ISSUE DATE:
Nov. 3, 2004
DECISION/ORDER NO:
1735

PL980499

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

The Corporation of the Township of Limerick and the Limerick Waterways Ratepayers Association have appealed to the Ontario Municipal Board under subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the County of Hastings to approve a proposed plan of subdivision on lands composed of Part of Lots 12, 13 and 14, Concession 4, in the Township of Limerick
OMB File No. S980045

Trident Members Inc. has applied to the Ontario Municipal Board under section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, for a review of the Board's Decision and Order No. 1170, issued on June 17, 1999

APPEARANCES:

Parties	Counsel
Trident Members Inc.	J. Wilker G. Sirman Curtis Smith (Student-at-Law)
Township of Limerick and the Limerick Waterways Ratepayers' Association	W. Walker
Ministry of Municipal Affairs and Housing	B. Linington M. MacNeill

DECISION DELIVERED BY N.C. JACKSON AND ORDER OF THE BOARD

On June 17,1999 this panel of the Board heard Appeals by the Corporation of the Township of Limerick and the Limerick Waterways Ratepayers' Association under section 51(39) of the *Planning Act* from a decision of the County of Hastings to approve a proposed plan of subdivision by Trident Members Inc. on lands composed of Part of Lots 12, 13, 14, Concession 4 in the Township of Limerick, County of Hastings. The Ministry of Municipal Affairs and Housing (the Ministry) was a party. As the Board was hearing evidence, the same Parties as herein, entered settlement discussions. Minutes of Settlement were arrived at and the Board heard further evidence that the Plan was

amended to delete Lots 88 to 145 consecutively, so as to create a 1000 foot setback from Limerick Lake. The Board found the settlement to be appropriate on planning grounds and allowed the appeals, in Decision 1170, so as to give effect to the settlement. The purpose, at that time, was consideration of the effect of the proposed development on the water quality of Lake Limerick.

The original Applicant and present Applicant on the Motion, Trident Members Inc. now seek to review Board Decision 1170 respecting the above, pursuant to section 43 of the *Ontario Municipal Board Act*. The Applicant, specifically by Motion, requests a rehearing on the 57 deleted lots within 1000 feet of Lake Limerick. The Applicant argues that new scientific research into the environmental impacts of septic systems on lakes and technological advancements in septic systems may now permit this type of lot development to be approved without impairing water quality. The Applicant argues this is new evidence that ought to be heard in a hearing format.

In addition the Motion seeks an extension of the draft approval from October 1, 2004 for a period of 6 months. This would allow other planning matters to be brought forward for possible consolidation in a hearing including final subdivision approval, rezoning, *Condominium Act* application, Official Plan amendment. The applicant also points out the need to seek reconveyance of roadways on an earlier plan of subdivision on the subject property deemed not registered. The Ministry, Township of Limerick (Township) and Limerick Waterways Ratepayers' Association (Association) do not object to the extension of time for draft approval although they do not consent. Their primary concern is that the matters proceed without the delay experienced in the past. All Responding Parties do request more time to consider the changes in the draft conditions respecting the *Condominium Act* process and to consider the change to the new *Municipal Act* respecting conveyancing in the former plan of subdivision deregistered. The Board in considering that final plan approval was reserved to the Board and the time required to bring forward this matter for final subdivision approval together with related planning matters for possible consolidation, allows the Motion in part so as to extend the time for draft approval from October 1, 2004 for a period of six months to April 1, 2005. This is done on the understanding that the Applicant who has now made an arrears payment to the Township, will move expeditiously, in good faith, on final subdivision approval and all related planning matters on the subject property.

The Board did not immediately grant that part of the Motion dealing with changes in the draft conditions of subdivision approval now proposed as a result of legislative changes in the *Condominium Act* and the *Municipal Act*. Such matters could be dealt with in the time extended for draft approval. The Respondents indicated matters may be consented to, in the future, but further analysis was first required. At the request of all Parties the Board established a status hearing for Friday, October 8, 2004 by Teleconference with all counsel. At that time, there was agreement as follows:

1. Since the reference to the former *Municipal Act* was in the Minutes of Settlement and not in the Draft Conditions of Approval, Mr. Wilker does not seek the Board's intervention and Mr. Walker and Mr. Wilker will work toward updating the reference to this legislation.

2. All counsel consent to amendment to the draft conditions to include provision for a common elements condominium. The revised condition of draft approval is as follows:

> That a not for profit corporation without share capitol shall be incorporated under the *Corporations Act* whose objects shall include the ownership and maintenance of all Blocks, facilities and roads contained therein, as described in condition 1 above. Each registered owner of a lot as finally approved shall be entitled to membership in the corporation and such ownership shall be a condition of membership.
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> In the alternative, the Owner may apply for approval for a common elements condominium and subject to such final approval being granted, the common elements condominium shall own all Blocks, facilities and roads as described in condition 1 above and each registered owner of a lot as finally approved shall have an interest in the common elements condominium. The common elements condominium shall be responsible for the maintenance of all Blocks, facilities and roads owned by it. Any application for a common elements condominium must be circulated to the Ministry of Municipal Affairs and Housing for its review and comment.
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> That the subdivision agreement include the lifting of the Inhibiting Order as it applies to Phase 1 will be conditional on the following:
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> A. The subdivision agreement has been registered on title and,
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> B. A not for profit corporation or a common elements condominium has been created as described in Condition 2.

On the main issue of the Motion, to reconsider the 57 deleted lots within 1000 feet of the water's edge, opposed by the 3 Respondents, the Board finds that the Applicant's Motion succeeds.

It is apparent from the Motion materials that scientific theory on how to attenuate phosphorus from septic systems and prevent it from entering lake water was evident in 1999 at the time of Decision 1170. That theory would have been entered in evidence from a witness failing the settlement in 1999. That theory is now, however, more advanced as a result of further credible scientific analysis in the following papers post 1999.

1. Text-Water Sensitive Planning and Design – Paper - "Limnology, plumbing and planning: Evaluation of nutrient based limits to shoreline development in Precambrian watersheds" by Dr. Neil Hutchison, 2002. Finding was that among other matters over 90% of septic phosphorus may be immobilized by virtue of mineralization reactions with the Precambriam Shield.

2. "Enhanced Attenuation of Septic System Phosphate in Non Calcareous Sediments" by Dr. W. Robertson, 2003. Findings were made that invalidated prior beliefs that septic systems generated phosphorus in acidic Pre-Cambrian Shields that continue to make their way to the lake in all circumstances.

The testing or monitoring of this new science has also progressed post 1999. Board Decisions are not stare decisis. Some credibility to the new developing science is set out in the OMB decision of Scroggie and the Township of Seguin PL011225 Decision 0136 issued January 27, 2003. That Decision is more limited than the present case since one new lot was created. The new science is also referenced in Board Decision MNR vs Haliburton Land Division Committee File C920055. The Haliburton Decision was however, issued June 17, 1994 some 5 years prior to the Limerick Decision. Monitoring of Low Phosphorous Systems is available in a March 21, 2003 report from the City of North Bay (Exhibit 1 page 185). The Ministry position is that the monitoring in North Bay and other recent monitoring related to C920055 are not conclusive. Those monitoring results, in advancing scientific theory, are better evaluated in a Hearing where witnesses can be cross-examined. Both in this Motion and in the original Decision 1170 there has not been cross-examination on these issues.

Even more striking is a statement in the Ministry response to this Motion that the Provincial Evaluation Model has been modified post 1999 (Exhibit 3, Page 130). Affidavit of Andrew Paterson, sworn September 22, 2004, paragraph 27:

> Over the past several months, the MOE has conducted a review and update of all the components and coefficients of the Lakeshore Capacity Model. This review reflects an improved scientific understanding of the sources and losses of phosphorus in lakes and watersheds. Most importantly, this review has resulted in changes to the MOE model that have a direct impact on the Hutchison model.

The Ministry asserts the scientific theory of the applicant is not new and some theory may have been published in 1998 or earlier. The Ministry response is to maintain their scientific theory supporting the need for 1000 foot setback regulations on lakes at carrying capacity. The Ministry position is based upon affidavit material both planning and scientific making the point, in some detail, that the scientific theory was known at the time of the first hearing in 1999 and that the test now is whether the new evidence would (not could) make a difference in the result. The Board finds that the test is "could" and not "would". The difference between "could" and "would" is more apparent in a close examination of the Board's Rules of Practice for rehearings and the cases that were argued on this Motion.

Ms Linington places some weight in her argument on the recent OMB decision Roehampton Corporation and the City of Toronto, File PL030223 Decision number 0897 issued May 14, 2004 [2004] O.M.B.D. No.897. In this case a rehearing was granted. Reference is made to the following in support of test being "would" have affected the result: "Furthermore, it has been held that the errors warranting a review pursuant to the provisions must be of such weight and of such importance that would have materially affected the final conclusions of the Board". It is clear from reading all of the Decision that the grounds for review were manifest errors under paragraph c of Rule 115 and not new evidence under paragraph e. Paragraph c uses the word would and an error or errors must be clear on the face of the decision. New evidence is not would since that evidence must be tested. The Province is seeking a degree of certainty in the new evidence not contemplated in Rule 115.

Rule 115e uses wording that new evidence could have affected the result Rule 112 provides. The Board may rehear any Application before deciding it or may review, rescind, change, alter or vary any decision, approval or order. It may order a rehearing of the whole or part of the matter before a different member.

Rule 115 provides the reasons for Review:

> The Board will hear a Motion to review a Decision only if the reasons provided in the request raise an arguable case that the Board
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> a) acted outside it's jurisdiction;
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> b) violated the rules of natural justice or procedural fairness, including those against bias;
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> c) made an error of law or fact such that the Board would likely have reached a different decision;
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> d) heard false or misleading evidence from a party or witness, which was discovered only after the hearing and could have affected the result ; or
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> e) should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

Commentary in the Rules states:

> If the reason for the request is new evidence, the new evidence must not have been available at the time of the Hearing; it must be credible, and material to the original result; the requester must act quickly upon becoming aware of it; and the prejudice to the requester must be far greater than the other parties right to a final decision.

Ms Linington opposes the reopening on all parts of the commentary above. Her affidavit evidence relates to the existence of the scientific theory in 1999 and before, that the Applicant's deponents to the affidavits are not credible, that the Applicant did not act quickly upon becoming aware and that the Respondents will suffer greater prejudice than the Applicant. The Board finds there are new advancements in this scientific theory and monitoring, material to phosphate attenuation. The deponents of the Applicant's affidavits would normally be qualified to give opinion evidence in a hearing even if they may not be geoscientists under the *Professional Geoscientists Act*, 2000 S.O.2000, C.13. The publications in 2002 and 2003 were by authors who would qualify as geoscientists. All are credible. Given the complexity of the evidence and the publication dates, the requester brought the Motion within reasonable time considerations. There no doubt will be some prejudice shared among all Parties. But comparing costs of the Ministry is not sufficient to show prejudice more on the side of the Province. The Board finds far greater prejudice to the Applicant considering the number of lots in dispute.

The Board makes no decision on the merits of the request for the additional lotting, that involve, inter alia, considerations of appropriate setback based upon scientific evaluation of phosphate attenuation. However, the Board finds there is sufficient new credible evidence as to scientific theory advancement and on site evaluation of phosphate attenuation that ought to be heard in a hearing format.

The Township and Association ably argued the apparent unfairness in allowing the Applicant to walk away from a "deal" negotiated over time, when the Applicant was represented by experienced legal counsel. Reconsideration under section 43 of the *Ontario Municipal Board Act* applies to a Decision based upon a finding and evidence. Bearing in mind the persuasiveness of the settlement to the Decision, Mr. Walker's position has some merit but more in a hearing on the merits. In the event that the section 43 Rehearing is consolidated with other planning applications and the final plan approval and in particular any further extension of the draft plan approval, the issue Mr. Walker raises will have a forum. Mr. Walker's arguments that the tests for a reopening ought to be fairness and good planning (including changes in the Official Plan) are found to be applicable but more so to the rehearing.

Mr. Wilker argued that in the alternative, the deleted 57 lots would be the subject of an OMB hearing in any event since he could merely apply again to the Municipality and Appeal to this Board. The Board acknowledges that a different plan of Subdivision could be filed, but the same plan is res judicata, unless reviewed under section 43 of the *Ontario Municipal Board Act*. The Board does not rely upon this reasoning of the Requester that is speculative. The Board does find more favour in the argument of the Applicant that an alternative similar process is available – that is a hearing on final subdivision plan approval reserved to the Board in the original Decision. Since the Subdivision Plan was made condition 1, the Applicant asserts that at final subdivision approval, in a hearing he could seek a different change to that plan respecting the number of lots.

Since this panel has now rendered two decisions, it is appropriate for a new panel to hear the merits in the rehearing based upon the advancing scientific theory on phosphate attenuation and monitoring of same. This member is not seized of the Hearing and will not be on the new panel.

The Motion seeking reconsideration on the deletion of the 57 lots is granted. A hearing time of up to one month is projected. The Board planner will schedule a Prehearing Conference date to settle a Procedural Order and set preliminaries and the new hearing date.

This is the Order of the Board.

"N.C. Jackson"

N.C. JACKSON
MEMBER