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DECISION/ORDER NO:

2419



PL060291

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

The Minister of Municipal Affairs and Housing has appealed to the Ontario Municipal Board under subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, against Zoning By-law 2006-03 of the Town of Kearney
OMB File No. R060069

APPEARANCES:

Parties

Ministry of Municipal Affairs and Housing

Gerry Churchill

Counsel*Agent

M. McNeill*
Irvin Shachter*

R. Drury
E. Varty

DECISION DELIVERED BY G. C. O'CONNOR AND ORDER OF THE BOARD

The Application

The subject lands, Part Lot 10, Concession 11, Parts 17 and 18, are located north of the town site of Kearney in the District of Parry Sound with water access to Proudfoot Lake, also known as Island Lake. The Town of Kearney was formed on December 1, 1979, when it was amalgamated with the unincorporated Townships of Bethune and Proudfoot.

The requested rezoning would create a new lot on a Trout lake, which has been identified as "at capacity". The East Parry Sound Planning Board requested the rezoning of the Applicants, as the lots, both severed and retained, did not meet the Rural zoning frontages.

The proposal would result in one severed parcel, Part 17, with a lot size of 0.568 hectares, and one retained, Part 18, with a lot size of 0.5349 hectares. The consent application indicates that a cottage is planned for the proposed severed land and the proposed retained land has an existing cottage. The proposed severed lands would be transferred to Gerald Churchill, the Applicant, from Patricia and Donna Churchill.

The Ministry of Municipal Affairs and Housing does not routinely receive Notices for consents in this planning area but do so for zoning by-laws and did receive Ministry of Natural Resources correspondence identifying Proudfoot Lake as a Lake Trout lake "at capacity". As a result, the Ministry of Municipal Affairs and Housing appealed the Town of Kearney Zoning By-law 2006-03 and filed on March 27, 2006 within the 20 days for doing so under Section 34(19) of the *Planning Act*.

Position of the Ministry

Laurie Brownlee, a planner with the Ministry of Municipal Affairs and Housing in the Northeastern Municipal Services Office, provided professional land use planning evidence in opposition to the proposal. Ms Brownlee testified that the Planning Report did not address the lake capacity issue even though Tunnock Consulting Ltd. had submitted their report to the Town recommending denial of the applications based on the capacity issues (Exhibit 2, Tab 22). She also referenced a Ministry of Natural Resources report to the Town of Kearney Council, which listed several provincial interests that would be affected, including "lake capacity", if the application was granted.

Ms Brownlee provided the Board with an historical planning perspective noting that the subject lands were registered in 1968 before there being a requirement to have *Planning Act* approval for lot creation. Prior to 1970, subdivision approval was not necessary to register and transfer lots, except where municipalities had passed by-laws requiring so. Proudfoot Township was not part of an incorporated township until 1979, so a by-law would not have been possible; hence, the lots were not created by an approval under the *Planning Act* in place at that time.

Ms. Brownlee explained to the Board that once the *Planning Act* came into effect in 1970, all lot creation was then required to take place by approval under the Act with specific restrictions that adjacent lots not be held in common ownership. Adjacent lots that did fall into common ownership at that time and since that time that had not been created under the Act became merged and any proposed lot creation then required a *Planning Act* approval to be valid. The subject lands came into common ownership when previous owners acquired Parts 17 and 18 in 1989, registered them in a common name and therefore merged on title. In this case the application is subject to the *Planning Act* as amended by Bill 26 and to the 2005 Provincial Policy Statement (PPS).

The consent application was processed in the usual manner, in accordance with the “One Window” process, which Ms Brownlee explained to the Board. The Ministry of Municipal Affairs and Housing takes the lead for provincial ministries on all policy matters relating to land use planning and policy development, and for land division where the Province retains that authority. The goal is to have the Province speaking with one voice on planning issues.

Ms Brownlee explained that this rezoning decision which would implement the consent does not protect provincial interests in fish habitat on this “at capacity” Lake Trout lake and that this appeal is to protect this provincial interest.

In her opinion the application does not have regard for specific provincial interests listed under Section 2 of the *Planning Act*:

- (a) the protection of ecological systems, including natural areas, features and functions;

Proudfoot Lake is a Trout lake, managed by the Ministry of Natural Resources and measured to be at capacity for additional development. The proposed amendment allowing an additional lot would jeopardize the protection of this natural feature.

- (n) the resolution of planning conflicts involving public and private interests;

Allowing lot creation on lakes “at capacity” to further a private interest of the property owner to create a new lot, does not protect the public interest in protecting maintaining and improving water quality of lake trout lakes for the broader public interest.

- (o) the appropriate location of growth and development

The fact that this rezoning would lead to new development on a lake identified as being “at capacity” makes it an inappropriate location for this development.

Ms Brownlee referenced Section 3 of the *Planning Act*, which requires that in exercising any authority that affects planning matters, planning authorities “shall be consistent with” policy statements issued under the Act. This requires

that the outcome of the decision be consistent with the relevant policies of the PPS. In her opinion, this proposal is for a site-specific residential waterfront development with potential negative impacts on the environment and is not consistent with the PPS. She further explained that there are 46 existing cottages on the lake with a possibility for 83 to 96 new cottages on existing shoreline and backlog lots of record within 300 m of the shoreline. Re-separating this lot exacerbates an existing, demonstrated water quality problem.

Ms Brownlee again referenced the PPS, specifically under section 2.0, "Wise Use and Management of Resources" clause 2.1.5: "Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal requirements.

She explained that the Province is not supportive of development on lakes that have been determined to be at capacity, except under three specific circumstances:

1. The tile fields on each new lot are set back at least 300 metres from the shoreline, or such that drainage from the fields would flow at least 300 metres to the lake;
2. the tile fields on each new lot are located such that they would drain into the drainage basin of another water body which is not at capacity;
3. to separate existing, habitable dwellings, each having a separate septic system, provided that the land use would not change.

These circumstances were communicated to the Town of Kearney and to the East Parry Sound Planning Board in response to the circulation of the application. Ms Brownlee's stated that the proposal does not meet any of these three circumstances under which the Province will support lot creation on lakes at capacity. The 300 metres cannot be met on the subject property, which only extends 103.3 metres to the shoreline. She also testified that the lots do not drain to another water body and there are not two existing habitable dwellings on the subject lands.

In reference to Section 8 of the Town of Kearney Official Plan, Ms Brownlee explained to the Board that the policy stipulates that “No development should be permitted which would result in a water body being developed to a point of being over capacity as estimated by the Ministry of the Environment, Ministry of Natural Resources or Council. She was of the opinion that although the lakes at capacity are not listed in the Official Plan, the policy as it reads, would apply to any lake which is determined to near or at capacity.

S. Scholten, a marine biologist with the Ministry of Natural Resources, provided professional opinion evidence in opposition to the proposal. He provided the Board with a Lake Trout Biology overview and emphasized the fact that Lake Trout are a high priority of Ontario's fisheries management program. They are a major component of the inland fish resource and he provided evidence that they are heavily stressed from several sources. He explained to the Board that shoreline development increases the loading of phosphorus to the lake resulting in algae growth, increasing the depletion of the oxygen rate and the amount of Lake Trout habitat. The Mean Volume Hypolimnetic Dissolved Oxygen (MVHDO) provincial criterion is 7 ppm and he testified that the level in Proudfoot Lake is less than 7 ppm thus, in his professional opinion, increased shoreline development will result in the cumulative reduction of oxygen and progressive decline in the capability of the lake to support a Lake Trout population and the fishery that it supports. Based on this scientific data, Mr. Scholten was of the opinion that the Province's appeal should be allowed.

D. Shaver, District Planner for the Ministry of Natural Resources, provided professional land planning evidence in opposition to the proposal. She testified that she had reviewed all pertinent files and made a site visit with the Ministry of Municipal Affairs and Housing. She explained to the Board that since the Ministry of Natural Resources was no longer involved in site-specific development review that she subsequently focused on working with the Ministry of Municipal Affairs and Housing to ensure that the various “at capacity” Lake Trout lakes would be specified in the recent Kearney Official Plan with appropriate policies. Ms Shaver was also of the opinion that the subject lands do not meet any of the three circumstances for flexibility that the Ministry of Natural Resources had developed in conjunction with the Ministry of the Environment

since the septic system on the vacant lot could not be set back over 300 metres from the lake, nor could it be set back over a height of land such that it would drain into another drainage basin that is not at capacity.

Her professional opinion with respect to the proposed amendment before the Board was that it was not consistent with the Provincial Policy Statement, in particular Sections 1.1.1(c), 2.1.5 and 2.1.6, (Exhibit 2, Tab 37, p.15) nor does it conform to Section 8.2.2.6 of the Town of Kearney's Official Plan. On this basis, approval of the amendment would not be good planning and the appeal should be allowed.

Position of the Applicant

Mr. G. Churchill, the proprietor of the subject lands, testified to the Board that he did not plan to build a cottage on Lot 17 and that the intent of the severance was to transfer the lots to his family members.

In his preparations for the application, Mr. Churchill explained that he had approval from the Mattawa Conservation Authority but could not provide this evidence during the course of the hearing. He also informed the Board that since he had two separate deeds for each of the lots, the subject lands were not merged. Under cross-examination, Mr. Churchill explained that he was under the impression that both of his deeds were valid but agreed that only one was legitimate (Exhibit 9). Accordingly the lots are still merged.

Mr. Churchill also explained that in preparing his application he was not aware of the 300 metres restriction or of the phosphorous data. He added that had he been informed he would have retained professionals in the matters. He was also of the opinion that his septic system plan would allow him to redirect the sewage over a rock ridge on the subject lands which would ensure that water would travel the required 300 metres before reaching the shoreline.

He also informed the Board that he was not aware of the lake capacity issue until he was recently provided with a copy of the Environmental Bill of Rights posting to this effect (Exhibit 11).

Mr. E. Varty, former Clerk with the Town of Kearny, testified on behalf of the Applicant that Town Council had been supportive of the consent. At that time he did have a copy of the Tunnock report and that there was no reference to the Lake Trout issue in that document. He testified that Council had considered all relevant documentation before passing the motion for consent. He also stated that in December 2005 he had requested a meeting with the ministry but that never materialized.

Mr. R. Drury, on behalf of the Applicant, stated that Mr. Churchill did not have the required resources for his case and that the Applicant was not aware of the seriousness of the hearing.

Mr. Drury, in reference to Ms. Shaver's letter of February 23, 2206 to the Town (Exhibit 2, Tab 11) wherein she listed a number of exceptional circumstances in which new development could occur on at capacity lakes, requested that the Board withholds its order to provide the time required to possibly meet a fourth criterion. The Province is in the process of identifying another option for flexibility where there are deep soils native to the site, which meet a specified chemical composition.

Findings of the Board

On all of the evidence presented, the Board finds that the proposed By-law amendment is not appropriate, does not represent good planning and is not in the overall interest of the community. With respect to the proposed consent to convey land, on all the evidence presented and having regard for subsection 51 (24) of the *Planning Act*, the Board finds that the proposed consent does not conform to the OP and is not in the overall public interest of the community. The reasons follow:

On the evidence presented, the Board finds that the proposed rezoning that would result in a new lot on a Lake Trout lake that is at capacity, does not have regard for several provincial interests listed in Section 2 of the *Planning Act*, is not consistent with the policies dealing with fish habitat and water quality of the Provincial Policy Statement 2005 and does not conform to the local planning documents in effect for the Town of Kearney.

In conclusion, the appeal by the Ministry of Municipal Affairs and Housing is allowed. The proposed amendment to By-law 2006-03 is not approved.

The Board so Orders.

"G. C. O'Connor"

G. C. O'CONNOR
MEMBER