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File No. 702782

December 13, 2015

By E-Mail to cballard.mpp.co@liberal.ola.org

Chris Ballard, MPP for Newmarket-Aurora
238 Wellington Street East, Suite 203
Aurora, Ontario
L4G 1J5

Dear Mr. Ballard:

**Re: Applications by Highland Gate Developments Inc.
21 Golf Links Drive, Aurora
Town File Nos. OPA-2015-01, ZBA-2015-02 and SUB-2015-01
OMB Case No. PL151160**

We are co-counsel to Highland Gate Developments Inc. ("HGDI"), the owner of the former Highland Gate Golf Club lands (the "Lands") for which Official Plan Amendment, Zoning By-law Amendment and Draft Plan of Subdivision applications (collectively, the "Applications") were filed with the Town of Aurora (the "Town") on February 27, 2015. The Applications were appealed to the Ontario Municipal Board ("OMB") on November 17, 2015 as a result of the Town's failure to make a decision on the Applications within the time periods set out in the *Planning Act*.

It has come to our attention that on December 11, 2015, you issued a press release regarding the Applications and what you referred to as "perceived encroachment issues", and that you then posted this information on your website under the heading: "Top Stories" (the "Press Release").

On behalf of HGDI, and for the reasons detailed below, we consider your Press Release to be inappropriate, misleading, and prejudicial to HGDI's interests. Accordingly, we insist that you immediately issue a retraction of the Press Release, remove the Press Release from your website and any other medium where you have posted this information, and then confirm in writing to us that you have done so.



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First, given that the Applications have been appealed to the OMB, it is inappropriate for you, as a Member of Provincial Parliament, to be commenting on a matter that is before a provincial administrative tribunal for adjudication. In this regard, we note previous remarks of the Province's Integrity Commissioner that have confirmed such comments to be improper. For instance, the 2001-2002 Annual Report of the Office of the Integrity Commissioner includes a summary of inquiries received and the advice provided by the Commissioner, including an inquiry as to whether it would be appropriate for a Member to write a letter to the editor of a local newspaper on behalf of constituents regarding an on-going contested OMB matter. In response, then Commissioner, The Honourable Coulter A. Osborne, Q.C., advised that "until such time as [the OMB] decision is released, the letter to the editor is inappropriate as it may also be interpreted as an attempt to influence or interfere with the decision of the OMB, contrary to the *Members' Integrity Act*" and that it would be "inappropriate to interfere with this quasi-judicial process". Accordingly, we are aware that other MPPs have refused to comment on contested matters before the OMB for this very reason.

Second, you have referred in the Press Release to "perceived encroachment issues" and structures that you claim HGDI "believes" are encroaching on the Lands. To be clear, any encroachments on the Lands are not "perceived", nor are they simply the "belief" of HGDI; rather, we understand that all existing encroachments have been properly identified by an Ontario Land Surveyor licensed under the *Surveyors Act*. If you have any information to the contrary, kindly provide it to us immediately.

Third, the Press Release quotes you as expressing a desire that HGDI not take any action "until boundary issues are resolved". If, by this statement, you are insinuating that HGDI's assertion of its ownership rights in the Lands (which are registered under the *Land Titles Act* with absolute title) is somehow in question, we require that you immediately identify the basis upon which you are making this allegation. To confirm its ownership rights in the Lands, including where any existing encroachments may exist, HGDI obtained an independent opinion from Izaak de Rijcke, who is both a lawyer and a licensed Ontario Land Surveyor. In his opinion dated November 23, 2015, which is attached for your reference, Mr. de Rijcke confirms that "adverse possession does not apply to land registered in Ontario under the *Land Titles Act* with an absolute title". Again, if you have any information to the contrary, please provide it to us immediately.



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Fourth, you refer in the Press Release to a resolution adopted by Aurora Council on December 8, 2015 that HGDI “be requested to hold off on addressing any encroachments until such time as the OMB appeal matter is fully decided”. Although your statement may be factually accurate, it is worth noting that a municipal council has no authority to prevent a landowner from exercising its legal property rights in this regard. Moreover, your statement regarding Council’s resolution fails to provide the reader of the Press Release with the full context in which this matter has arisen.

As you may be aware, on its own initiative, HGDI engaged in an extensive public consultation process earlier this year with the owners of lands adjacent to the Lands where there are existing encroachments. More specifically, HGDI initially sent letters to 190 households and offered to meet with those residents on an individual basis. Many, but not all, residents accepted HGDI’s invitation and met with our client and its consultants. Resulting from those meetings, HGDI entered into approximately 40 signed agreements with adjacent landowners, and approximately 50 similar agreements were in process. Notwithstanding HGDI’s ability to enforce its property rights, many of the agreements provided for a potential conveyance of land from HGDI to the adjacent landowner, which would effectively eliminate the encroachment on the Lands.

However, the agreements were expressly conditional upon the Town of Aurora approving the Applications. Further, Town Council was well aware of this fact, as we advised Council of this stipulation in correspondence dated October 13, 2015, and on October 22, 2015 we provided the Town with copies of each of the agreements that had been signed as of that date.

Notwithstanding this awareness regarding the status of the agreements, Town Council failed to make any decision on the Applications. In fact, after holding three public planning meetings between June and October 2015, and after receiving a recommendation from the Town’s Director of Planning and Development Services that a “comprehensive [staff] report outlining recommendations and options” be presented at a future meeting, Town Council chose not to adopt, or even discuss, the staff recommendation at the public planning meeting on October 28, 2015. It is worth noting that only one such public meeting is required under the *Planning Act*. Nonetheless, HGDI willingly took an active role in all three public meetings hosted by the Town, and even sponsored its own public meeting to obtain public input in April 2015.



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Rather than adopting the recommendation of the Town's Director of Planning and Development Services, Aurora Council instead adopted a resolution on October 28, 2015 directing that Town staff report back to a further public planning meeting to address any issues raised at the previous public meetings, but with no direction for staff to provide its overall recommendations on the Applications. No specific date was identified by Council for this further public planning meeting and no further public meeting was ever scheduled. As a result, with no end to the municipal planning process in sight, HGDI exercised its right to appeal the Applications to the OMB.

We appreciate that Aurora Council was under no legal obligation to make a decision on the Applications within any particular timeframe. However, Council's failure to make any decision, or even identify when a decision would be made, resulted in the Applications being appealed to the OMB. Therefore, it was Council's failure to make a decision on the Applications that ultimately led to the agreements between HGDI and the various residents being rendered null and void.

Having said that, HGDI continues to believe that all matters related to the Applications, as well as the encroachment issues, can be resolved through a comprehensive settlement with both the Town and the residents that is in the public interest and respects the rights of all parties involved.

Fifth, you have stated in the Press Release that the existence of the (former) golf course "was [a] deciding factor for almost every resident when making that decision to purchase a home". Please provide the basis upon which you have made (and presumably verified) this assertion. Further, kindly advise why you believe this statement, even if true, to be relevant "background" information concerning the Applications.

Sixth, you have commented in the Press Release that "many residents of Aurora, including the Highland Gate Ratepayers [sic] Association, have been outspoken in regards to the proposed development". Given your statement that, as an MPP, "it is vital to respect the rights of all parties involved" and that your office is "monitoring the current processes to ensure fairness in the public planning process", we are curious as to why you would then choose to only refer to opposition to the proposed development, and fail to make any mention whatsoever of the positive comments that the Applications have generated from various sources, including public agencies.



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For example, you have failed to note that York Region has advised that HGDI's proposed Official Plan Amendment "does not adversely affect Regional planning policies or interests" and has confirmed to the Town that it has "no objection to draft plan approval of the plan of subdivision". Similarly, you have failed to advise the reader of the Press Release that the Lake Simcoe Region Conservation Authority has advised the Town that it is "satisfied that all outstanding matters can be addressed through conditions of draft plan approval", nor have you made any reference to any of the positive comments received thus far from various Town departments or the Town's peer review consultants regarding the Applications.

As an elected Member of Provincial Parliament who professes to espouse "respect" for all parties and "fairness" in the process, kindly explain why you have chosen to present such a one-sided version of the numerous comments that have been received in response to the Applications.

Finally, we were surprised to see that in a Press Release purportedly intended to deal with the Applications and various encroachments on the Lands, you would choose to make reference to the Province's recently enacted *Protection of Public Participation Act, 2015*, and SLAPPs (Strategic Litigation Against Public Participation). If, by doing so, you were attempting to draw any connection between HDGI's assertion of its legally recognized property rights and so-called SLAPPs, we consider your comments to be highly improper, especially for someone in your position. To be clear, HGDI has not brought a legal proceeding against any person arising from expressions made by such person(s). Rather, the only proceeding commenced by HGDI was the appeal of the Applications to the OMB as a result of Aurora Council's failure to make a decision within the time periods set out in the *Planning Act*. Thus, we insist that in retracting the Press Release you also expressly confirm that you have no basis to allege that HGDI is in contravention of the *Protection of Public Participation Act, 2015* or has otherwise taken any steps to unduly limit public participation or to inhibit individuals from expressing themselves on matters of public interest.



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We look forward to receiving confirmation from you that the Press Release has been retracted, as well as your responses to the various requests for information and/or clarification identified above.

Yours truly,

DAVIES HOWE PARTNERS LLP

KAGAN SHASTRI LLP

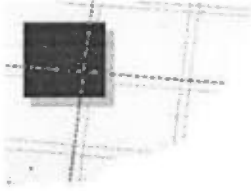
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Ira T. Kagan

Encl.

copy: Kathleen Wynne, Premier of Ontario
Madeleine Meilleur, Attorney General
Ted McMeekin, Minister of Municipal Affairs and Housing
Mayor Geoffrey Dawe and Members of Aurora Council (Attn: Town Clerk)
Warren Mar, Town Solicitor, Town of Aurora
Patrick Moyle, Chief Administrative Officer, Town of Aurora
Marco Ramunno, Director of Planning and Development Services, Town of Aurora
Wayne Emmerson, Chair, York Region
Gabriel Szobel, Senior Counsel, York Region
Bruce Macgregor, Chief Administrative Officer, York Region
Mike Walters, Chief Administrative Officer, LSRCA
Alan Patton, Patton Cormier & Associates (counsel to Highland Gate Rate Payers Association)
Leo Longo, Aird & Berlis LLP
Kent Pollard, Peddle & Pollard LLP
Highland Gate Developments Inc.



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November 23, 2015

Jeffrey P. Shankman
Barristers & Solicitors
Suite 310
3190 Steeles Ave. E.
Markham, Ontario L3R 1G9

COPY

Dear Mr. Shankman,

Re: Adverse Possession and land registered as Absolute Title under the *Land Titles Act* in Ontario

Introduction

Thank you for your retainer of my services in connection with this matter. I acknowledge receipt of your verbal instructions on November 19, last. You have asked that I opine on whether or not land can be acquired through “adverse possession” from a registered owner once title has been registered under the *Land Titles Act* as “absolute title”. This letter is my opinion in respect of same.

A.1 Scope of Retainer, Qualifications and Limiting Factors

A.1.1 My qualifications and expertise are set out in my CV, which is attached as an Appendix to this report. I am licensed as an Ontario Land Surveyor by the Association of Ontario Land Surveyors. I am the holder of a Certificate of Authorization through my professional surveying services corporation¹ and have been licensed since 1978 as Registration Number 1458. I continue to practice professional land surveying in the Province of Ontario, appear in the courts as a witness, and provide opinions and reports to statutory decision-makers under the *Land Titles Act* and the *Boundaries Act*. I have lectured in boundary law for professional land surveying candidates in the field of cadastral surveying at the University of Toronto, directly for the Association of Ontario Land Surveyors and, most recently, at the Lassonde School of Engineering at York University since the 1990s and continue in that capacity to the present time. In January 2014, I taught for one semester at Osgoode Hall Law School, York University, as Adjunct Professor in Property for First year law students. I continue to enjoy an appointment as Adjunct Professor at Osgoode Hall Law School.

¹ Izaak de Rijcke Surveying Inc.

Re: Adverse Possession and land registered as Absolute Title under the Land Titles Act in Ontario

A.1.2 I am also licensed by the Law Society of Upper Canada to practice law in the Province of Ontario (Licence Number 22684E) and I am certified by the Law Society of Upper Canada as a Specialist in Real Estate Law. I am also a member of the Law Society of Yukon.

A.1.3 As a result of my qualifications and experience as a lawyer and certified real estate specialist, informed by my experience as a cadastral land surveyor, I believe I have the expertise to opine on the matters covered in this report. I am, however, deferential to any Court as the ultimate decision-maker. Please note that I am aware of *Rule 4.1.01* of the *Rules of Civil Procedure*² and confirm that I have complied with this requirement. If also needed, I am prepared to provide further certification in the form of *Form 53* under the *Rules*.

A.2 Overview and Purpose

A.2.1 The purpose of this report is to provide an analysis of the law and legislation as it relates to adverse possession in Ontario in respect of lands which have been registered under the *Land Titles Act* as *absolute title*. My approach, as followed below, is to provide a brief explanation of adverse possession and then an explanation of what “*absolute title*” means. Thereafter, an application of the legislation to lands held as absolute title is discussed in order to explain my conclusion.

A.2.2 This is a legal opinion. My conclusions have been reached independent of any external consideration and in my capacity as a lawyer.

B.1 Adverse Possession

B.1.1 Adverse possession is understood in real property law in this Province as a mechanism by which title can be acquired to land from the legal owner by reason of trespass and possession. The mechanism relies on both legislation and the common law for its operation.

B.1.2 The legislation which bars the recovery of land after the passage of time is the *Real Property Limitations Act*.³ The specific sections which deserve repeating are sections 4 and 15:

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make

² *Rule 4.1.01* states,

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

- a) to provide opinion evidence that is fair, objective and non-partisan;
- b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
- c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O.Reg. 438/08, s. 8.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O.Reg. 438/08, s. 8

³ *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

Re: Adverse Possession and land registered as Absolute Title under the Land Titles Act in Ontario

such entry or distress, or to bring such action, first accrued to the person making or bringing it. R.S.O. 1990, c. L.15, s. 4.

...

15. At the determination of the period limited by this *Act* to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished. R.S.O. 1990, c. L.15, s. 15.

B.1.3 The operation of these two sections therefore bars the legal owner from bringing a legal proceeding after the passage of more than ten years' time and, at the end of that ten year period, extinguishes the legal owner's right title and interest in the lands.

B.1.4 The common law, as can be understood from decisions rendered by the courts in Ontario, have explained and clarified what is meant by "possession" for it to be adverse. In particular, three frequently cited decisions from the Ontario Court of Appeal⁴ have established that a claimant to a possessory title throughout the statutory period must have:

- (1) had actual possession;
- (2) had the intention of excluding the true owner from possession, and
- (3) effectively excluded the true owner from possession.

The claim will fail unless the claimant meets each of these three tests and time will begin to run against the true owner only from the last date when all of them are satisfied.

Subsequent court cases have also confirmed the long standing fourth element as:

- (4) the possession has been visible, open, notorious, and continuous.

B.1.5 An academic authority describing this aspect of the mechanism wrote, "In general, the squatter must use the property as the owner might. Looked at another way, the adverse use must be such as to put the paper owner on notice that a cause of action has arisen. After all, the doctrine is based on the failure to take action within the limitation period, and therefore time should not run unless it is fair to hold a delay against the owner. This is reflected in the requirement that the occupation must be open and notorious, and not clandestine. The adverse possessor must send out a clarion call to the owner, who, if listening, should realize that something is awry. If the adverse possession continues, the owner must commence an action within the limitation period to avoid being statute barred."⁵

⁴ These 3 decisions are: *Keefer v. Arillotta* (1976), 1976 CanLII 571 (ON CA), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182; *Fletcher v. Storoschuk et al.* (1981), 1981 CanLII 1724 (ON CA), 35 O.R. (2d) 722, 128 D.L.R. (3d) 59, 22 R.P.R. 75, and *Masidon Investments Ltd. v. Ham*, 1984 CanLII 1877 (ON CA).

⁵ Professor Bruce Ziff in: *Principles of Property Law (3rd ed.)* (Toronto: Carswell, 2000), at p. 126.

Re: Adverse Possession and land registered as Absolute Title under the Land Titles Act in Ontario

B.1.6 The *Land Titles Act* in Ontario was first enacted in 1885.⁶ It was based on the English *Land Transfer Act*,⁷ but has generally been seen as a *Torrens*-type⁸ of statute which provided for improved certainty and efficiency in the registration of title to land. As part of that underlying goal of *Torrens*-type statutes, adverse possession is not allowed.

B.1.7 The relevant section of the *Land Titles Act*, with the subsection headings, is:

No title by adverse possession, etc.

51(1) Despite any provision of this Act, the *Real Property Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription. R.S.O. 1990, c. L.5, s.51(1); 2002, c.24, Sched. B, s.40(2).

Operation of section

(2) This section does not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of the first owner took place. R.S.O. 1990, c. L.5, s.51 (2).

B.1.8 Section 51(1) is therefore a complete answer in respect of land to which an absolute title is held under the *Land Titles Act*. Section 51(2) is generally regarded as a mechanism by which vested rights arising through adverse possession had been acquired against the first owner of land brought into Land Titles through a claim based on possession. Your question to me related to the owner of land under *Land Titles* based on Absolute Title, so this provision would not apply and would not allow for such land to be “lost” through adverse possession.

B.1.9 A distinction must also be made in respect of lands which are owned on the basis of *Land Titles Conversion Qualified*, or “*LTCQ*”. Such a form of *Land Titles* is the result of administrative conversion⁹ by which land formerly registered under the *Registry Act* is converted to registration under the *Land Titles Act*. Such a form of *LTCQ* does carry forward any possessory rights which had

⁶ *Land Titles Act, 1885*, S.O. 1885, c. 22.

⁷ *Land Transfer Act, 1875* (38 & 39 Vict. c. 87)(UK).

⁸ A *Torrens*-type of statute establishes a system of land title registration in which a register of land holdings maintained by the state guarantees an indefeasible title to those named in the register. Land ownership is transferred through registration of title instead of through the registration of deeds as mere evidence of title. Its main purpose is to simplify land transactions and to allow for ownership to be established with certainty.

⁹ Section 46 of the *Land Titles Act* deals with land which is converted from *Registry Act* to *Land Titles Act*. This has been generally referred to as “administrative conversion” since there was no notice given to property owners and there was no formal hearing process involved. As a result, two types of titles have resulted under Ontario’s *Land Titles Act*; one that derives from conversion namely, *Land Titles Absolute* and the other, *Land Titles Conversion Qualified*.

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matured on or before the date of conversion and are “grandfathered” in.¹⁰ However, this does not apply to land registered as *Land Titles Absolute*. Instead, such land enjoys the benefit of the language in section 45:

Estate of first registered owner with absolute title

45. The first registration of a person as owner of land, in this *Act* referred to as first registered owner with an absolute title, vests in the person so registered an estate in fee simple in the land, together with all rights, privileges and appurtenances, free from all estates and interests whatsoever, including estates and interests of Her Majesty, that are within the legislative jurisdiction of Ontario, but subject to the following:

1. The encumbrances, if any, entered on the register.
2. The liabilities, rights and interests that are declared for the purposes of this *Act* not to be encumbrances, unless the contrary is expressed on the register.
3. Where the first registered owner is not entitled for the owner’s own benefit to the land registered, then as between the owner and any persons claiming under the owner, any unregistered estates, rights, interests or equities to which such person may be entitled. R.S.O. 1990, c. L.5, s. 45.

As stated, the interest is an estate in fee simple.

C.1 Conclusion

C.1.1 Based on the analysis outlined above, it is my opinion that adverse possession does not apply to land registered in Ontario under the *Land Titles Act* with an absolute title.

I trust that this serves to answer your question in regards to the opinion sought from me.

Yours truly,



Izaak de Rijcke
Barrister & Solicitor
IdR:js
Encl: cv

¹⁰ The date of conversion is stated on the face of a parcel register for a specific property which has been administratively converted to *LTCQ*.