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**DELIVERED**

Mr. Blaine Parkin
Chief Administrative Officer
Town of New Tecumseth
10 Wellington Street East
Alliston, Ontario
L9R 1A1

Dear Mr. Parkin:

***Re: Town/Briar Hill Subdivisions;***
***Responsibility Agreements;***
***And Re: Water Supply Issue***
***Our File No. 11438JF17***

As requested, I am following up to provide my further report regarding the above-noted matter. I did supply some background after my initial review pursuant to my e-mail of August 31st, 2017, a copy of which is attached hereto. In addition, as I was reviewing the history of this matter, I received a letter dated October 11th, 2017 from the solicitor for the servicing organizations setting out their position. A copy of the letter is attached. In this report, I will provide more detail on the responsibilities and obligations arising from the Responsibility Agreements in relation to the Briar Hill and Briar Hill West Subdivisions and in particular, the water supply issue in the Responsibility Agreement dated November 22nd, 2000. This report and my opinions contained herein are intended to address Council's Resolution of 2017-275 passed October 2nd, 2017, as well as address some of the issues raised in the solicitor's letter of October 11th, 2017.

**Responsibility Agreements**:

The Municipality has entered into two separate Responsibility Agreements, both of which are styled "Communal Servicing Responsibility Agreement". The first of such Agreements was entered into on June 18th, 1997 (the "1997 Agreement") and the second one was entered into on November 22nd, 2000 (the "2000 Agreement"). The 1997 Agreement relates to the Briar Hill Subdivision while the 2000 Agreement relates to the Briar Hill West Subdivision. Neither Agreement expressly addresses

responsibility obligations for the original Green Briar Subdivision. However, there were provisions in the Original Subdivision Agreement and these are addressed below.

Both Responsibility Agreements are virtually identical with the exception of a new paragraph 4 added to the 2000 Agreement under the heading "Requirement to Purchase Municipal Water". I will address that particular section in some detail. However, it is important to recognize the overall context within which the Agreements are structured.

**Obligations Under the Responsibility Agreements**:

Each of the Agreements essentially involves four parties: the subdivision land developer; Briar Hill Residential Servicing Organization referred to as the "Servicing Company"; the landowner on which servicing facilities are located being 1204551 Ontario Ltd. and referred to as the "Private Servicing Landowner"; and the Municipality. In both Agreements, the developer and the Private Servicing Landowner are the same party, namely, the numbered company 1204551 Ontario Ltd. In the June 19th, 1997 Agreement, Cablebridge Enterprises Ltd. was also listed as a developer but not in the 2000 Agreement. I do not believe that anything turns on that difference other than in the initial Agreement, Cablebridge probably was also a landowner with the numbered company.

Effectively, the developer, as the Private Servicing Landowner, has retained ownership of the lands on which the Briar Hill servicing facilities are located. In turn, there is an Agreement with Briar Hill Residential Servicing Organization (BRSO) which operates the private services. Both Agreements also acknowledge that Green Briar Residential Servicing Organization (GRSO) has entered into a Licensing Agreement with BRSO in relation to lands owned by the Green Briar Organization on which the sewage treatment plant for the various developments is located.

Under both Agreements, the Municipality has obligations in relation to either an "Emergency" as defined in Section 1(d) of the Agreement or a "Default" as defined in Section 1(e) of the Agreement. An emergency situation exists where the appropriate governmental and regulatory authority is of the opinion that the health and public safety of residents is at imminent risk, while a default relates to a material non-performance in relation to the servicing responsibilities and obligations.

In the case of an emergency, the Municipality is required to go in and remediate the water or sewage issue. In the case of a default, the Municipality is required to give notice of default and allow at least 30 days for it to be corrected. In either event, the Agreements contemplate that the servicing company will continue its function. Further, the Municipality is only authorized to take remedial action when there is an identified default or emergency.

**GRSO Servicing Responsibilities**:

The original Green Briar subdivision was developed pursuant to a Development Agreement dated February 27th, 1985 between Cablebridge Enterprises Ltd. and The Corporation of the Township of Tecumseth. Whereas clause G sets out the works to be included pursuant to the Development Agreement which includes "drinking water, storm water and sewage treatment facilities" which the developer agrees "to provide and maintain for the benefit of the future residents of the Lands and to the satisfaction of and at no expense to the Township". Specific provisions relating to the subdivision Works are set out in paragraphs 23 to 29 of the Development Agreement. As set out in the letter from the solicitor for the servicing organizations, these provisions are somewhat akin to the provisions of the Responsibility Agreements.

Briefly, the obligations can be summarized as follows:

(i) The developer is to maintain the Works and there are to be no changes to the Works without the express written consent of the Township;

(ii) The developer is responsible for maintaining the Works in accordance with all relevant statues and regulations;

(iii) The developer is to indemnify and save harmless the Township from any claims arising from the operation of the services;

(iv) The developer is to maintain and operate the Works to the satisfaction of the Township and relevant Ontario Government Ministries;

(v) The Township has the right to inspect the Works and to issue Work Orders if there are breaches in the obligations under the Agreement;

(vi) The Township would have the right to purchase materials and employ workmen to correct deficiencies;

(vii) The Township would have the right to give notice of failures to perform and requirements to rectify;

(viii) The Township would have the right in emergency situations to enter and correct situations;

(ix) Any operation or correction by the Township would be at the developer's expense; and

(x) The Township would be entitled to draw upon any letter of credit retained or alternatively, to add the cost of default to realty taxes.

As with the Responsibility Agreements, the Development Agreement did not contemplate the Township taking over the Works but rather being in a position to correct deficiencies and charge it back to the developer. While the Agreement contemplated the possibility of retaining a letter of credit, there is no specific provision as to an amount that would be retained on an ongoing basis. In paragraph 18(a) of the Development Agreement, the developer was entitled to have the letter of credit reduced to $25,000.00 which would remain with the Township "until such time as the Township deems it no longer necessary". There is no indication in the documentation that I have that this letter of credit was maintained.

**Status of Private Servicing Systems:**

As the Municipality has the ultimate responsibility for any failure of the servicing systems, it should have on file up-to-date information on the operational status of the essential services of drinking water and sewage treatment, as well as possibly stormwater systems in all three developments. Schedule "C" to the Green Briar Development Agreement is titled as "Private Servicing Scheme". However, the actual plans were not attached and the Schedule indicates that the servicing scheme was simply lodged with the Clerk of the Township and was available for inspection during business hours. The location of those plans is not currently known and in any event, they are probably outdated. Similarly, with the Responsibility Agreements, I identified in my e-mail of May 31st, 2017 that there is no information on the location and exact nature of the "servicing facilities". While the Municipality is entitled to this information, there is nothing to indicate that there is a positive obligation to deliver it. It is my recommendation that all aspects of the design and location of these facilities should be brought up-to-date. As well, the Municipality should have on file a copy of all inter-organizational agreements within the three developments.

**Municipal Security:**

Pursuant to the Responsibility Agreements, it is acknowledged that the Servicing Company (BRSO) is to maintain both an operating account and a segregated reserve account in order to be able to address capital repairs and replacements. In paragraph 1(a) of the Agreements, it is acknowledged that in the event of either an emergency or a default, that: "The Municipality shall have a right to effect remediation with respect to the water and sewage services components of the PSS, and shall have the right to full recovery from the servicing company for the costs thereof". If full reimbursement is not provided, the Agreements acknowledge that the Municipality may seek recovery from the condominium corporations and the unit owners of each condominium corporation benefiting from the PSS. In addition, under paragraph 2, the developer was to have given a $100,000.00 letter of credit delivered under the Subdivision Agreement and then supplement that to an amount of up to $200,000.00 or such lesser amount that would equal 10% of the replacement cost of the system. The security is to be provided "... not later than the date of substantial performance of the last intended phase of the development within the Subdivision Lands". The Subdivision Lands are defined in Schedule "A" of each Agreement.

There should be separate securities for each Agreement. However, the Agreements also specify that the servicing company would have the right to utilize funds in its replacement reserve to secure the letter of credit. In other words, the funds in the replacement reserve may be the same as the funds secured by way of the letter of credit. I have been advised that there is one security on file under the name of Cablebridge Enterprises in an amount of $100,000.00 earmarked for Green Briar and Briar Hill. As Briar Hill is built-out, the security should be a letter of credit in the amount of $200,000.00 (assuming the replacement value of the system is at least $2,000,000.00). For Briar Hill West, there should be $100,000.00 available under the Subdivision Agreement until substantial completion of this phase.

The significance of the foregoing essentially relates to the fact that the Municipality is in a position where it will be required to remediate deficiencies that the servicing organization is not able to do. Neither the Responsibility Agreements nor the Green Briar Subdivision Agreement in any way contemplate the Municipality taking over or operating any of the private service systems. Effectively, in the event of an emergency or a default as defined under the Agreements, the Municipality is there as the back-up to ensure that an emergency is remediated or a default corrected. There is no requirement to continue to operate any of the private services.

**Requirement to Purchase Municipal Water**:

Paragraph 4 of the 2000 Agreement is unique to that Agreement. There is no comparable provision in the 1997 Agreement. As noted above, the Agreements are essentially the same with the exception of this particular process.

Paragraph 4(a) of the 2000 Agreement sets up an obligation on the Municipality to be in a position to supply a certain quantity of water capacity to the private servicing system. The paragraph purports to recognize "the Municipality's contingent liability pursuant to MOE Guidelines and this Agreement and the resultant need to guarantee a minimal water reserve and supply for the Subdivision Llands ...". The Subdivision Lands are defined in Schedule "A" to the Agreement and correspond to the lands covered by the Briar Hill West Subdivision Agreement dated November 22nd, 2000. Therefore, the obligations should only apply to the Briar Hill West lands. The paragraph then goes on to indicate that the Municipality has committed to provide from its supply source in 2005 and 2010 the water capacity that is set out in sub-paragraph (b).

Sub-paragraph (b) indicates that as of January 1st, 2005 up to and including December 31st, 2009, the developer and/or servicing company agree to pay for the right to receive "whether actually received or not, $91m^3$/day of water capacity ...". Then, beginning January 1st, 2010, the water capacity is to be increased to the amount $228m^3$/day. The payment rate was to be in accordance with the rate and manner in force for the Area 1 Urban Service Area or its successor.

While the developer and/or the Servicing Company were to pay for this right, it is my understanding that no payment has been made to date. Further, under paragraph

4(a), a request could be made to receive and utilize the water capacity from the dates set out in paragraph 4(b) and in the amounts described. Again, it is my understanding that until this issue surfaced, there had been no request to supply the water in accordance with the amounts set out in paragraph 4 of the 2000 Agreement.

Paragraph 4(d) provides that the Municipality did not make any representation or warranty for any additional amounts to be supplied. However, the developer or the servicing company "may request, from time-to-time, additional water supply, and the Municipality agrees to consider such request for additional water supply from time-to-time in a fair an equitable manner, having regard to the availability of water supplied to the Municipality from time-to-time". However, pursuant to paragraph 4(e), the obligation of the Municipality to supply water capacity lasts as long as the contingent liability which is probably in perpetuity.

In my initial review, I also reviewed paragraph 4(c) of the 2000 Agreement. It was my impression that this was a relatively minor aspect of the Agreement since it required the Town "in good faith, prior to January 1, 2005, determine the appropriate connection point or points between the municipal water supply system and the PSS or other water delivery system". As the Town had in fact established connection points for both Briar Hill and Green Briar in 2013, I did not consider this to be an issue. However, it is clear from the solicitor's letter that this is being utilized as a justification for the Town being in breach of the Section 4 requirements relating to the supply of water as "... no attempt was made by the Town in accordance with Section 4(c) of the 2000 CSRA to determine a connection point in respect of a connection from the municipal water system to the BRSO PSS and no discussions or negotiations were undertaken with the developer or BRSO respecting same" (p.4). There was also the assertion that in 2013 a request for a hook-up to the municipal system was made and no response was received. The letter goes on in paragraph 7 to assert that the developer made a request to the Municipality in 2015 "... for not only the water supply the Town was obligated to provide under the 2000 CSRA, but additional water supply in advance of the study which resulted in the Water Master Plan".

These assertions are being made in the context that the Municipality has been in default under the Agreements and therefore the servicing organizations had no obligation to honour the requirement to pay for the water capacity as set out in the other paragraphs of Section 4. In discussions with Staff, I have been advised that there was no specific request in writing or otherwise to provide the water capacity set out in Section 4. Further, whether the Town actually looked at connection points prior to January 1, 2005 is, in my opinion, irrelevant to the obligation to pay for the water. There is no indication that the developer expressed any concern about whether the Town did or did not determine connection points prior to January 1, 2005. The determination of the connection point was a mutual good faith statement and subject to the developer obtaining "all required approvals" and being responsible for all related connection issues including costs. In addition, as of 2013, those connection points were fully in place with appropriate piping and valves. However, the costs were paid through development charges and not by the developer.

**Status of Water Capacity Obligations**:

The 2000 Agreement clearly imposed two fundamental obligations:

1. The Municipality had an obligation to be in a position to supply the quantities specified as set out above.

2. The developer and/or Servicing Company had an obligation to make payments for the capacity whether the water was supplied or not.

While it is clear these were fundamental obligations under the 2000 Agreement, there may be an issue as to whether or not either or both of these obligations continue to survive, either in whole or in part. The issues are significant. Had the developer made the required payments to the end of 2017, it is my understanding that the obligation would have been in the order of $1,288,000.00. However, there is no evidence that the Municipality either requested payment or took any steps of enforcement. The Agreements do not provide any guidance in terms of what happens if there is default by either or both parties.

At the time this particular aspect of the 2000 Agreement was negotiated, I was not involved. As a result, I do not have any background as to the nature of the negotiations nor any understanding if there were subsequent arrangements or understandings that would have affected the obligations under paragraph 4. The following are some of the possible outcomes or positions that could be taken:

1. As the developer is in default of payment, the Municipality is not required to supply the water capacity as set out in the 2000 Agreement;

2. The Municipality continues to have the obligation to supply the water capacity in consideration of full payment of the arrears;

3. The Municipality has the obligation to supply the water capacity but is allowed to collect only on a go-forward basis or retroactively for a period either from 2013 (the time of the connection points) or for approximately 2 years. The 2-year argument is based upon the fact that the developer can argue that the obligations continue to subsist but the failure to give notice or enforce payment has become statute-barred with the exception of the last 2 years; or

4. As submitted by the servicing organizations in their solicitor's letter, we are in default and therefore no payment is required and we have the duty to provide the water without any retroactive payment but subject to them being responsible for payment once delivery is made.

There is no easy answer as to what would be the outcome. However, it is my opinion that the obligation to supply the water probably continues to subsist and it

becomes a question of whether or not the Municipality is able to collect previous arrears. In the circumstances, the most appropriate way of approaching this problem at the present time would be to engage the developer in "without prejudice" discussions in an attempt to come to a satisfactory resolution.

**Cost Responsibility**:

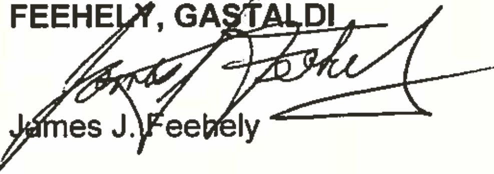
A further aspect of this matter relates to cost. I am satisfied that the Municipality is entitled to be reimbursed for costs in relation to negotiating a resolution, taking into account that the Responsibility Agreements fall under the umbrella of the Subdivision Agreement. However, there is no contractual right or ability for the Municipality to impose a restriction on the developer or Servicing Company from passing on its costs to the ratepayers. The fundamental obligation for the Municipality is to supply water and charge an appropriate rate. Once the water crosses onto the private lands and into the private servicing system, the cost is subject to the internal arrangements of the private system.

**Conclusion**:

This has become a complex matter in terms of the historical nature of the obligations. However, the potential responsibility of the Municipality to supply water capacity is relatively straight-forward in terms of quantity and pricing as well as the defined recipient (Briar Hill West). There is no obligation in the Responsibility Agreements to be the sole or main source of water capacity for the private servicing systems. However, it is clearly time to address both the historical and current issues through the "without prejudice" discussions I have recommended above.

I would be pleased to review this with you in order to determine whether or not the above addresses the questions and concerns. I would also be pleased to attend at Council as well to review the matter.

Yours very truly,
**FEEHELY, GASTALDI**



James J. Feehely

JJF/jm

Attachments:

Appendix 1 - August 31st, 2017 e-mail of James J. Feehely

Appendix 2 - October 11th, 2017 letter of Paul Grespan (McCarter, Grespan) to James J. Feehely