

Sent via email

September 16, 2020

Dear Chair Bridgeman and Members of the Planning Committee,

**Re: Legacy Cottages Condominium Agreement,
Agenda Item 7b for the September 17, 2020 Planning Committee Meeting**

The Muskoka Lakes Association (MLA) and Friends of Muskoka (FOM) are writing in connection with the draft condominium agreement between the Township and TRG-KFH (Lakeside) Inc. (“Legacy”) that is being considered at tomorrow’s Planning Committee meeting.

Premature to Approve Condominium Agreement:

This request for approval of a condominium agreement is premature because the appeal period has not yet expired. While it is true that the 30 day time period to request the Local Planning Appeal Tribunal (“LPAT”) to review the decision has expired, the time period to appeal the decision to the Ontario Divisional Court pursuant to Section 37 of the Local Planning Appeal Tribunal Act has not expired. Pursuant to the Ontario government’s emergency orders, time periods for court proceedings, such as an appeal of an LPAT decision to the court, have been extended such that the 15 day appeal period begins running on September 14, 2020. This means that the appeal period ends on September 29, 2020.

Terms relating to Enforcement may be Added:

The MLA and FOM believe that the Township is entitled to add provisions to the draft condominium agreement that will help the Township to enforce the obligations in the agreement, and urge the Planning Committee to add enforcement provisions.

The preamble to Section 11 of LPAT’s conditions of draft approval relating to the condominium agreement states as follows:

“11. The condominium agreement shall contain provisions to **ensure** the long-term **commercial use** and management of the resort operation, units and facilities, as follows:”
[Emphasis added]

The end of such section states as follows:

“The Township of Muskoka Lakes shall not be permitted to impose requirements with respect to the mandatory rental [sic] program requirement and/or owner occupancy or any requirements that are more restrictive than set out here within.”

Similarly, we have received a legal opinion of our counsel to the effect that the condominium agreement with Legacy is not meant to be a simple ‘cut and paste’ from LPAT’s conditions, nor is it meant to be a new set of restrictions disconnected from LPAT’s decision. Rather, the condominium agreement is meant to provide more detail in order to ensure that LPAT’s conditions are properly implemented and administered. We are attaching a copy of this legal opinion dated today from Mr. Stephen D’Agostino at Thomson Rogers.

As a result, while you are precluded from imposing new restrictions on use, you are not precluded from including provisions that enable LPAT’s conditions to be implemented and enforced.

We note that the Touchstone/Villas LPAT decision confirms that enforcement is the Township’s responsibility and that the Township’s ZBL along with the condominium agreement are the appropriate tools to ensure that the units remain commercial rather than becoming residential (paragraphs 111 to 114 and 140 and 141).

The LPAT decision reflects the draft conditions of approval requested by Legacy and supported by the District of Muskoka. The next step is for a condominium agreement to be negotiated by the Township and Legacy. The draft condominium agreement presented to the Planning Committee by Director Pink includes a number of conditions in addition to those in the LPAT decision. For example:

- the condominium agreement must be registered on title within 30 days of it being executed, and Legacy must send a copy of the registered agreement to the Township (see section 1.3 of the draft condominium agreement).
- Legacy shall be responsible for the cost of registering the condominium agreement on title (see section 1.4 of the draft condominium agreement).

Both of these examples demonstrate that the Township is entitled to include additional terms in the condominium agreement if it is justified.

The MLA and FOM believe that these examples are justified because they enable the Township to enforce the conditions that were set out in the LPAT decision. Similarly, the MLA and FOM believe that the Township is justified in including other terms that will enable it to enforce LPAT’s conditions, which we explain below.

The Condominium Declaration - not the Condominium Agreement - Binds Unit Owners:

The MLA and FOM urge the Planning Committee to require that the obligations of unit owners be included in the condominium declaration, and that the Township be given the right to enforce the obligations of unit owners in the condominium declaration.

When the Township seeks to enforce conditions for use of a condominium resort unit, it is important to understand that the condominium agreement is between the owner and the Township. The condominium agreement does not impose any obligations on unit owners (who are not a party to it). Registration of the condominium agreement on title only provides notice of it to unit owners. That is why the unit owner obligations need to be included in the condominium declaration, which is binding on unit owners.

It is also important to understand that the Township is not a party to any agreement with the unit owners, and is therefore not in a position to enforce any obligations against them. This can be solved by adding a provision to the condominium declaration that gives the Township the right to enforce obligations of unit owners in the condominium declaration, such as the requirement to put their unit in a rental pool for part of the year and not use the unit as their primary residence. This is commonly referred to as a ‘third party beneficiary’ provision. The Township is effectively deemed to be a party to the condominium declaration for the limited purpose of enforcement.

Additional Enforcement Provisions

The MLA and FOM urge the Planning Committee to add wording to the Legacy condominium agreement that will enable the Township to enforce the conditions approved by LPAT. Our recommended wording is set out in red in the annotated draft condominium agreement attached to this letter.

Our legal counsel reviewed our recommended wording and confirmed in the attached opinion that: **“the proposed changes to the condominium agreement can be made** respecting the Tribunal’s constraints set out earlier in this letter. **These changes represent details required to facilitate the implementation and or administration of the conditions.”** [emphasis added]

Our recommended wording appears in the following sections:

Section 2.3: The only way for the Township to ensure that unit owners will comply with the condition regarding MPAC assessment is if the condition is included in the condominium declaration. Unit owners are not bound by the condominium agreement, but they are bound by the condominium declaration, as we explained above.

Section 2.4: In order to ensure that the rental pool is implemented, rental of units should only be permitted through the rental program, only the operator should be permitted to set rental rates for the units, and unit owners should not be permitted to occupy their units or have the ability to determine or control who is permitted to occupy their units while they are in the rental program.

Section 2.5: There should be a due date when the annual report is to be provided, otherwise the provision is unenforceable. Information that should be provided to document each unit's participation in the rental program includes not only the number of weeks in the rental pool, but also the number of days rented, rental rates charged and usage by the unit owner during the summer season.

Section 2.6: There should be a mechanism to deal with the securities in the event that the annual report is not provided in time. In addition, if the securities are drawn upon, there should be a requirement for it to be replenished.

Section 2.10: The Township should have the right to enter onto the Legacy property to inspect, and also to receive information from the condominium corporation and unit owners that it reasonably requests in order to ensure there is compliance with the condominium agreement (for example, that unit owners and guests are checking in and out, and unit owners' mail is not being delivered to the resort). Having the ability to impose a fine that is recoverable as taxes will assist the Township with enforcing these obligations.

Sections 2.11 and 2.12: As explained above, it is only possible for the Township to enforce the obligations of the unit owners if the conditions are included in the condominium declaration, and the Township has the right to enforce the conditions (by being a third party beneficiary to the condominium declaration).

Section 3.1(e): There should be a requirement for unit owners to advise subsequent purchasers that the unit may not be occupied as any form of residence.

Section 3.2(c): Since there is a mandatory furniture, fixtures and equipment program, unit owners should not be entitled to avoid the mandatory program by having their own furniture, fixtures and equipment in their unit or making alterations to their unit.

Additional term from the Site Plan Agreement

Just as the draft condominium agreement incorporates provisions from the site plan agreement regarding stormwater management, construction mitigation and private communal water and sewer services (see section 1.1), the MLA and FOM believe that the condominium agreement should incorporate the provision from the site plan agreement that requires on-site management at all times when the resort is occupied. On-site management whenever the resort is open is required in order to ensure compliance with the LPAT condition requiring unit owners to check in and out, and register guests and their vehicles at the front desk of the resort.

We hope these comments will be helpful.

Respectfully submitted,



Deborah Martin-Downs
President, Muskoka Lakes Association



Laurie Thomson
President, Friends of Muskoka

cc. David Pink, Director of Development Services and Environmental Sustainability