



## FRIENDS *of* SECOND MARSH

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### **Comments by Friends of Second Marsh: Oshawa Port Authority Draft Land Use Plan, November 23, 2012**

January 23, 2013

#### **Overview**

Friends of Second Marsh respectfully request that the following comments be taken into consideration and that significant modifications be enacted to bring about a land use plan and planning policies that incorporate the intent of the Canada Marine Act (CMA). The CMA's apparent intent is to establish agencies that act to manage transport hubs in a manner that incorporates measures which effectively meet the surrounding community's requirements in terms of relevant social, economic and environmental matters and zoning by-laws that apply to neighbouring lands [CMA 48(1)]. The apparent intent of the CMA is also that this process be carried out in a manner that provides public clarity and transparency.

It is our opinion that the Oshawa Port Authority (OPA) land use planning process and resulting draft plan has failed to meet the above parameters. We respectfully submit that the land use planning measures of the OPA have been seriously deficient in terms of:

1. The public consultation process,
2. The decision making process, and,
3. The contents of the draft plan.

This submission represents only a partial criticism of the draft land use plan. The omission of criticisms of other portions of the draft plan should not be construed as agreement with, and/or support for, those portions.

#### **Detailed Comments**

##### ***1. The public consultation process***

###### Draft plan content

In addition to a gross lack of sufficient detail within the draft plan, there is no clear indication as to whether some information, such as references to the 1984 Oshawa Harbour Development Plan of the former Oshawa Harbour Commission (OHC), is to be considered as the proposed plan of the OPA or is just there for historical context. In effect, the public has been presented with little more than a plan to make a plan and left with the difficult task of trying to speculate as to what the OPA is proposing for large

sections of land. Meaningful public scrutiny requires informed awareness and the draft land use plan does not provide that awareness.

#### Public meeting format

With regard to the format of the “public meeting” that is required in CMA 48(5); the OPA has continued the dismal track record of their predecessor, the former Oshawa Harbour Commission (OHC), in choosing so-called “public meeting” formats that allow minimal public awareness of criticisms regarding the deficiencies in the publicized information and arguments of these harbour agencies.

The intent of a public meeting is supposedly to give members of the public the opportunity to contribute to, and be made aware of, as many aspects of an issue as possible. In so doing, the public can then determine if an agency, in this case the OPA, is being responsive to the community’s concerns, and meeting the agency’s obligations as stated by the regulations governing that agency.

On January 9, 2013, for a total of three hours, the OPA merely provided a room with copies of the draft plan and associated documents and some sheets for written comments to be left. While some OPA personnel were on hand, they had no visible identification to allow their recognition as such. In addition, no mechanism was provided that encouraged, or allowed, members of the public to effectively share information and concerns with each other.

What is the advantage to the public of making what is essentially a private statement of concern to the OPA? That could have been accomplished through a written submission or by visiting the OPA offices. The selected meeting format makes it extremely difficult for Oshawa residents to learn what questions others are asking and what input others are providing.

In effect, the OPA has again selected a method that minimizes effective public scrutiny.

Given the fact that key personnel from the former OHC now occupy key positions with the OPA, and thus should have adequate experience and insight to determine what meeting formats would provide adequate public awareness, how is it that the OPA selected the extremely inadequate format that it did?

In addition, any argument that the purpose of this public meeting was mostly to allow members of the public a chance to examine the documents seems to have little merit since these documents were available on the internet and at the public library, both of which are highly accessible. The point of the CMA 48(5) is to allow the public sufficient time to examine the documents in preparation for a public meeting (i.e. an open and public exchange of information and concerns that can be contributed to, and can easily be heard, by all who attend that meeting) followed by an opportunity to submit comments.

## ***2. The decision making process***

The OPA has left inadequate time between the deadline for receiving public comments and the OPA's submission of a finished detailed land use plan that would effectively consider and modify its content in response to criticisms. According to information provided at the so-called public meeting of January 9, 2013, the deadline for the public's comments is January 23, 2013 while the OPA must submit its final land use plan by January 25, 2013. It is difficult to imagine how the OPA anticipates an adequate, serious and sincere review and incorporation of criticisms within that short timeframe. The entire public review process should have been started at a much earlier date.

The OPA needs to ensure that it meets the parameters set out for land use planning in the regulations that govern this agency.

The CMA 8(2)(i) states that a port authority's letters patent set out "the extent to which the port authority and a wholly-owned subsidiary of the port authority may undertake port activities referred to in paragraph 28(2)(a) and other activities referred to in paragraph 28(2)(b)". CMA 28(2)(a) & (b) restrict those activities to navigation, the transport of goods and people, the storage of goods, and other activities necessary to support port operations. The OPA's letters patent 7.2(ii) state that the leasing or licensing of land is for, or in connection with "manufacturing, fabricating or processing of goods incidental to the handling of shipping of goods through the port ..."

The OPA needs to ensure that it does not water down the definitions of words and/or phrases in these documents, nor attempts to interpret its letter patent outside the context of the CMA.

In our opinion, the OPA has not presented a defensible argument that industries, such as ethanol refineries, meet the requirements of their letters patent 7.2(ii), particularly in the context of the CMA 28(2)(a)&(b).

The land use plan draft (page #9) references a 1984 Oshawa Harbour Development Plan but disregards the 1996 agreement worked out with the Ontario Municipal Board (OMB) and disregards the federally commissioned report by the Honourable David Crombie in 2008 (Recommendation for the Future of Oshawa Harbour, hereafter referred to as "the Crombie report"). Both these processes were enacted to deal with the disagreements between the City of Oshawa and the OHC regarding the OHC's proposed use of certain lands on the waterfront.

The OPA approval of an ethanol refinery on the Gifford Farmlands is strongly suggestive that the OPA also intends to continue to act in disregard of the clauses in the harbour settlement agreement (e.g. section 3.2.2) that aim to facilitate cooperation with the City in terms of land use planning.

In disregarding these three documents, the OPA is very likely to exacerbate contention between itself and the surrounding community regarding land use issues.

Given the draft land use plan's disregard for these important considerations and the OPA's disregard of the City of Oshawa's clear and absolute rejection of an ethanol refinery on the waterfront, what comfort can the community take in the draft land use

plan claim that the OPA will consult with the “ Suggested Guidelines for Preparation of a Land Use Plan” that were included in the harbour settlement agreement with the City of Oshawa?

Despite the fact that it is not mentioned within the land use draft plan, the OPA approval of the proposed establishment of the FarmTech Energy Corporation ethanol refinery on the Gifford Farmlands is a de facto land use decision and warrants comment.

The decision was inappropriate and needs to be reversed for the following reasons:

- a. This decision was made prior to the appointment of a provincial representative to the OPA board of directors and therefore lacked sufficient appropriate input, especially regarding the potential impacts and consequences from a provincial perspective,
- b. It was made in disregard of the 1996 OMB agreement that set out allowable land uses for the Gifford Farmlands (none of which remotely resemble an ethanol refinery) and of the resulting City of Oshawa Zoning By-law No. 60-94,
- c. It was made in disregard of the harbour settlement agreement cooperation clauses (e.g. section 3.2.2) with the City of Oshawa and despite the City’s clear and absolute rejection of the proposed refinery location,
- d. It was made in disregard of the recommendations of the Crombie report, particularly of the very strong suggestion that the entire Gifford Farmlands should act as a buffer zone between industry at the port to the west and the environmentally sensitive wetlands, known as Second Marsh, to the east,
- e. It was made in disregard of the proposed refinery’s complete lack of successful applications to government environmental approvals processes, provincially and federally. Particularly disturbing is the OPA’s public statements suggesting that they will accede to a FarmTech proposition that its project circumvent key requirements of the Ontario Environmental Protection Act, and,
- f. Recent accidents in the port area involving a major spill into the harbour and a major fire at the asphalt plant indicate that there is a very real possibility of accidents related to the operation of the proposed refinery that could result in catastrophic effects on the surrounding community.

### ***3. The contents of the draft plan***

The OPA draft land use plan is seriously deficient in terms of both the quantity of detail and quality of information that is provided. The land use plan lacks sufficient relevant detail to provide the public with a meaningful picture of what the OPA will do with significant portions of the land under their control, particularly on the east side of the harbour. As a result, and as stated elsewhere in this submission, the draft plan appears to be little more than a plan to make a plan.

With that in mind, we express general agreement with the thorough comments in Sections 5.2, 5.3 and 5.4 of a public report (Item: DS-13-02, File: B-1100-0309) made by City of Oshawa staff in a meeting of the City’s Development Services Committee on January 14, 2013 regarding the OPA draft land use plan.

Despite the fact that the OPA's August 2012 approval for the proposed establishment of an ethanol refinery on the Gifford Farmlands by FarmTech Energy Corporation constitutes a major land use decision, there is, incredibly, no mention of, or reference to, that decision within the draft land use plan. This is a glaring omission and is also dealt with elsewhere in this submission. This decision alone has enormous potential impacts and yet the draft plan contains no detailed statements, policies or studies regarding:

- a. the protection of the sensitive environmental features on OPA controlled land or neighbouring land,
- b. the protection of cultural features,
- c. the impacts of heavy truck traffic,
- d. the potential for catastrophic accidents and the very significant possibility that accidents at an ethanol refinery could impact the asphalt plant, and vice versa, with disastrous results to the surrounding community, and,
- e. the existence of requirements, such as a performance bond, to ensure the waterfront is not marked by a rusting steel skeleton for many years to come.

The draft plan's suggested buffer zone between the Gifford Farmlands and Second Marsh appears to be proposed with no clear detailed context as to what activities would be allowed on the Gifford Farmlands. The buffers, as they are presented in the draft plan (pages 9, 11, 18 and 19), were actually agreed upon in the past in reference to the 1996 OMB land use allowances decision and the City of Oshawa Zoning By-law 60-94. They were designed for the uses listed in those documents. They are certainly completely inadequate for heavier industrial activities, such as an ethanol refinery. In fact, as stated elsewhere in this submission, the appropriate buffer zone allotment for such categories of industry were outlined in the Crombie report's recommendation for the Gifford Farmlands. It strongly suggests that the entirety of this agricultural land is the suitable buffer zone between industry at the port and Second Marsh. The OPA should design its land use plan accordingly.

Further to the matter of buffer zones, the draft plan's stated intent of planting "indigenous species" in and/or near the buffer zone would only provide benefit as a public relations gambit. Firstly, these plantings would add no significant value from a Second Marsh Wildlife Area management and/or protection perspective and secondly, these areas have already vegetated themselves with mostly indigenous species.

The draft plan contains a number of unwarranted extrapolations of the meaning of the City of Oshawa's by-laws and official plan. For example, page #10 contains the claim that, "...support for the role of the harbour as an industrial port also continued, as evident by support for the 1984 Harbour Development Plan, and by the long-standing policies of the City's Official Plan and corresponding zoning by-law, which regard the OHC lands surrounding the harbour as a site for industrial development."

In reality, the tolerance, by the City, of limited amounts and limited types of land uses does not constitute support for the expansion of those and/or similar land uses to other parcels of land.

Similarly, there are statements in the draft plan that leave the misimpression that the OHC had been active in preserving the ecological integrity of Second Marsh. For

example, the claim that “Previously the OHC had ... (p)reserved the Oshawa Second Marsh and transferred it to the City of Oshawa” (p19) creates the misimpression that this was done with the welfare of these wetlands in mind. In fact, the OHC had made a concerted effort to arrange the dredging of this natural area in order to use it as a harbour and had caused extensive degradation of the marsh during their oversight of this property. It was only after a long (approximately 18 year) and contentious battle with conservationists that the Second Marsh area was finally declared “surplus” and transferred to the City of Oshawa.

Given that these unsubstantiated claims in the draft plan are of no real benefit to the land use planning process, it is more appropriate that they be left out.

### **Summary**

In summary, Friends of Second Marsh finds that the OPA draft land use plan is a grossly inadequate guideline for rational land use administration and for the appropriate mitigation of the inevitable impacts on neighbour’s interests, including those of the City of Oshawa, the Second Marsh Wildlife Area and the public’s access to, and enjoyment of, the Oshawa waterfront.

As evidenced above, the OPA has failed thus far to incorporate many key elements of a minimally adequate land use plan as mandated by the Canada Marine Act.

In our view, the serious deficiencies evidenced in the public consultation process, in the decision making process and in the content of the draft plan do not engender confidence that the OPA will adequately manage its lands as a going business concern, operating within the norms of accepted conventions and regulations and in a manner that will not be a detriment to the surrounding community’s plans for a healthy, safe, people-friendly waterfront.

Friends of Second Marsh respectfully submit that significant and extensive modifications need to be enacted to bring about a land use plan and planning policies that incorporate the intent of the Canada Marine Act (CMA); that is, to establish agencies that act to manage transport hubs in a manner that incorporates measures which effectively meet the surrounding community’s requirements in terms of relevant social, economic and environmental matters and zoning by-laws that apply to neighbouring lands [CMA 48(1)].

Otherwise, we urge the federal Minister of Transport to reject the OPA land use plan as failing to meet the CMA’s mandated requirements and as providing no adequate basis for a relationship of consultation on which to proceed.