A Common Declaration against ABCA's Proposed SMP2016

1. The underlying philosophy behind SMP2016 is **"managed retreat"** (page 9). Nowhere is managed retreat identified in the enabling legislation as one of the "objects" of a Conservation Authority—forcing the removal of buildings in order to be able to repair or maintain them, or forcing the sale of property due to draconian prohibitions (such as the examples to be discussed below). The ABCA does not have the legislative authority nor mandate to precipitate the immediate loss of marketability and evaporation of the market values of lakefront properties. ABCA does not have the legislative authority nor mandate to prevent the development of our properties under the guise of protection against 1% probability hazards or safety concerns. The greatest hazards to our lakeshore properties are the members of the ABCA who sponsored this new "managed retreat" plan on a blanket, non-property specific basis, and who may be seriously considering its adoption as is or after some minor concessions.

2. ABCA's adoption of SMP 2016 will result in the immediate and substantial loss of value of our Area 1 and 2 shoreline properties, with 100% certainty—a far greater hazard than a 1% per year probability of a damaging flood or a rate of erosion, especially for existing properties that have already installed hard shoreline protection measures and that have managed to survive intact over several decades of water level and weather pattern fluctuations. It is against ABCA's legislative mandates and clear case law to willfully ignore any existing hard shoreline protection structures on specific sites when assessing hazards upon which you base your blanket prohibitions and restrictions.

3. Your adoption of this plan and even the potential adoption of this Plan or minor variants thereof will immediately cloud our titles, diminish our property values, and effectively steal the equity we have built in these properties. You will greatly diminish the market value of all **lakefront properties with existing structures** within your arbitrarily-drawn Areas 1 and 2, and you will destroy the market value of **vacant lakefront properties** with your absolute prohibition against any further development. These drastic measures directly contravene your legislative mandate to formulate a "program that FURTHERS the CONSERVATION, RESTORATION, DEVELOPMENT AND MANAGEMENT of the LANDS" we own along the shoreline of Lake Huron. Please don't overlook or forget the important legislative mandate of "DEVELOPMENT". You must enact programs that FURTHER the DEVELOPMENT of our LAND, NOT PROHIBIT IT. As such, the trial balloon plan you have floated in the form of the SMP2016 represents a clear, present, and immediate danger to our property values, with potential losses of market values amounting to over $1.3 BILLION DOLLARS. In addition the reduction in these property values will cause the drying up of municipality funds from reduced property taxes, and a barrage of property tax challenges and lawsuits, forcing higher property taxes on non-shoreline properties further inland. Think about it: Is that what your constituencies really desire?

3. The severe set of prohibitions, restrictions, rules and regulations, most of which actually **directly contravene your enabling legislation,** is equivalent to announcing to us that you want us OFF our properties at cheap prices. Your plan appears to be: First destroy their property values by passing SMP2016. Then expropriate their properties at pennies on the dollar for some undisclosed public purpose. The SMP 2016 represents a thinly veiled attempt to commit extortion in the name of the law, and to force the unpaid expropriation of our valuable properties. Its adoption would represent an *ultra vires* exercise of your delegated powers, an

over-reaching of your legislative authority, and a tortious interference with our private property rights under common law and under NAFTA (for American residents).

4. The SMP 2016 also **tortiously interferes with** the advantageous contractual relationships with our **property insurers**, like Hay Mutual Insurance, whose issued policies will not pay 100% of the insured value of our properties in the event of loss, such as fire or windstorm unless we rebuild. Thus, your proposed prevention of rebuilding in such circumstances would make it impossible for us to collect the full insured value of our properties in the event of loss by fire, windstorm, and the like. Did the legislature give you the power to do that? If so, show us where in the enabling legislation. We cannot find it.

5. Canadian citizens, and American citizens who own property in Canada do have private property rights as enshrined in Canadian and British common law. Private property rights form the basis, the structure, and the essence of Western civilized society and the rule of law and order. Private property rights gave rise to agriculture itself. Private property rights stem from the ancient adage that a man's home is his castle into which no-one, not even the King of England, could set foot without permission. The SMP2016 plan of "managed retreat" represents an even more provocative and odious set of measures than the Stamp Act of 1765 or the Tea Act of 1773 that precipitated the American Revolution. No agency of the government should be able, with the mere stroke of a pen, to deprive legitimate owners of their lawful property, without fair compensation To first damage property values through the passage of harsh, absolute, blanket prohibitions and restrictions, and then to subsequently offer greatly reduced compensation to owners, would constitute a revolting methodical plan of extortion under the guise of legitimacy and feigned concern for our "safety" against trumped-up hazards based on theoretical models the authors themselves admitted were filled with "a lot of uncertainties" when it comes to beach and dune erosion. (Page 87)

6. There are naturally limitations on private property as there are on free speech. Nonetheless, the deprivation of private property rights is a serious exercise of governmental power, and must be strictly construed under its enabling legislation. Neither Conservation Authorities nor governmental agencies like the Ministry of Natural Resources may expand the purview of their authorized powers through issued regulations, plans, or reports.

7. The SMP 2016, if adopted in its present form, would constitute an *ultra vires* ("beyond the power of") exercise of authority by the ABCA, for the following reasons:

- The ABCA may not adopt rules, regulations, or prohibitions that would not be consistent with the OBJECTS of its own formation. These objects are contained in the enabling legislation that authorized the creation of Conservation Authorities by two or more municipalities.

- The Conservation Authorities Act defines the OBJECTS of the legislation as follows:
    - **to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources** other than gas, oil, coal and minerals. R.S.O. 1990, c. C.27, s. 20. Notice that the Conservation Authority's objects are in the conjunctive, not disjunctive, meaning that the word "AND" is very important. The ABCA's overall program MUST **FURTHER** the CONSERVATION AND RESTORATION **AND DEVELOPMENT** AND

MANAGEMENT OF NATURAL RESOURCES—**not just one of the four mandate**s. Guarding against **personal safety concerns** is nowhere to be found in the enabling legislation.

- The phrase "natural resources, other than gas, oil, coal and minerals", is not otherwise defined in the Act. However, some common definitions of the term "natural resources" garnered from various dictionaries include:
    - materials or substances such as minerals, forests, **water,** and **fertile land that occur in nature** and **can be used for economic gain;**
    - a naturally occurring source of wealth, as **land or water.**
    - the **natural wealth of a country, consisting of land,** forests, mineral deposits, **water**, etc.

I think we can agree then that the term "natural resources" includes "land". In this case, the proposed rules purport to govern the land owned by shoreline property owners along southern Lake Huron. Hence, it is the express mandate of the ABCA to adopt **programs that further the…development of…the land, not prohibit all development of it.**

9. The 126 page proposed draft of the SMP 2016 is filled with prohibitions, restrictions, regulations, and rules that **do the opposite of conserving, restoring, developing, and managing the land that lakefront property owners have purchased** along the shores of Lake Huron. We are the owners of that land, that precious natural resource, by virtue of our purchase of it with hard-earned capital. Therefore,

- there is **no legal justification** whatsoever for the ABCA to prohibit **the repair or maintenance of septic systems** after some **arbitrarily set sunset date**; (Instead, plugged or non-working septic systems represent a hazardous threat to the involved property, the waters of the Lake, and the use, enjoyment, and property values of neighboring properties, the health of surrounding inhabitants and those nearby using the lake or shoreline for swimming or playing with children.)

- there is no legal justification to **prohibit the installation of "hard" shoreline protection measures such as rock wall barriers and steel wall barrier**s to protect our land and improvements thereon; (The ABCA cannot show that the installation of all the rock and steel wall shoreline protection measures along the shoreline within its jurisdiction has done more net damage than good to the involved properties. It is apparent to all reasonable observers that the presence of steel and rock seawalls have indeed protected the vast majority of homes close to the shoreline during intermittent periods of high water. During low water cycles, the sand beach has been restored all along and in front of such walls, even to the point of almost burying them in sand. To prohibit any further hard shoreline protection measures, as a blanket mandate, actually increases the hazards facing many existing properties along the shoreline, and is short-sighted in scope. Such a broad prohibition contravenes the express objects of ABCA's creation, namely to FURTHER the CONSERVATION, RESTORATION, DEVELOPMENT AND MANAGEMENT of lands along the shoreline of Lake Huron. ABCA is not protecting the water, the land, the dwellings or the people with its recommendations and proposed plan. So what is the real purpose of "managed retreat"—it can only be the attempted expropriation of our lakefront property values and rights.)

- there is no legal justification for **arbitrarily restricting the size of decks to 16 sq. meters;** (Under ABCA rules, decks under 16 sq. meters apparently pose no hazard but 17 sq. meter decks do. It is logically impossible to argue that a 16 sq. meter deck furthers the conservation, restoration, development and management of someone's lakeshore land, but a 17 sq. meter deck does not. This prohibition is yet another example of an arbitrary and capricious exercise of power, designed to limit the attractiveness of our lands, with no basis in the enabling legislation.)

- there is no legal justification for **arbitrarily restricting the size of storage sheds to 16 sq. meter**s, making it impossible for winter storage of boats; (Again, how does that possibly further the conservation, restoration, development, and management of our lands?)

- there is no legal justification to **currently prohibit any exterior improvements to buildings within Area 1 which is not "like for like" (however that may be interpreted), and then after some arbitrarily set sunset period, prohibit them in Area 2 as well (Page 113-114).** Supposedly, then, in an existing building you could not put in larger windows or replace a group of windows with bay or bow windows, install skylights, install wider or taller patio doors, substitute tempered glass for spindles on decks, add dormers for more light or better views, extend a deck, add a stairway, etc. **How would those activities possibly add a new hazard or expand an existing hazard to the property?** The mere existence of the prohibition itself, before any improvements are required, clouds our title and diminishes our property values. Even the PROSPECT of your adoption of this "managed retreat" philosophy reduces the marketability and perceived value of our properties. The damage you are causing us is IMMEDIATE and ONGOING. Nothing short of your IMMEDIATE REPUDIATION of "MANAGED RETREAT" as an underlying philosophy supporting the blanket, non-property specific measures you are proposing in SMP2016 would relieve us of this immediate and accelerating harm to our collective and individual property values.

- there is no legal justification to **prohibit any additions to homes or buildings on one's private property within Areas 1 and 2.** (Page 113) This overly broad, non-property specific prohibition does nothing to conserve, restore, develop, and manage anyone's land. In fact, it ignores and contravenes your legislated mandate to further the **development** of lands along the shoreline and the **conservation** of such lands. On public lands, the ABCA could decide to conserve, restore, develop, and manage such properties in any reasonable way it deemed necessary. But on private lands, your programs must further the conservation, restoration, **development** and management of OUR lands. They are not yours to develop. If you want them, then offer us fair market value for them NOW, before any draconian prohibitions and restrictions are imposed on us.

- there is no legal justification whatsoever for the **blanket prohibition of any development whatsoever on vacant lots,** such as new habitable buildings or structures, new accessory buildings, decks, sheds, gazebos, new unattached garages, swimming pools, and the like. (Page 115) Conservation Authorities have no legal power to make *ex post facto* sweeping prohibitions on development without

assessing the specific circumstances in each case. See *Gilmor vs. Nottawasaga Conservation Authority.*

10. The stated goals and intentions of the ABCA, page 98, **exceed your legislative mandate.** ABCA states that: "Provincial policy direction is clear: no new hazards are to be created; existing hazards are not to be aggravated and **adverse environmental impacts are not to result.**" The problem is that the interpretation of this language by the handful of authors of this Report is so distorted and myopic as to effectively accomplish the OPPOSITE of ABCA's legislative mandate. For example:

- the SMP 2016 **prohibition against septic system repair** after an indeterminate sunset clause period places an immediate detrimental cloud over the marketability of shoreline property owners' properties. The prohibition directly contravene's the enabling statutes's mandate to create programs to further the conservation, restoration, development and management of natural resources, like land and water. It increases the hazard of pollution in the lake and surrounding parcels of land, and increases hazardous risks to the health of the inhabitants and neighbors. It violates the Provincial policy direction that **"adverse environmental impacts are not to result**".

- the SMP 2016 **prohibition against hard shoreline protection** increases the hazard of erosion to the slope of shoreline properties. The proof of the pudding is the very evident loss of trees and beach grass along unprotected shores, due to dynamic beach wave action, vs. the protection of trees, grass, and shrubs behind hard shoreline protection structures, all along the shoreline from Grand Bend to Bayfield. The hundreds of examples of successful multi-decade-old shoreline protection structures along this shoreline bear witness to the argument that **prohibiting** such structures would **actually cause more harm, more damage, and more hazards t**han permitting such structures to be installed.

- the SMP 2016 **prohibition against covered accessory buildings greater than 16 sq. meter**s would actually cause greater risks of wind, hailstorm, UV degradation, and other risks to personal property that could not fit into such small enclosures (like boats, sailboats, watercraft, trailers, kayaks, rowboats and other similar personal property items typically stored in such buildings. Is outside storage of these items somehow preferable, or less hazardous?

- the SMP 2016 **prohibition against any exterior improvements which are not "like for like" to buildings in Area 1, and eventually in Area 2, such as larger windows, patio doors, brick or stone exteriors replacing siding, steel roofs with a different pitch replacing flatter asphalt shingle roofs, etc. simply are not the business of ABCA. It is not in your legislative mandate. These improvements have no discernible impact on flood control, erosion, or wave action.** This prohibition in no way furthers the conservation, restoration, development, and management of these properties. The money we spend to preserve an existing structure on our property does NOT cause, by itself, the creation or expansion of a hazard, which you define as flood control, erosion, or dynamic beaches. But your proposed blanket prohibitions against our monetary

investments for development of our properties **definitely causes an immediate harm to our economic health and security.**

- The 126 page SMP 2016 is filled with additional restrictions, regulations, and minutiae that do nothing to fulfill the ABCA's stated objects, but serve only to diminish the attractiveness, marketability, use, enjoyment, and value of our affected shoreline properties. (e.g. the restriction on the height of boardwalks above the sand to a few inches—a ridiculous intrusion that has no impact on any of the stated shoreline hazards whatsoever. If anything wind-blown sand will end up covering these boardwalks, defeating their very purpose.)

11. The protection against loss of life (as stated in Section 3.1.6 and 3.1.7 on page 100 of SMP 2016) is not within the legislated purview and scope of ABCA's authority. The case of *Gilmor et al. v. Nottawasaga Valley* a*nd The Township of Amaranth* 2015 ONSC 5327 confirms this view and remains the law of the land. Likewise in in J*unker v. Grant River Conservation Authority,* the court clearly stated:

"I am aware that conservation authorities adopt provincial flood plain planning policy statements. These policies refer to 'preventing loss of life'. **Government policies are not, however, law. By adopting these policies, an authority cannot acquire a jurisdiction greater than it is given by statute. Nor can an authority use the policy statements to expand on its objectives as they are set out in legislation** …(Conservation) Authorities have been taking risk to life into account in refusing permission to build. This is beyond their authority. That all authorities seem, without challenge to use concern for risk to life as a reason for refusing permission is amazing. **They, clearly, do so without authority."**

12. The ABCA's right to review, grant or withhold permission to develop property under the proposed SMP 2016 Regulation only arises in cases where a **proposed development is first found to have an effect on flood control or other stated hazards.** Creating a "heavy onus" against approval of development before finding any adverse impact on flood control or erosion and then "**erecting barriers to discretionary approval based on criteria not listed in the statute or regulation**, such as general concepts of 'appropriateness', or relying on unpublished and newly-raised strict standards of safety or a general fear of adverse precedents is both an error of law and also unreasonable." See *Gilmor et al. v. Nottawasaga Valley and The Township of Amaranth* 2015 ONSC 5327.

13. The SMP2016 cannot presumptively prohibit development within a mapped area supposedly classified as hazardous, under a set of unproven assumptions, predictions of the future, or, in the very words of the author of SMP 2016, where "there are still a lot of uncertainties in models used to predict beach and dune erosion during storms" . (Page 87). As in the "*Gilmor et al*" case, there is **no statutory foundation for a presumed general prohibition on development within a certain zone drawn on a map, especially those based on uncertain models**. As made clear in the Gilmor case, a general prohibition on development within a certain mapped area, without consideration of **the particular circumstances of each case**, and the specific impact a proposed improvement would have on a hazard (such as flood control within a designated flood plain area), is beyond the jurisdiction of the ABCA to enact pursuant to s. 28(1) (c) of the CCA Act, and is thus ***ultra vires*, null and void, and of no force or effect.** ABCA cannot acquire expanded jurisdiction by misinterpreting its own regulation. Thus, in the present

case, ABCA cannot impose blanket prohibitions or restrictions on development within Areas 1 or 2 without finding, in the particular circumstances of each case, that the proposed development would affect flood control, erosion, or dynamic beach wave uprush.

14. The Government of Ontario, through its various agencies over the years, surveyed and platted the lands along the shoreline of Lake Huron and established their boundaries; approved of the original sizes of the parcels along the lake in the form of metes and bounds descriptions or lots within platted subdivisions; required, reviewed, and approved building permits regarding the location and size of proposed structures on those properties, including those built in the newly designated Areas 1 and 2; authorized insurance agencies to sell hazard insurance to homeowners who built homes and accessory buildings on their lots, collected property taxes from the owners of those parcels to fund various public programs such as schools and governmental administration; authorized and licensed real estate brokers and realtors to market and sell those properties; authorized and licensed construction contractors to engage in property development, home construction, and other land improvement projects on those properties, and was the beneficiary of the increased economic development that occurred from the development and improvement of those properties. Those properties have often become one of the most valuable assets of the owners, and a source of capital for their retirement or senior care. Now, the ABCA, a corporate service provider to the government, seeks to impose *ex post facto* laws that would deprive these owners of the use, enjoyment, development, improvement, opportunity to maintain, repair, and secure or enhance the valuation of these properties through draconian blanket prohibitions, restrictions, sunset clauses, regulations and unnecessary inspection fees. Ex Post Facto laws essentially change the rules of the game after someone has relied on them to make key economic decisions. That violates essential principles of morality and justice.

15. It is only right and just that existing properties built on lots during prior regulatory regimes should be exempt from any of the new “managed retreat” and sunset provisions within SMP2016, including any prohibitions against rebuilding damaged or destroyed buildings, restrictions against building additions, installing hard shoreline protection, or making any exterior improvements to any buildings on their lots. Owners of vacant properties should be given a reasonable period of time to develop their lots under the rules and regulations in effect at the time they purchased the lots, after which they would be subject to any new or updated regulations. This approach would be eminently fair, just, and within the bounds of governmental power. Existing property owners would have to bear the risks of their existing buildings being too close to the shoreline, but should be able to protect existing buildings with seawalls or rock walls and undertake erosion control measures to protect their buildings. In this way, the ABCA would be furthering the conservation, restoration, development and management of lands owned along the shoreline in a responsible and reasonable manner.

For the above reasons, we, as lakefront property owners within your claimed jurisdiction, **strongly oppose adoption of SMP 2016 as written, and reject entirely the philosophy of “managed retreat”** as an **attempted extortion** and **expropriation of our properties** through the passage of an intolerable set of blanket prohibitions and restrictions. The ABCA will be held accountable for all damages caused by willfully and intentionally adopting this ex post facto, “managed retreat”, sunset-clause based plan of expropriation, now that you have been put on clear notice of how the SMP2016 is beyond your legislative jurisdiction and what your proposed plan will do to the value of our properties.

What is truly sad is that Conservation Authorities, with the right leadership, could function as a valuable resource for lakefront property owners who seek to preserve, restore, develop, and manage their properties in a responsible manner utilizing the latest information on coastal zone management, products, techniques, and construction practices. Instead, ABCA has chosen to try and ram down our throats a set of blanket prohibitions and restrictions whose only logical purpose is to extort the surrender of our lands under a so-called “managed retreat” regimen, and expropriate the value of our lands without just compensation, wrapped in the disingenuous banner of hazard mitigation.

If expropriation is your aim, then buy the properties from us for cash NOW, at the current market value, BEFORE you cause the depreciation of our market values through adoption of your “managed retreat” plan. If that is not your intention, there is no need to adopt **any portion** of the new Plan. But adopting the SMP2016 before offering us current market value prices is not an option. We will hold all members of the ABCA voting for its adoption and whatever agencies of government you supposedly represent accountable for our losses as an *ultra vires* exercise of your legislated scope of authority. Simply stated, ABCA does not have the power to do what it intends to do in the proposed SMP 2016. Consider this your official notice.

Concerned Lakefront Property Owners