



Ontario Case Study: Findlay Creek Village

CBA National Environment, Energy and
Resources Law Summit: Water Law 2011
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- **Findlay Creek Village is a residential development that will contain 2,900 homes when complete**
- **Development rights date back to 1988 – since that time ~24 separate development approvals have been granted**
 - Official Plan approvals & amendments
 - Community Design Plan approval
 - Plan of Subdivision approvals
 - Zoning by-laws
- **Construction at the site began in 2002**
- **By the time the Future Stages Permit to Take Water was appealed, 900 homes had been built and occupied**

Leitrim Wetland



The proponents agreed in late 1980's to voluntarily protect 238 acres of wetland at the Site, all of which will be donated to the South Nation Conservation Authority once development is complete.

- **Our involvement began with an Ontario Municipal Board proceeding in early 2007**
 - A citizen's group and certain individuals were opposed to any development taking place at the site
- **While nominally an appeal of zoning by-laws, the appeal was in essence a dispute over whether development should take place**
 - Location of the PSW boundary was disputed
 - Appellants feared homes would be built within the PSW
 - Appeal alleged that development would either flood or dry out the PSW and the underlying peat
- **OMB appeal was dismissed in June 2007, a request for review was denied later that year**
 - Judicial Review of the OMB decision was dismissed in January 2009
- **Key issues raised by Appellants before the OMB appeared again within the context of the PTTW process**

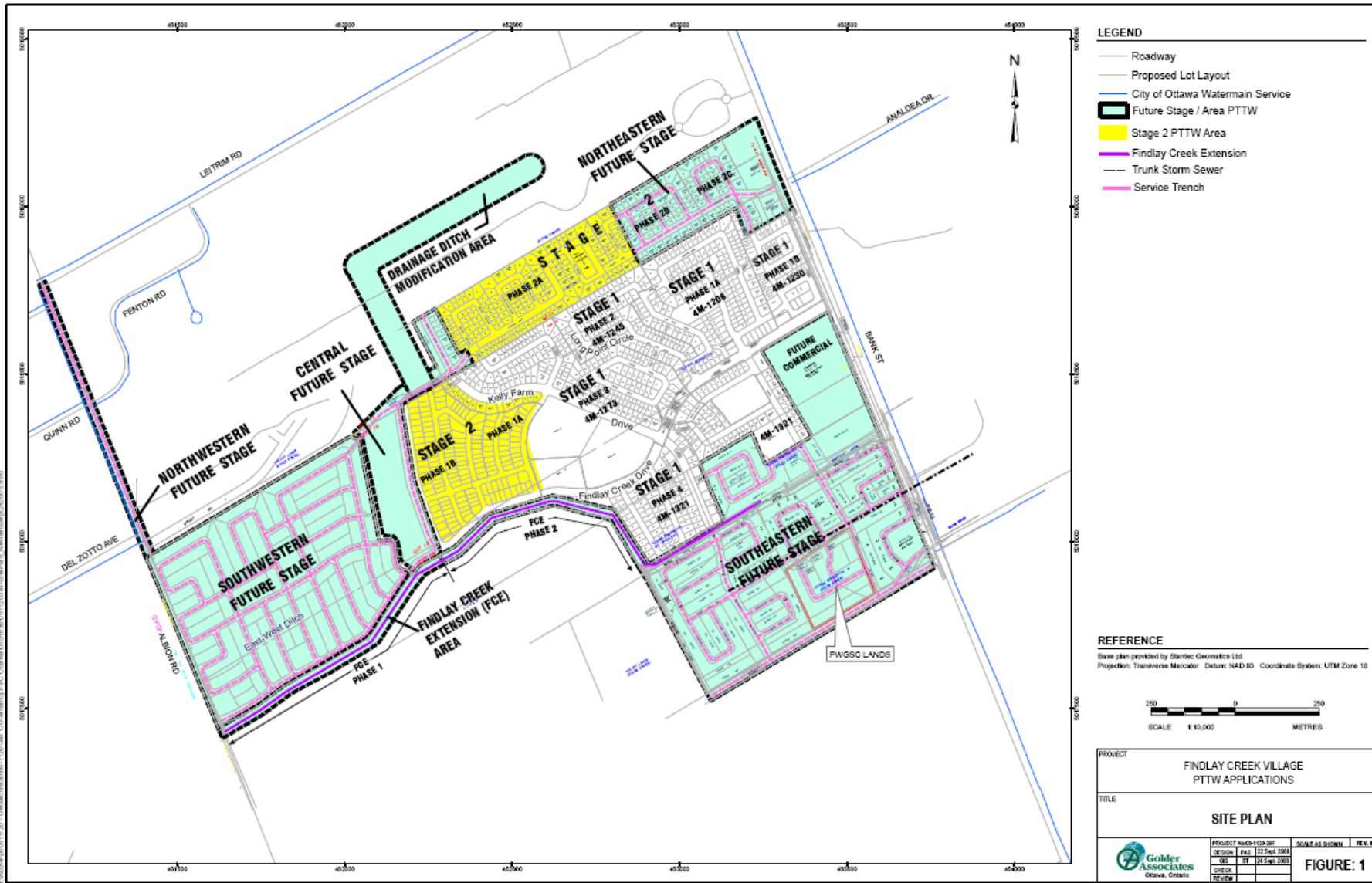
- **By that time, the site had already been the subject of at least 50 environmental review / approval processes, including:**
 - Two federal environmental assessment screenings (1990-1996, 2000-2006)
 - Two *Fisheries Act* authorizations under s. 35
 - Provincial Class EA, and denial of 4 bump-up requests (1990 – 2006)
 - 2 petitions to the Federal Commissioner ESD
 - 19 Certificates of Approval granted
 - 8 previous Permits to Take Water granted
 - 8 South Nation Conservation Authority Permits granted
 - *Lakes and Rivers Improvement Act* approvals
- **The Appellants involved in the OMB appeal had objected on similar grounds in at least 12 of these approval processes**
 - As a result, considerable frustration existed on both sides prior to the Future Stages PTTW application and appeal discussed herein

Future Stages PTTW Application



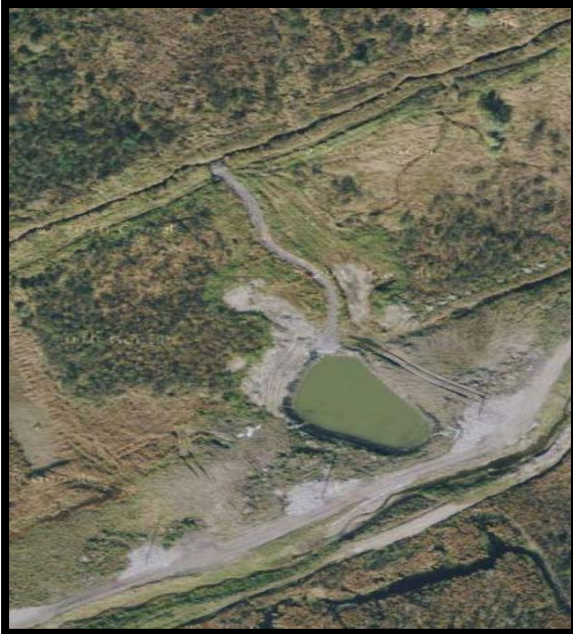
- In 2008, MOE signaled a shift in approach to water taking applications for the site
- MOE requested that a single long-term (10 year) application for all future water taking needs
- Future Stages PTTW application was made in the summer of 2008 and posted twice to the Environmental Registry

Location of Proposed Water Taking



Types of Water Taking

- Dewatering of trenches during installation of water pipes, sanitary and storm sewers
- Diversion of surface water around work areas, to permit work “in the dry”
 - Primarily for construction of naturalized stream bed / habitat features
 - Diverted water routed through sediment ponds and returned downstream
- Dewatering of “miscellaneous” ponded water (i.e. basement excavations)



- *Ontario Water Resources Act*
- **Section 34 – Permits to Take Water**
 - Required for water taking of >50,000 litres / day
 - Approximately the volume of a residential swimming pool
- **“Water Taking” not clearly defined**
 - Certain methods of taking are specifically included (wells, structures for diversion or storage, intake from surface water)
 - May include non-consumptive uses of water – such as diversion around a work area where there is no reduction in volume
- **Concern is not only water quantity / consumption, but also water quality and ecosystem impacts**

- **Water Taking Regulation (O. Reg. 387/04)**
 - Director must consider impact of water taking on
 - Ecosystem function and the impact of variability in water flow and levels on habitat
 - Minimum stream flow
 - Water quality and water quantity
 - Water availability, water balance and aquifer yield
 - Water conservation and use – will the water be used? what conservation measures are proposed?
- **Director has authority to require applicant to consult with persons with an interest in the water taking**
 - May also require information on efforts made to resolve the concerns of persons with an interest in the water taking

Consultation Prior to Appeal

- Director required extensive consultation on the Future Stages PTTW application before a decision was made
- This consultation was in addition to EBR posting requirements, and took place in advance of any appeal
- **For example:**
 - The Director asked that submissions be circulated proactively to project opponents
 - An open house was held to answer questions in relation to the application
 - Extensions of time for comment were granted
- **A full day meeting was convened to permit opponents to ask questions of proponent, consultant and regulators**

- **Ontario's *Environmental Bill of Rights, 1993***
 - Proposals to take water for more than 1 year must be posted on the Environmental Registry to permit consultation
 - Interested persons may submit comments to the decision-maker
- **If the permit is issued, interested persons may seek leave to appeal (s. 38)**
 - Test is in two parts – Tribunal must find that “no reasonable person” could have made the decision, having regard to applicable law and policy
 - And that the decision could result in significant harm to the environment
- **An automatic stay applies if leave is granted (s. 42) – motion must be brought to lift the stay during the appeal**

Appeal of Future Stages PTTW

- **The Future Stages PTTW was issued, and leave to appeal was sought by opponents, in 2009**
- **Environmental Review Tribunal denied leave for 3 of 4 sources (groundwater and surface water diversion)**
 - Limited leave was granted, in relation to one source – the taking of “miscellaneous ponded water”
 - In relation to a term lacking a definition in the PTTW (“adverse effect” for mitigation purposes), and
 - In relation to the removal of trigger elevations from a well nest
- **Motions were brought to lift the s. 42 stay**
- **Rather than proceeding with the appeal, the parties reached a negotiated resolution**

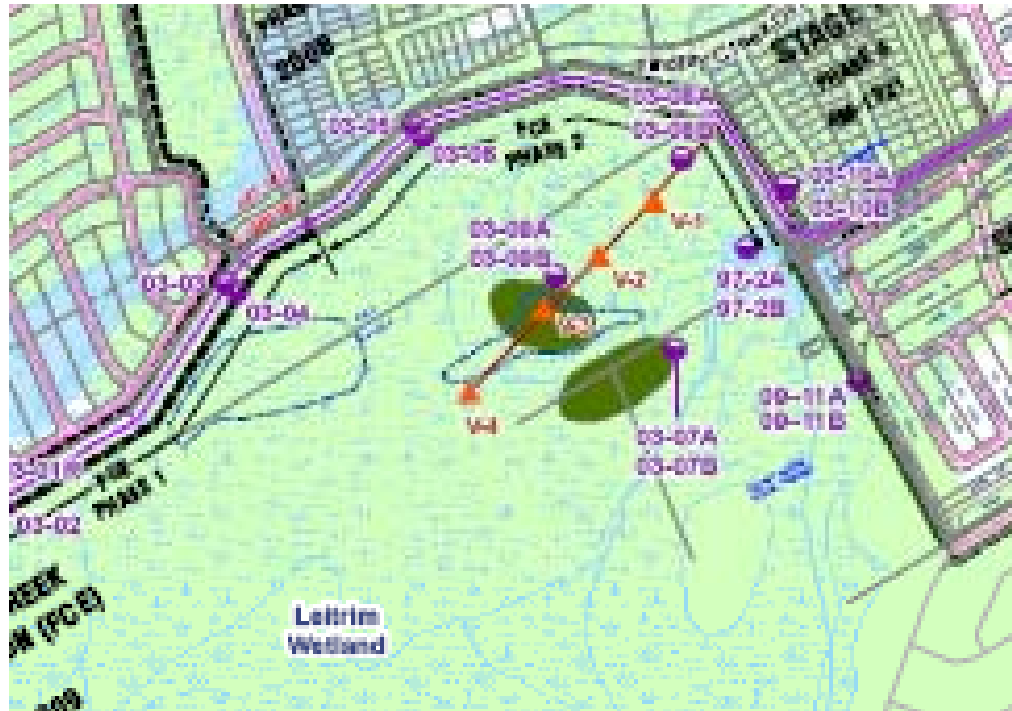
Negotiated Resolution

- **The Instrument Holder's interest was in obtaining certainty and clear timing, and in containing cost**
 - The Appellant's interest was in obtaining independent confirmation that the PSW would be protected, and having concerns heard and recognized
- **Settlement was greatly facilitated when the Appellants obtained independent technical assistance**
 - A process of data sharing was then possible
 - The Appellants obtained independent reassurance that the technical conclusions of the proponent and MOE were valid
- **The MOE assisted by mediating acceptable changes to the Future Stages PTTW**
 - The settlement process permitted the inclusion of measures that important to the Appellants but outside the scope of the leave

Negotiated Resolution

- **Certain changes were made to the text of the PTTW to provide definitions for “potential adverse effect” and “miscellaneous ponded water”**
- **The well nest at issue remained within the monitoring network but was replaced by a new nest within the PSW**
 - A trigger elevation applied to the new well nest, not the old nest
- **Other measures were included to respond to the Appellant’s concerns regarding peat and vegetation**
 - Installation of 5 “peat posts” to measure peat levels
 - Monitoring of vegetation identified by the appellant’s botanist
 - Hosting a site visit for the botanist together with project consultants and the Conservation Authority to discuss long term management and rehabilitation by the CA

Findlay Creek Village



The ERT approved the settlement in April 2010

Thank You

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