

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: March 22, 2016

CASE NO(S): PL081034

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant / Applicant: Muski Properties Ltd
Subject: Consent
Property Address/Description: Part Lot 11, Concession 12
Municipality: Township of Minden Hills
OMB Case No.: PL081034
OMB File No.: PL081034
Municipal No. H-108/05
OMB Case Name: Muski Properties Ltd. v. Minden Hills
(Township)

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant / Applicant: Muski Properties Ltd
Subject: Consent
Property Address/Description: Part Lot 11, Concession 12
Municipality: Township of Minden Hills
OMB Case No.: PL081034
OMB File No.: PL081035
Municipal No. H-109/05

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant / Applicant: Muski Properties Ltd
Subject: Consent
Property Address/Description: Part Lot 11, Concession 12
Municipality: Township of Minden Hills
OMB Case No.: PL081034
OMB File No.: PL081036
Municipal No. H-110/05

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant / Applicant:	Muski Properties Ltd
Subject:	Consent
Property Address/Description:	Part Lot 11, Concession 12
Municipality:	Township of Minden Hills
OMB Case No.:	PL081034
OMB File No.:	PL081037
Municipal No.	H-111/05

Heard: April 20 to 22, 2015 and September 28 to 29, 2015 in Minden, Ontario

APPEARANCES:

Parties

Counsel

Muski Properties Ltd.

I. Rowe

County of Haliburton and Township
Of Minden Hills

R. Taylor

DECISION DELIVERED BY C. CONTI AND ORDER OF THE BOARD

INTRODUCTION

[1] This is the decision for an appeal by Muski Properties Ltd. (“Appellant”) against the refusal by the County of Haliburton Land Division Committee (“Committee”) of an application for consent for a property at Part Lot 11, Concession 12, Township of Minden Hills (“Township”).

[2] The subject property is located in a waterfront residential area of the Township adjacent to the shoreline of Twelve Mile Lake and Little Boshkung Lake. The subject property is formed by a peninsula at the juncture of the two lakes. The property has an area of approximately 1.88 hectares (“ha.”) and a total frontage of approximately 438 metres (“m.”) along the shoreline. The purpose of the application is to create three additional lots from the existing parcel.

[3] In addition to the appearances noted above, Ian Clendening attended the hearing on behalf of the Township of Minden Hills. The Township had been a joint party along with the County represented by Mr. Taylor through the pre-hearing process for this appeal. However, the Procedural Order for the hearing in paragraph 4 recognized only the Appellant and County as parties and it directed the Township to inform the Board prior to February 6, 2015 if it wanted party status at the hearing. Through correspondence from Mr. Clendening the Township informed the Board that it would not be seeking party status, but requested participant status.

[4] Mr. Rowe expressed some reservation but did not object to the Board granting participant status provided that the Township understood the limitations of being a participant relative to being a full party. The Board granted participant status to the Township on consent.

THE PROPOSAL

[5] The intent of the proposal is to sever three lots from the existing parcel resulting in four residential waterfront lots.

[6] The dimensions of the retained and severed parcels are identified in the Site Development Plan submitted by the Appellant (Exhibit 36). The retained parcel comprises the northwest portion of the property on Little Boshkung Lake and it has an area of 5000 square metres ("sq. m.") and a frontage of 116 m. The proposed first severed lot is located south of the retained parcel on Twelve Mile Lake and has an area of 5825 sq. m. and a frontage of 81 m. The proposed severed parcel No. 2 is located on Twelve Mile Lake to the east of the first severed parcel and it has an area of 4000 sq. m. and frontage of 98 m. The third severed parcel is north of parcel No. 2 and east of the retained parcel. It has an area of 4000 sq. m. and a frontage of 82 m.

[7] The subject property does not have direct access on a public road. Access to the subject property and the proposed lots is intended to be provided through rights- of- way from a private portion of Twelve Mile Lake Road. In the vicinity of the subject property,

Twelve Mile Lake Road is a private road. However, in some areas, further removed from the subject property, Twelve Mile Lake Road is a public road. The proposal includes a right- of- way across the retained parcel and extending into severed parcels No. 2 and No. 3 which will end in a turning circle. Access to each lot will be provided from the driveway extension located in right- of- way or from the turning circle.

[8] A cottage which is a state of disrepair and two sheds are located on the property. The proposal will result in four lots on which a dwelling with associated structures and private services could be located.

[9] The original Township road allowance, which is partially submerged, still exists along the shoreline of the lakes in this area. During the course of the hearing, the Board was informed that the Township had accepted an application by the Appellant to close and convey the portion of the road allowance in front of the subject property (Exhibit 24).

[10] There is sufficient space for the location of a dock, subject to obtaining any required approvals, in front of each proposed lot.

ISSUE

[11] The main issue in this appeal is whether or not the proposed consents comply with the provisions of s. 53 of the *Planning Act* (“Act”) which require compliance with s. 51(24) of the Act. Through s. 53(12) the Act also provides for consideration of applying conditions to the consents under s. 51(25). While the parties identified a number of issues in the Procedural Order, a critical matter in making this decision is to determine if the consents are appropriate under the requirements of the Township Official Plan which restrict development adjacent to “at capacity” lake trout lakes.

EVIDENCE

[12] The Board heard evidence in support of the Appellant from Anthony Usher, Principal of Anthony Usher Planning Consultant. Mr. Usher is a Registered Professional Planner with approximately forty years of experience. He was qualified by the Board as an expert in land use planning.

[13] The Board heard evidence in support of the Appellant from Michael Michalski, Senior Advisor with Michalski Nielson Associates Limited. Mr. Michalski practices as a limnologist who has more than forty years of experience. He was qualified by the Board to give expert evidence with respect to limnology issues and with respect to phosphorus impacts on “at capacity” lakes.

[14] The Board heard evidence from Victor Castro who testified under summons from the Appellant. Mr. Castro is Senior Aquatic Scientist-Group Leader with the Ministry of the Environment and Climate Change (“MOECC”). He was qualified by the Board as an expert in lake impact assessment, lake capacity modelling and lake studies.

[15] The Board heard evidence on behalf of the County from Richard Hunter, Partner with Planscape. Mr. Hunter is a Registered Professional Planner with close to forty years of experience. He was qualified by the Board as an expert in land use planning.

[16] The Board also heard evidence from Mr. Clendening on behalf of the Township, a participant in the appeal. Mr. Clendening is a Planner with the Township who has more than three years of experience. He was qualified by the Board as an expert in land use planning.

RELEVANT FACTS

[17] Based upon the evidence, the Board has determined that the facts discussed below are relevant to this appeal.

[18] The subject property is designated as waterfront in the Township official plan. At the time of the application the 2005 Official Plan was in effect. Section 6.2 of the 2005 Official Plan sets out requirements for the waterfront designation. The policies permit single family residential uses and anticipate that development will use individual water and sewage services. Section 6.2.3.2 requires development to have frontage on a public road where possible but permits access from a private road “with a legal right-of-way on an infill basis” (Exhibit 2, Tab 13, p. 183-184).

[19] Section 6.2.5.2 requires that a natural vegetative buffer at least 30 m. in width must be maintained along the shoreline and s. 6.2.6.3 requires a minimum frontage of 60 m. and minimum lot area of 0.4 ha. for waterfront lots.

[20] Through s. 6.2.4 Lake Carrying Capacity must be considered in conjunction with the development and the policies in s. 4 of the Official Plan apply.

[21] Section 4 provides requirements for the protection of natural heritage features. In s. 4.5 policies are provided specifically for lake capacity. In s. 4.5.2.3 the Official Plan lists a number of lakes with naturally reproducing lake trout populations that are “...highly sensitive to further shoreline development and are considered to be at development capacity...” (Exhibit 2, Tab 13, p. 170). The list includes both Little Boshkung and Twelve Mile Lakes and requires for any development within 300 m. of the lake that detailed studies must be submitted to demonstrate that there will be no adverse impact on lake trout populations. This section also recognizes existing development rights on “at capacity” lakes.

[22] Section 4.5.2.4 sets out a number of provisions through which development on “at capacity” lake trout lakes can be considered. It states:

Council will not consider any application that involves the creation of a new lot, or new medium density, lifestyle or cluster residential units, or any non-residential development, on the shorelines of lakes listed in Section 4.5.2.3 unless at least one of the following applies.

- Each created and retained lot has an existing dwelling and septic tank tile field, and its use is and will remain residential.

- If the proposed development is residential, it is eligible for an approved pilot program of the Ministry of Municipal Affairs and Housing to evaluate alternative phosphorus removal technologies, and the applicant and the Township are prepared to enter into agreements required by the pilot program to the satisfaction of the Ministry.
- If the proposed development is non-residential and it does not involve or require any new individual on-site or communal sewage disposal systems, or expansion of existing systems.
- Any new individual on-site or communal sewage disposal systems, or expansion of existing systems, will use technologies recognized by the Ministry of Municipal Affairs and Housing and the Ministry of the Environment as causing no increase in phosphorus inputs over those existing before development.
- The applicant undertakes a lake trout habitat impact assessment that demonstrates to the satisfaction of the Ministry of the Environment and the Ministry of Natural Resources that the development will not adversely affect the lake's lake trout habitat. (Exhibit 2, Tab 13, p. 171).

[23] The 2014 Township Official Plan has not carried forward all provisions of s. 4.5.2.4. In particular the provision whereby development may be permitted on at capacity lakes based upon entering into a pilot program with the Ministry of Municipal Affairs and Housing has been eliminated. In s. 3.2.3.1.1.5 an additional provision has been included which indicates that new lots may be considered:

Where the local municipality has in place tools such as a site alteration by-law, site plan control and a tree cutting by-law under the Municipal Act, and where a site-specific soils investigation, prepared by a qualified professional, demonstrates that phosphorus can be retained in deep, native, acidic soils on-site, to the satisfaction of the Ministry of the Environment. A tree cutting by-law in place at the County of Haliburton will be considered as sufficient to meet the local requirement for a tree cutting by-law. However, in the absence of a tree cutting by-law at the County, a by-law must be in place at the local municipality. (Exhibit 3, Tab 14, p 225).

[24] The subject property is zoned SR (Shoreline Residential) in Township Comprehensive Zoning By-law No. 06-10 which is currently in effect. At the time of the application the zoning by-law of the former Township of Anson, Hindon and Minden was in effect which zoned the property RLS (Residential Limited Services). The parties acknowledged that the proposed lots comply with all provisions of both By-laws which

was confirmed in the agreed statement of facts between Mr. Usher and Mr. Hunter (Exhibit 2, Tab 1, p. 2).

ISSUES, ANALYSIS AND FINDINGS

[25] The Appellant contended that the proposed consents are appropriate and that all requirements of s. 51 (24) of the Act are met and the conditions of consent included in Exhibit 8 are appropriate under s. 51(25) of the Act. The Appellant maintained that all applicable requirements of the Official Plan are fulfilled by the proposal.

[26] The Board heard that severances had been approved for the subject property which were upheld by a previous Board decision in 1997. However, the conditions of approval were never fulfilled and the approval lapsed in 2001 (Exhibit 3, Tab 14, p. 322).

[27] Through the evidence of Mr. Michalski and Mr. Castro, the Appellant maintained that the four lots can be developed with septic systems and other appropriate measures that control phosphorus inputs into the lakes so that there will be no adverse impact on lake trout populations. Mr. Castro indicated that the proposed lots would be candidate for a pilot program using the measures proposed by Mr. Michalski with the involvement of the MOECC.

[28] Mr. Usher contended that the proposal meets all applicable planning requirements, in particular the requirements of the 2005 Township Official Plan which he maintained is the Official Plan that is determinative for the suitability of the proposal.

[29] The County maintained that the proposal is not appropriate and could only be approved if the Township is prepared to enter into a pilot program with the MOECC. Mr. Hunter contended that the consents as proposed by the Appellant could only meet the provisions of the Township Official Plan if the Township agreed to participate in a pilot program. Since the Township has refused to participate, the proposal does not comply with the Official Plan.

[30] Mr. Clendening's evidence confirmed that the Township considered a request to participate in a pilot program for the subject property and declined. He maintained that the proposal is not appropriate and does not meet the relevant Official Plan requirements.

[31] There was no dispute that the proposed lots meet size requirements in the Official Plan and Zoning By-law. There was little dispute that road access requirements could be met.

[32] The main dispute between the parties focused on the ability of the proposal to comply with the provisions of the 2005 Township Official Plan, in particular the requirements for development adjacent to "at capacity" lake trout lakes.

[33] This issue, as well as a number of other issues, were addressed in the evidence including those identified in the issues list attached to the Procedural Order. After carefully reviewing the evidence and submissions, the Board has determined that the key issues in making this decision are those discussed in the sections of this decision that follow. The findings of the Board are provided where appropriate.

Need for Further Notice

[34] An initial issue raised at the start of the hearing involved a revision to the application which has resulted in one fewer proposed lot. The application that was refused by the Committee in 2008 proposed four severed parcels resulting in a total of five lots, instead of four lots proposed by the current application. Mr. Rowe indicated that one severance application was being withdrawn and the Appellant's application had been revised to consider three lots plus the retained parcel. Mr. Michalksi and Mr. Usher indicated that based upon their analyses, the five lot proposal would not be acceptable, but the revised application proposing four total lots is appropriate.

[35] Mr. Taylor maintained that the reduction in lots represents a major change in the application and that further notice may be required. He noted that in the agreed

statement of facts the planners acknowledged that the proposal differs significantly from the original application. He questioned whether it would be appropriate to grant relief to the revised application under s. 53(35.1) of the Act.

[36] Mr. Rowe maintained that a new application is not required. Mr. Usher provided the opinion that the boundaries of the lots in the new application overlap the boundaries of the lots in the previous application and the changes will result in less impact. He maintained that the reduction in the number of lots represented a minor change and that under s. 53(35.1) of the Act no further notice is required.

[37] Mr. Taylor contended that the impact is only one consideration and there are process concerns that may require that further notice be provided for the amended application.

[38] The Board determined that the hearing should continue on the amended application and that consideration would be given in its decision regarding whether further notice is required under s. 53(35) of the Act.

[39] After fully considering the matter, the Board finds that the revisions to the application are minor and no further notice is required in accordance with s. 53(35.1) of the Act. The Board recognizes that in the agreed statement of facts the planners for the parties consider the revisions to the application to be "substantial". However, the Board agrees with the Appellant's submissions that reducing the number of lots is likely to result in less impact from the proposal. This is a factor in determining that the revisions are minor, but this determination is not just a matter of potential impact.

[40] The revisions to the proposal represent a reduction in the number of structures and facilities that will be located on the property. There will be a reduction in the number of dwellings, septic systems, docks and associated facilities because of the decrease in number of proposed lots.

[41] The revisions are simply a matter of changing the lot lines within the existing property so that one fewer lot is proposed. There is no change in the limits of the application.

[42] In response to questions from the Board Mr. Usher acknowledged that “red line” revisions are often made to plans of subdivision without requiring further notice. The Board considers this to be a similar case.

[43] Given the nature of the revisions to the proposal the Board has concluded that further notice is unlikely to raise additional concerns. Notice has been provided for this appeal which has provided the opportunity for all concerned agencies and individuals to seek status. Those who have concerns have status at this hearing. Therefore, based upon all of these factors, the Board has determined that the revisions are minor and further notice is not required.

Official Plan Requirements

[44] There was some dispute among the parties about the relevance of the 2014 Township Official Plan and the County Official Plan, both of which were not in effect at the time the application was filed. While the applicability of a number of provisions of the relevant planning documents were in dispute, the parties agreed and the planning evidence was clear that the provisions of the 2005 Township Official Plan must be fulfilled. The planning experts also agreed that proposal must meet the requirements of the 2005 Official Plan related to development adjacent to “at capacity” lake trout lakes.

[45] These are the key requirements that the proposal must meet. It was clear from the evidence and from the opinions of the planning experts that if the proposed consents do not comply with the provisions of the 2005 Township Official Plan related to “at capacity lakes” that the consents would not comply with the Official Plan and could not be approved. The applicability of the provisions of the County Official Plan and the 2014 Township Official Plan is not an issue if the consents do not conform to the 2005 Township Official Plan.

Provisions for “at capacity” Lakes

[46] In the 2005 Township Official Plan, policy 4.5.2.3 provides permission to develop existing waterfront lots on “at capacity” lakes. This permission has been carried forward into the current Official Plan. So the Appellant has the right to construct a single residence on the property.

[47] However, in order to create additional lots on “at capacity” lakes, the proposal must meet the requirements of s. 4.5.2.4, noted earlier in this decision. It is clear from the planning evidence that in order for there to be consideration for creating new lots, the proposal must fall under at least one of the bullet points in this section. The expert planners agreed that this provision would be satisfied if the requirements of only one of the bullet points were met.

[48] Mr. Usher’s evidence was that the proposed lots comply with the requirements of the 2005 Township Official Plan. He indicated that the lots need to comply with one of the bullet points in s. 4.5.2.4 and they could meet the requirements of the second, fourth or fifth bullet points.

[49] The Appellant contended that the proposal would utilize sewage systems with phosphorus removal technologies that would allow it to meet the requirements of s. 4.5.2.4.

[50] Mr. Michalski prepared an Environmental Impact Assessment for the proposal (Exhibit 7) which he contended demonstrates that the lots can be developed without significant increase in phosphorus levels in the lakes. According to the submissions, increases in phosphorus levels are a key component in excessive nutrient enrichment of lakes which can damage lake trout populations. The main input of phosphorus to lakes from residential development comes from sewage systems. There are also inputs from stormwater runoff, but to a much lesser degree.

[51] Mr. Michalski indicated that there are three new technologies being employed when installing sewage systems that remove substantial amounts of phosphorus. These technologies are being used at other locations in pilot programs in conjunction with the MOECC.

[52] The first method is use of a conventional septic system where the tile field is backfilled with acidic B-horizon soils that are high in iron and aluminum concentrations which have the capability to remove sewage related phosphorus. The other two options use different technologies for the septic system that is either the modified Waterloo Biofilter system or the Premier Tech Aqua phosphorus removal treatment system.

[53] Mr. Michalski's recommendation for the subject property was that either a modified Waterloo Biofilter system or Premier Tech Aqua system should be used for the septic system on each proposed lot and that the effluent should be discharged into drainage fields composed of B horizon soils that have phosphorus removal capability. This would provide additional phosphorus removal and would help ensure that the lake trout habitat was protected.

[54] Mr. Michalski indicated that through the use of soakaway pits and a 30 m. wide vegetative buffer zone along the shoreline phosphorus inputs from stormwater would be mitigated.

[55] Mr. Michalski testified that the phosphorus input from the proposed sewage systems on the four lots combined would be significantly less than the phosphorus loading that would result from one conventional septic system which could be constructed on the property to service the existing lot.

[56] The Board heard through Mr. Castro's testimony that the proposal if it used the above-noted phosphorus reducing technologies would be a candidate for a pilot program. In order to undertake a pilot program, MOECC requires municipal agreement and involvement. Mr. Castro indicated that he appeared before Township Council to request its participation in undertaking a pilot program in relation to the proposal. After

considering the matter, the Township would not agree to participate in a pilot program. Through Mr. Clendening's testimony the Board heard that the Township had a number of concerns with participating in a pilot program and therefore, in his opinion, the proposal could not comply with the second bullet in s. 4.5.2.4 of the Official Plan.

[57] From the evidence, the Board understands that in order for a pilot program to be undertaken, there must be voluntary participation by the relevant municipality. Furthermore, the second bullet point of s. 4.5.2.4 of the Official Plan clearly states that the applicant and Township must be prepared to enter into agreements required by the pilot program.

[58] After reviewing the evidence, it is clear that the Township specifically considered the matter and is not prepared to participate and enter into the required agreements. The Board concludes that the proposed consents cannot comply with s. 4.5.2.4 of the Official Plan by meeting the requirements of the second bullet.

[59] Since the phosphorus reduction technologies are used in the provincial pilot programs, it was Mr. Michalksi's opinion that they are "recognized" technologies and that the proposal could be approved under the fourth bullet of s. 4.5.2.4 of the Township Official Plan which requires the use of technologies, "... recognized by the Ministry of Municipal Affairs and Housing and the Ministry of the Environment..." (Exhibit 2, Tab 13, p. 17).

[60] Mr. Michalski's position was supported by Mr. Usher's opinion who indicated that the proposal would fulfill the requirements of s. 4.5.2.4 of the Official Plan through either the fourth, second or fifth bullet.

[61] The contention that the phosphorus removal technologies are "recognized" by the MOECC was disputed by the County. Mr. Hunter maintained that although the technologies are used in pilot programs, they have not been incorporated into the Ontario Building Code or into the provincial Lakeshore Capacity Assessment Handbook.

[62] During the course of the hearing, Mr. Clendening produced an e-mail exchange with Mr. Castro in which it appeared that Mr. Castro acknowledged that the technologies are not “recognized” by the MOECC (Exhibit 22). This caused an adjournment in the hearing in order for Mr. Castro to be recalled to address this matter.

[63] Mr. Castro testified that there are different levels of recognition. He stated that some technologies have been tested, are proven and meet standards. Mr. Castro indicated that the pilot program provides an opportunity to have the technologies tested and this represented a broader public interest.

[64] Mr. Castro stated that in Exhibit 22 he was referring to recognition under the Ontario Building Code. The technologies discussed by Mr. Michalski are recognized for use in the pilot program but are not incorporated into the Ontario Building Code. Mr. Castro indicated that the Premier Tech Aqua system has been recognized for use in Quebec.

[65] In addition to concern about whether the phosphorus removal technologies should be considered to be “recognized” by the provincial Ministries, there was also some discussion about the reference in the fourth bullet to “...causing no increase in phosphorus inputs over those existing before development.”

[66] The Appellant’s witnesses contended that it was not possible to have no increase in phosphorus levels and that the objective should be that the phosphorus removal technologies would result in phosphorus inputs that were as low as reasonably achievable. Mr. Usher noted that Official Plan policies must be able to be fulfilled. The Board agrees with the Appellant’s evidence that a reasonable interpretation of this provision of the Official Plan is that phosphorus inputs should be limited as much as possible through the recognized technologies.

[67] However, if the intent of the fourth bullet in s. 4.5.2.4 is that “recognized” technologies are simply those used in the pilot programs and that “no increase in phosphorus” means limiting phosphorus as much as possible, then it is difficult to

understand the reason for including this provision in the Official Plan. If this is the intent of the fourth bullet, it achieves nothing beyond what would be achieved by the second bullet, but outside of the requirements of a pilot program.

[68] The Township has already provided through the second bullet a means for new lots to be created on “at capacity” lakes based upon the use of phosphorus reduction technologies through its participation in pilot programs. Why would the Township include another option for approving new lots using the same technologies to the same standards of phosphorus removal that would eliminate the requirement for its participation?

[69] After considering the matter, the Board has concluded that the fourth bullet anticipates that phosphorus removal technologies would receive a level of recognition beyond being eligible for use in the pilot program. The Board interprets this provision as requiring incorporation of technologies in the Ontario Building Code or some other more formal recognition by the province.

[70] From the above, it is not clear to the Board that the proposal uses technologies that are “recognized” in the sense that the term is used in the fourth bullet. Based upon these considerations the Board cannot conclude that the proposed consents can be approved under the fourth bullet of s. 4.5.2.4 of the Official Plan.

[71] With regard to the fifth bullet in s. 4.5.2.4, Mr. Castro indicated that Mr. Michalski’s Environmental Impact Assessment could qualify as a “lake trout habitat assessment” as required in this provision. Also, Mr. Usher’s planning opinion was that the proposal could be considered under this provision.

[72] However, the fifth bullet requires that the lake trout habitat assessment must demonstrate, “... to the satisfaction of the Ministry of the Environment and the Ministry of Natural Resources that the development will not adversely affect the lake’s lake trout habitat.” (Exhibit 2, Tab 13, p. 171). Mr. Hunter’s evidence was that Mr. Michalski’s assessment has not been approved by the Ministries. While the Board recognizes that

Mr. Castro may be the main individual responsible for consideration of the report on behalf of the MOECC, the Board was not made aware of any formal acceptance of the assessment by the provincial Ministries.

[73] However, regardless of whether or not the proposal could meet the requirements of the fifth bullet, or the second or fourth bullet, the Board is concerned that the Appellant has proposed conditions of consent to be included in a consent agreement which require the Township to assume the same functions that it would take on if it were agreeing to participate in a pilot program. In effect, approval of the proposal under either the fourth bullet or the fifth bullet would impose a pilot program on the Township when it specifically refused to participate in such a program.

[74] If the consents were approved, the required functions of the Township are identified in the proposed conditions of provisional consent (Exhibit 8). They include a requirement in condition 7(h) that the Township receive a report from a qualified professional engineer verifying that the sewage systems have been constructed and will be maintained and operated according to the recommendations of the Environmental Impact Assessment and that sampling facilities have been installed. Condition 7(i) states in part "...The professional shall prepare a monitoring and reporting protocol generally consistent with the requirements of the Environmental Impact Assessment and consistent with the requirements of the Regional Guidance for Phosphorus Abatement Technology, May 2012, and submit it to the Ministry of Environment and Climate Change and the Township for staff approval." The Township and the MOECC will then receive the monitoring reports for a minimum of three years (Exhibit 8, p. 3)

[75] Also, condition 7(j) requires the Township to hold a \$5000.00 deposit as security to ensure that the monitoring is undertaken. This condition also includes the following provision in case the monitoring is not completed according to the protocol, "Should the owner fail to fulfill the protocol, the Township may retain some or all of the security, and may use or retain its own agents to enter the subject lot to conduct samples and

otherwise conduct monitoring and reporting in accordance with the protocol as it sees fit.” (Exhibit 8, p. 3)

[76] According to the evidence, these are the same obligations that would be required if the Township agreed to participate in a pilot program. While on the face of it, these conditions may not seem onerous, they do place additional obligations on the Township. By receiving the reports on the construction of the sewage works, the monitoring and by holding funds, the Township assumes some level of responsibility that the works will be constructed and function as intended. Condition 7(i) requires Township staff to approve the monitoring and reporting protocol and then receive the monitoring reports. To fulfill this condition, Township staff must at least become familiar with the monitoring requirements and the protocol set out in Mr. Michalski’s report.

[77] The Board is concerned that the Township’s involvement could become onerous if complications arise, such as if difficulties are encountered with the performance of the septic systems or the monitoring is not carried out according to the protocol. Condition 7(j) appears to leave the Township with the obligation to ensure that monitoring is carried out if the owner of a lot fails to fulfill the monitoring protocol.

[78] The Board understands that the Township is responsible for inspection of the installation of septic systems. According to Mr. Clendening, the Township did not want to take on additional obligations and that was one reason for its refusal to participate in the pilot program.

[79] In consideration of the above then, the main question for the Board in determining if the proposal complies with s. 4.5.2.4 of the Township Official Plan is, should the Board require the Township to participate in a pilot program when it specifically refused to do so?

[80] Mr. Rowe argued that a consent agreement between the Appellant and Township is a standard requirement for land divisions and is authorized in the Act by reference in s. 53(12) to s. 51(26). He maintained that including the above-noted conditions is similar

to the Board applying conditions that impose requirements on a municipality when it approves consents or plans of subdivision that are opposed by the municipality in an appeal.

[81] The Board was provided with examples where agreements had been entered into for proposals that required phosphorus reduction technologies. The majority of these cases involved settlements of appeals where the parties, including the relevant municipalities, agreed to undertake pilot programs. In most cases only a portion of the proposed lots were given approval subject to a pilot program being implemented and monitoring of phosphorus loading from those lots was to be undertaken for a period of years. Approval of the remainder of the lots depended on the results of the monitoring. In the current case the intent is that all of the lots be given approval at the same time.

[82] The Appellant's authorities included the decision *Ministry of Natural Resources v. County of Haliburton Land Division Committee*, (1994) 31 O.M.B.R. 69 where the Board approved a severance in part based upon phosphorus removal procedures. The Board understands that this proposal was approved prior to the pilot program being established. Conditions were imposed through the decision which involved oversight, monitoring and the holding of financial guarantees by the municipality. However, it appears from page 71 of the decision that these conditions were acceptable to the municipality. The application in that case was approved by the County of Haliburton Land Division Committee and appealed by the Ministry of Natural Resources.

[83] However, none of the examples raised by the Appellant imposed requirements on municipalities to take on the responsibilities of a pilot program where they had refused to participate.

[84] The Official Plan sets out an option for the approval of the lots based upon the Township participating in a pilot program in the second bullet. It is clear from the second bullet and from the evidence of Mr. Castro that a pilot program requires the voluntary participation of the Township.

[85] The Board has concluded that in order to determine the intent of s. 4.5.2.4 of the Official Plan, the five bullet points must be read together. The second bullet point provides the only option for the consents to be considered where a pilot program is undertaken and it requires the agreement of the Township. The fourth and fifth bullets provide other options for considering consents where a pilot program is not undertaken. The Board does not agree that the fourth and fifth bullets can be used to impose the same requirements of a pilot program on the Township while not formally entering into a pilot program with the MOECC. To do so would be contrary to the intent of the second bullet point.

[86] When the five bullets in this section are read together it is clear to the Board that the intent is that consents can be considered when a pilot program is undertaken with the participation to the Township. To undertake a *de facto* pilot program in conjunction with the fourth or fifth bullet without voluntary participation of the Township would be contrary to the intent of s. 4.5.2.4 of the Official Plan.

[87] If the proposal were to be approved under the fourth or fifth bullet of s. 4.5.2.4 of the Official Plan, it would need to be accomplished without consent conditions that include the same requirements for the Township that would be imposed in a pilot program. However, the evidence of Mr. Michalski (Exhibit 17, p. 9) and the testimony of Mr. Castro indicate that the proposed consent conditions that include the requirements for the Township are important elements of the proposal. Furthermore, the Appellant is proposing that these requirements should be included as part of the approval of the consents by including them in the conditions.

[88] The intent of the conditions is to provide for some oversight regarding the installation and performance of the phosphorus removal technologies installed on the proposed lots. The Board understands that the “qualified professional” referenced in condition 7(h) and 7(i) will be responsible for ensuring that the installation of the works and monitoring are carried out as planned. However, if problems arise the Board is concerned that if the consents were to be approved without the requirements for the

Township that there would be a lack of oversight on the monitoring and performance of the phosphorus removal technologies.

[89] Based upon the above, the Board considers the conditions that require the involvement of the Township to be necessary elements if the consents were to be approved.

Proposed Conditions Must Be Reasonable

[90] In addition to the above findings, the Board is also concerned that the proposed conditions of consent are not reasonable and would not be appropriate under s. 51(25) of the Act.

[91] In this section the Act states, “The approval authority may impose such conditions to the approval of a plan of subdivision as in the opinion of the approval authority are reasonable” In s. 51(25)(a) to (c) the Act sets out types of conditions that can be imposed. They do not include matters related to the proposed conditions of consent that involve the Township.

[92] In s. 51(25)(d) the Act states that the owner of the land can enter into agreements with the municipality for any matters that the approval authority considers necessary. As noted earlier this section applies to consents as well as plans of subdivision. In the current appeal the proposed conditions of consent would need to be imposed on the Township under this section through a consent agreement. However, through this appeal the Board must be satisfied that the conditions are reasonable.

[93] After reviewing the evidence, the Board concludes that the proposed conditions of consent that require the Township to participate in activities that are intended to be part of a voluntary, experimental program are not within the normal area of municipal jurisdiction and responsibility. Furthermore, the evidence has not demonstrated that a compelling public interest would be served by requiring the Township’s participation.

[94] There is some element of risk that the Township would need to assume if the proposed conditions were applied. There is an experimental element to pilot programs. Mr. Castro acknowledged that the purpose of pilot programs is to test the phosphorus removal technologies in various locations and to monitor their performance. If the technologies perform as expected, they may be approved for more general use in phosphorus reduction.

[95] While the Board does not dispute the scientific evidence provided by Mr. Michalski and recognizes that the technologies may well perform as intended, there is an element of risk in developing new lots using this technology. If there were no risk, the technologies would likely already be approved for widespread phosphorus reduction use in Ontario.

[96] At a minimum the risk to the Township is that monitoring will not be carried out as intended and the Township will have to take action under condition 7(j) to use the funds deposited or retain its own agents to carry out the monitoring and reporting.

[97] The Board is concerned that there may be additional risk to the Township if the phosphorus reduction systems are not maintained as required. The Board understands that both the modified Waterloo Biofilter and Premier Tech Aqua systems use metal plates which must be replaced periodically. The septic systems also generate phosphorus precipitate that must be removed on an occasional basis. It appears from the evidence that the responsibility for maintenance and replacement of the system, if required, would fall on the purchasers of the lots. It is not clear that there is any requirement that they would need to continue to use a system that has phosphorus removal technology if replacement was required or if they were dissatisfied with the original system.

[98] Mr. Castro was confident that the systems would function as intended and that if the Waterloo Biofilter or Premier Tech Aqua devices were not functioning properly that the B-horizon soils used in the tile fields would remove enough phosphorus to protect

the lake trout habitat. However, the Board is concerned that if issues arise, the responsibility for undertaking further work on the lots is not clear and may fall to the Township.

[99] From the evidence of Mr. Clendening, the Board understands that in refusing to participate in a pilot program, the Township was concerned about potential impacts on the lakes, but also has chosen not to assume the risk, the responsibilities, and any potential additional costs.

[100] According to the evidence the participation of municipalities in pilot programs is intended to be voluntary. Mr. Castro testified that the program was set up this way in part to get municipal support.

[101] Those municipalities that have agreed to participate in pilot programs presumably reviewed the potential benefits of the program and their obligations in conjunction with municipal capabilities and resources and considered potential problems and made the decision to participate.

[102] Municipalities are responsible for establishing their priorities within the context of the applicable legislative framework. The Board must assume that those municipalities that have agreed to participate in pilot programs are prepared to devote the resources to carry out their obligations under the program, no matter how small those obligations may turn out to be.

[103] The Township in reviewing the obligations and potential benefits and risks of the program has determined that a pilot program in this case is not a priority. The Board cannot conclude from evidence that there was anything unusual about the Township's decision. There could be a multitude of legitimate reasons for the Township's position that go well beyond the purview of the *Planning Act*. Conditions of consent agreements are reasonable when they fall within the normal areas of municipal responsibility. However, conditions that require the Township to participate in an experimental program that is intended to be voluntary, and to potentially take some responsibility for a

monitoring program, go beyond those normal areas of responsibility. Conditions that go beyond these normal areas may be included in agreements based upon the consent of the relevant parties. However, in this case the Township does not consent to these conditions.

[104] Based upon these considerations, the Board is simply not in a position to contradict the Township's decision. The Board considers it to be unreasonable to apply conditions of consent that would impose obligations on the Township the implications of which are not completely clear, requiring it to participate in a voluntary program. The Township was not prepared to enter into an agreement which included these types of conditions on a previous occasion and it cannot be characterized as a standard servicing agreement.

[105] The Appellant contended that there is a public interest in undertaking pilot programs. This position was supported by Mr. Castro. The Appellant also contended that to approve four lots using phosphorus reduction technology rather than permitting the existing lot to develop using a standard septic system would be in the public interest because there would be less phosphorus input to the lakes.

[106] In his argument Mr. Rowe indicated that official plans should be given a broad and liberal interpretation and the public interest would be served by approving the consents with the phosphorus reduction technologies. This would facilitate further testing of the technologies and also result in better protection of lake trout habitat.

[107] The Board acknowledges that pilot programs are in the public interest. Also it would be better to ensure that lower levels of phosphorus are entering the lakes.

[108] In this case, there is a specific public interest in the protection of lake trout habitat that the policies of the Official Plan regarding "at capacity" lakes and the pilot programs are intended to protect. The policies of the Official Plan recognize the potential of new development to affect this interest and that is the reason policies to restrict new development and the creation of new lots were established.

[109] However, the creation of four lots through the application replacing the one existing lot generates a permanent requirement that phosphorus removal technologies be used in order to avoid impacts on the “at capacity” lakes. If for whatever reason, it is determined that the technologies do not perform as required and should not be used, then the specific public interest that requires protection will be threatened.

[110] If the application is approved the lots will have been created and other types of septic servicing must be provided if for some reason phosphorus removal technologies cannot be used. In this context the threat to lake trout habitat from four lots could be greater than the threat from the existing lot using a standard septic system.

[111] Based upon these factors, the Board cannot conclude from the evidence that the public interest would be better served by approving the consent applications.

[112] Furthermore, if there were a more critical public interest in undertaking pilot programs, they could have been established in a way that municipal participation was mandatory.

[113] The Board concludes from the above that conditions of consent that require the Township to take on the responsibilities of a pilot program where participation of the Township is intended to be voluntary, where the ultimate obligations of the Township are not clear, where the Township specifically refused to participate and where a compelling public interest has not been demonstrated are not reasonable under s. 51 (25) of the Act.

Other Issues

[114] Given the Board’s conclusions on the above matters it is unnecessary to deal with a number of other issues raised in the course of this appeal. The Board will not make findings on the applicability of the 2014 Township Official Plan or the County Official Plan. Furthermore, the Board will not make findings on any additional issues included in the issues list of the Procedural Order.

[115] The Board has found above that the proposed consents do not comply with s. 4.5.2.4 of the Township Official Plan and therefore, with the Township Official Plan. Therefore, the Board agrees with Mr. Hunter's expert opinion that the consents cannot have appropriate regard for s. 51(24)(c) of the Act.

[116] In addition the Board has found the proposed conditions are not reasonable under s. 51(25) of the Act. Therefore, the proposal in its current form cannot be approved.

[117] The Board recognizes that there is some merit in the proposal and that there is a public interest served by the pilot programs. However, unless the Township were to agree to participate in a pilot program or unless another appropriate agency were able to assume the responsibilities ascribed to the Township in the consent agreement, then in the Board's opinion, the proposed consents cannot be approved under the applicable planning regime.

CONCLUSION

[118] The Board has carefully considered all of the evidence including the authorities submitted by the parties. Based upon the evidence, the Board finds that in order to be approved the consents must comply with the 2005 Township Official Plan. The Board finds that the consents do not meet the requirements of s. 4.5.2.4 of the Official Plan and therefore the application does not comply with the applicable Township Official Plan. The proposed consents then also do not have regard for s. 51(24) of the Act.

[119] Furthermore, the Board finds that the proposed conditions of the consent agreement are not reasonable under s. 51(25) of the Act.

[120] The Board considers this decision to have regard for the decision of the County Land Division Committee as required in s. 2.1 of the Act.

[121] Based upon these considerations the Board will dismiss the appeal and will not give the provisional consents. The appropriate order is provided below.

ORDER

[122] The Board orders that the appeal is dismissed and the provisional consents are not to be given.

"C. Conti"

C. CONTI
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248