

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: February 23, 2016

CASE NO(S): PL141431

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

Appellant:	The Corporation of the City of North Bay
Applicant:	Gino Bitonti & Karen Bitonti
Subject:	Consent
Property Address/Description:	640 Anita Avenue
Municipality:	City of North Bay
Municipal File No.:	B-08-14
OMB Case No.:	PL141431
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OMB Case Name:	Bitonti v. North Bay (City)

Heard: June 17, 2015 in North Bay, Ontario

APPEARANCES:

Parties

Counsel*/Representative

City of North Bay

Peter Leckie*

Gino Bitonti

Self-represented

DECISION DELIVERED BY KAREN KRAFT SLOAN AND ORDER OF THE BOARD

INTRODUCTION

[1] Gino and Karen Bitonti (“Applicants”) applied to have four new lots created at 640 Anita Avenue (“subject property”). The City of North Bay’s (“City”) Committee of Adjustment (“COA”) granted consent approval for two of the proposed lots (Lot 1 and

Lot 2) on June 10, 2014, while the remaining lots (Lot 3 and Lot 4) were granted severance approval on October 28, 2014. The City has appealed the October 28, 2014 decision of the COA to permit severance of Lot 3 and Lot 4 pursuant to s. 53(19) of the *Planning Act* (“Act”).

[2] Thus, the appeal by the City is limited to Lot 3 and Lot 4. The Applicants’ current dwelling is located on the retained lot, and new dwellings would be constructed on Lot 3 and Lot 4.

[3] The Staff planning report and the North Bay-Mattawa Conservation Authority (“NBMCA”) supported the consent application to create Lot 1 and Lot 2, however, neither supported the creation of Lot 3 and Lot 4.

[4] Beverley Hillier, the City Manager of Planning Services, and Paul Goodridge, provided expert land use planning opinion evidence on behalf of the City and the Applicants respectively. Carole Felicie, Judith Jessen and Jim Alkins appeared as Participants.

THE SUBJECT PROPERTY

[5] The subject property fronts on to Anita Avenue, which is a street that runs parallel to the shoreline of Trout Lake, a lake that is the source of drinking water for the City as well as for private residences in the area. The subject property rises above the lots on the lake-side of Anita Avenue due to the area topography. The subject property has a lot frontage of 138.67 metres and an area of 12.41 hectares and it is covered with vegetation and bedrock, and it has a second entrance on Highway 63. It is primarily vacant, other than the Applicants’ existing dwelling and garage.

[6] To the south of the subject property on the other side of Anita Avenue, is a shoreline residential area, characterised by single-detached homes, on small legal undersized lots, along Trout Lake. Many of the homes were built before the City Official Plan (“OP”) and Zoning By-Law No. 28-80 (“ZBL”) came into force. There is evidence of

redevelopment through renovations, additions, and demolition with new construction in the area. The properties on the same side of Anita Avenue as the subject property are considered second tier or back-lots, and feature large lots. These lots are mostly underdeveloped properties that are vacant or that have a single-detached dwelling, as evidenced by the large lots to the east and west of the subject property. Highway 63 and the Ontario Northland Railway are north of the subject property, and the lands in this area allow industrial uses.

[7] The subject property is designated Rural under the City Official Plan (“OP”) and it is zoned Rural A under the ZBL.

PLANNING CONTEXT

[8] The Board must be satisfied that the consent application meets the criteria set out in s. 51(24) of the Act and all other applicable provisions of relevant planning documents, such as the Provincial Policy Statement 2014 (“PPS”), particularly in this instance Rural and Water policies, and the Growth Plan of Northern Ontario 2011 (“GPNO”), especially Environmental Protection policies. Of special relevance in the City OP are Rural Lot Creation and Trout Lake Severance provisions.

ISSUES, EVIDENCE AND FINDINGS

[9] It was Ms. Hillier’s opinion that the consent did not meet two criteria in s. 51(24) of the Act, these are a) the effect of the proposal on provincial interest and c) whether the proposal conforms to the Official Plan. It was Ms. Hillier’s opinion that the consent was not consistent with the PPS, that it conflicted with the GPNO, and that it did not conform with the City OP.

[10] Mr. Goodridge disagreed, as it was his opinion that the development meets the general intent of the City OP, and as it meets the general intent of the City OP, it also meets the PPS and is not in conflict with the GPNO.

[11] The Participants were primarily concerned with the impact that the additional four lots would have on existing runoff and drainage issues, as these would be exacerbated through excavations for, and construction of the new homes. They contended that loss of vegetation and trees would increase drainage issues and silt problems, and increased turbidity would result in lake water quality issues. The Board was told that the bottom of the lake used to be sand and clay, however in recent years the lake bottom has become soft and weedy and it was the Participants' view that this would become worse with the proposed development. The Participants expressed concern about the quality of the drinking water as the residents along Anita Avenue get their water from the lake and even now, they have experienced a strain on filters and pumps due to runoff and silt problems. The Board heard that current infrastructure is not capable of addressing existing demand and that it needs to be improved before more people can move into the area.

[12] Ms. Hillier provided an overview of the GPNO, which is a Plan prepared under the *Places to Grow Act*, 2005, and acts as a "strategic framework that will guide decision-making and planning in Northern Ontario over the next 25 years" (Exhibit 2, Tab 7). Ms. Hillier said that all planning applications must consider the GPNO as part of the evaluation process. The GPNO is broad in scope and aimed at shaping development in Northern Ontario. It outlines strategies that deal with community planning, economic development, education, transportation, infrastructure, environment and aboriginal peoples. Ms. Hillier further explained that s. 4.0 Communities, is essential in understanding the relationship of the GPNO to local planning processes and instruments, where "this begins at the local level with establishing a clear vision for each community's future and mapping out the path to achieve this vision" (Exhibit 2, Tab 7).

[13] Ms. Hillier continued in this vein by pointing to s. 4.2 of the GPNO, Long-Range Planning for All Communities in that municipalities "prepare long-term community strategies" ... to "support local opportunities to implement the Policies of this Plan" (Exhibit 2, Tab 7). Ms. Hillier stated that a municipality's OP is a tool to implement the GPNO, that it was her opinion that while the GPNO applies to all of Northern Ontario the municipal OP helps to apply these policies within a local situation.

[14] Ms. Hillier further noted s. 6.0 of the GPNO, Environmental Policies, have significance for the proposed severance, specifically policy 6.3.2 of the GPNO. Here Municipalities are encouraged to protect surface water features by “coordinating and planning for potable water, stormwater, and wastewater systems with communities with which they share inland water sources and/or receiving water bodies” (Exhibit 2, Tab 7).

[15] By way of reinforcing the importance of this policy to the proposal, Ms. Hillier informed the Board that Trout Lake is the source of the City’s drinking water, as well as supplying drinking water for private residences in the area around the lake.

[16] Ms. Hillier provided an overview of the PPS, drawing the Board’s attention to the Preamble and Vision sections. Ms. Hillier highlighted key PPS sections of relevance to the proposal, for example, in Part IV, Vision for Ontario’s Land Use Planning System, the wise use and management of the Province’s water resources. Ms. Hillier noted select sections of policy 2.2.1 of the PPS,

2.2.1 Planning authorities shall protect, improve or restore the quality and the quantity of water by:

- a) using the watershed as the ecologically meaningful scale for integrated and long-term planning, which can be a foundation for considering cumulative impacts of development;
- e) implementing necessary restrictions on development and site alteration to:
 - 1. protect all municipal drinking water supplies and designated vulnerable areas:
and
 - 2. protect, improve or restore vulnerable surface and ground water, sensitive surface water features and sensitive ground water features, and their hydrologic functions;
 - 3. ensuring consideration of environmental lake capacity, where applicable...
(Exhibit 2, Tab 8).

[17] Additionally, Ms. Hillier stated that Rural policies in the PPS, particularly policies pertaining to Rural Lands in Municipalities, for example in policy 1.1.5.2.c of the PPS, that permitted uses are limited residential development, and that new development should be directed to urban settlement areas.

[18] It is Ms. Hillier's opinion that the PPS provides general lot creation policy, however it is the City OP that provides the specifics. It is Ms. Hillier's opinion that the proposal is not consistent with the PPS nor does it conform with the GPNO as these documents are implemented through the City OP to which the proposed consent does not conform. It was Ms. Hillier's opinion that it did not conform with the City OP policies on lot creation in rural areas, which limits lot creation to two lots nor does it conform with policies respecting the Trout Lake watershed.

[19] Ms. Hillier told the Board that 80% of the City is rural and the rural area will not be serviced with municipal services for the duration of the City OP. The intent of the City OP is to protect the rural nature of the lands by directing new development to urban settlement leaving rural areas largely undeveloped. Part 3, Rural Area, of the City OP identifies uses as "those that are location dependent and do not require urban services, such as but not limited to: aggregate and mineral extraction, limited restricted industrial, highway commercial, waterfront commercial, rural institutional and limited residential development" (Exhibit 2, Tab 9).

[20] Ms. Hillier further emphasized the intent of the City OP is to strictly control development within the rural area and to minimize land use conflicts. By way of illustrating this, Ms. Hillier pointed to s. 3.4 of the City OP, which contains policies on rural residential lot creation. Policies, of note, in Ms. Hillier's opinion are 3.4.1, 3.4.2, 3.4.7, and 3.4.10. Briefly these policies discourage both multiple lot creation for new residential lots and applications for consent to sever as well as setting out a list of nine policies that shall be adhered to prior to a consent to sever is granted or if an amendment to the Comprehensive Zoning By-Law is approved.

[21] Mr. Goodridge's opinion was that the proposed serpentine driveway and the soak away pits, and the increased extent of the vegetative buffer from 30 metres required by the City OP to 60 metres served the purpose of mitigating the amount and speed of water runoff, thus, addressing concerns identified by neighbours. As well, it was his opinion that the intensification in vegetation cover would act as a visual buffer to screen the driveway, which would preserve the nature and character of the rural area.

[22] Ms. Hillier said that policy 3.4.10 of the City OP permits “very limited residential development” that maintains the rural character of the area in one of three ways: infill lot creation, limited lot creation and rural estate subdivision. Ms. Hillier went on to say that each of these mechanisms for lot creation has its own set of policies to be met.

[23] Ms. Hillier told the Board that the consent under appeal was determined by the COA to meet the policies of 3.4.10.b of the City OP, Limited Lot Creation. However, Mr. Goodridge suggested that the proposal could also be considered an infill lot as it “generally met the criteria” for infill lots in the City OP.

[24] Ms. Hillier said, that policy 3.5.15 of the City OP, specifies that the “intent of the Plan is to strictly control or limit the nature and extent of development along the shoreline of Trout Lake, including second-tier or backshore development”. It does this by prohibiting the “creation of any new lot within 300 linear metres of the un-serviced shoreline of Trout Lake on lands deemed to constitute a ‘second tier’ or ‘back lot’” (Exhibit 2, Tab 9).

[25] Ms. Hillier provided visual evidence by way of the site plan and other maps to demonstrate that approximately two thirds of the subject property and approximately two thirds of the proposed severed Lot 3 and Lot 4, are within 300 metres of the Trout Lake shoreline. Ms. Hillier pointed out that policy 3.5.15.f. of the City OP states, “‘non-impact’ lots are those in excess of 300 metres from Trout Lake shoreline or any major inflowing stream to Trout Lake... any proposal for “non-impact” residential development within the Trout Lake Watershed shall be accompanied by the types of technical justification studies and analyses identified in 3.5.16”. These include: erosion control and drainage plans, reports on how vegetation will be protected, soils reports, water quality impact studies, fisheries habitat assessments, visual screening plans and any other studies or reports as required.

[26] Mr. Goodridge introduced a letter from the Ministry of the Environment (“Ministry”) dated February 1, 2005, in which it state that the “Ministry does not have a formal definition for non-impact lake lot” (Exhibit 5). He further stated that the 300

metres identified is conservative and therefore the “Ministry considers the environmental risk from a septic system located greater than 300 metres from the shoreline to be low”. Thus, the Applicants proposed locating the septic system 300 metres from the Trout Lake shoreline.

[27] Under cross-examination, Mr. Goodridge was questioned on the lack of studies and technical reports that were submitted by the Applicants, to which he replied that the COA was satisfied by the information provided.

[28] Mr. Goodridge stated that s. 3.5.27 of the OP allows for the creation of 23 minimum impact lots within the watershed of Trout Lake as a means to study phosphorous abatement septic technology through pilot testing. Mr. Goodridge stated that other lots considered to be minimal impact have been created and determined to be in conformity even though septic systems are less than 60 metres from the shore. It was his opinion that the subject property would be a good candidate for pilot projects as in the event the system failed completely the septic would be located in excess of 300 metres from the lake.

[29] Mr. Goodridge explained that s. 3.5.28 of the OP defines a minimum impact lot as a “conventional lot, developed using Best Management Practices to reduce the phosphorous impact of development”. It was his opinion that the proposal satisfied the criteria in s. 3.5.28 of the OP for a minimum impact lot as the serpentine driveway addressed the requirement for a drainage plan, future purchasers would install septic technology approved by the City and the NBMCA and the severed lots would be subject to site plan control. Additional criteria would also be met, as the septic was proposed to be located 300 metres from the shoreline it maximized available setbacks and that the proposal proposed 60 metres of vegetative buffer exceeds the criteria of 30 metres.

[30] Ms. Hillier pointed out that this policy is permissive, in that it allows the City to create new minimal impact lots; it does not require the City to do so. She contended that the Applicants should have provided a study that reviewed the impact of mitigative measures but this was not done.

[31] Mr. Goodridge presented examples of specific sites that illustrated how the City interprets OP policies through municipal practice and settlements before the Board in order to demonstrate that other proposals were settled in ways that did not meet the rural or lakefront residential policies. It was his opinion that this matter should be settled in the same way.

[32] Both planners agreed that the proposed consent did not contravene the City's ZBL.

[33] It was Ms. Hillier's opinion that the proposed consent conflicts with policies in the City OP, policies that Ms. Hillier underscored reflects the intent of the City to protect its supply of drinking water and the Trout Lake watershed. It was also her opinion that the proposal conflicts with the GPNO, specifically as it relates to environmental protection, and nor is it consistent with the PPS for the reasons Ms. Hillier expressed earlier in this Decision.

[34] Mr. Goodridge's opinion was that the proposed consent met the general intent of the City OP and its provisions for protecting water quality as the lots will institute Best Management Practices and the proposal will increase the vegetative buffer. In his opinion, the proposal is consistent with the PPS and it is not in conflict with the GPNO because it meets the general intent of the City OP.

[35] The Board carefully reviewed the evidence of the expert witnesses and Participants. The Board prefers Ms. Hillier's evidence to that of Mr. Goodridge's. Ms. Hillier provided comprehensive evidence, which reinforced the emphasis in the City OP policies to reflect the desire of the City's residents "to see that special care is taken through strict lake and watershed development controls to maintain or improve" the existing quality of Trout Lake.

[36] In order for a consent application to be approved, it must have appropriate regard for the criteria with respect to subdivision of land as outlined in s. 51(24) of the Act. In this instance, criteria a) and c) were challenged by the City. These are:

- a) the effect of the development of the proposed subdivision on matters of provincial interest as referred to in section 2; and
- c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any.

[37] The Board finds that the proposed consent fails to have appropriate regard for either of these two criteria.

[38] Despite the fact that the septic systems are proposed to be located beyond 300 metres of Trout Lake's shoreline, the lots themselves are mostly within the 300 metres of shore prohibited in the City OP for non-impact lots. The Board notes that while an option for lot creation within 300 metres of Trout Lake exists, namely in the City OP's minimal lot creation policies, this is a permissive policy and the Board is satisfied based on the evidence heard at the hearing that the City had good reason not to pursue this approach with the Applicants. For this and reasons already set out in this Decision, the proposed consent is not consistent with the PPS, nor does it conform with the GPNO, and the appeal of the City should be upheld.

ORDER

[39] The Board orders that the appeal is allowed.

"Karen Kraft Sloan"

KAREN KRAFT SLOAN
MEMBER

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Ontario Municipal Board

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