

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 17, 2015

CASE NO(S): PL150313

PROCEEDING COMMENCED UNDER subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Burleigh Bay Corporation
Subject:	Proposed Plan of Subdivision - Failure of the County of Peterborough to make a decision
Purpose:	To permit a 60 unit waterfront vacant plan of condominium together with common elements
Property Address/Description:	Part of Lots 3, 4, 5 and 6 Concessions I and II
Municipality:	Township of North Kawartha
Municipality File No.:	15CD-03001
OMB Case No.:	PL150313
OMB File No.:	PL150313
OMB Case Name:	Burleigh Bay Corporation v. North Kawartha (Township)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Burleigh Bay Corporation
Subject:	Application to amend Zoning By-law No. 66-1996 - Refusal or neglect of the County of Peterborough to make a decision
Existing Zoning:	Rural Zone
Proposed Zoning:	Shoreline Residential Exception Eleven (SRE-11) Zone; Special Community Facility (SCF) Zone; Shoreline Natural Environment (SNE) Zone; Special Major Recreation Open Space (SOS) Zone; Limited Institutional (LI) Zone and Environmental Constraint One (EC-1) Zone
Purpose:	To permit 60 single detached residential units, to recognize the proposed vacant land condominium development and to provide

Property Address/Description: special regulation for controlling development and the protection of wetland features
 Municipality: Part of Lots 3, 4, 5 and 6 Concessions I and II
 Municipality File No.: Township of North Kawartha
 OMB Case No.: NK02-06P
 OMB File No.: PL150313
 OMB File No.: PL150323

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Burleigh Bay Corporation
 Subject: Request to amend the Official Plan - Failure of the Township of North Kawartha to adopt the requested amendment

Existing Designation: Rural Zone
 Proposed Designated: Restricted Shoreline Residential; Restricted Recreation-Open Space; Private Community Facility; Shoreline Conservation and Provincially Significant Fraser Property Wetland Complex

Purpose: To establish a Burleigh Bay Corporation Special Policy Area to facilitate the proposed 60 single detached residential units

Property Address/Description: Part of Lots 3, 4, 5 and 6 Concessions I and II
 Municipality: Township of North Kawartha
 Approval Authority File No.: NK02-06P
 OMB Case No.: PL150313
 OMB File No.: PL150322

Heard: October 26, 2015 in Apsley, Ontario

APPEARANCES:

Parties

Counsel/Representative*

Burleigh Bay Corporation

J. Wigley

Township of North Kawartha

J. Ewart

Friends of the Fraser Wetlands Inc.

D. Donnelly, A. Sabourin

Curve Lake First Nation

M. Dokis*

**MEMORANDUM OF ORAL DECISION DELIVERED BY M. C. DENHEZ ON
OCTOBER 26, 2015 AND PARTIAL ORDER OF THE BOARD**

INTRODUCTION

[1] This is the third decision stemming from two pre-hearing conferences (“PHCs”) in this file. The first decision stemmed from a PHC held on August 31, 2015, whose decision was issued on October 1, 2015. The second and third decisions both stemmed from a PHC held on October 26, 2015. The second decision overall was issued on November 9, 2015. This is hence the third decision.

[2] The dispute deals with the proposal, by Burleigh Bay Corporation (“the applicant”), to build a 60-unit residential condominium project on the shore of Stony Lake, in the Township of North Kawartha (“the Township”). The applicant applied for an amendment to the Township's Official Plan, rezoning, and approval of a draft plan of condominium. There was no municipal decision within the statutory timelines, and the applicant appealed to the Ontario Municipal Board (“the Board”). Further background is outlined in the Board’s decision from the first PHC, issued on October 1, 2015.

[3] The first PHC had dealt with parties, including the Curve Lake First Nation (“the First Nation”). The Board was told that the Curve Lake Reserve is about 45-55 minutes away by car.

[4] The Board decided to split the second PHC decision and Order as follows:

- Matters including the length of the hearing, its timing, prospects for visitation, and a further PHC were addressed in the decision issued on November 9, 2015.
- This part addresses the Procedural Order, and the question of the hearing’s venue.

PROCEDURAL ORDER

[5] The parties undertook to agree on a draft Procedural Order for the Board's consideration. The Board has now reviewed the matter, and its Procedural Order is produced herein at Attachment A.

[6] The Board also noted earlier that the parties appeared to agree to the parties' experts and elders exchanging views, and consulting with each other. There was also no objection to the production of an Agreed Statement of Facts. The Board notes that these were not referenced in the draft Procedural Order. The Board expects that the parties may wish to discuss the above further.

VENUE

[7] The Board had determined that the hearing on the merits should be slightly under four weeks, with a start date of September 13, 2016.

[8] The First Nation proposed that one of the four weeks should be devoted to cultural heritage – and that it should be conducted on the Reserve. The Township took no position, but the applicant opposed that proposition.

[9] Disputes over the venue(s) of a Board hearing are uncommon. The typical practice, in most municipalities, is for the venue to be provided by the municipality. If the First Nation wishes to propose a different venue for the hearing in this matter, in whole or in part, and the latter proposal is contested, then the proper process would be for the First Nation to propose such other venue by way of Motion. The Board outlines the procedure at Attachment B.

ORDER

[10] The Board disposes of this matter as follows:

1. The Board's Procedural Order is reproduced herewith at Attachment A.
2. Subject to paragraphs 3 and 4 below, all proceedings during the hearing on the merits will occur at:

**Meeting Room
Wilson Park Community Centre (North Kawartha)
66 Northeys Bay Road
Woodview, Ontario**

3. If a party wishes any change in the above venue arrangements, and it is by consent, the Board may be spoken to.
4. If a party wishes any change in the above venue arrangements, and it is not by consent, then that party may file a Motion to that effect, in accordance with the parameters set out at Attachment B.

"M. C. Denhez"

M. C. DENHEZ
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

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ATTACHMENT A : Procedural Order

1. The Board may vary or add to these rules at any time, either on request or as it sees fit. It may alter this Order by an oral ruling, or by another written Order.

Organization of the Hearing

2. The hearing will begin on Tuesday, September 13, 2016 at 10 a.m. at in the Township of North Kawartha.

3. The length of the hearing will be 4 weeks.

4. The parties and participants identified at the prehearing conference (see the Attachment for the meaning of these terms) are listed in Attachment 1 to this Order.

5. The Issues are: set out in the Issues List attached as Attachment 2. There will be no changes to this list unless the Board permits, and a party who asks for changes may have costs awarded against it.

6. Any person intending to participate in the hearing should provide a telephone number and email address (if available) to the Board as soon as possible (preferably before the prehearing conference.) Any such person who will be retaining a representative should advise the other parties and the Board of the representative's name, address, phone number and email address (if available) as soon as possible.

Requirements Before the Hearing

7. A party who intends to call witnesses, whether by summons or not, shall provide to the Board, the other parties and to the Clerk a list of the witnesses, their professional qualifications, their areas of expertise, completed Acknowledgements of Expert's Duty, the precise area and discipline in which they will seek to be qualified to provide expert testimony, and the intended order in which the witnesses will be called during the

hearing and the order in which they will be called. This information must be delivered on or before May 31, 2016. Any challenge by a Party to the qualifications or expertise of a witness must be filed with the Board with supporting reasons within 30 days.

8. An expert witness shall prepare an expert witness statement which shall list any reports prepared by the expert, or any other reports or documents to be relied on at the hearing. Copies of this must be provided as in section 11. Instead of a witness statement, the expert may file his or her entire report if it contains the required information. If this is not done, the Board may refuse to hear the expert's testimony. For greater certainty, each expert witness statement must comply with the minimum content requirements specified in Rule 21 of the Board's Rules of Practice and Procedure. If the expert witness has prepared any report(s) that he/she intends to rely on at the hearing, and which did not form part of the submissions made to the City such report(s) shall be provided to the other parties at the same time as the delivery of expert witness statements, as in section 11.

9. A participant must provide to the Board and the parties a participant statement consisting of a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which the participant will address and a short outline of the evidence on those issues; and a list of reports, if any which the participant will refer to at the hearing, on or before July 22, 2016, or the participant may not give oral evidence at the hearing.

10. Expert witnesses who are under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence, as in section 11.

11. Expert witnesses in the same field shall have at least one meeting 20 days before the hearing to try to resolve or reduce the issues for the hearing. The experts must prepare a list of agreed facts and the remaining issues in the area of their

expertise to be addressed at the hearing, and provide this list to all of the parties and the municipal Clerk.

12. On or before August 3, 2016, the parties shall provide copies of their witness and expert witness statements to the other parties and to the Clerk.

13. On or before August 26, 2016, the parties shall provide copies of their visual evidence to the other parties. If a model will be used, all parties must have a reasonable opportunity to view it before the hearing.

14. On or before August 26, 2016, the parties shall provide any reply witness statements responding to any written evidence received to the other parties.

15. A person wishing to change written evidence, including witness statements, must make a written motion to the Board. Such a motion shall be in accordance with the Board's Rules 34 to 38, which require that the moving party provide copies of the motion to all other parties 10 days before the Board hears the motion.

16. A party who provides a witness' evidence to the other parties must have the witness attend the hearing to give oral evidence, unless the party notifies the Board at least 7 days before the hearing that the written evidence is not part of the record.

17. Documents may be delivered by means of electronic document sharing, e-mail, personal delivery, facsimile, courier or registered or certified mail or otherwise as the Board may direct. The delivery of documents by fax shall be governed by the Board's Rules [26 – 31] on this subject. Material delivered by mail shall be deemed to have been received five business days after the date of registration or certification.

18. The Board's file number is to be clearly marked on all documents served by the parties or filed with the Board.

19. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness. The Board's Rules 61 to 65 apply to such requests.

20. Subject to paragraph 21, the order of evidence shall be in accordance with Attachment 3.

21. Subject to the discretion of the Board member(s) hearing the matter, all of the evidence to be called relating to archaeological issues shall be heard at one time and from all of the parties notwithstanding that this may be out of the order set forth in Attachment 3..

22. The purpose of the Procedural Order and the meaning of the terms used in the Procedural Order are set out in Attachment 4.

This Member is not seized

So orders the Board.

Attachment 1

List of Parties

REPRESENTATIVE	PARTY	ADDRESS	EMAIL
JONATHAN WIGLEY, GARDINER ROBERTS LLP	BURLEIGH BAY CORPORATION	(AS OF JANUARY 1, 2016) BAY ADELAIDE CENTRE - EAST TOWER 22 ADELAIDE ST WEST, SUITE 3600 TORONTO, ONTARIO M5H 4E3 416-865-6655	JWIGLEY@GRLLP.COM
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List of Participants

NAME	ORGANIZATION	STREET ADDRESS	CITY, PROV	POSTAL CODE	OTHER ADDRESS	PHONE 1	EMAIL
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		ST					
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Attachment 2

Issues List

Provincial Policy Statement, 2014 ("PPS 2014")

1. Depending on the applicable test, is the proposed development consistent with the PPS 2014 or have regard for it, and specifically:
 - (a) Policy 1.1.3.8, "A planning authority may identify a settlement area or allow the expansion of a settlement area boundary only at the time of a comprehensive review and only where it has been demonstrate that ...; (Township, FFW)
 - (b) Policy 1.6.6.7, regarding stormwater management; (Township, FFW)
 - (c) Policy 2.1.4, "development and site alteration shall not be permitted in significant wetlands"; (Township, FFW)
 - (d) Policy 2.1.6, Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal requirements; (Township, FFW)
 - (e) Policy 2.1.7, Development and site alteration shall not be permitted in habitat of endangered species and threatened species, except in accordance with provincial and federal requirements; (Township, FFW)
 - (f) Policy 2.1.8, Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas identified in policies 2.1.4, 2.1.5, and 2.1.6 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions; (Township, FFW)
 - (g) Policy 2.2.1, Planning authorities shall protect, improve, restore the quality and quantity of water by: (a), (c), (d), (g) and (h); (Township, FFW) and
 - (h) Policies per 2.6, cultural heritage and archaeology. (Township, FFW)
 - (i) Is the subject property a "significant cultural heritage landscape"? If yes, is the significant cultural heritage landscape conserved in the development proposal? (CLFN)
 - (ii) Is development proposed on lands containing archaeological resources or areas of archaeological potential? If yes, are significant archaeological resource conserved? (CLFN)
 - (iii) Have the interests of Aboriginal communities in conserving cultural heritage and archaeological resources been considered? (CLFN)

Growth Plan

2. Does the proposed development exceed the growth forecast for the Township of North Kawartha? (FFW)

County of Peterborough/Township of North Kawartha Official Plan

3. Does the proposed development conform with the Official Plan, and specifically
- (a) Policy 2.6 and 4.1.3.1, is the Environmental Impact Analysis and justification for the development satisfactory; (FFW)
 - (b) Policy 4.1.3.4, regarding development and natural heritage features; (FFW)
 - (c) Policy 4.4, regarding shoreland areas and the waterfront; (FFW)
 - (d) Policy 4.7.3.3, regarding the identification and assessment of all operating and closed landfill sites within a 500-metre radius; (FFW)
 - (e) Policy 5.1.3.3, regarding the prohibition of year-round occupancy unless certain criteria are met; (FFW)
 - (f) Policy 5.3.3.5, regarding private roads; (FFW)
 - (g) Policy 6.2.5.3, regarding seasonal residential areas; (FFW)
 - (h) Policy 6.2.5.4, regarding the conversion of residences to year-round use on private roads; (FFW)
 - (i) Policy 6.2.16.2, regarding a prohibition on site alteration and development in a Provincially Significant Wetland; (FFW)
 - (j) Policy 6.2.16.3, regarding the need to show no loss of wetland functions; (FFW)
 - (k) Policy 7.5.2, regarding runoff from the development; (FFW)
 - (l) Policy 7.9, regarding the need for the proposed use; (FFW)
 - (m) Policy 7.13, regarding criteria for reviewing subdivision/condominium plans. (FFW)
 - (n) Does the development application encourage development adjacent to heritage resources to be of an appropriate scale and character? (Objective 5.2.2) (CLFN)
 - (o) Does the proposed development identify and encourage linkages between tourism opportunities and heritage resources? (Objective 5.2.2) (CLFN)
 - (p) Does the development proposal maintain the heritage integrity of the site? (Policy 5.2.3.3) (CLFN)

Natural Heritage

4. Is the extent of the proposed development in continued close proximity to the wetlands, appropriate and does it represent good planning? (Township, FFW)
5. Have all potential adverse impacts on the natural environmental features been adequately addressed? (Township, FFW)
6. Does the overall magnitude of the proposed development maintain the established natural and built character of the developed shoreline of Stony Lake? (Township)
7. Are there adequate safeguards to protect the Provincially Significant Wetland from harmful impacts? (FFW)

Implementation Issues

8. What is the appropriate ownership model for the Provincially Significant Wetland and shoreline? (FFW)
9. Is the proposed Conservation Agreement appropriate? (FFW)
10. Will the proposed Conservation Easement pose unrealistic and unpractical enforcement difficulties for the Township? (Township, FFW)
11. If the proposed development is found to be appropriate, what is the appropriate form for the official plan and zoning by-law amendments? (FFW)
12. How will use of the proposed main common area be enforced? (FFW)
13. Is the concept of 'back-lotting' acceptable and in conformity with the Official Plan Policy for the Township? (Township, FFW)
14. Is it appropriate to recognize / permit a waterfront property as having no direct exposure to the shoreline? (Township)
15. Is the proposed location of accessory structures at the high water mark in keeping with contemporary waterfront planning policy; and would such a proposal be approved for a smaller development project? (Township)
16. Is the proposed number of boat slips adequate for the number of intended units/lots? (Township)
17. Is the communal well concept appropriate for a seasonal development; and would approval create a municipal responsibility? (Township)
18. Would approval of the zoning be premature until such time as the proposed development and layout is finalized? (Township, FFW)

Attachment 3

Order of Evidence

1. Appellant, Burleigh Bay Corporation
2. Township of North Kawartha
3. Friends of the Fraser Wetlands
4. Curve Lake First Nation
5. Participants (not represented by Friends of the Fraser Wetlands)
6. Reply by Burleigh Bay Corporation

Attachment 4

Purpose of the Procedural Order and Meaning of Terms

The Board recommends that the parties meet to discuss this sample Order before the prehearing conference to try to identify the issues and the process that they want the Board to order following the conference. The Board will hear the parties' comments about the contents of the Order at the conference.

Prehearing conferences usually take place only where the hearing is expected to be long and complicated. If you are not represented by a lawyer, you should prepare by obtaining the Guide to the Ontario Municipal Board, and the Board's Rules, from the Board Information Office, 15th Floor, 655 Bay Street, Toronto, M5G 1E5, 416-326-6800 or Toll Free 1-866-887-8820 , or from the Board website at www.omb.gov.on.ca.

Meaning of terms used in the Procedural Order:

Party is an individual or corporation permitted by the Board to participate fully in the hearing by receiving copies of written evidence, presenting witnesses, cross-examining the witnesses of the other parties, and making submissions on all of the evidence. If an unincorporated group wishes to become a party, it must appoint one person to speak for it, and that person must accept the other responsibilities of a party as set out in the Order. Parties do not have to be represented by a lawyer, and may have an agent speak for them. The agent must have written authorization from the party.

NOTE that a person who wishes to become a party before or at the hearing, and who did not request this at the prehearing conference, must ask the Board to permit this.

Participant is an individual, group or corporation, whether represented by a lawyer or not, who may attend only part of the proceeding but who makes a statement to the Board on all or some of the issues in the hearing. Such persons may also be identified at the start of the hearing. The Board will set the time for hearing this statements. NOTE that such persons will likely not receive notice of a mediation or conference calls on procedural issues. They also cannot ask for costs, or review of a decision as parties can. If a participant does not attend the hearing and only files a written statement, the Board will not give it the same attention or weight as submissions made orally. The reason is that parties cannot ask further questions of a person if they merely file material and do not attend.

Written and Visual Evidence: Written evidence includes all written material, reports, studies, documents, letters and witness statements which a party or participant intends to present as evidence at the hearing. These must have pages numbered consecutively throughout the entire document, even if there are tabs or dividers in the material. Visual evidence includes photographs, maps, videos, models, and overlays which a party or participant intends to present as evidence at the hearing.

Witness Statements: A witness statement is a short written outline of the person's background, experience and interest in the matter; a list of the issues which he or she will discuss and the witness' opinions on those issues; and a list of reports that the witness will rely on at the hearing. An expert witness statement should include his or her (1) name and address, (2) qualifications, (3) a list of the issues he or she will address, (4) the witness' opinions on those issues and the complete reasons for the opinions and (5) a list of reports that the witness will rely on at the hearing. A participant statement is a short written outline of the person's or group's background, experience and interest in the matter; a list of the issues which the participant will address and a short outline of the evidence on those issues; and a list of reports, if any, which the participant will refer to at the hearing.

Additional Information

Summons: A party must ask a Board Member or the senior staff of the Board to issue a summons. This request must be made before the time that the list of witnesses is provided to the Board and the parties. (See Rules 41 and 42 on the summons procedure.) If the Board requests it, an affidavit must be provided indicating how the witness' evidence is relevant to the hearing. If the Board is not satisfied from the affidavit, it will require that a motion be heard to decide whether the witness should be summoned.

The order of examination of witnesses: is usually direct examination, cross-examination and re-examination in the following way:

- direct examination by the party presenting the witness;
- direct examination by any party of similar interest, in the manner determined by the Board;
- cross-examination by parties of opposite interest;
- re-examination by the party presenting the witness; or
- another order of examination mutually agreed among the parties or directed by the Board.

Attachment B: Procedure for a Motion pertaining to Venue

1. If any party proposes to bring a Motion pertaining to the venue for all or part of the hearing on the merits, the Board directs that such Motion shall be presented and held in writing.
2. The moving party shall provide notice of such Motion to the other parties, the Board Secretary, and any other person as directed by the Board.
3. The moving party shall provide to the Board Secretary, and the other parties, copies of its affidavit(s) and written submissions, within 30 days after the date of the notice of the Motion.
4. The written submissions of the moving party will not exceed fifteen double-spaced pages. Those submissions shall include the reasons for the Motion and the order requested, and any law relied on. The affidavit shall include the facts relied on, the evidence supporting the facts, and a copy of supporting documentation. A copy of the cited jurisprudence will be attached.
5. The other parties wishing to respond to the submissions shall do so by copy to all parties and the Board Secretary, within 30 days of the date that the moving party's affidavit and submissions were served. The responding submissions will not exceed fifteen double-spaced pages. The responding submissions shall include an affidavit of the facts and

the evidence relied upon, and a copy of supporting documentation. A copy of the cited jurisprudence will be attached. It shall state if that party has no submissions or evidence on any of the issues raised, if this is the case.

6. The moving party may reply to the other parties' responses, with a copy to the Board Secretary, within 10 days after the date for service of the responses, and the reply shall be limited to any new evidence in the responses.