



THE DISTRICT MUNICIPALITY OF MUSKOKA

ENGINEERING AND PUBLIC WORKS DEPARTMENT

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TO: Chair and Members
Engineering and Public Works Committee

FROM: A.J. White, P.Eng.
Commissioner of Engineering and Public Works

DATE: May 21, 2014

SUBJECT: Applications For Entrance And Roadway Occupation Permits Pertaining To
Lands Owned By The Ontario Ministry Of Natural Resources Abutting
Muskoka Road 169 In The Community Of Bala, In The Township Of Muskoka Lakes

REPORT NO: PW-5-2014-1

RECOMMENDATION

THAT subject to the conditions set out in Attachment No. 1, the following applications for access permits and roadway occupation permits submitted on behalf of the Ontario Ministry of Natural Resources in respect of the Ministry's lands identified as Parcels A, B and C in Attachment No. 2 be approved:

- 1) A temporary commercial access permit from Muskoka Road 169 to Parcel A;
- 2) A permanent commercial access permit from Muskoka Road 169 to Parcel B;
- 3) A permanent roadway occupation permit in respect of lands to be occupied by a hydro pole adjacent to Parcel C;
- 4) A permanent roadway occupation permit in respect of lands to be occupied by a hydro pole adjacent to Parcel B;
- 5) A permanent roadway occupation permit in respect of lands to be occupied by a hydro line either under or over Muskoka Road 169 from lands adjacent to Parcel B to lands adjacent to Parcel C; and,
- 6) A temporary roadway occupation permit in respect of lands to be occupied by a road widening south of Parcel B.

ORIGIN

The Ontario Ministry of Natural Resources (MNR) owns lands abutting Muskoka Road (MR) 169 near the North Bala Falls. On behalf of the MNR and with the MNR's written consent, Swift River Energy Limited (SREL) has applied for one temporary and one permanent entrance permit relating to the lands, as well as a roadway occupation permit which consists of five components, the details of which are described below.

BACKGROUND

All Muskoka District Roads are controlled access highways, which is to say that access to District Roads is regulated, and the owners of lands abutting District Roads must obtain a permit before constructing, altering or using an access to a District Road.

The procedure for obtaining a permit to gain access to a District Road is set out in Schedule "A" to District By-law No. 87-50, being a by-law to regulate access onto District Roads. The schedule is entitled *Policy And Procedures For Access Onto District Roads* and may be viewed on the District's web site at: <https://muskoka.civicweb.net/Documents/DocumentDisplay.aspx?ID=7252>.

The Policy and Procedures are used to ensure that new properties are not created if they are unable to comply with the applicable technical requirements. The Policy and Procedures are also used to ensure that for existing properties, accesses are located where they best meet the technical requirements, and to compel property owners to make improvements where desirable and feasible. However, the Policy and Procedures have never been used to prevent owners of existing properties from obtaining access.

By-law No. 87-50 delegates authority to issue access permits to the head of the Engineering and Public Works Department or a designate. However, a refusal to issue a permit may be appealed to the Engineering and Public Works Committee. Also, in some circumstances, it may be prudent to refer an application to District Council via the Engineering and Public Works Committee to ensure that the applicant has sufficient authority to proceed with constructing, altering and/or using an access to a District Road. That being said, it is a rare event indeed for an application for an access permit to be referred to the Committee. However, for reasons that will become apparent, referral of the subject applications to the Committee is deemed appropriate in this case.

In this case, there has been an unprecedented level of interest in the applications for permits due to a high level of opposition to proposed uses of the lands in question. In most cases, objections to proposed land uses do not lead to a focus on relatively routine procedures such as the processing of applications for access permits. This is because questions relating to land use are addressed through official plans, zoning by-laws, site plan control and other planning processes. However, due to the application of Ontario's Green Energy Act, these tools are not available in this case.

The fact that the usual instruments of land use control are not available does not mean that other mechanisms such as access control can be used as a substitute for them or to fill a perceived void. It has long been established that access controls may only be brought to bear for the purposes of addressing matters relating to the functioning of the road. The road authority may impose conditions or requirements relating to the expected impact of the access on the road. For example, an authority may demand that traffic signals, turning lanes, etc., be installed to cope with a very high volume of traffic associated with an access point. However, whether that volume of traffic is generated by a shopping mall, a hospital, a factory or something else, is of no concern to the road authority when considering access permit applications. The decision as to the nature of the land use is made elsewhere, and the road authority has no ability to change that decision using access controls. This point was made by the District Solicitor to District Council in a presentation made on March 30, 2009, wherein he stated:

- *If SREL obtains permission to develop the MNR site, and SREL applies for access permit, Muskoka may only refuse or place conditions on issuance for traffic management purposes*
- *Refusal for reasons other than traffic management would be bad faith and illegal*
- *If Green Energy Act passed in current form and project qualifies as Green Energy Project, Muskoka's controlled access by-law may not be used so as to interfere with the project*

As mentioned above, there has been a lot of interest in this matter, and it would be very easy to create a large document from the submissions received. While it is unnecessary to submit all of these documents with this report, the Committee should be aware of recent correspondence from the Township of Muskoka Lakes as well as resolutions of the Township Council. These documents are included in Appendix "A". By Resolutions SC-2 02/05/14 and SC-3 02/05/14 the Township has requested that consideration of approvals relating to the permits be deferred.

ANALYSIS

Attachment No. 2 contains an aerial photograph that indicates the location of the lands in question and the related permit applications. On behalf of the MNR, SREL has asked for a temporary access from MR 169 to Parcel A and for a permanent access from MR 169 to Parcel B. Parcel A is known locally as Margaret Burgess Park and the MNR has approved its use as a construction staging area for a proposed hydro-electric generating station to be built on Parcel B.

In addition to the access permits, permission to occupy the roadway has also been requested in respect of the areas outlined in yellow. The application pertaining to the area adjacent to Parcel A is for temporary occupancy. The area adjacent to Parcel B is for a temporary occupancy while the proposed road widening is constructed and used for the purposes of building the proposed generating station. After the project is completed it is proposed that the widening would be assumed by the District and become a permanent feature of the roadway. However, permission is also required to permanently occupy the roadway in this area with a hydro pole. Likewise, permanent permission is required in respect of a second hydro pole located in the area adjacent to Parcel C as well as the hydro line that runs between the two poles. It is also possible that an underground electrical service line will be required on the same alignment.

The applications for permits have been supported by detailed drawings prepared by WSP Global Inc., a very large professional services firm headquartered in Montreal.

Concerns

A summary of the principal concerns raised by the Township and others is as follows:

- 1) There is no access to the usual mechanisms of land use control.
- 2) The MNR lands are the subject of unresolved litigation scheduled to go before the Ontario Court of Appeal in July.
- 3) The duration of temporary permits is unknown.
- 4) Temporary access/occupation may result in permanent change, the nature of which is unknown.
- 5) The District should insist on a bond to ensure the obligations of the applicant are met.
- 6) The entrances requested from the Township and the District are in close proximity to each other and will lead to congestion as well as conflicts with infrastructure such as the approved pedestrian crossing.
- 7) MR 169 is the only route through Bala.
- 8) Granting the permits will adversely impact the safety of pedestrians and cause traffic to circumvent Bala.
- 9) Margaret Burgess Park has a mature tree canopy of white pine with recognized heritage value.
- 10) Trees on land adjacent to the proposed road widening at Parcel B have heritage value. Trees and other vegetation should be inventoried and protected.
- 11) Drawings submitted in support of the applications are inadequate and a comprehensive amalgamated schematic is required.
- 12) More information is required regarding work to be performed adjacent to the bridge on MR 169, significant damage to which will require a 50km detour around Bala.
- 13) Permits will be required for overweight vehicles (if any) on Muskoka Roads.

- 14) Insufficient information has been provided by the applicant to be able to assess the impact of the proposed generating station with respect to numerous considerations including facility appearance, flood mitigation, riparian rights, crane operation, blasting, the local economy, access to Margaret Burgess Park, other necessary approvals and construction sequencing.
- 15) The intake for the proposed generating station is currently shown as being located on District property.
- 16) Access to the proposed generating station has obstructed sightlines and will present a threat to pedestrians. All movements should be overseen by trained flag persons.
- 17) The construction of the proposed generating station will lead to traffic congestion.
- 18) The guiderail and retaining structure associated with the road widening do not meet standards and require further work.
- 19) Pedestrian access to sidewalks in the vicinity of road widening must be maintained.
- 20) The requested access lacks environmental approval.
- 21) The proposed pedestrian crossover conflicts with the temporary access to Parcel A.
- 22) Trucks using Parcel A will have to reverse in or out.
- 23) It is not clear how trucks in the road widening will be unloaded. Will a crane be required and, if so, will its stabilizers interfere with traffic?
- 24) Maneuvering of trucks into the road widening area may require lane closures in both directions.
- 25) The access to Parcel A is not directly opposite Bala Falls Road and does not form a four way intersection.

Many of the concerns raised do not relate to the question of access to private property, or to the compliance (or otherwise) of the permitted access points with District policy. In other cases the connection to the issue of permitted access is tenuous at best. In still others, the concerns pertain to the temporary impacts of construction activity for a project that may or may not proceed based on approvals granted elsewhere. In this latter case, the denial of access may serve to address the concern by rendering the other approvals moot. With this in mind, and at the risk of stating the obvious, it may be worthwhile to note that the project is clearly supported by the Province of Ontario. The Province owns the land upon which the construction activity is to take place and has established the legal framework underpinning the approval of the project. The Province also regulates and sets the standards for a number of the items raised within the concerns listed above, such as the protection of natural heritage features, etc.

Responses To Concerns

Responses to the concerns listed above are provided below in the same numerical sequence:

- 1) As noted previously, the requirement for access permits cannot substitute for the lack of traditional land use control mechanisms.
- 2) The litigation is not directly related to the question of the landowner's application for an access permit. As noted above, a permit cannot be denied for reasons that have no connection to the function of the access in relation to the road.
- 3) The period of validity for the requested temporary permits is two years, which will be a condition of the permits. However, extensions may be granted if applied for and deemed appropriate.

- 4) Securities will be required to ensure that areas disturbed as a result of temporary works will be restored to as good as or better than previously existing conditions.
- 5) The nature of securities may vary. Options include readily negotiable securities such as letters of credit, but bonds may also be used. As a condition of approval of roadway occupation, a bond will be sought to protect the District from the financial impacts of any damages related to the activities of the owner of the lands (i.e. MNR). In addition, indemnification of the District will be required, as will evidence of satisfactory insurance naming the District as co-insured.
- 6) The District and the Township have been asked for two access permits each. All but one pertain to temporary access. Obviously, in any location where no activity is replaced by some activity, this constitutes change, but there is no reason to suspect that the simultaneous use of these access points will yield unacceptable congestion. Even if the change is undesirable to some, it will be temporary. Impact on the proposed pedestrian crossover is not expected to be a problem. Indeed, the presence of the crossover, which will be equipped with standard traffic signal heads, will assist in traffic control.
- 7) The fact that MR 169 is the only route through Bala is not sufficient reason to deny access permits to abutting lands.
- 8) Construction of the generating station, if it proceeds, will likely cause some disruption and it is not unusual for motorists who become aware of the potential for such disruption to seek alternative routes. This is not sufficient reason to deny an access permit. With the appropriate flagging, barriers, etc., there is no reason to expect the management of pedestrian traffic in the vicinity of the construction project to be any more challenging than in other construction zones. That being said, there is no direct link between this issue and the application of the criteria for approval of access from District Roads to abutting lands.
- 9) The heritage value of the MNR's land or the trees on the land may not be considered when assessing the merits of an application for access.
- 10) Damage to adjacent property resulting from work that may be permitted on the District's property is something that the District should be, and is, concerned about from a liability perspective. The requested inventory and protection of trees on Township property will be a condition of approval of a roadway occupation permit.
- 11) The drawings submitted are sufficient for the District's purposes. However, the applicant will be required to provide the requested plan.
- 12) Information relating to work around the bridge is not pertinent to the application of the District's access policies. That being said, as the owner of the bridge the District is interested in receiving this information and has asked for it. As an organization that frequently employs blasting in the course of construction, the District is also very much aware that blasting can be carried out in close proximity to buildings and other structures with no adverse consequences. Despite this, the District can and will take steps to protect itself against unintended results as noted in 4 and 5 above.
- 13) The District has a process for addressing overweight vehicles which is unrelated to the processing of access permits.
- 14) The lack of information on matters unrelated to access, such as the appearance of buildings, flood mitigation, etc., may not be considered when assessing the merits of an application for access.
- 15) There is no permission granted for facilities to encroach on District property, including the road allowance for MR 169. Although, once again, not related to the question of access, the applicant will be advised that the intake cannot be located on District property. The applicant may choose to apply for permission to encroach on District property, but that would be a separate and distinct process.

- 16) Except during the construction of the proposed generating station, the volume of traffic using the permanent access will be minimal. While the proximity of the access to the bridge is not ideal, visibility is adequate. Flag persons will be on hand when the access is used during construction.
- 17) Construction activity where there is presently no construction activity may well affect traffic in the area, but there is no reason to suspect that this will lead to unacceptable congestion. More to the point, the prospect of construction activity does not affect the applicant's eligibility for an access permit.
- 18) The design of the guiderail and retaining wall will be performed by licensed professional engineers employed by WSP Group Inc., who will seal the plans.
- 19) Except during the construction of the proposed generating station, pedestrian traffic will be unaffected by the granting of permits. During construction there will likely be periods when pedestrian traffic must be diverted away from the vicinity of Parcel B. Pedestrians will be required to cross to the east side of the road, under the supervision of flag persons if necessary. It must be noted that while the bridge does indeed feature sidewalks, they transition to relatively narrow paved shoulders on the road, and they are separated from traffic only by a rollover curb. In short, there are no proper sidewalks beyond the bridge on either side.
- 20) The granting of access permits does not relieve the applicant of the duty to comply with any other regulatory requirements and obtain other applicable approvals.
- 21) Ideally, pedestrian crossovers would be located some distance from any intersecting roadways and entrances. However, the reality is that the locations that satisfy the warrants for pedestrian crossovers are invariably in urban settings where side roads and driveways abound. Consequently, it is not uncommon, indeed it is usual, for crossovers to be close to intersections and/or driveways. It has been noted that the District's policy calls for a separation of 65 metres between commercial accesses and pedestrian signals. This is a simple extension of the required distance from a signalized intersection and may be explained by the fact that at the time the policy was written, the only pedestrian signals in existence were those collocated on traffic signal poles at intersections. There is, in fact, no prescribed separation between crossovers and access points. In this particular instance, the crossover is quite close to the driveway, but the access will be temporary and, when necessary, under the supervision of flag persons.
- 22) WSP Group Inc. asserts that based on digital models, the trucks accessing Parcel A will be able to turn around on the site. However, as long as the trucks are under the supervision of flag persons, reversing in or out might be cumbersome, but not dangerous. Once again, this will be a temporary arrangement.
- 23) Day-to-day lifting will be done by a crane on the MNR property. Unloading of trucks in the widening will be accomplished using a crane located in the access to Parcel B which, with one exception, will not protrude into the roadway. A larger crane will be required to unload the generator that is expected to protrude into the roadway and will require special traffic controls.
- 24) WSP Group Inc. asserts that based on digital models, trucks will be able to reverse into the road widening area without impacting (or closing) the northbound lane. District staff have confirmed this finding using the more dated truck template technique. The template technique also indicates that the truck should be able to drive straight into the road widening area.
- 25) The access to Parcel B is, in fact, quite close to being aligned with the projection of Bala Falls Road. Any misalignment is inconsequential and cannot be avoided in any event. The North Bala Falls Dam is currently serviced from this location.

Other Observations

The necessity for the temporary roadway occupation adjacent to Parcel A is unclear. At this time it is not recommended that a permit for occupation of this portion of the road be granted. Of course, this would not preclude the construction of a temporary entrance, if permitted.

The applicant has suggested that the proposed road widening south of Parcel B should become a permanent feature of the road and be assumed by the District. The applicant makes some good arguments for doing this, and staff support this recommendation. However, it must be acknowledged that the applicant may also be motivated by cost savings resulting from not having to remove the widening. A decision as to whether or not to allow this feature to remain need not be made immediately. If the Committee wishes to reserve judgement, any permit should be issued on the basis that the widening will be removed. The terms of the permit can be changed later if it is decided to leave the widening in place.

SUMMARY

The Engineering and Public Works Department can find no compelling reason to deny or defer the applications for permits submitted on behalf of the MNR. Looked at from a very high level, it would seem almost inconceivable that the Province might be prevented from gaining access to Provincial property from what was not too long ago, a Provincial Highway. A Provincial Order In Council transferred the highway to the District in the 1990s, and it doesn't require the suspension of disbelief to imagine that the reverse, or some other equivalent measure, could happen very quickly if the Province deemed it necessary. The bottom line is that the Province is in a position of authority, and it is reasonable to assume that it is willing to exercise that authority in the furtherance of Provincial objectives. Indeed, the history of the Bala Falls Hydro Project is evidence of this.

In view of the above, staff believe that the applicant is entitled to receive the requested access permits. It is also considered that the District's interests would be best served by issuing the permits with appropriate conditions. A denial or further delay of the applications could well conclude with the District's decision being overturned, with the loss of any ability to impose conditions and a potential to incur costs.

The District has a little more discretion in respect of applications for roadway occupation permits, but there would appear to be no reasonable explanation available for the denial or deferral of the permits in respect of the lands adjacent to Parcels B and C. The applicant has not provided details of the need to occupy the roadway adjacent to Parcel A and accordingly, it is recommended that this application be denied. The applicant can reapply if it wishes to pursue this matter.

COMMUNICATIONS

Within 24 hours of the adoption by District Council of any decisions taken by the Committee in respect of this matter, those decisions will be communicated to the MNR, SREL and the Township of Muskoka Lakes.

Respectfully submitted,



A.J. White, P.Eng.
Commissioner of Engineering and Public Works



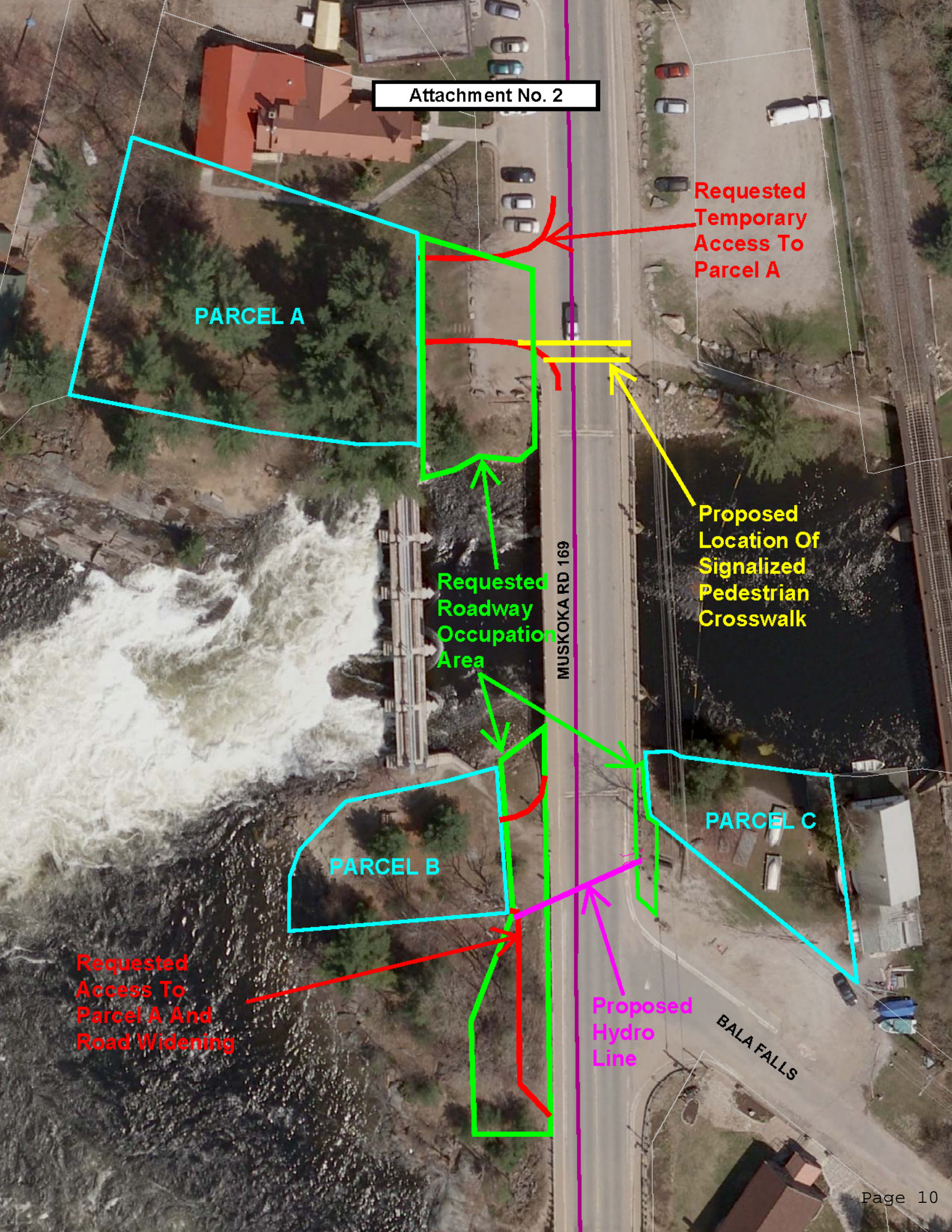
Michael Duben, B.A., LL.B.
Chief Administrative Officer

**Conditions To Be Attached To Permits Pertaining To Lands Owned
By The Ontario Ministry Of Natural Resources Abutting Muskoka Road 169
In The Community Of Bala, In The Township Of Muskoka Lakes**

- i) Access permit number 1) shall expire two years from the date that the access is installed. Within two weeks of the expiry of the permit, temporary access shall be removed and the adjacent lands restored to conditions as good as or better than the conditions that prevailed prior to the installation of the temporary access.
- ii) Flag persons shall be available at all times to oversee the use of access number 1). The use of access number 1) by vehicles weighing in excess of 3 tonnes shall at all times be under the supervision of flag persons.
- iii) As an alternative to supervision by flag persons, temporary signals may be installed at access number 1) so as to create a fully signalized intersection with Muskoka Road (MR) 169. Despite this permissive authority, the applicant shall install such temporary signals if they are deemed to be required at any time by the District.
- iv) The applicant is to provide an irrevocable Letter of Credit in the standard form required by the District in the amount of \$50,000 (fifty thousand dollars) as security to ensure that the applicant's obligations respecting access number 1) are met.
- v) During construction of the proposed generating station, flag persons shall be available at all times to oversee the use of access number 2). During construction of the proposed generating station, the use of access number 2) by vehicles weighing in excess of 3 tonnes shall at all times be under the supervision of flag persons.
- vi) Following completion of construction of the proposed generating station, the use of access number 2) by vehicles weighing in excess of 3 tonnes shall be under the supervision of flag persons where required to ensure that such use does not conflict with the use of MR 169 by other vehicles and pedestrians.
- vii) Roadway occupation permit number 6) shall expire two years from the date that construction of the proposed generating station commences. Within two months of the expiry of the permit, the roadway shall be removed and the adjacent lands restored to conditions as good as or better than the conditions that prevailed prior to the installation of the temporary access.
- viii) No materials or equipment may be stored or left on the road allowance for MR 169.
- ix) All traffic control is to be carried out in accordance with the latest edition of Ontario Traffic Manual Book 7.
- x) Prior to the construction of the roadway widening relating to roadway occupation permit number 6) or to the commencement of construction of the generating station, whichever comes first, the applicant shall:
 - 1) Supply a complete set of final design drawings of the roadway widening and related retaining structure signed and sealed by a licensed professional engineer.
 - 2) Supply a comprehensive amalgamated schematic drawing showing all access points requested on District and Township roads.
 - 3) Produce a pre-construction record of condition for the adjacent lands and roadway, including an inventory of trees and other vegetation on lands owned by the Township of Muskoka Lakes and a description of the means by which such lands will be protected from damage arising from construction on the road allowance for MR 169.

- 4) Confirm that the work will be carried out in accordance with the District's standard requirements for Vibration Control relating to blasting and other construction activity.
- 5) Provide an irrevocable Letter of Credit in the standard form required by the District in the amount of \$200,000 (two hundred thousand dollars) as security to ensure that the applicant's obligations respecting roadway occupation permit number 6) are met.
- 6) Provide a performance bond in the amount of \$2,000,000 (two million dollars) as security to compensate the District for any direct or indirect damages suffered by the District arising from the activities of the applicant or subsequent owners or occupants of the applicant's lands, which bond is to continue to be in place for a period of two years following commissioning of the generating station.
- 7) Confirm that the applicant will indemnify and hold the District, its agents, officers and employees harmless from and against all claims, demands, losses, expenses, costs, damages, actions, suits or proceedings by third parties, directly or indirectly arising or alleged to arise out of the actions of the applicant or subsequent owners or occupants of the applicant's lands until a period of six years has elapsed following commissioning of the generating station.
- 8) Provide a copy of a certificate of general liability insurance naming the District, the applicant and occupants of the applicant's lands as insured parties, with limits of not less than \$5,000,000 (five million dollars) inclusive per occurrence for bodily injury, death, and damage to property including loss of use thereof, with a property damage deductible of not more than \$5,000 (five thousand dollars), which certificate is to remain in continuous effect until a period of six years has elapsed following commissioning of the generating station.

Attachment No. 2



PARCEL A

Requested Temporary Access To Parcel A

Requested Roadway Occupation Area

Proposed Location Of Signalized Pedestrian Crosswalk

MUSKOKA RD 169

PARCEL B

PARCEL C

Requested Access To Parcel A And Road Widening

Proposed Hydro Line

BALA FALLS