

July 29, 2024

To: Members of the Township of Scugog Planning and Community Affairs Committee
Members of the Township of Scugog Council
Kevin Heritage, Director of Development Services
Valerie Hendry, Manager of Planning
Ralph Walton, Director of Corporate Services/Clerk
Ashley MacDougall, Acting Deputy Clerk

From Peter Swinton

Re: Council Meeting of June 24, 2024
Items 9.3 through 10.2.14 inclusive
Avenu Properties Minister's Zoning Order (MZO) Request for the lands fronting Castle Harbour Drive

Resolution CR-2024-154

That Council refer resolution CR-2024-153 to planning and development staff for study of the proposal and report back to the first PCA meeting in September. (*Planning and Community Affairs Committee September 16, 2024, 6:30 pm*)

I am a retired land-use and urban design planner who has spent half my career working for the cities of Scarborough, then Toronto, and half my career in private sector consulting. I have been qualified to give expert opinion evidence before the OMB/OLT in both land-use planning and urban design matters. I have been a resident of Scugog Township on a property with Lake Scugog frontage since 2015.

I was first made aware of the June 24, 2024 agenda item on June 21st, when I was advised by a friend who is a member of the Scugog Lake Stewards. I did a quick review of the report and forwarded my initial thoughts to my friend. I did not attend the June 24th Council meeting. Subsequent to the motion to refer the matter to staff, I did a further review and passed those further thoughts on to my friend.

While I have had discussions about the matter with people both involved with the Scugog Lake Stewards and not, I have not been asked by any party to provide professional services related to this matter.

This letter is intended as a general discussion. Attached as Appendix A, please find a more detailed discussion with policy references intended to support this letter, and to provide the detailed information Councillors and Planning staff need to understand and investigate the points I'm putting forward.

Can Council even make the Decision to request an MZO?

Scugog Township Official Plan

Scugog Township Official Plan Section 9.5 requires that "*any Amendment to the existing By-law shall be in conformity with this Plan*". As such, in order for the Township to request the Minister of Municipal Affairs and Housing (Minister) to approve an MZO to implement the Proposed Development, the Township would need to satisfy itself that the proposal and Draft MZO order does comply with the Official Plan. It is my opinion that it does not.

Density

While the Township Official Plan allows a maximum density of 50 units per net hectare, the Official Plan goes on to:

- Identify Priority Intensification Areas – (the site is not a Priority Intensification Area)
- State that intensification on other lands shall preserve and protect the character of existing established neighbourhoods
- Require new medium and high density residential to be located on and have direct access to an arterial road – (the block fronting Simcoe Rd is not part of the MZO request, so no development or access is being requested or can be secured on these lands fronting an arterial road)
- Low density (the remaining allowable density) is defined as singles, semis and duplexes up to 15 to 25 units per hectare, based on net area, which excludes roadways, parkland and environmentally protected non-developable areas on a site.

No block areas have been shown on the Block Plan provided by Fausto Cortese to support the MZO request, so it is not possible to assess the net developable area of the 582 unit proposal. The 2004 20-lot draft plan of subdivision shows a net developable area of 11.475 ha, not including roads, the storm water management pond and environmentally protected areas. Applying the Official Plan definitions of low density to this net area results in a maximum of 172 to 287 units, which would be further reduced when the net area of additional roads and parkland needed to serve the increased number of smaller units/lots is removed.

The proposed density of 600 units is at least double to triple the density allowed by the Township's Official Plan. As such, it is my opinion that the proposed development and Draft MZO Order are nowhere close to complying with the Township's Official Plan density policies.

Hazard Lands

The Township's Official Plan designates the waterfront along the east and south side of the lands within the proposed MZO area as Hazard Lands. Permitted uses include passive recreational parks and trails, allowing only essential structural works required for flood and/or erosion or sediment control. The boundaries of Hazard Lands are intended to reflect the limits of flooding of streams and lakes (including Lake Scugog) and wetlands, as well as steep slopes, erosion areas, meander belts and unstable/organic soils. Precise boundaries are to be established through a survey identifying the appropriate elevation wherever development occurs adjacent to Hazard Lands, in consultation with the Conservation Authority.

This assessment has not been undertaken in association with the proposed development. The Regional Official Plan states that the location of *key natural heritage* and/or *hydrologic features* are identified and shown in more detail in area municipal official plans and zoning by-laws. Mapping of the Environmental Protection zone in Scugog Zoning By-law 14-14, mapping of Provincially Significant Wetlands in the Durham Region May 2023 updated Official Plan, and the mapping of the 30 m setback from Provincially Significant Wetlands shown in the GHD Natural Heritage Letter, provided in support of the MZO request all show a relatively consistent location of the line between development lands and a safe setback for wetlands/hazard lands. This line intrudes into the proposed development blocks within Fausto Cortese Block Plan, and as such, it is my opinion that the proposed development does not conform to the Hazard

Land policies of the Township's Official Plan, nor the Environmental Areas policies of the 2020 Durham Region Official Plan, nor the Wetlands policies of the 2023 Durham Region Official Plan.

Parkland

The Township's Official Plan states that neighbourhood parks shall be provided at a standard of 1.0 hectares per 1000 persons. The WSP Wastewater Recycling Report, provided in support of the MZO request, assumes a person equivalent of 2.2 people per unit. As such and based on the 600 unit permission requested in the MZO draft order, it is fair to assume a final population for the development of 1,320 people. This would require a 1.32 ha park on lands that are not Hazard Lands. As no public park dedication is shown in the proposed Site Plan or Block Plan, no minimum parkland requirements are included in the proposed Draft MZO Order, and no specific parkland or open space is shown on the proposed zoning map, no mechanism has been put in place to require the amount of parkland specified by the Official Plan. As such the proposed Draft MZO Order can be reasonably deemed to not comply with the parkland provisions of the Township Official Plan.

Durham Region Official Plan

Bill 23 created the concept of an "*upper-tier municipality without planning responsibilities*" and defined it to include the County of Simcoe as well as the Regional Municipalities of Durham and others. Under the in-force legislation, the upper-tier municipalities of Peel, Halton and York will no longer have planning responsibilities as of July 1, 2024. Durham Region and others will continue to be listed as "*upper-tier municipalities without planning responsibilities*", but the in-force date for their loss of planning responsibilities remains to be determined. The Province has indicated that on and after July 1, 2024, site-specific official plan amendments previously exempted by the upper-tier municipality from its need for approval will be reviewed and adopted by the lower-tier municipality without an additional level of approval.

Subject to legal confirmation, it is reasonable to assume that should the Township choose to request an MZO for the Avenu Development, the Township would be assuming the responsibility to confirm that the proposed MZO order also complies with the Regional Official Plan and that no Regional Official Plan Amendment is required.

Can Council request an MZO – Conclusion

While Section 47 of the Planning Act grants the right for the Minister to grant an MZO creating an unappealable rezoning of lands, nothing has changed regarding a lower tier municipality's need that its actions must comply with its own Official Plan. This responsibility may even be growing with legislative changes currently taking place reducing the planning role of upper tier municipalities, and placing that additional burden on lower tier municipalities.

As no planning application has been filed with the Township, Ontario Land Tribunal (OLT) appeal rules do not currently apply. But as Council is being asked to request the Minister to approve an MZO with a specific draft zoning by-law to implement the Proposed Development, that decision and admission of acceptance of the development and zoning bylaw could be subject to legal processes outside of the OLT.

As an example, any involved party or parties could seek a Judicial Review of the Township's decision to ask the Minister for an MZO. The Judicial Panel would then review the decision against the processes

under which a municipality normally undertakes to study and come to a conclusion on a rezoning application, including circulation, consultation and Official Plan compliance.

It is my opinion that the proposed development and draft MZO order do not comply with significant provisions of the Township and Regional Official Plans, and that as such, the Township does not have the right to request the Minister to approve an MZO for a non-complying rezoning.

What is the Township Giving Up by Requesting an MZO?

Zoning orders are made at the discretion of the Minister. Who the Minister chooses to consult and the level to which the Minister chooses to accept that input is also at the discretion of the Minister. As mentioned above, the Minister's Zoning Order is not appealable by anyone.

A detailed Draft Zoning Order along with a detailed Council Draft MZO resolution were included in the final June 24, 2024 Council agenda. Should the Township approve resolution CR-2024-153 and request the Minister to approve the MZO order, it would be reasonable for the Minister to assume that the Township is satisfied with the entire document package in the agenda, and no further consultation with the Township is required.

Environmental Protection

The current zoning shows a significant Environmental Protection (EP) Zone on the lands, which is tied to Environmental Protection provisions in Zoning By-law 14-14. The proposed zoning map shows no EP Zone but Environmental Protection provisions are included in the draft Zoning By-law which apply to no lands shown on the zoning map. The zoning map only includes a note saying

“Environmental Protection Zone boundary (with none shown) to be confirmed through updated Environmental Impact Study”

- No provision has been put in place to require further input from or consultation with the Township, Region or Conservation Authority;
- No provision has been put in place to ensure that any replacement Environmental Protection zone is even put in place, or if it is, that its provisions and location comply with Zoning By-law 14-14 and the policies of the Township and Regional Official Plans;
- Without underlying zoning in place securing the location or existence of the EP zone, the Planning Act limits what can be later implemented through only Draft Plan of Subdivision and Site Plan Control approval.

Affordable Housing

Both the old and new Regional Official Plans require that at least 25% of all new residential units be affordable to low and moderate income households. The proposed development and Draft MZO Order do not show any affordable housing. Nor do they commit to how any affordable housing could be secured. While the submitted Planning Report acknowledges Regional policies related to affordable housing, the report does not identify affordable units within the proposed development. Nor does it show the required calculations to determine rents or purchase prices which comply with the affordable housing requirements. With no planning vehicles in place to secure affordable housing, the proposed

development and Draft MZO Order can be reasonably deemed to not conform to the affordable housing policies of both the in-force and recently adopted Durham Region Official Plans.

The normal planning vehicle used to secure affordable housing is through an agreement authorized under Section 37 of the Planning Act. The Township has Official Plan policies to allow this to happen, but it must happen as part of a rezoning process.

As no affordable housing provisions or Section 37 agreement requirements are proposed within the Draft MZO By-law, if the Township asks for an MZO as outlined in resolution CR-2024-153, the Township is giving up on its ability to secure the affordable housing required by the Region.

Other Section 37 Benefits

The following types of benefits are allowed within the Township's Official Plan, and are typically secured through Section 37:

- The dedication of additional waterfront open space on hazard lands, as contemplated by the previous 20-unit draft plan of subdivision and Township OP policy 4.8.3 d);
- The construction of and dedication to the Township of the Waterfront Municipal Trail;
- Provision of and funding in perpetuity to maintain and operate the shuttle bus Transit intended to connect the site to downtown as referenced in the Planning Report and Public Consultation documents;
- Public Art

While extra land dedications are typically shown in Draft Plan of Subdivisions, the authority to require them is usually secured through Section 37 agreements processed as part of the associated rezoning. As no Section 37 requests have been included in the MZO as outlined in resolution CR-2024-153, the Minister would understand that to mean that no Section 37 benefits are being requested by the Township.

Public and Private Utilities

Public Supply Water

The Civil Engineering report, prepared by SCS in support of this MZO request stated that:

"The subject site was previously approved to be serviced via an extension of watermain along Simcoe Street, Castle Harbour Drive and the internal local roadways. The Region had previously agreed to service the subject site with a long dead end watermain due to the small number of homes being proposed."

"Due to the number of units in the proposed development, the Region would require a second water feed to service the subject site. To achieve this, two existing watermain extensions are required. It is proposed to extend the existing watermain on Simcoe Street through the West Block and the existing watermain on Scugog Line 8 along Castle Harbour Drive."

“The (Development) project is anticipated to be constructed with advanced water recycling technology from the sanitary treatment plant that can potentially reduce potable water usage by 30%”

“In 2018, a Class EA study for a new water supply and storage facility to service the Port Perry Urban Area was completed by the Region to accommodate the projected 2031 population. The proposed water supply and storage expansion identified in the EA study will not be sufficient to service the projected 2051 population or any future projections.”

The West Block fronting Simcoe Rd is not part of the MZO request, so no water supply line is being requested, or can be secured on these lands. Similarly, no provisions have been included in the MZO, as outlined in resolution CR-2024-153, to require the proposed advanced water recycling technology to ensure the 30% reduction required to make the proposal work.

Holding provisions are a zoning tool that is used when the zoning is otherwise supportable, but certain facilities are required to allow the zoning provisions to occur. Draft Plan of Subdivision conditions can usually deal when typical servicing connections with appropriate capacity available at the property frontage, but when additional facilities are required, these are usually outlined through Holding provisions and Section 37 requirements. No holding or Section 37 provisions have been put in place to ensure that a proper water supply system is constructed to support the development.

The following Holding provisions would normally be secured through a typical rezoning process dealing with these kind of issues:

- Withholding density until all lands required to service the development are incorporated in the application before the Township/OLT;
- Withholding density until necessary water supply improvements have been either financially secured or constructed;
- Withholding density until necessary advanced water recycling technology to ensure the 30% potable water reduction have been either financially secured or constructed;
- Withhold density until provisions have been put in place or financially secured to ensure compliance with the Township and Region Official Plan policies related to long term water supply capacity.

As the supply water improvements only serve this development site and have ongoing active operational cost requirements, it would also be appropriate that the following Section 37 requirements be implemented in association with the rezoning:

- Secure purchaser notification and agreements to ensure funding in perpetuity to maintain and operate the required water supply improvements;
- Secure purchaser notification and agreements to ensure funding in perpetuity to maintain and operate the required water recycling technology from the sanitary treatment facilities necessary to achieve a 30% reduction in potable water usage.

As none of these holding or Section 37 provisions have been included in the draft MZO order, it would not be unexpected that even if the developer did initially construct these facilities, that purchasers, businesses and residents of the development would resist extra charges for facilities which are normally

operated by the municipalities and covered by taxes. The Township and Region should reasonably expect the residents and business owners to lobby Councils to assume these facilities, downloading their development-specific costs onto the broader tax base.

Private Sanitary Services

The 20 lots approved in 2004 ranged in size from 0.424 to 0.805 ha (1.05 to 1.99 acres). These large lots were intended to have individual private septic systems. No communal private sanitary services were anticipated at that time. To reflect this, the in-force Regional OP labelled the Application Lands as:

“Areas Developable on Municipal Water Systems and Private Waste Disposal Systems” (plural)

The Regional Official Plan also considered granting draft plan of subdivision approval in advance of immediately available services providing capacity was available. Servicing capacity will only be granted at the time a *development* agreement is executed.

The updated Regional Official Plan recognised the site area as being a *“location(s) within the Urban Area in which the provision of municipal water and/or sewage services is not technically or financially feasible”* and allowed development on the basis of ***individual on-site sewage services***. (Emphasis mine) Prior to development on private services, the feasibility of full municipal services must be assessed. The only portion of the updated Regional Official Plan that speaks to “communal systems” relates to rural settlements, not urban like this site, and requires an agreement to connect to regional services when they become available.

The policies in place clearly anticipate the individual private septic systems proposed as part of the 20-unit subdivision. No studies were provided with the new development to assess connecting to municipal services, and no agreements are proposed to secure future connections. Nothing is proposed to ensure no future financial or environmental burden to the Region. As such, it is my opinion that the proposed communal sanitary services were not contemplated by the Regional Official Plans, and the safeguards required by the Region have not been secured. As such, it is my opinion that the proposed communal sanitary service does not comply with the Regional Official Plans.

Again, this is an area where Holding provisions and Section 37 can be used to secure compliance with the Official Plan. Section 37 can be used to:

- Require the studies to justify the proposed communal private services
- Require the agreements necessary to secure financing for and commitment to future municipal connections
- Secure purchaser notification and agreements to ensure funding in perpetuity to maintain and operate the required communal sanitary treatment facilities.

Holding provisions can be used to:

- Withholding density until acceptable sanitary facilities have been either financially secured or constructed
- Withhold density until the ability to accommodate the physical requirements for the communal sanitary service facility has been proven, and its impact on net density lands can be determined.

None of this will be possible if the Township supports the Minister's approval of an MZO that does not include these provisions. Once the Minister has been advised that the Township supports the approval of the MZO, as outlined in resolution CR-2024-153, the opportunity to request any further provisions is only at the Minister's discretion.

What is the Township Giving Up – Conclusion

It must be understood that Planning is a top down process:

1. The Ministry is at the top, and develops and updates broad policy documents such as the Provincial Policy Statement (PPS) and the Growth Plan for the Greater Golden Horseshoe, which all upper and lower tier governments and private sector operators must comply with.
2. The next step down are upper tier municipalities such as regions, with their Official Plans which they, lower tier governments and private sector operators must comply with.
3. The next step down are lower tier municipalities such as Scugog Township, with their Official Plans, zoning by-law and planning approval processes. Those must be complied with by the lower tier municipality and private sector operators, or go through a Planning Act process to adjust those requirements.

MZOs have existed in the Planning Act for a while, and it is a tool that was generally used to allow for quick action in an emergency situation. Since the change in Provincial government in 2018, MZOs have been used more frequently.

Because an MZO is an order from the Minister, it is a ruling from the top of this process. When issuing an MZO, the Minister is not required to comply with the provincial policy documents nor the upper and lower tier Official Plans, except for the PPS as it applies to the Greenbelt Area. As such, the Minister is not required to have any regard for:

- The Township's density, environmental and parkland policies
- The Region's environmental, affordable housing and servicing policies.

By requesting that the Minister approve resolution CR-2024-153, the Township Council is saying that it supports the development with no ability for the Township or Region to:

- Secure the environmental protection which currently applies to the site
- Reduce the density based on need for any environmental protection
- Achieve any affordable housing
- Secure its required parkland
- Secure any additional parkland, trails, shuttle bus service or public art
- Secure the construction and ongoing operation of the municipal water supply to the site
- Secure the construction and ongoing operation of the communal sanitary services for the site

An MZO applies a zoning by-law to the lands, and it must be understood that zoning applies the rights and obligations that are tied to that land. Today, that land has the right to develop a 20 lot subdivision on the lands currently zoned R3 (approximately 60% of the MZO site, as shown in By-law 14-14). The MZO would provide the right to develop 600 units on 100% of the MZO lands, and a wide range of commercial office and medical uses with the only restriction being that these uses are limited to the

ground floor. Typical restrictions such as built area or unit count on an individual lot, minimum lot area, minimum lot frontage and some setbacks are not applied.

I have heard that some members of Council believe that applying an MZO does not limit the Township's rights through other Planning approval processes. It needs to be understood that zoning applies the rights to the lands, and other processes such as Draft Plan of Subdivision and Site Plan Control approval are used to manage how those rights are implemented or distributed on the lands, within the scope of the zoning.

- Draft Plan of Subdivision or Site Plan Control cannot be used to implement an Environmental Protection Zone, or to compel the dedication of lands which are not otherwise required.
- A draft Plan of Subdivision can show the size location and access for parkland that the developer wishes to provide, but it cannot compel the provision of that parkland unless it is required by the zoning by-law.
- No planning process other than the implementation of a zoning holding provision can compel a land owner to include a parcel of land in an application. If those lands are required to service or provide access to the development site, they must either be included voluntarily, or be compelled through a holding provision tied to the services or access intended on those lands.
- No planning process other than the requirements for a Section 37 agreement implemented through the zoning process can compel the provision of the benefits offered by the developer and discussed above.
- Draft Plan of Subdivision conditions need to be met by the developer before a subdivision can be registered, and are generally not intended to be used to secure the ongoing operation of communal services by some form of residential or owners group. Section 37 agreements, registered to the lands form a much better basis to secure these long term obligations.

Conclusion

In a normal planning process, especially where density is based on net lands after excluding roadways, parkland and environmentally protected non-developable areas on a site, all the considerations discussed above are assessed together by the Township, community and commenting agencies to determine how a site should be developed and the appropriate zoning rights and obligations which should apply to the lands.

Instead Avenu Properties is asking the Township to divorce itself from the planning process and to support an independent and un-appealable approval of zoning which would secure the rights for a development with an arbitrarily high number of units, which does not comply with the Township and Regional Official Plans, and which includes no opportunity to secure significant developer future obligations. With other planning applications such as Draft Plan of Subdivision and Site Plan Control, the Township can move around some roads and planting and play with the architectural treatments, so long as it's done within and does not undercut the underlying right to build 600 residential units and a somewhat unlimited amount of a wide range of commercial secured in the zoning.

A decision by the Township to ask the Minister to approve resolution CR-2024-153 is effectively a decision by the Township to abdicate its planning responsibilities, and to burden future taxpayers with the obligations normally required of a developer.