ISSUE DATE:
June 28, 2012

PL110422

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 51(43) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Laurentian Heights Ltd.
Subject:	Condition No. 9 of approval of draft plan of subdivision
Property Address/Description:	Part of South Half of Lots 18 & 19, Concession B
Municipality:	City of North Bay
Municipal File No.:	SU 07 133313
OMB Case No.:	PL110422
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A P P E A R A N C E S :

Parties	**Counsel**
Laurentian Heights Limited	I.T. Kagan
City of North Bay	M. Burke

DECISION DELIVERED BY JOE G. WONG AND ORDER OF THE BOARD

Introduction

Laurentian Heights Limited (Applicant) is appealing Condition No. 9 of a draft plan of subdivision pursuant to subsection 51(43) of the *Planning Act*. The Council of the City of North Bay (City) approved a draft plan of subdivision for lands described as Part of South Half of Lots 18 & 19, Concession B (Subject Lands) that was subject to twenty-one (21) Draft Approval Conditions approved on October 20, 1997. Condition No. 9 pertains to parkland dedication and the Applicants are seeking its removal. The removal of Condition No. 9 would bring an end to the requirement for any further parkland dedication as a condition of draft plan approval.

The draft plan of subdivision is for 147 (current total) single detached residential lots. The Subject Lands consist of 36 hectares (89 acres); and Condition No. 9 calls for a total planned parkland dedication of 13.8 hectares (34 acres) representing 38% of the entire Subject Lands. To date, a total of fifty-six (56) lots have been registered on lands within the subdivision; and a total of 3.14 hectares (7.76 acres) or 8.7% of the Subject Lands have been dedicated to the City as parkland/open space.

Condition No. 9 reads as follows:

1. That the owner agree to convey up to 5% of the land included in the plan to the Municipality for park or other public recreational purposes, and the owner further agrees as follows:

   a) The Blocks 152,153, 156 and 157 be transferred to the City as passive open blocks.

Evidence and issues

As per the Procedural Order, the parties have agreed to the following issues:

1. Should Condition No. 9 be deleted from the conditions of subdivision approval?

2. What condition, if any should replace Condition No. 9 to ensure Block 156 remains undeveloped despite being held in private ownership?

John Wallace is the President of Laurentian Heights Limited (Applicant) and this is an appeal of a condition of approval for a draft plan of subdivision. According to Mr. Wallace, the City has not kept up its side of the bargain; City officials have disregarded the agreements in place and he cited the example of being compelled to transfer/dedicate a portion of Block 156 in exchange for the registration of new lots. Mr. Wallace testified that the 2008 Surrey Agreement said nothing about Block 156 because the lots under development did not abut Block 156. He needed marketable title to the Surrey lots and because of the financial pressures to close the pending lot sales he felt “extorted” (his word) to give up and dedicate a 200-feet wide strip of Block 156 to the City in exchange for the lot registrations. In addition, he believed the City has not abided by its agreement to permit homes with 50% views of the lake and horizon.

Mr. Wallace acknowledged that the 1997 Draft Approval Conditions contained a provision specifying 38% parkland dedication but points out that the *Planning Act* only makes reference to a 5% parkland dedication. Therefore, he feels that the additional 33% (38-5%) should be considered as a "gift" to the City at his (the company's) discretion. He testified that he would like all references to Block 156 (this is where the bulk of the remaining parkland is located) removed from the Draft Approval Conditions but indicated that he is prepared to gift Block156, at some point, to the City or alternatively to the local conservation authority.

Hal Falk is a qualified arborist who was retained by the Applicant. Mr. Falk testified that City-owned trees located near the reservoir were cut down and removed in error but this was not clear cutting (where you remove everything) but selective cutting. According to Mr. Falk, to clear the lot you remove 75% of trees at the front of the lot to make room for the house; and with the remaining trees you remove dead trees, hazardous trees and the large poplars to improve and open up the view. After that, with some additional trimming you create a 50% view (meaning 50% of the field of view can be blocked) of the downtown and the lake. In his opinion, the view is created by trimming the trees so you can see through them.

According to Mr. Falk, it is the landowner/developer who determines the "50% view" for the purposes of selling the building lot (construction is done by separate builder). In his opinion, with a steep slope you cannot save many trees when clearing the lot, however, people also plant new trees as part of the landscaping. Mr. Falk described Block 156 as a mixed forest that had been previously cleared for agriculture and that it should be kept in a natural state to provide bio-diversity and wildlife habitat. When asked, he testified that there is no City by-law prohibiting tree cutting on private property.

Paul Johnston is a qualified land-use planner who was retained by the Applicant. According to Mr. Johnston, the developer (Applicant) clears the lots before selling them and directs the viewscape based on their sense of what is a 50% view. In his opinion, views are important as a private residential amenity and as a valid planning objective.

Mr. Johnston testified that the Draft Approval Conditions are intended to address all phases of the subdivision. The principles are established but a difference of opinion about the principles has developed. According to Mr. Johnston, there is usually a

relationship between parkland dedication and the development; in this case more than 5% parkland dedication has already been provided and so the amount above the 5% is being withdrawn.

According to Mr. Johnston, Block 156 cannot be developed because it is part of the North Bay Escarpment. Block 156 is a protected resource and according to the Official Plan (OP) development is not permitted there. In Mr. Johnston's opinion, the OP policies and characteristics of Block 156 are such that any application for development would fail. He testified that the OP policies do not speak to public ownership of the North Bay Escarpment. The intent of the OP is to prevent development of the escarpment and that even in private hands these lands can be maintained in a natural state.

It was Mr. Johnston's evidence that the current situation arose from the inability of the City to agree on tree clearing and to allow the owner to clear the trees in order to provide the view as an amenity. In Mr. Johnston's opinion, a view of the City lights and the lake together form a 50% viewscape. According to Mr. Johnston, the owner of Block 156 is entitled to the cut trees because there is no by-law to prevent tree cutting on private property. In this case, no further parkland dedication should be required because the City already has a total parkland dedication of 8.7% of Subject Lands. According to Mr. Johnston, the rest of the agreement continues and the City can otherwise negotiate, expropriate, trade or exchange to obtain Block 156.

Mr. Johnston testified that the draft plan process is fluid and change is appropriate. The subdivision is a two-staged process: first draft plan approval and then final approval/registration. That up until final approval, either party is entitled to change the draft plan conditions and/or can go to the Ontario Municipal Board (OMB) to challenge a condition on future phases.

In terms of the Issues List, Mr. Johnston would delete the reference to Block 156 from Condition No. 9 because the Applicant has already given more than 5% parkland (so no more land to be dedicated) and he had no proposal for an alternative requirement. In his opinion, taking away Condition No. 9 had no effect.

Beverly Hillier is a qualified land-use planner and the Manager of Planning Services for the City. According to Ms. Hillier, the individual subdivision agreements are based on

the twenty-one Draft Approval Conditions. The practice in North Bay is to get all parkland dedication up front, when the first lots are registered as opposed to when the subdivision is completed.

Ms. Hillier testified that the 1997 draft plan approval expected that Block 156 would come into public ownership as parkland dedication and it is the transfer that protects the public interest. This is what Council intended when it approved the Draft Approval Conditions. She testified that a central theme of the OP is to retain the escarpment in its natural state, as a treed and wooded area. Ms. Hillier referred to a related 2000 OMB Decision No. 0947 for a zoning appeal involving the Subject Land that made reference to 13.5 hectares of open space. This decision serves as confirmation of the significant role that parkland dedication played in Council's approval of the subdivision. In addition, this decision makes it clear that Block 156 would come into City ownership. She confirmed that 7.76 acres of parkland has already been dedicated with another 26.24 (34 - 7.76) acres remaining.

Ms. Hillier acknowledged that subsection 51.1(1) of the *Planning Act* has a 5% limit on parkland dedication but adds that a developer can choose to give more. She cited many examples of where the City received more than 5% parkland dedication and they include Connaught, Pierce, and Trillium Woods subdivisions with parkland dedication that ranged from 9 - 51%. According to Ms. Hillier, the appeal of Condition No. 9 has the effect of not requiring the remaining lands in Block 156 to be dedicated to the City. In her opinion, Condition No. 9 should remain and it does not need replacing.

Ms. Hillier testified that the Applicant's prior unauthorized cutting of City-owned trees has created some apprehension but this incident has since been resolved to the satisfaction of all parties. According to Ms. Hillier, the developer wants to maintain the value of the lots up by creating the desired views and therefore views take precedence over everything else. The objective of the OP is to protect the escarpment but there is no guarantee that Block 156 will remain undeveloped in private hands. Therefore, the City needs to own Block 156 to safeguard it.

Ms. Hillier testified that each phase of the subdivision is negotiated separately for final registration but the principles in the Draft Approval Conditions are carried through for all the phases. The specifics of a particular phase relate only to those specific lots being

developed. When asked, Ms. Hillers acknowledged that development along Kenreta Drive, which abuts Block 156, contemplated the cutting and trimming of some trees on Block 156 depending on the view being sought, (i.e. greater view then more tree cutting/trimming required).

Ian Kilgour is a qualified land-use planner and the former Manager of Planning Services, now the City's Director, Recreation and Leisure Services. He testified that parkland dedication is normally transferred at the first phase of registration. Mr. Kilgour believed there was agreement to transfer the Blocks 152,153, etc. in the subsequent phases.

Mr. Kilgour acknowledged that there have been minor technical changes to the Draft Approval Conditions to reflect redline amendments such as reduction in number of lots (where 2 lots were consolidated and lot lines adjusted) but no conditions have been added or removed. Mr. Kilgour had previously spoken with the Applicant about the views, the significance of the views and the impact of the views on the lot values. But he gave no assurances about the views on future lots (new phases). He agreed that the Applicant had in prior phases dedicated the parkland that abutted the new lots.

Mr. Kilgour testified that in terms of the unauthorized tree cutting on municipal property, the City received restitution and 27 new trees were replanted. With Mapleview Phase II, a request was made to the Applicant to transfer all of the remaining parkland dedication. The Applicant offered no parkland and instead bypassed the planner to get to his superior. Mr. Kilgour acknowledged that the Mapleview Phase II agreement did not specify parkland dedication but the development was moving across the escarpment and therefore, he insisted on some parkland dedication for the City.

Allan Korell is a qualified professional civil engineer and the City's Managing Director of Engineering, Environmental Services and Works. He expressed some concern about the location of the planned stormwater pond on Block 156 particularly if the City does not own this block. However, he agreed that the lands for the stormwater pond can be dedicated separately. It was his belief that Block 156 was coming to the City.

Mr. Korell proposed a solution whereby a ten-metre wide strip of Block 156 would be dedicated for every new lot registered on a go forward basis (based on approximately 80 lots and 800 feet of frontage remaining on Block 156). He acknowledged that this

solution may not result in the City owning the entire Block 156 but he was prepared to accept that result. He noted that Council had not considered his recommendation/solution.

The Board heard from a number of local residents and their chief concern was that the City obtain/retain Block 156 as parkland dedication in order to preserve the escarpment and its natural beauty. According to the residents, Block 156 was part of the original planning rational for the subdivision and that there should be no change to the existing conditions. Furthermore, the City's ownership of Block 156 would prevent any future tree cutting on it. One resident expressed support for the development and for tree cutting on Block 156 if it resulted in creating enhanced views as means of attracting newcomers to the City.

On consent, the parties requested that the Board consider Council's position as it has yet to consider the issues in this appeal. The Applicant, as is his prerogative brought this matter directly to the OMB without discussion with Council. The Board was asked to withhold its decision for 90 days allow time for Council to consider its position and any staff and counsel recommendations. The Board was subsequently advised that Council had considered the matter and that it had nothing further to add.

Analysis and Disposition

1. Should Condition No. 9 be deleted from the conditions of subdivision approval?

Condition No. 9 deals with the requirement for the public dedication of parkland and open space that totals approximately 38% (13.8 hectares/34 hectares) of the entire subdivision. The Applicant acknowledged that he initially agreed to a total parkland dedication of 13.8 hectares (34 acres) but now withdraws his consent to any further parkland dedication because he believes that he has met the maximum requirement for 5% parkland dedication under the *Planning Act*; having already dedicated approximately 3.14 hectares or 7.76 acre which representing 8.7% of the Subject Lands. The Applicant believes that he has been unfairly treated by the City. According to the Applicant, he intends to "gift"" the remaining 26.24 acres (34 -7.76) of parkland at some future point to a public body but not necessarily the City.

The Board finds that the reference to parkland and open space dedication has a long history in this subdivision. It began with the Applicant's initial application in 1992 (Exhibit 9, Tab 1) which made reference to 13.5 hectares of Park or Open Space (out of a total of 32.3) including references to Blocks 152, 153, 156 and 157; the 1997 Draft Conditions (Exhibit 9, Tab 5) which contain Condition No. 9 specifies that Blocks 152, 153, 156, and 157 are to be transferred as passive open space; and later re-confirmed in the June 28, 2000 OMB Decision No. 0947 (Exhibit 9, Tab14) for an appeal of a zoning by-law amendment to implement one of the 1997 Draft Approval Conditions. In this decision, Member Granger (as he was then) wrote on page 8 of his decision:

> The Board finds that the City and the applicant have arrived at a reasonable balance between open space protection and function of the Escarpment feature and the property development rights presently existing. This includes the enforcement of site plan control by the City and the application of the objectives of the Architectural Design Statement by the applicant as set out in Exhibit No. 8, Tab 50. More than one third of the total subdivision area, 13.5 hectares, will now be in public ownership as open space. (The underlining here was added by the Board.)

The Board finds that the parkland dedication also has a very integral role in the overall subdivision plan because it deals directly with more than 1/3 (38.0%) of the entire subdivision/Subject Lands. Therefore, given its long history and integral role there must be a compelling reasons to consider deleting Condition No. 9.

To date approximately 3.14 hectares or 23% of the original 13.8 hectares (Exhibit 3(a)) has been dedicated to the City. Deleting Condition No. 9 at this stage in the development of the subdivision would have the effect of fixing the parkland dedication at 8.7% as compared to the original 38%; this results in a vastly different plan than the one the parties had originally contemplated because it contains less than one-quarter of the total planned parkland dedication. The 2000 OMB decision of Vice-Chair Granger, makes it clear to this Member that the entire 13.5 hectares of parkland dedications was integral to Council's approval of the draft plan of subdivision. The Board notes that the 2000 OMB decision makes reference to 13.5 hectares of parkland dedication but the parties here have acknowledged that the current figure is 13.8 hectares. The Board finds it would not be appropriate to delete Condition No. 9 because it deals with more than 1/3 (38%) of the entire subdivision/Subject Lands making it too significant to delete.

The public comments and sentiments received by the Board for this appeal all revolve around retaining the parkland dedication as per the original plan and for the protection and maintenance of the escarpment and the natural conditions. The rational for providing parkland dedication is the public interest. From a public interest perspective, the Board finds Condition No. 9 which deals with parkland dedication is too important and vital to delete especially since less than ¼ (23%) of the total planned dedication has been completed.

Ms. Hillier, the City's planner, testified that other subdivision agreements contained parkland dedication ranging from 9 - 51 % of the site area. She acknowledged that subsection 51.1(1) of the *Act* refers to a 5% parkland dedication but argued that a developer can choose to give more and this is not an uncommon occurrence. The Board agrees with Ms. Hiller, while the *Act* specifies that a 5% parkland dedication may be imposed by an approval authority, there is nothing to preclude the parties from agreeing to additional parkland dedication which is the case here. Condition No. 9 explicitly acknowledges the 5% maximum parkland dedication and then specifically refers to the transfers of Blocks 152, 153, 156, and 157 as going above and beyond the basic requirements. All of this was freely agreed to and confirmed by the parties in their Draft Approval Conditions.

According to Ms. Hillier, parkland dedication is a vital component when considering a plan of subdivision as evidence by the specific inclusion of parkland dedication as a provision in the *Act*. The Applicant offered a 38% parkland dedication as part of its subdivision application which made the proposal attractive/acceptable to the approval authorities. Conversely the City, as the approval authority, accepted the proposal because it found the proposal attractive/acceptable. The Board finds it is reasonable to conclude that the 38% parkland dedication contained in Condition No. 9 was integral to the entire subdivision plan especially when the *Act* only mandates a 5% contribution. Therefore, it would be unreasonable to permit the deletion the requirement for the remaining of parkland dedication (approximately 26 acres) because of disagreements over the application of the Draft Conditions.

The parties agreed on twenty-one Draft Conditions as the basis for the entire subdivision development. There is no evidence that the subdivision will not continue to its full build-out. The Board finds there has been no change to the basic subject matter

of the subdivision agreement. The Subject Lands are unchanged, the number of lots is essentially unchanged (except for minor adjustments and lot consolidations), a new sewer line was put in and development continued, all of which indicates that this development is continuing as planned. The Board finds that it would be unfair to strike Condition No. 9 because the greater part of this provision has yet to be completed. The effect of removing Condition No. 9 is to fix the parkland dedication at the current 8.7% while the build-out of the subdivision continues with the remaining 91 lots (147- 56).

As an alternative, the Applicant has suggested making a “gift” of the remainder of Block 156 (which contains essentially all of the remaining parkland) at the time of his choosing and under his terms (i.e. possibly some sort of naming recognition, tax receipt, etc.) to some public entity and not necessarily to the City which he believes will have the same effect as Condition No. 9. Black’s Law Dictionary, Seventh Edition defines a “gift” as: “the act of voluntarily transferring property to another without compensation”; and the definition of a “condition” as: “a stipulation or prerequisite in a contract, will or other instrument, constituting the essence of the instrument”. The Board accepts these definitions and does not find that making the remaining parkland dedication a "gift” in this instance is equivalent to retaining Condition No. 9. The Board finds the concept of a gift very different from the simple parkland dedication contained in Condition No. 9. Gifts can come with conditions and terms as determined by the giver; and this is different from the public dedication contemplated in Condition No. 9 that is dedicated without conditions.

In summary, the Board finds the Condition No. 9 is so very fundamental to the plan of subdivision because it deals with 38% of the entire subdivision/Subject Lands that removing it is unreasonable because this would significantly alter the development from what the parties had originally agreed to with the Draft Approval Conditions. This subdivision plan would be very different without the remaining 10.66 hectare (13.8 - 3.14 hectares) of parkland dedication. From a land-use planning and a public interest perspective the difference between 8.7% and 38% parkland dedication is very significant and this cannot be disregarded. Therefore, Condition No. 9 should remain unchanged for all of the reasons discussed.

2. What condition, if any should replace Condition No. 9 to ensure Block 156 remains undeveloped despite being held in private ownership?

Condition No. 9 is not being removed and therefore this specific issue need not be discussed. However, the question of how to handle the remaining parkland dedication (approximately 26.24 acres) should be dealt with because the current ad hoc process of determining the amount of parkland dedication with each phase is no longer workable.

The parties agreed to Condition No. 9 for the parkland dedication but it was silent on the implementation. City officials were intent on following their normal practice of receiving all of the parkland dedication with the first phase of registration of the subdivision. The Applicant was not prepared to dedicate the entire parkland dedication (38 acres) all at once but rather to retain control over the lands until he was required to relinquish a portion of the lands. The testimony and the evidence various witnesses confirmed that there was never a meeting of the minds as to how and when the parklands were to be transferred.

The Board believes that the difficulties arose in part because this was a large and long-standing project for North Bay. This subdivision began in 2001 and only 56 lots have been registered to date with still another 91 (147-56) or so lots to go. In hindsight some of the difficulties/disagreements may have been avoided if the Parties had prepared more detailed documents but it is also clear that this is a work-in-progress and many of the “problems” could not have been anticipated but arose as the work progressed.

What is needed to resolve the current impasse is a mechanism/formula to deal with the remaining parkland dedication. The only effective way to deal with all of the remaining 26.24 acres parkland dedication is for it to be linked on a pro-rata basis to the remaining 91 lots. The most basic approach would be a simple mathematical or pro-rata formula where a percentage of the remaining parkland is attributed to each remaining lot in the subdivision. However, the Board notes that a strict mathematical formula may not be effective or practical in all instances. What is required is for the parties to agree on a formula/methodology to be put in place to deal with all of the remaining parkland dedication and all of the remaining undeveloped lots before any new lot registrations are

permitted. The purpose of the parkland dedication is for public benefit, and there is no public benefit until the lands are dedicated.

THE BOARD ORDERS that the appeal is allowed in part with Condition No. 9 to remain unchanged but with an added requirement that the parties agree on a mechanism/formula to allocate all of the remaining parkland dedication before any new lots are registered. In the event of difficulties the Board may be spoken to.

This is the Order of the Board.

"Joe G. Wong"

JOE G. WONG
MEMBER