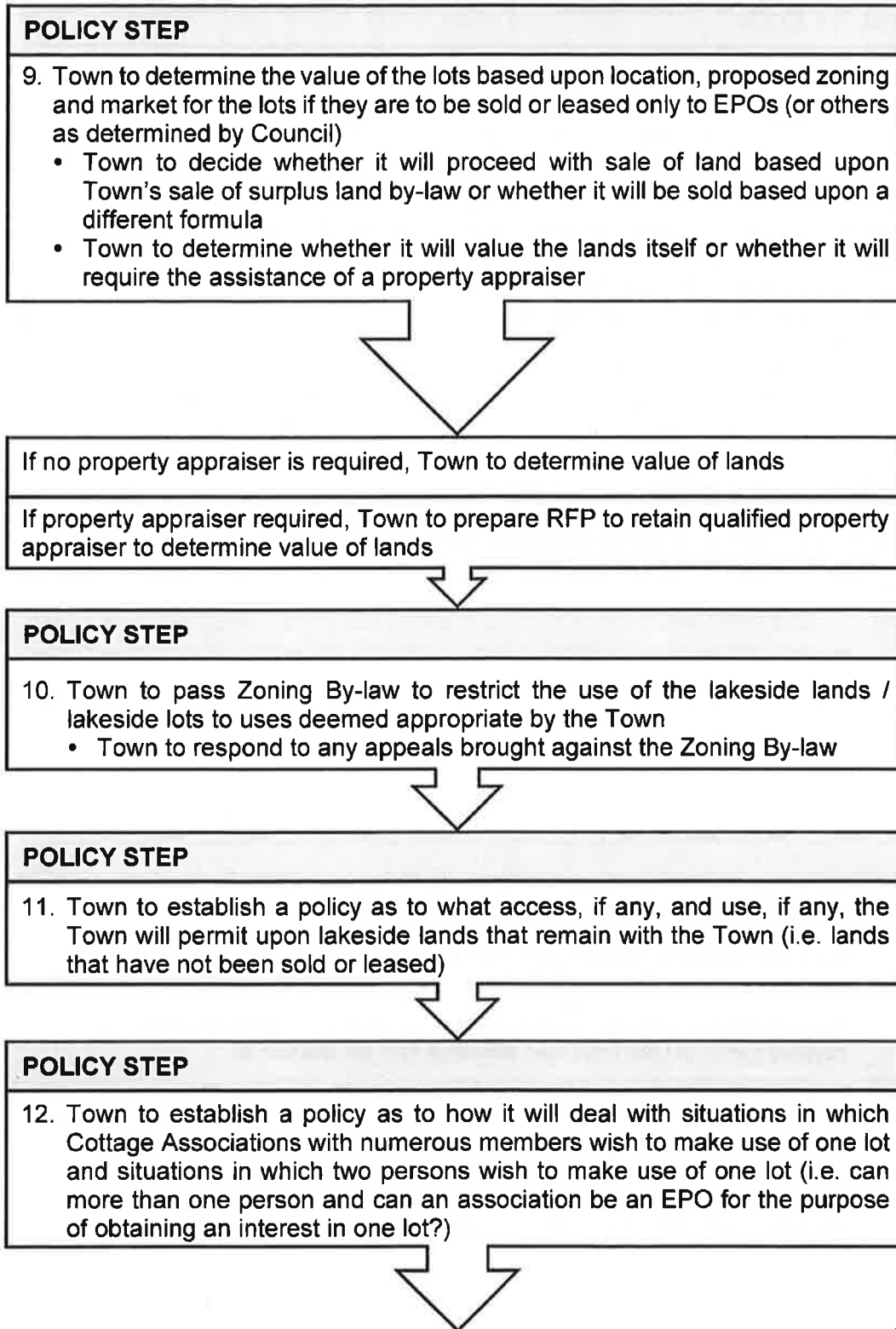
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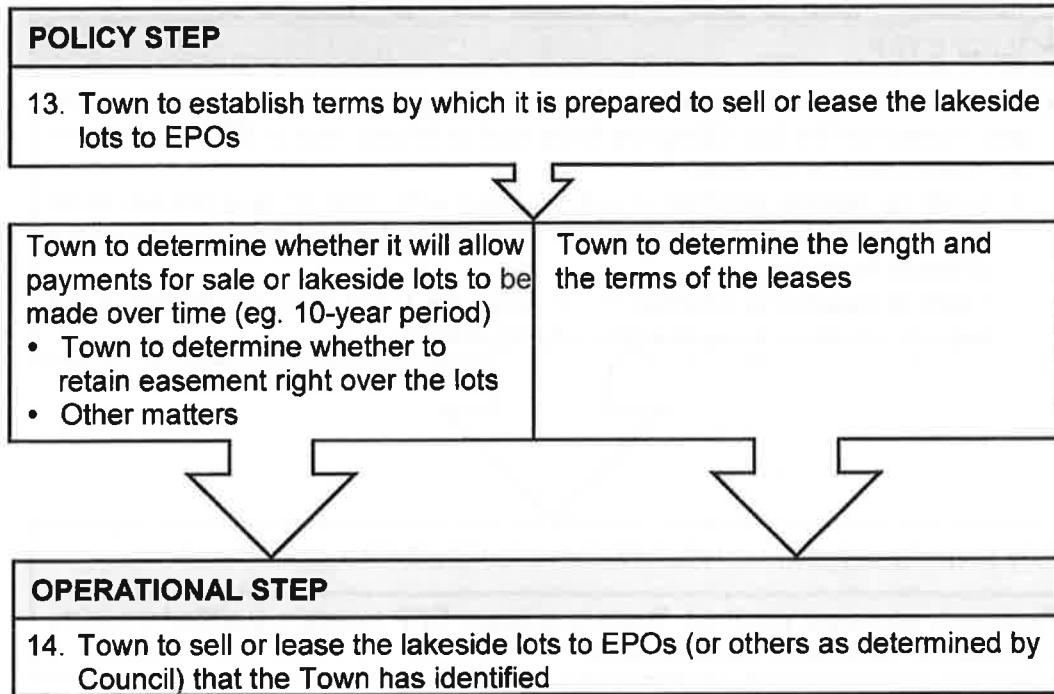
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****Definitions for the Purpose of the above Flow Chart**

“Lakeside lands” means the lands from the shoreline to the travelled portion of the road allowance.

“Eligible Property Owner” means primarily the owners of property across the travelled portion of Lake Drive road allowance from the lakeside lot.

“Lakeside lots” means lots created upon the Lakeside lands.

*This Flow Chart is to be read as an overview of basic steps that should be undertaken. It is not an exhaustive list of each step that could or should necessarily be taken. Removing certain steps or adding additional steps may be necessary depending upon decisions made by Council and steps taken by third parties.

VIA E-MAIL

October 2, 2017

The Corporation of the Town of Georgina
26557 Civic Centre Road
Keswick, ON L4P 3G1

Attention: Winanne Grant, Chief Administrative Officer

Dear Ms. Grant:

**RE: LEGISLATIVE AND LEGAL MATTERS REGARDING SALE OR LEASE OF
LAKESIDE LANDS NORTH AND EAST OF LAKE DRIVE, GEORGINA**

This report addresses the primary legal and legislative matters that will have to be considered if the Town proceeds with the potential sale, lease or licensed use of the lands between the Lake Simcoe shoreline and Lake Drive, hereinafter referred to as the "Lakeside lands". We also provide our opinion on numerous issues that may arise in the process of the Town pursuing the sale, lease or licensed use of the Lakeside lands.

This report has been prepared to provide an outline of the operational matters (from a legal standpoint) that must be considered by the Town.

Issues:

We have identified the following issues to be addressed regarding the potential sale, lease or licensed use of the Lakeside Lands, which we list in chronological order below. These issues are discussed in more detail in this report.

1. Closure of untraveled portion of the road allowance in order to sell, lease or license the Lakeside lands and whether this can be done adjacent to Crown navigable waters.
2. Official Plan amendment and Re-zoning of Lakeside Lands
3. Sale, Lease or License of Lakeside Lands
4. Sale, Lease or License of Lakeside Lands to "Eligible Property Owners"
5. Dividing Lakeside Lands into Separate Lots
6. Cost to Town

Assumptions:

For the purposes of this opinion letter, we have assumed that the Lakeside lands are part of the existing road allowance. This assumption will, of course, have to be confirmed before the Town proceeds with any steps to sell, lease or license any of the Lakeside lands. It is also assumed that the Town does not have any ownership or control over land that is in the lake.

Road Allowance is a “Highway”

Pursuant to the *Municipal Act, 2001*¹ (“Act”), s. 26.4, a road allowance made by the Crown surveyor that is located in a municipality is a highway, unless it has been closed. As a road allowance, the Lakeside lands are subject to the legislative provisions in Part III of the Act regarding highways.

1. Closure of untraveled portion of the road allowance in order to sell, lease or licence the Lakeside lands and whether this can be done adjacent to Crown navigable waters

Prior to closing the Lakeside lands that form part of the highway, the Act identifies certain considerations that affect such a highway closure by potentially limiting the Town’s ability to close the highway or create additional requirements in the process of so doing. Those provisions in the Act, and our comments regarding their application to this matter, follow:

a) Reservations by Crown (Act, s. 30)

The Town’s jurisdiction over the Lakeside lands may be limited by any rights reserved by a person who dedicated the highway or lands. In this case, the Russell Report details that Lake Drive was laid out in the Smalley Report of 1835 and adopted in the Quarter Sessions Report which opened the road as a common and public highway.² The highway did not vest in the municipality until the Baldwin Act, 1849.³ We have reviewed the Russell Report and note that it does not indicate that any rights were reserved by the Crown. We therefore cannot identify any limitation that would be protected pursuant to s. 30 of the Act.

b) By-law to permanently close the highway (Act, s. 34):

The Town has the power to pass by-laws with respect to highways over which it has jurisdiction,⁴ and this is also captured in the powers afforded to lower-tier municipalities in s. 11(3)1 and 11(4)3 of the Act. One of the first steps that will be required of the Town is the passing of a by-law to permanently close the highway located on the Lakeside lands. This is required to shed the “highway” status from the Lakeside lands and enable private owners to take title without the burden associated with having public uses permitted on the lands. This is also recommended prior to the licensing, if any, of the Lakeside lands.

¹ S.O. 2001, c. 25, as amended

² W.D. Russell, Legal Research – Lake Drive, 1992, para. 3.3

³ W.D. Russell, Legal Research – Lake Drive, 1992, para. 3.8

⁴ Act, s. 27(1)

To permanently close a highway, the Town must not only pass a by-law but also register a certified copy of same in the land registry office for York Region.

c) Consent of the Government of Canada to close a highway (s. 34(2))

Prior to passing a by-law to permanently close the Lakeside lands, s. 34(2) of the Act requires that the Town obtain the consent of the Government of Canada if the highway abuts land owned by the federal Crown or if the highway leads to or abuts a bridge, wharf, dock or quay or other work owned by the Federal Crown.

The Lakeside lands abut Lake Simcoe to the west or north. Jurisdiction of the lake bed is identified in Ontario's *Beds of Navigable Waters Act*⁵ which provides that,

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

Absent express language to the contrary, the Crown is deemed to have reserved to itself the ownership of beds of navigable water bodies. Although it is ultimately up to a court to decide whether a body of water is navigable, the courts have commented that to be navigable in law, the body of water must be navigable in fact, and it must be capable in its natural state of being traversed by large or small craft of some sort.⁶ Lake Simcoe is extremely likely to be found to be a navigable body of water, and as such, the lake bed would be owned by the Crown. The Russell Report states that the bed of Lake Simcoe belongs to the Provincial Crown.⁷ Therefore, both the Federal and Provincial governments should be contacted to obtain their consent or to confirm that their consent is not required prior to the closing of the highway.

We are not aware of any bridge, wharf, dock, quay or other work owned by the Federal Crown that abuts the Lakeside lands (Mossington Wharf is to the west of the Lakeside lands that are subject to this report); however, if such a work exists, then the consent of the federal government shall be required prior to passing a by-law to permanently close a highway, if it has not already been sought or required pursuant to s. 34(2) of the Act.

First Nations Reserves

The Town must confirm whether there are First Nations Reserves that are impacted by any proposed divestiture of the Lakeside lands, and if so, how those may be impacted. We recommend keeping any impacted First Nations bands apprised and involved in the process of formulating policies and by-laws on the disposal of the Lakeside lands.

⁵ R.S.O. 1990, c. B.4

⁶ *Coleman v. Ontario (Attorney-General)*, 1983, CanLII 3055 (Ont. H.Ct.J.) at para. 15

⁷ See also W.D. Russell, 1992, Legal Research Lake Drive, at Background Data, Volume I, Topic #14

2. Official Plan amendment and Re-zoning of Lakeside Lands

Official Plan

The Region of York's and the Town's Official Plans contain the goals and objectives and policies to manage and direct the physical change of the municipality.⁸

Any Zoning by-law passed by Town Council must conform to the Official Plan of the Town. There is currently no Official Plan policy that speaks to utilizing closed road allowances to create separate lots to further the sale of the Town's lands. The Town may consider adopting such a policy, but at the very least we recommend that Council adopt an area specific Official Plan Amendment related to the Lakeside lands and, thereafter, pass a Zoning by-law restricting the uses upon such lands. These are matters (Official Plan policies and Zoning By-law restrictions) that are best left to further review and a detailed report from the Town's planning department.

The process of adopting an Official Plan Amendment will entail Council initiating an amendment to the Official Plan which will go through the public planning process including notifying the public, consulting with other public entities, holding a public meeting, and Council's consideration of the by-law to authorize the amendment. Further notice is required of the Town's adoption of the Official Plan Amendment, and the amendment may then be subject to approval by York Region. The Official Plan Amendment should be adopted while the Town owns the property. It should also be noted that an Official Plan Amendment could be subject to an appeal to the Ontario Municipal Board.

Zoning By-law Amendment

While detailed zoning issues are best left to a further detailed report from the Planning department, a few substantive and procedural matters can be addressed at this time.

The Lakeside lands are currently zoned Residential. It is anticipated that the Lakeside lands will be sold as lots, as defined in the Town's Zoning By-law No. 500, which are parcels of land that are in separate legal ownership. Even when a Lakeside lot is transferred to a property owner of the lot on the south or east side of the travelled portion of Lake Drive, the two lots will not merge in title because they are not contiguous. The Lakeside lot will remain its own distinct lot when applying the provisions of the Zoning By-law. In order to control the use of the Lakeside lots, it is strongly recommended that the Town pass new zoning for the Lakeside lands while those lands are still in the Town's ownership. The new zoning to be applied to the Lakeside lands should control the use of the lands and the size of buildings and structures that may be permitted thereon.

Similar to the Official Plan amendment process described above, a zoning by-law amendment also requires notification to persons and public bodies of the proposed amendment, a public meeting for the purpose of giving the public the opportunity to make representations with respect to the

⁸ *Planning Act*, R.S.O. 1990, c. P.13, s. 16(1)(a)

proposed amendment, and Council's consideration of whether to approve or refuse the proposed amendment. Council's decision may be appealed to the Ontario Municipal Board.

3. Sale, Lease or License of the Lakeside Lands

The concept of selling, leasing or licensing the Lakeside lands to "Eligible Property Owners" has been previously discussed as part of the ongoing Lake Drive matter. To confirm, an "Eligible Property Owner" primarily means the owner of a property across from the travelled portion of the Lake Drive road allowance from the Lakeside lots (Lakeside lots will be discussed below under the heading "Dividing Lakeside lands into Separate Lots").

Sale of a Closed Highway

Due to a change in the legislation from the *Municipal Act*, R.S.O. 1990, c. M.45, to the current *Municipal Act, 2001*, there is no longer a provision which speaks specifically to a municipality's sale of a closed highway nor is there a requirement for a municipality to offer to sell such lands to an abutting landowner.

The provisions regarding who should have the first right of refusal have been repealed and there is nothing in the current legislation that mandates a similar requirement.⁹ The Town is therefore no longer required to offer the Lakeside lands for sale to an abutting owner. Given the change in legislation the Town may sell a closed road allowance to any person, as set out further below.

Whether the Consent of the Ministry of Natural Resources is Required to Sell a Closed Highway

Section 43 of the *Municipal Act, 2001* requires that the Ministry of Natural Resources (MNR) consent to the conveyance by a municipality of a closed highway that is covered by water. This raises the concern of whether varying Lake Simcoe water levels will, at times, cover the Lakeside lands with water, thereby requiring MNR's consent.

We anticipate that the reference plan will show the Lakeside lands to the high-water mark, thereby eliminating the need to seek the MNR's consent. Nonetheless, it would be prudent for the Town to advise the MNR of the steps that the Town intends to take to determine if the MNR has any concerns, and whether its consent is required. This is particularly necessary because the Ontario Court of Appeal has held that where the boundaries of land granted is bounded by water, the water established the boundary at the water's edge, not the high-water mark (unless the grant provides otherwise).¹⁰

Sale of Municipal Lands Generally

Under the Act, there used to be provisions addressing the sale of land by a municipality until those were repealed in 2006. Repealed section 268 of the Act provided for the passing of a by-law

⁹ *Simek v. Gravenhurst (Town)*, 2012 CarswellOnt 14119, 2012 ONSC 6314, 223 A.C.W.S. (3d) 463, 4 M.P.L.R. (5th) 254 at para. 12

¹⁰ *Ontario (Attorney General) v. Walker*, [1972] 2 O.R. 558 (C.A.)

establishing procedures governing the sale of land, including giving notice to the public. Among the requirement that used to apply was a by-law declaring the land to be surplus and notice to the public of the proposed sale.

As there are currently no provisions in the Act which specifically address to whom a closed highway can be sold, the general powers of municipal governments apply. As described above, there is no longer any requirement to sell a closed road allowance to an abutting land owner. In this case, that absence of legislative direction regarding first rights of refusal for the sale of municipal lands affords more flexibility to the Town's sale process.

Town's Disposition of Land Policy

Paragraph 270(1)1 of the Act requires a municipality to adopt and maintain policies with respect to its sale and other disposition of land. The Town has done so in Policy DAS-CL-029 as amended, being *Procedures Governing the Sale and Disposition of land, including Giving of Notice to the Public* (last amendment on April 26, 2017) ("2017 Policy") which sets out the procedures governing the disposition of Town land. Its aim is to have the process occur in a consistent and transparent manner by having the Town first identify surplus land, obtain an appraisal, provide notice to the public, and evaluate the offers received. An exception to the procedures set out in the 2017 Policy applies to closed highways: if a closed highway is sold to an owner of land abutting the closed highway, the sale occurs based on the square footage rate of the average price for a single-family home in Georgina in the month that the purchase application is received. Town Council passed Resolution No. C-2017-0026 in relation to the staff report on Policy DAS-CL-029, which resolution states that the valuation methodology for lands associated with the potential Lake Drive conveyances will be subject to a subsequent report for Council's consideration.

Therefore, as matters now stand, the Town has the option to create a policy similar to the 2017 Policy process used with fee simple interest lands for the Lakeside lands (i.e. declare lands as being surplus by resolution, request an appraisal, request if public bodies have an interest in acquiring the property, if no such interest is received then offer the land for sale to the public). In our opinion, this is an onerous process to follow for the Lakeside lands because it will be costly to the Town to obtain the surveys and appraisal reports required. Instead, we recommend that the Town consider passing a policy specifically related to the sale, lease or licensing of the Lakeside lands which will recognize that although they are not technically "abutting owners", the Eligible Property Owners have a unique interest in these lands, and in many cases, already own encroaching structures on the lands, and therefore they should be the persons able to potentially purchase, lease or be granted a licence for the use of the Lakeside lots. This is discussed in more detail below under the heading "Sale, Lease or Licensing of Lakeside lots to 'Eligible Property Owners'".

Sale Price, Lease or Licensing Rate

Given the lack of specific legislation regarding the sale of a closed road allowance specifically, or the sale of municipal land generally, as compared to former legislative provisions in the *Municipal Act*, R.S.O. 1990, the Town has the discretion as to how to conduct the sale, lease or license of the Lakeside lands provided that it does not pass a by-law that is illegal (e.g. where the Town acts

outside of its powers) or act in bad faith. This also applies to the Town's decisions regarding sale price, lease rate or licensing fee of the Lakeside lands.

Although not applicable to the Lakeside lots, the Town's 2017 Policy speaks to obtaining an appraisal for the "fee simple interest" lands. We are of the opinion that an appraisal report is a good step for the municipality to take to best inform itself of what would be fair compensation for the sale, lease or licensing of the Lakeside lots. By knowing the value of the lands, the Town will be in a better position to negotiate agreements of purchase and sale, leases and licenses.

The *Municipal Act, 2001* does not specifically require the Town to obtain fair market value for the disposal of land; however, the Town must govern its affairs as it considers appropriate and act in good faith. If the Town is of the opinion that it is in its best interest to dispose of its lands at less than fair market value, then it may do so. The courts have determined that a by-law approving a transaction at less than fair market value shall not be quashed or open to review because of the unreasonableness or supposed unreasonableness of the by-law.¹¹ However, Town Council must consider the interests of the municipality as a whole, and not just the interests of particular residents, when it establishes a sale price, lease rate or licensing fee.

4. Sale, Lease or Licensing of Lakeside Lots to "Eligible Property Owners" and related Policy

As noted earlier, the *Municipal Act, 2001* does not require the Town to offer to sell closed road allowances to abutting property owners. However, the Town must have a policy in effect to address the sale of land.

It is our recommendation that the Town pass a new policy, by by-law, specific to the disposition of the Lakeside lands that will provide for a different process than what is currently provided in the existing and recently passed 2017 Policy.

The key for any Council by-law passed in relation to the sale, lease or licensing of the Lakeside lands is for the Council to act in good faith. The Ontario Court of Appeal has cited the following in considering a bad faith allegation against a municipality:

The procedure adopted by a council in passing by-laws or in transacting any other business within its jurisdiction, in the absence of express statutory requirements, is a matter wholly of domestic concern and internal regulation. The courts will accordingly not give effect to objections based upon the failure of council to observe its established procedure, unless there is clear evidence of bad faith or fraudulent intent(s).¹²

¹¹ Act, s. 272

¹² Ian MacFee Rogers, *The Law of Canadian Municipal Corporations*, 2d ed., loose-leaf (Toronto: Thomson Reuters Canada Ltd., 2009) at s. 48.22, cited in *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273 at para. 72

In the course of the sale of municipal lands, municipalities must follow the applicable legislation to avoid a by-law being found to be illegal. A municipal by-law passed in good faith under any act shall not be quashed or open to review because of the unreasonableness of the by-law.¹³

Bad faith by a municipality has been found by the Ontario Court of Appeal to connote “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”.¹⁴ If challenged, the Town must be able to demonstrate that it considered whether it is in the best interest of the municipality to sell, lease or license the property only to Eligible Property Owners. Through the process of passing a policy with public input being received and considered, Council can then come to a defensible determination as to whether it is in the best interest to sell, lease or license the Lakeside lots to Eligible Property Owners.

Given the above, it is our opinion that the Town may offer to sell, lease or license the Lakeside lands only to the Eligible Property Owners if Council, acting in good faith and having acting in a transparent manner, determines through the passing of a new policy, that such a step is in the best interest of the Town as a whole.

Sale, Lease or Licensing of Lakeside Lots to a Cottage Association

If the Lakeside lands are to be sold, leased or licensed by the Town, in accordance with a new policy, there will likely be interest expressed by cottage associations to purchase, lease or use those lands. Any transaction entered into by the Town must be with a legal entity: this means a natural person, or a corporation, which is a “person” at law. A group of people who form an association should either enter into an agreement with the Town in each individual’s name jointly, or, alternatively those people should establish a corporation as a vehicle through which to purchase, lease or license the Lakeside lands.

The Town should not enter into any agreement with a person who, or body of people who, hold themselves out as representing an “association”. An “association” is not an entity recognized at law.

We anticipate that the Town may receive some demands that it deals with “associations” that have existed for decades. However, the Town should, in our opinion, advise any association to investigate the opportunity to establish a not-for-profit corporation which can be created rather quickly and with very little money. Of course, members of an association who decide to establish a corporation should also be advised to seek their own independent legal advice.

Unforeseen future need for Lakeside lands by Town

The sale of the Lakeside lands should only proceed if the Town has assessed its present and future needs for those lands, and has concluded that they are not now required, nor will they be required in the future. If, in the future, an unforeseen need by the Town for the Lakeside lands arises after

¹³ Act, s. 272

¹⁴ *Equity Waste Management of Canada v. Halton Hills (Town)* (1997) 36 O.R. (3d) 321 (Ont. C.A.)

they have been sold to Eligible Property Owners, the Town will have to negotiate a purchase of those lands from private ownership, or alternatively engage its expropriation powers under the *Expropriations Act*.

One option for the Town to avoid future expropriation is, during the sale of a lot, to retain an easement in the Town's favour over certain portions of the Lakeside lots for the purpose of performing certain works in the future. Conversely, if the Town does not wish to dispose of its Lakeside lands, an alternative option is to license the lands to Eligible Property Owners for their use, rather than selling or granting exclusive possession to the Lakeside lands.

5. Dividing Lakeside Lands into Separate Lots

Reference Plan

The Lakeside lands are not currently comprised of lots or blocks within a plan of subdivision. Every proposed sale, lease or license of the Lakeside lands will only involve parts thereof in each transaction. These parts, which we will refer to as "Lakeside lots", need to be accurately described if the Town leases, and particularly if it sells the Lakeside lots. Therefore, a legal description capable of precisely describing the lands will be required. This can be achieved through the preparation of a reference plan by a qualified Ontario land surveyor. A reference plan is a type of survey which depicts "parts" of land, which plan can be used to create new legal parcels. In this case, a "part" would identify the lands that are to be created into a Lakeside lot.

A reference plan is deposited with the appropriate land registry office and is assigned a reference plan number. The new parcels of the Lakeside lands will be identified as parts on a reference plan, and the new legal description of each new "lot" from the Lakeside lands will incorporate the reference plan number therein.

If the Town is to undertake to have reference plans prepared, we anticipate that the extensive work involved will necessitate a request for tenders in order to obtain a competitive price for the surveyor's services. The allocation of costs associated with the creation of a reference plan is discussed below.

No Need for Planning Act Consent

When land, or any use or right therein, is being acquired or disposed of by a municipality, consent approval is not required. The potential sale or lease of 21 years or more of the Lakeside lots by the Town will therefore not trigger the requirement to obtain consent from the Committee of Adjustment pursuant to section 50(3) of the *Planning Act*.

6. Cost to Town

As noted earlier, it is recommended that the Town create a new policy regarding the disposal of Lakeside lots.

The new policy should establish both the allocation of costs related to the creation of a legal lot (i.e. the reference plan) and the method by which the sale price or the lease/license price will be established.

Recommended Approach

Given the cost associated with the preparation of the reference plans and appraisal reports, we recommend that the Town consider an application process which shifts the burden on an applicant (i.e. the Eligible Property Owner) who may wish to purchase, lease or license a Lakeside lot from the Town, after the Town has passed the appropriate by-laws to close the highway.

In terms of shifting the cost to the Eligible Property Owners, there are different ways of so doing. Below we discuss one method wherein all costs are placed upon the Eligible Property Owners (Approach #1), and another method wherein the Town's costs are recovered from those Eligible Property Owners who finalize a sale, lease or license of the Lakeside lands (Approach #2).

Potential Approach #1: all costs to be incurred by the Eligible Property Owners

As part of the application process, the applicant would complete an application form, pay an application fee, and provide the Town with a surveyor's plan depicting the lands proposed to be purchased or leased (which would not be a deposited reference plan at this early stage).

As part of the application process, the applicant would be required to agree to reimburse the Town for an appraisal report that will be prepared in connection with the sale or lease (and possibly licensing) application. Once the applicant and Town are in agreement regarding the purchase price, lease rate or licensing fee for the Lakeside lot, the reference plan can be filed, based on the dimensions of the lot being to the satisfaction of the Town. It is assumed that the Town will also advise the property owners on either side of the Eligible Property Owner of the Town's intention to sell, lease or license the proposed Lakeside Lot to the Eligible Property Owner. The draft reference plan shall also be approved by the Town prior to same being deposited with the Land Registry Office for the purpose of creating a 'legal lot'.

The Town and the applicant will then proceed to enter into the appropriate sale, lease or license agreement to finalize the closing. All of the Town's legal fees and disbursements shall be paid by the applicant as part of this process.

With respect to the sale of the Lakeside lots, the registration of the Transfer/Deed will occur upon payment by the applicant of all outstanding fees, including the cost to register the instrument.

A detailed policy would have to be prepared by the Town which outlines the required information, steps and necessary consultation with the Town staff as part of this application process. Such an approach will involve the Town overseeing the entire process to ensure that all plans prepared and appraisal reports obtained are referring to specific lands at an exact location and of specific dimensions.

One of the disadvantages of this approach is that Town staff will have to oversee and essentially manage all aspects of the reference plan process through the Eligible Property Owner, rather than through instructing the surveyor directly, as it is not the Town which will be retaining the surveyor. This may cause confusion with the Eligible Property Owner, and may require significant time and effort from Town staff. There is also the potential for the Town to have to deal with competing Eligible Property Owners who come forward with reference plans that overlap the same Lakeside property.

Potential Approach #2: Town to retain surveyor and be reimbursed upon a sale, lease or license of the Lakeside lands

Another approach that may be taken by the Town is for the Town to have one or more surveyors on retainer to prepare reference plans for the Lakeside lands on the Town's behalf and at the Town's cost, as the reference plan become necessary due to interests being expressed by Eligible Property Owners. When the Eligible Property Owners purchase, lease or license the Lakeside lots, the cost of creating the reference plan will be passed onto them at that time.

The risk involved in this approach is that not all costs may be recovered if the transaction is not completed. Regardless, the reference plan may still be useful to the Town for the sale, lease or license of a Lakeside lot in the future, to identify lands for the purpose of applying new zoning provisions, or to create a legal description for a Lakeside lot in the event that the ownership of the Lakeside lands is considered by the court.

Recommendation Re: Approaches

The above two approaches are, of course, only two out of many different approaches available to the Town. It is recommended that the 'approach' to cost recovery is best dealt with in the policy that Town Council would pass, by by-law, to address the sale, lease or license of the Lakeside lots.

Deferral of Payment

We understand that some Eligible Property Owners may not have the funds available in one lump sum to purchase a Lakeside lot.

In the event that an Eligible Property Owner wishes to purchase or lease a Lakeside lot but is unable to make the required payment at the time of the sale, the Town may approve an alternative process which will allow the transaction to occur while payment installments are being made with respect to the legal, appraisal and surveying services fees.

The purchaser, lessee or licensee can enter into a suitable repayment plan with the Town for the fees and charges in connection with the legal, appraisal and surveying services. In the repayment plan, the Town may charge interest on the debt, but not a late fee on account of the payments being made as agreed-to installments. The imposition of fees and charges may be approved pursuant to s. 391 of the Act, and, in the case of a purchase, the fees or charges can be collected pursuant to s. 398 of the Act as a debt that may be added to the tax roll of the purchaser's property.

With respect to payment of the purchase price of a Lakeside lot in installments over time, the Town and the Eligible Property Owner may enter into a vendor takeback mortgage as an instrument for the Town to secure the repayment of the purchase price together with interest. The courts have held that a municipality has a right to a take back a mortgage as a proper requirement for carrying into effect the sale of real property, and therefore this power is necessarily implied with a municipality's power to dispose of land.¹⁵

Conclusion

In summary, we are of the opinion that the Town, if it so chooses and if it determines that it is in the best interest of the municipality as a whole, may create and then sell, lease or license Lakeside lots to Eligible Property Owners after Council has passed a policy to address the sale, leasing and/or licensing of those lots.

We would be pleased to answer any questions that the Town may have with respect to the foregoing.

Yours truly,

**RITCHIE KETCHESON
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R. Andrew Biggart

RAB/bjc

¹⁵ *Seralanca Inc. v. Sudbury (City)* (1981), 36 O.R. (2d) 1 (Ont. H.C.)