

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: July 14, 2016

CASE NO(S): MM150077

PROCEEDING COMMENCED UNDER subsection 41(4) of the *Ontario Heritage Act*,
R.S.O. 1990, c. O.18, as amended

Appellant:	Linda J. Hind
Appellant:	Ministry of Natural Resources and Forestry
Subject:	142-2015 – Heritage Conservation District Area
Municipality:	Chatham-Kent
OMB Case No.:	MM150077
OMB File No.:	MM150077
OMB Case Name:	Hind v. Chatham-Kent (Municipality)

Heard: June 15, 2016 in Chatham, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Ministry of Natural Resources and
Forestry ("MNR")

Brian Wilkie*

Linda Hind

Self-represented

Municipality of Chatham-Kent
("Municipality")

John Norton* and David Taylor*

Rondeau Cottagers Association
("Association" or "Cottagers
Association")

David Kirwin*

DECISION DELIVERED BY STEVEN STEFANKO AND ORDER OF THE BOARD

Introduction

[1] On October 26, 2015, the Municipality passed By-law Number 142-2015 (“Heritage By-law”) which adopts a Heritage Conservation District Plan and designates a Heritage Conservation District within the Municipality and, more specifically, within the Rondeau Provincial Park (“Park”).

[2] MNR and Linda Hind (collectively the “Appellants”) objected to the provisions of the By-law and pursuant to s. 41 (4) of the *Ontario Heritage Act* (“OHA”) appealed (“Appeals”) to the Ontario Municipal Board. The Municipality and the Association (collectively the “Supporting Parties”) support the passage of the By-law and believe it to be valid and enforceable.

[3] There is no dispute I have the authority to determine the matters raised on the Appeals.

The Park and Cottagers’ Association

[4] The Park, located along the north shore of Lake Erie, was established in 1894 by “An Act to establish a Provincial Park at Rondeau” and is the second oldest provincial park in Ontario. The original legislation expressly authorized the responsible Minister to “lease for any term of years...such parcels of land in the park as he deems advisable...for the construction of buildings for habitation during the summer...”

[5] Following creation of the Park, the leasing of lots was undertaken and correspondingly, over time, cottages were built. These cottages are owned by the cottagers themselves and the land upon which they are situated is owned by the Crown in right of Ontario (“Crown”).

[6] The lots themselves are approximately 50 feet by 100 feet in size. None of the lots extend to the water's edge of the lake and all users of the Park (cottagers, campers, visitors) have equal and unfettered access to the Lake Erie beach and waterfront.

[7] The cottage community, at its peak, grew to 451 cottages in the early 1950's. Currently there are 285 cottages remaining in the Park. Each cottage is subject to a lease with the Crown and all leases have been coordinated to expire on December 31, 2017.

[8] The cottage community in the Park takes up approximately 1.5% of the Park's 8,039 acres. The area designated as a Heritage Conservation District in the Heritage By-law represents approximately 6% of the Park's total area.

[9] The Cottager's Association was founded in 1928 and it represents in excess of 90% of the cottage owners in the park. The Association is an incorporated entity.

[10] In the summer of 2011, the Association commissioned the firm of McNaughton Hermesen Britton Clarkson Planning Limited and George Robb Architect to study the impact of the proposed termination of cottage leases by the MNR and to investigate and report on the cultural heritage values or attributes of the Park's cottage community.

[11] A report was released in May, 2012 entitled "Rondeau: A Cultural Heritage Landscape."

[12] Following release of this report the Municipality became actively involved in the review of the heritage attributes of the cottage community. That involvement resulted in the passing of the Heritage By-law.

The Heritage By-law

[13] Schedule A to the By-law outlines the area designated as the Heritage Conservation District and that area encompasses real property owned by the Crown as well as structures within the Park, i.e. Visitor's Center, Main Office and Maintenance Building. The area so designated also includes the camping, recreational and forested areas of the Park and most of the Park's beach.

[14] Schedule B to the By-law is the Rondeau Heritage Conservation Plan. This Plan contains the substance of the By-law and its provisions are enforceable under the OHA. The Plan, in general terms, establishes guidelines and restrictions for a number of things including alterations and additions to buildings, new development and the demolition and removal of buildings.

[15] The Plan also sets out provisions for exempting some forms of alteration, i.e. those that are minor in nature, which may be carried out without the need for a permit pursuant to s. 42 of the OHA.

Issue

[16] The issue to be determined in this matter is whether the Municipality had the lawful authority to pass the Heritage By-law. If it did, the Appeals must be dismissed; if it did not, then pursuant to s.41 (7) of the OHA, the Heritage By-law should be repealed and the Appeals allowed.

Positions of the Parties

[17] The Appellants and, in particular, the MNR argue, *inter alia*, that based upon the provisions of the *Provincial Parks and Conservation Reserves Act, 2006* ("PPCRA") and certain provisions of the OHA, the Municipality did not have lawful authority to pass the

By-law in question. In addition, they argue that the By-law is not in conformity with the Chatham-Kent Official Plan (“CKOP”).

[18] The Association contends that the Municipality is permitted under Part V of the OHA to designate a Heritage Conservation District and, based upon a proper reading of s. 25.2 (2) (a) of the OHA, there is nothing to prevent the passage and operation of the Heritage By-law. The Association also suggests that the interpretation applied to s. 39.1.1(1) and s. 25.2 (1) and (2) (a) of the OHA and s. 31(1) of the PPCRA by the MNR is incorrect.

[19] The Municipality argues, among other things, that the OHA is a complete code for any by-law passed for heritage purposes and, to the extent any conflict exists with other legislation, s.68(3) of the OHA stipulates the OHA is to prevail.

[20] The Municipality also suggests that the MNR has not discharged its obligations to evaluate the heritage attributes of the cottage community at the Park and therefore has not met requisite Standards and Guidelines established by the Ministry of Tourism and Culture. In essence, the Municipality suggests that the MNR does not come to this proceeding with clean hands.

Analysis and Discussion

(i) PPCRA

[21] In my view, the starting point in this analysis is the PPCRA and the provisions of that legislation which are germane to the issue before me.

[22] The PPCRA was enacted in 2006 and its purpose, as stated in s. 1 is “to permanently protect a system of provincial parks and conservation reserves that includes ecosystems that are representative of all of Ontario’s natural regions, protects provincially significant elements of Ontario’s natural and cultural heritage, maintains biodiversity and provides opportunities for compatible, ecologically sustainable recreation.”

[23] Section 12(1) of this legislation places responsibility for the control and management of provincial parks on the Minister of Natural Resources and Forestry (“Minister”), allows for the implementation of a management plan in s. 10 (3) (c) and stipulates, in s. 13 (1), that land in provincial parks is to be used and occupied in accordance with the PPCRA.

[24] Further to the control and management responsibilities set out in the PPCRA, the Rondeau Provincial Park Management Plan (“Provincial Management Plan”) was established and was included in the materials filed in this proceeding.

[25] The Provincial Management Plan is the official provincial policy for the management and development of the Park. It establishes guidance, restrictions and directives for a range of topics including the protection of fauna, a marketing strategy to promote the Park, the construction, operation and maintenance of water and sewer systems, restrictions on boating and the orderly and environmentally sound development of the Park’s trail system. The Plan also contains a section dealing with leasehold interests and confirms December 31, 2017 as the expiration date for the various leases in place.

[26] The Supporting Parties contend that because the Provincial Management Plan references the protection of Provincially Significant Elements of the Natural and Cultural Landscape of Ontario in s. 2.3.1, and Cultural Resources of the Park in s. 3.5, such references validate the designation set out in the Heritage By-law. I am not persuaded.

[27] In my view, the PPCRA is decidedly clear with respect to its objects and the manner in which those objects are attained. Responsibility for the control and management of the park is unequivocally and undeniably given to the Minister. Such exclusive control and management is underscored by Ontario Regulation 347/07, which was issued in relation to the PPCRA. Section 13 (2) of that Regulation states that “No person shall occupy land for non-commercial residential purposes in...Rondeau Provincial Park except under a lease granted before July 2, 1954 or a renewal or extension of such a lease that does not extend beyond December 31, 2017.”

[28] In addition, s. 31 (1) of the PPCRA makes it abundantly clear that “for municipal purposes” land in a provincial park is “deemed to be separated” from a municipality. If the Heritage By-law was passed for a ‘municipal purpose’, such passage would be contrary to s. 31(1) and therefore, its validity would be called into question.

[29] Since the phrase “municipal purposes” is not defined in the PPCRA, in my view the phrase should be given its plain and ordinary meaning in order to properly interpret it. In that regard, it would be instructive to examine the substantive provisions of the By-law itself.

[30] Paragraph 2 of the By-law adopts the Heritage Conservation District Plan which is attached as Schedule B. The Plan’s intention, as stated in s. 1.2, is to “conserve the unique character of Rondeau Provincial Park,” and the section then goes on to say that it “provides guidance regarding the conservation, *management*, care and protection of the heritage character and attributes” of the Park. (Board emphasis in italics)

[31] Among other things, the Plan limits alterations and additions to existing buildings, restricts new building construction, prohibits (contrary to the obligations cottage owners have to the Crown in their leases) demolition of existing buildings except in certain identified circumstances, prohibits the widening or establishment of new paths/trails to the beach and provides comment on views to the water from the public realm.

[32] By establishing a Heritage Conservation District and a Plan for that District, what the By-law essentially does, *inter alia*, is to ensure that municipal input and approval is required for various matters within the cottage community, including changes to property. In other words, it allows the Municipality to exert some control and management over the cottage community in the Park. That, in my view, is the reason it was passed and as a result, such passage and the By-law itself clearly falls within the phrase 'municipal purpose' based on the plain and ordinary meaning of such phrase.

[33] It follows therefore, that the Municipality's authority to pass the Heritage By-law is not only restricted by the application of s. 31(1) of the PPCRA but it is also at odds with the authority conferred on the Minister in s. 12 (1) of the PPCRA. Any general reference to the natural and cultural landscape or the cultural resources in the Provincial Management Plan to legally validate the By-law simply does not and, in my estimation, cannot, vitiate or override, the unambiguous language set out in s. 31 (1) and s. 12 (1).

(ii) OHA

[34] The Supporting Parties argue that the OHA is a complete code for any by-laws passed for heritage purposes and that, pursuant to s. 68 (3), in the event any conflict exists between the OHA and any other Act, the OHA shall prevail. Again, I am not persuaded.

[35] Although it is true that the OHA, in Part V, authorizes the council of a municipality ("Council") to designate, by by-law, a heritage conservation district, one must, in my opinion, read the provisions of the OHA in their entire context. When I do so, the provisions of s.39.1.1 and s. 25.2 undeniably come into play.

[36] Section 39.1.1 states categorically that Part V does apply to property described in s. 25.2 (2) (a). The relevant portions of s. 25.2 read as follows:

25.2 (1) In this Part,

“property” means real property and includes all buildings and structures thereon.

(2) This Part applies to property,

(a) that is owned by the Crown in right of Ontario or by a prescribed public body;

[37] The real property in this case is the Park and is owned (except for the cottage buildings) by the Crown. As a result, the legislature established a specific limitation on Council’s ability to designate under Part V. Moreover, the fact that the cottagers themselves own the cottage buildings does not, in my view, in any way alter or modify this limitation. In short, when I read the OHA in its entire context, it is clear to me that a municipality does not have authority to create a heritage conservation district that encompasses land in a provincial park owned by the Crown.

[38] The Supporting Parties also suggest that, pursuant to s. B.2 of the Standards & Guidelines for Conservation of Provincial Heritage Properties issued by the Ministry of Tourism and Culture, the MNR has an obligation to identify *provincial heritage properties* and has not done so. According to the Supporting Parties, the Municipality satisfied that obligation by passing the Heritage By-law and, as a result, the By-law should be upheld.

[39] In my opinion, that argument must also fail. Any delinquency on the part of the MNR to evaluate and/or identify provincial heritage properties is not a jurisdictional argument with respect to the passing of the By-law and should not be treated as such. The ability and authority of the Municipality to pass the Heritage By-law should not be confused with or tainted by whatever Standards & Guidelines are promulgated by the Ministry of Tourism and Culture concerning heritage properties. Simply put, there is no nexus between the two for purposes of the determination I must make.

[40] As for the argument relating to s. 68 (3) of the OHA, I would simply state that the language of the PPCRA is clear and unambiguous. In my estimation, there is no conflict between it and the provisions of the OHA. If I were to decide otherwise, I would effectively be rendering all or a substantial part of the PPCRA meaningless. In my opinion s. 68 (3) has no application in this case.

(iii) CKOP

[41] The MNR contends that the Heritage By-law does not conform to the CKOP in that the Park is excluded from the CKOP by virtue of s. 1.8 and the mapping in Schedule A4 of the Official Plan. The relevant portions of s. 1.8 state that “Lands within...Rondeau Provincial Park...are not subject to the municipal planning documents, and therefore are not included on the Land Use Schedules in this Plan.”

[42] The Supporting Parties, on the other hand, argue that the Heritage By-law is not a municipal planning document for purposes of s. 1.8 and therefore whatever limitation may be set out, has no application in this case. Once again I disagree with the position of the Supporting Parties.

[43] The Heritage By-law includes the Heritage Conservation District Plan which, as I stated above, controls, limits and restricts what can and cannot be done within the cottage community in the Park. Heritage conservation is a planning matter and the Heritage By-law is therefore, in my estimation, a municipal planning document. Accordingly, s. 1.8 of the CKOP applies to further impair the passage of the By-law. Even if I am incorrect on my interpretation of s.1.8 and its application in this case, in my opinion, the provisions of subsections 10 (3) (c), 12 (1), 13 (1) and 31 (1) of the PPCRA, 39.1.1 and 25.2 of the OHA and 13 (2) of Ontario Regulation 347/07 as referred to above, unequivocally undermine the validity of the Heritage By-law and its passage and outweigh any arguments to the contrary.

Disposition

[44] In the final analysis, I do not believe, notwithstanding the provisions of s. 8 of the *Municipal Act* which suggests that powers of a municipality are to be interpreted broadly, that the Municipality possessed the requisite authority to pass the Heritage By-law.

[45] Any interpretation of s. 8 of the *Municipal Act* must also reflect and take into account established jurisprudence which states very clearly that municipalities cannot constrain the province within areas of provincial control. As Doherty, J, stated at paragraph 53 in *Barrick Gold Corp. v. Ontario* [2000] O.J. No. 4426 (C.A.) when referring to the legality of a by-law and resolution passed by the Corporation of the Township of Black River-Matheson:

The legality of the by-law and resolution passed by Black River turns on whether Black River had the statutory authority to pass the resolution and by-law. Municipalities are creatures of statute. They can exercise only those powers conferred on them by provincial legislation: *R. v. Greebaum* [1993] 1 S.C.R. 674 at 687-88. The principle is well described in these terms by I. Rogers, *The Law of Canadian Municipal Corporations*, 2d ed., looseleaf (Scarborough: Carswell, 1971), at p.344:

Although it is said that by-laws are similar to statutes, they are still “inferior” laws and cannot usurp the authority of or be contrary to a higher law. Since a by-law is a form of local legislation, it is for this reason that it must not be at variance with provincial legislation. It is a cardinal rule of municipal law that all by-laws are subject to the general rule of the realm and are subordinate to it and any by-laws which are repugnant to or inconsistent with general provincial legislation are void and of no effect.

[46] Accordingly, based on all of the foregoing, it is ordered that the Heritage By-law is repealed.

[47] Board Rule 107 states:

107. Effective Date of Board Decision A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

[48] Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

“Steven Stefanko”

STEVEN STEFANKO
VICE-CHAIR

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Ontario Municipal Board

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