

TO: Chair and Members, Planning and Economic Development Committee
District Municipality of Muskoka

Re. Proposed Official Plan Amendment No. 45 to the Muskoka Official Plan
(Lake System Health Policy Update)

The undersigned, Bruce T. McNeely, lives on a waterfront lot on Leonard Lake, and makes the following submissions to you at the public meeting called by the District for October 20, 2016 at the Council Chambers in Bracebridge to receive comments in respect to the said proposed official plan amendment 45 to the Muskoka Official Plan (the Amendment). I oppose the passage of the Amendment as currently drafted:

1. Caution is a Better Choice for the District.

The District and Township should address both their stewardship obligation to preserve the natural environment from development that is not sustainable and their need to generate revenues derived from real property taxes levied on a fair market value basis against properties in Muskoka, including lake and river waterfront lots. While in the short term, new waterfront lot creation is likely to result in increased assessments and increased revenues. The District's stewardship obligation demands a longer view requiring the District/Township to consider whether the lake in question has the capacity to handle the resulting increase in the recreational use. Tax revenues will be sustained and grow as existing lots are sold and new owners upgrade their properties, but this redevelopment will only happen if the lake is not in decline. The Amendment will result in the elimination of the "over threshold" lake category. **The Amendment should be revised to reflect the existing classification for those lakes currently identified as "over threshold" by designating them as "special" based on the lake's current health and not solely on total phosphorous measurements. The Amendment should also add the remedy that a holding by-law be passed prohibiting new lot development on each such special lake until it can be demonstrated by the owner seeking to create a new lot that the lake has the capacity to absorb the increased recreational water use and attendant stressors resulting from such development.**

2. The Test Should Be: Is the Lake in Question Sufficiently Healthy to Absorb New Lot Development Stressors? The Test Should Not Be: Does the Creation of One New Lot, Responsibly Developed, Have An Adverse Effect on the Lake Water?

The Amendment is intended to address the mischief evident to everyone: Regarding new waterfront lot creation and development, past experience has been that the mandated water quality assessment reports consistently conclude that if a new lot is created and developed in accordance with best construction and development practices, the water quality of the lake would not be materially degraded. I agree that the law should not require the developer to spend time and money on a process where the outcome is known from the start. The Amendment begins by endorsing the Hutchinson commentary on the recreational water quality model (a "whole lake issue"). The Amendment then segues into what can be described as best construction and development practice to be set out in a site plan agreement (a "single new lot issue"). How structures on waterfront properties are located and built are important, but these considerations do not answer the question whether the new lot development should be permitted. It is not whether the development of a new lot will degrade the lake (again, a single new lot issue) but whether the health of this lake is sufficiently robust to absorb the increased

use and stressors inherent in a new lot creation and development, regardless of how well-built the structures are. The first question should be is the lake healthy? If there are indicia that the lake is not healthy based on review of the criteria set out in the Provincial Policy Statement, 2014 (see paragraph 5 below), then new lots should not be permitted until the developer can demonstrate that the lake is sufficiently healthy that it would not be adversely affected by the additional stressors raising from the creation and development of any new lots. **The Amendment should retain best construction and development practices set out in an enforceable (and enforced) site plan agreement and it should remove the requirement for individual lot water quality assessment reports, but it should provide for the proposed lake classification and developer onus described in paragraph 1 above.**

3. Lake Health and Water Quality Cannot be Reduced to a Number.

The Amendment is based on the false premises that (a) the only factors that should be considered in adjudicating the health of a District lake in the context of a new lot development are those factors that can be precisely measured (that is, “defensible on appeal”) and (b) it can be clearly demonstrated that there would be a causal connection between such factor and possible degradation in the water quality of the lake. The approach in the Amendment is wrong in that it fails to permit the Planning Department to consider individual lake characteristics such as the rate of water turnover (refreshing) in the lake, the lake’s water volume (the lake’s capacity to absorb contaminants), its water clarity, its oxygen content, its chemistry and other stressors on the lake. Section F.20 of the Amendment reads as follows:

“Additional water quality indicators may be included in Section F.18 by amendment to this Plan to address multiple environmental stressors and/or to incorporate advances in science, provided that they are evidence-based and to the satisfaction of the District of Muskoka and/or provincial ministry with jurisdiction.”

The Provincial Policy Statement, 2014 (PPS) (see paragraph 5 below) identifies a series of stressors that must be reflected in the Official Plan. The PPS list is not be subject to the District’s view of the adequacy of the science or evidence on which the science is based. Official Plans are subordinate to the PPS, and the PPS specifically identifies issues to be considered by the District and Townships. **The Amendment should be revised to add reference to each PPS listed stressor faced by the lake in question as issues that must be considered and reflected in any new waterfront lot development adjudications. Section F.20 should be revised by deleting the following language: “are evidence-based and” and by adding the following language at the end of Section F.20: “subject to compliance with the Provincial Policy Statement then in effect”.**

4. Concern Regarding the Cost of Possible OMB Appeals Should Not be a Major Factor Driving District Policy Decisions.

The Hutchinson report anticipates that the District may face legal costs and District/Township planner’s time in defending appeals to the Ontario Municipal Board (OMB) on the basis that the science on which the District relies in evaluating a proposed new waterfront lot development may not be “scientifically defensible”. The Hutchinson report’s conclusion is based on its understanding of the science. Hutchinson does not practice municipal law before the OMB and there may be legal principles that would shift the onus of proof from the District/Township onto the applicant. That is, the applicant may have to demonstrate to the satisfaction of the OMB that

the health of the affected waterbody is such that it can absorb the stressors created by the proposed development. The District has the power, subject to applicable law, to prescribe the terms on which new waterfront lot development will be permitted. This rationale (concern about the cost of an appeal) upon which the Amendment is, at least in part, based is wrong. **The Amendment should not be passed by the District if the purpose is to avoid the possibility of legal costs and the resulting use of staff time. If the Township has a concern regarding the conflict between its zoning by-law and Official Plan, remove the requirement for the water quality impact studies by the Amendment, add site plan agreements containing relevant best construction/development principles but implement the “special” lake classification in the Official Plan as proposed in paragraph 1 above.**

5. The Amendment Does Not Comply With Overriding Provincial Legislation.

By law, the Amendment must meet the policies set out in the Provincial Policy Statement, 2014 (PPS). Small lakes such as Leonard Lake are “rural lands” as such term is used in the PPS.

- Subsection 1.1.5.1 of the PPS provides that “... when directing development on *rural lands*, a planning authority shall apply the relevant policies of Section 2.”
- Section 2.2 of the PPS provides that “quality and quantity of water” is measured by indicators associated with the water body’s hydrologic function **such as** minimum base flow, depth to water table, aquifer pressure, oxygen levels, suspended solids, temperature, bacteria, nutrients and hazardous contaminants, and hydrologic regime.
- Section 2.2.1 of the PPS requires planning authorities to protect, improve or restore the *quality and quantity of water* by: “... (d) maintaining linkages and related functions among *ground water features, hydrologic functions, natural heritage features and areas, and surface water features* including shoreline areas; (e) implementing necessary restrictions on development and site alteration to: ... protect, improve or restore vulnerable surface and ground water, sensitive surface water features (and sensitive ground water features, and their hydrologic functions) ...; (f) planning for efficient and sustainable use of water resources, through practices for water conservation and sustaining water quality; (g) ensuring consideration of environmental lake capacity, where applicable”
- The PPS defines “sensitive” in regard to surface water features and ground water features as “... areas that are particularly susceptible to impacts from activities or events ...” and “vulnerable” in this context as surface and/or ground water that can be easily changed or impacted.
- Section 2.2.2 of the PPS provides that “...development and site alteration shall be restricted in or near sensitive surface water features and sensitive ground water features such that these features and their related hydrologic functions will be protected, improved or restored. Mitigative measures and/or alternative development approaches may be required in order to protect, improve or restore *sensitive surface water features, sensitive ground water features, and their hydrologic functions.*”
- “Hydrologic function” is defined in the PPS as “... the functions of the hydrological cycle that include the occurrence, circulation, distribution and chemical and physical properties of water on the surface of the land, in the soil and underlying rocks, and in the

atmosphere, and water's interaction with the environment including its relation to living things.”

The Amendment fails to meet the requirements of the PPS in that it **does not** provide for necessary restrictions on development on smaller lakes such as Leonard Lake to protect, improve or restore vulnerable surface and ground water, sensitive surface water features (contrary to Section 2.2.1(e)). The Amendment **does not** include metrics for development that considers environmental lake capacity on smaller lakes such as Leonard Lake (contrary to Section 2.2.1(g)). The Amendment **does not** recognize the obligation, especially with respect to smaller lakes, to meet the requirements of section 2.2.2 of the PPS. As such, **the Amendment should be revised to comply with the PPS by including the indicators referred to in the PPS, that is, minimum base flow, depth to water table, aquifer pressure, oxygen levels, suspended solids, temperature, bacteria, nutrients and hazardous contaminants, and hydrologic regime of the lake in question when considering new waterfront lot development and the possibility of restrictions on development contemplated by section 2.2.2 of the PPS.**

6. This Public Meeting Should be Adjourned to a Date Following the Return of Cottagers to Muskoka.

Scheduling this public meeting on October 20, 2016, ten days after Thanksgiving, fails to meet the requirement of procedural fairness. Approximately 80% of the owners of waterfront lots on Leonard Lake, and likely a similar number on the other Muskoka lakes, have closed their waterfront dwellings and moved back to their city homes. Few owners (most of whom have daytime jobs) could have been expected to return to Bracebridge for this meeting. It took a lot of time and effort for us to understand the ramifications of the changes that will flow from the Amendment. As such, the holding of the official “public meeting” for the purpose of the Amendment is contrary to the principles of natural justice and the requirement for transparency. **This public meeting to consider the Amendment should be adjourned until a date, time and place selected by the District in July 2017 to permit all waterfront property owners in Muskoka have a fair opportunity to consider the proposed Amendment and its effect on development of new waterfront lots on lakes in Muskoka that would arise from implementation of the Amendment in its present form.**

7. The Township's Interim Period Approach.

The Township's interim period approach is to process severance and zoning by-law exception applications as if the Amendment in its present form were law today. The Amendment will only be law when the Minister approves it in compliance with the provisions of the Planning Act (Ontario). It is possible that the Minister may either refuse to approve the Amendment or require changes to the current draft of the Amendment, some of which may be material. By assuming that the Amendment will be the law, the Township is, in effect, retroactively applying the pending Amendment to present-day applications as if it were law, when it is not law. Retroactive application of legislation is contrary to law. If the Township proceeds with this approach, there may be adverse consequences to the Township by aggrieved interim period applicants whether or not the Amendment is enacted. **If the Township were to apply the current Official Plan and Zoning By-law in severance and zoning exception applications processed prior to**

the enactment of a final version of the Amendment by the Minister, there would be no persons with a claim against the Township arising from its interim period actions.

October 20, 2016.

Bruce T. McNeely