

**Ontario Municipal Board**  
Commission des affaires municipales  
de l'Ontario



**ISSUE DATE:** December 30, 2016

**CASE NO(S):** PL160468

**PROCEEDING COMMENCED UNDER** subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

|                               |  |
|-------------------------------|--|
| Appellant:                    | Temagami Lakes Association                               |
| Applicant:                    | William Harry Bettridge                                  |
| Subject:                      | Minor Variance   |
| Variance from By-law No.:     | 06-650   |
| Property Address/Description: | Island 864 Lake Temagami                                 |
| Municipality:                 | Township of Temagami                                     |
| Municipal File No.:           | MV-16-04   |
| OMB Case No.:                 | PL160468   |
| OMB File No.:                 | PL160468   |
| OMB Case Name:                | Temagami Lakes Association v. Temagami<br>(Municipality) |

**Board Rule 107 states:**

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

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

**Heard:** September 8, 2016 in Temagami, Ontario

**APPEARANCES:**

**Parties**

Temagami Lakes Association

**Counsel**

Edward Veldboom

William Bettridge

Neil Smiley

**Participant**

Barrett Leudke

Self-represented

**DECISION DELIVERED BY JUSTIN DUNCAN AND ORDER OF THE BOARD**

**Background**

[1] This was a hearing in the matter of an appeal by the Temagami Lakes Association (“Appellant”) from the decision of the Township of Temagami (“Township”) Committee of Adjustment (“COA”) to approve variances from Zoning By-law No. 06-650 to permit the construction of a boathouse that has a width of 16.7 metres, a height of 6 metres and a roof with a pitch of 5 in 12 by William Bettridge (“Applicant”) at an island property known variously as Island 864 Lake Temagami or Wingfoot Island (“Subject Property”).

[2] The variances sought by the Applicant are intended to allow for the replacement of an existing boathouse on the Subject Property with a boathouse of increased size. The variances are as follows:

**1. Section 6.06, By-law 06-650**

A maximum roof pitch of 4/12 is permitted or a maximum height of 5 metres from the top of the dock, whichever is greater.

A roof pitch of 5/12 and a height of 6 metres from the top of the dock are proposed.

**2. Section 6.06, By-law 06-650**

A maximum boathouse width of 11 metres is permitted.

A boathouse width of 16.7 metres is proposed (12.2 metre boathouse and 4.5 metre covered area)

[3] The Appellant is an incorporated not-for-profit organization that has a long history of involvement with the protection of the Lake Temagami area. It takes the position that the proposed development is excessive and will result in a boathouse that does not meet the intent of the Zoning By-law, which is aimed at limiting the size of boathouses on Lake Temagami. The Appellant takes the position that the Applicant should be permitted to rebuild the existing non-conforming boathouse but not expand it further and that the variances should not be authorized by the Board.

[4] The Applicant takes the position that the proposal to rebuild and increase the size of the existing boathouse will not result in unacceptable adverse impacts and it meets the test for a minor variance under the *Planning Act* ("Act").

[5] The Board also added a participant, Barrett Leudke, to the appeal. Mr. Leudke provided contextual evidence to the Board relating to the use of the Lake channels closest to the development by boat traffic.

[6] The Township did not appear at the hearing.

## **ISSUE**

[7] The main issue for the Board's determination is whether the application for variances meets the requirements of s. 45(1) of the Act.

## **EVIDENCE**

[8] The Board qualified and heard expert planning evidence from Jamie Robinson who was called by the Applicant. Mr. Robinson explained that he is a consulting planner who is on retainer with the Township and that he had prepared the planning report that had been provided to the COA.

[9] Mr. Robinson explained that the mainland around Lake Temagami is predominately Crown land and that the bulk of cottage properties on the Lake are located on islands near the Bear Island Reserve of the Temagami First Nation.

[10] Mr. Robinson explained that the Applicant owns the entire Subject Property which is a three-hectare island with a frontage, insofar as such a measurement can be made for an island property, that he measured as being 357 metres. He explained that the cottage is not visible from the Lake as it is setback and buffered by vegetation. He also explained that the existing boathouse is sheltered within a small cove at the east part of the Subject Property.

[11] It was explained that the Subject Property is zoned R1, Lake Temagami Residential Zone, in the Zoning By-law and designated Lake Temagami Neighbourhood Special Management Area (SMA) in the Township Official Plan. Mr. Robinson explained that under the Provincial Policy Statement 2014 ("PPS"), the Subject Property is considered rural lands and resource based recreational use.

[12] Mr. Robinson explained that the Subject Property has the largest frontage of any island in the area proximate to it and that the majority of islands in the area have boathouses on them already. He also explained that the density of boathouse development at other areas of the Lake are already higher than what exists in the immediate area of the Subject Property.

[13] Mr. Robinson explained that the Applicant's existing boathouse structure consists of two separate but linked boathouses that are legal non-compliant with the Zoning By-law as the Zoning By-law does not allow for any property to have more than one water-based boathouse and additionally, the boathouses are located more than three metres from shore, thereby exceeding the maximum distance permitted. He explained that the boathouse closest to shore is no longer usable as the water is too shallow for use. He explained that the Applicant now seeks to expand the boathouse that is located in deeper water to include two boat slips that will be used for year-round storage.

[14] In reviewing the variances sought, Mr. Robinson explained that the existing boathouse is legal non-compliant and the Applicant seeks to expand the non-compliant structure beyond additional Zoning By-law standards. He explained that the existing structure is 5 metres in height, whereas the Applicant seeks to add another metre in height. He explained that the boathouse stalls are to be 12.2 metres wide and a see-through covered porch area is to be added, which is 4.5 metres wide. He explained that the greater pitch of the roof sought is aimed at accommodating the increased height necessary for boat hoists that will be incorporated into the boat slips to raise the boats above water for winter storage. Mr. Robinson explained that no variance is required for maximum length or for the height of sidewalls for the proposed development.

[15] Based on the proportions of the Subject Property, including the length of the frontage on which the boathouse will be located, Mr. Robinson opined that the site is appropriate for a boathouse larger than what is permitted under the Zoning By-law.

[16] Mr. Robinson explained that the intent and purpose of the Zoning By-law limit on height is to prevent the establishment of living space over boathouses, which is possible at a height over 5 meters. In this situation, even with a height of 6 metres as proposed, Mr. Robinson explained that the establishment of living space is not possible given the design of the boathouse proposed.

[17] Mr. Robinson explained that the Zoning By-law allows for one land and one water-based boathouse on the Subject Property. He also explained that the Zoning By-law prohibits three-slip boathouses but allows for two-slip boathouses. He explained that the proposal is to convert a one-slip boathouse into a two-slip boathouse.

[18] Mr. Robinson then applied the four tests under s. 45(1) of the Act.

[19] He began by explaining that the Township Official Plan contains policies aimed at ensuring that the mainland around Lake Temagami remains wilderness and the islands

remain semi-wilderness. He explained that the Official Plan policies for the island areas are aimed at attaining a balance between development and preserving a semi-wilderness character.

[20] Mr. Robinson explained that a key goal of the land use policies of the Official Plan is to preserve the visual aesthetic of the Lake. It was his opinion that this policy goal would be met by the proposal in that increasing the size of the boathouse will not affect the visual aesthetic of the Lake. Further, it was his opinion that the design of the proposal would be an improvement of the existing aesthetic condition of the boathouse. Mr. Robinson was of the view that if the proposal was in close proximity to other boathouses that the proposal may not be appropriate but he explained that the Subject Property is quite distant from boathouses located on other islands in the area. As a result, Mr. Robinson was of the opinion that the policies of the Official Plan were maintained by the proposal.

[21] Mr. Robinson then reviewed the intent and purpose of the Zoning By-law standards for boathouses. He explained that the limits on height and roof pitch are aimed at limiting massing and ensuring no living space is established above boathouses. The limit on width, he explained, is aimed at ensuring massing is controlled on properties that may only have a frontage of 40 metres on the Lake. It was his opinion that the Subject Property is uniquely large in terms of frontage and a precedent would not be set in terms of the variances given the ratio of width proposed to the frontage of the Subject Property.

[22] Regarding the desirability of the proposed development, Mr. Robinson explained that the Applicant seeks to store large boats using lifts in the boathouse during the winter. He also expressed the view that since the proposal would be more aesthetically appealing than the existing boathouse and would only be experienced as a larger boathouse when observed straight on, that the proposal is desirable from both the Applicant's and the public perspective.

[23] Finally, Mr. Robinson opined that the variances sought are minor as a result of the specific context of shallow water rendering the Applicant's one boathouse unusable and the lack of any impact to other properties.

[24] Mr. Robinson opined that although it was not necessary to impose a condition of site plan control, he had no objection to doing so here as it is standard for the Township to do so for waterfront development.

[25] In cross-examination, Mr. Robinson expressed the opinion that the standards of s. 6.28 of the Zoning By-law relating to the continuation of existing non-complying uses allowed for not only the removal and subsequent replacement of a non-complying boathouse, but also for its expansion.

[26] Mr. Robinson also opined in cross-examination that the intent of the Zoning By-law is not to limit the number of boat slips necessarily, and he could find no reason to limit boat slips, but to regulate massing and visual impact.

[27] Mr. Robinson acknowledged that the plans for the proposal included an outdoor summer kitchen area and further acknowledged that the Zoning By-law is silent on outdoor kitchen space. He explained that the building permit process would address any concerns relating to this particular issue.

[28] Next, the Board qualified and heard expert planning evidence from Alan McNair who was called by the Appellant. Mr. McNair had been involved in the development of the Township Official Plan and has assisted the Appellant with planning matters relating to Lake Temagami since 1999. He explained that the main focus of the Appellant in the development of the Official Plan was the impact of waterfront development on the aesthetics of Lake Temagami.

[29] Mr. McNair was of the view that the proposal was for the complete demolition of the existing boathouse and should be considered a new build.

[30] He reviewed s. 6.06 of the Zoning By-law and expressed the opinion that the Applicant requires additional variances to allow for two water-based boathouses on the Subject Property and also to allow for more than two boat slips. It was Mr. McNair's opinion that the Applicant's proposal cannot simply ignore the existence of the second boathouse, which will remain after the proposal is constructed. Mr. McNair also interpreted s. 6.06 as necessarily including the dock in the width calculated and that, as a result, the variance required for width is for 18.2 metres.

[31] In reviewing s. 6.06, Mr. McNair also explained that the Zoning By-law prohibits bathrooms and accommodations. He extrapolated that a kitchen, as proposed by the Applicant, would also be prohibited and that a variance would be necessary for this part of the proposal as well.

[32] Mr. McNair also stressed that the boathouse is 37 metres from shore, whereas the Zoning By-law limits boathouses to 3 metres from shore. It was his view that increasing the size of the existing structure would exacerbate the impact of boathouses located this far from shore.

[33] The intent of the R1 zoning and s. 6.06 of the Zoning By-law, Mr. McNair opined, is to keep building lower at the waterfront so as to minimize impacts.

[34] Mr. McNair disagreed with Mr. Robinson's interpretation of s. 6.28 of the Zoning By-law. It was his interpretation that s. 6.28 should be read as resetting the Zoning By-law standards in a situation where a non-complying structure is proposed to be completely removed before new construction begins. It was also his interpretation of s. 6.28 that a non-complying structure could be enlarged or altered provided that the Zoning By-law standards are complied with.

[35] Mr. McNair then also applied the four tests of s. 45(1) of the Act.



[36] With regards to the Official Plan, he opined that policies prioritized on the preservation of the natural waterfront landscape, vistas and panoramas by minimizing visual impacts of development (s. 2.1.7). He opined that the purpose of the Official Plan in this context is to minimize built form on the Lake Temagami shoreline, limit the size and distance of development from shore and the screen or blend in development, including boathouses which are intended to be built as small as practical. He opined that the proposal does not achieve these objectives.

[37] With regards to the intent and purpose of the Zoning By-law, in addition to the evidence already given, including that the Zoning By-law intends that only one water-based boathouse be built per property, he opined that the size of the property is irrelevant as the Zoning By-law is seeking to ensure all built structures are minimized to meet the objective of preserving the natural vistas of the Lake. It was his opinion that the Zoning By-law does not intend that a balancing occur but rather, that built form be minimized. It was his opinion that the proposal is not consistent with the Zoning By-law as a result as it does not seek to minimize development at this location.

[38] Mr. McNair opined that the Applicant's desires are irrelevant to the test under s. 45(1) and that it is not desirable to rebuild an even larger boathouse structure. He explained that the storage of boats is permitted generally but here the visual impact of the proposal has not been fully addressed.

[39] In considering whether the proposal is minor, Mr. McNair expressed the view that at least five variances are required in this context and that the context in this situation is substantially different than in other cottage areas in Ontario as the emphasis here is on prioritizing the preservation of the natural environment over development. It was his opinion therefore, that the proposal is anything but minor in this context given its potential for visual impacts.

[40] In cross-examination, Mr. McNair explained that the Applicant's current boathouses already exceed the Zoning By-law standards and that in this scenario, it would be more appropriate for the Applicant to seek a Zoning By-law amendment.

[41] Mr. McNair also refused to accept the proposition, in cross-examination, that the existing boathouse that is not proposed to be reconstructed is irrelevant as it is not part of the application. It was Mr. McNair's opinion that this boathouse adds to the overall massing of the structure that is being expanded and is therefore relevant for assessing the application.

[42] In cross-examination, Mr. McNair acknowledged that there are no zoning limits on the size of dock structures. He also acknowledged that the Applicant was now willing to remove the summer kitchen from the proposal to address the Appellant's concern about that aspect of the proposal.

[43] After reviewing various photos in cross-examination, Mr. McNair reiterated his opinion that given the distance of the boathouse from shore, that the variances could not be considered minor in this context.

[44] Finally, the Board heard from Mr. Leudke. He explained that he maintains the waterways around the Subject Property under contract with the Township. He explained that in his experience the channel of the Lake that runs past the Subject Property where the boathouse is located is not a main channel of travel and that it is not used as frequently as other channels used by boats.

## **SUBMISSIONS OF THE PARTIES**

[45] By way of summary, the Applicant's counsel, Mr. Smiley, submitted that the application will have a bare minimum of impact on the Lake and that as one gets further away from the Subject Property, vistas and panoramas are protected as intended by the Official Plan and Zoning By-law. It was submitted that the test here is not whether the

proposal results in no impact but rather, whether impacts have been minimized. With regards to the competing interpretations of s. 6.28 of the Zoning By-law, Mr. Smiley submitted that the proposal for an expansion is why the application is before the Board. It was submitted that two boathouses currently exist legally at the Subject Property and that the Board should not consider the existence of the second boathouse that is not the subject of the application. Finally, Mr. Smiley submitted that the variances ought to be authorized by the Board, subject to the conditions that the proposal be constructed in accordance with the submitted plans and subject to site plan control. Mr. Smiley also indicated that the Applicant is willing to remove the summer kitchen space from the proposal if that is a concern.

[46] On behalf of the Appellant, Mr. Veldboom submitted that the Applicant should not be permitted to scope his application in a manner that permits him to ignore the fact that he already has two boathouses with two slips on the Subject Property that already exceed zoning standards. It was submitted that the Applicant must either seek an amendment to the Zoning By-law or additional variances to in order to allow him to add a third boat slip at the Subject Property and another variance to recognize that he has two boathouses. It was Mr. Veldboom's submission that it is the intent of both the Official Plan and the Zoning By-law that the natural form dominate and that built form be minimized. He submitted that the Applicant should only be permitted to rebuild what exists and what is legal non-complying but not create something new and different and cause an increase in impact.

## **DISCUSSION, ANALYSIS AND FINDINGS**

[47] To begin, as a threshold issue, the Board notes that the Appellant had expressed the intent to raise a jurisdictional issue relating to the ability of the Township to regulate structures located on the bed of navigable waters and the resultant ability of the Board to adjudicate on the application. The Board granted the parties additional time, following the hearing, to make written submissions on this issue as the Applicant had not been given notice of and was not fully prepared to respond to this jurisdictional issue

at the hearing. The Appellant subsequently wrote to the Board on September 21, 2016, referencing the case of *Glaspell v. Ontario*, 2015 ONSC 3965 (S.C.J.) (“*Glaspell*”) and indicated that it “did not wish to pursue this issue further and that it was content for the matter to be determined by the Board on the substantive land use planning merits.” Even though the Appellant indicated that it did not wish to pursue this jurisdiction issue, the Board has briefly considered this issue in order to ensure that there is not a clear court ruling excluding its jurisdiction in this context. The Board has reviewed the case of *Glaspell* and is doubtful that the jurisdiction of the Board is called into question in this context. Absent additional detailed submissions however, the Board is content to leave the adjudication of this issue to another day and will decide the application on its merits under the Act.

[48] When considering an application for variances from the Zoning By-law, the Board must find that the variances meet all of the four tests set out in s. 45(1) of the Act. The tests are:

- maintain the general intent and purpose of the official plan;
- maintain the general intent and purpose of the zoning by-law;
- be desirable for the appropriate development or use of the land; and
- be minor.

[49] Additionally, the Board must be satisfied that the application conforms to the Growth Plan for Northern Ontario and is consistent with the PPS.

[50] Although the Board received no evidence about conformity with the Growth Plan for Northern Ontario, the Board has reviewed this document and finds that the proposal does not raise any issues of non-conformity. With regards to consistency with the PPS, the Board similarly finds that the variances raise no issue of inconsistency. As a result, the Board finds that the application meets all necessary provincial policy in accordance with the applicable standards of the Act.

[51] The Board finds that the main issue remaining for the Board's determination relates to the visual and aesthetic impact from the proposed expansion of the boathouse structure on the Subject Property.

[52] In considering this issue, the Board finds that ignoring the existence of portions of the boathouse structure is artificial and does not represent good planning in this context. It is necessary to consider the application as a request to rebuild and expand parts of a structure that should be properly considered either as two separate boathouses or a two-slip boathouse. Alternatively, the Board must consider the other parts of the Applicant's boathouse structure as part of the context in which the application is to be considered. Either way, the Board finds that the relevant issue here is whether the massing that will result from the proposed development in conjunction with the remaining existing structure is acceptable.

[53] In comparing the evidence provided by Mr. Robinson and Mr. McNair, the Board finds that, on balance, the evidence of Mr. McNair is preferable to the extent that it considered the proper scope of the application's impact. Mr. Robinson artificially ignored the impact of the proposal in conjunction with the remaining existing boathouse structure.

[54] That said, the Board heard uncontested evidence from both planners that the intent of the Township's Official Plan and the Zoning By-law generally in this context is to preserve the aesthetics and natural panoramas afforded by Lake Temagami. Anyone familiar with Lake Temagami would be aware that the natural vistas on the Lake are unparalleled. As explained by Mr. McNair, this unique situation is due in no small part to a lengthy land claim process initiated by the Temagami First Nation.

[55] The Official Plan, which was adopted by the Township in 2011 and modified and approved by the Ministry of Municipal Affairs in 2013, is intended to ensure that built form is minimized on Lake Temagami and prioritizes preservation of the natural environment. The Official Plan prioritizes preservation of the natural environment rather

than simply balancing preservation with development by ensuring the mainland remains wilderness and by limiting development on the islands, including the Subject Property, to preserve a semi-wilderness state. The Board agrees with Mr. McNair that this situation differs from the balancing that takes place in many other cottage areas of the province.

[56] The Official Plan definitions of both wilderness and semi-wilderness focus on limiting disturbance to the natural environment as follows:

**Semi-Wilderness**

Physical Characteristics of Semi-wilderness – areas with dispersed development which may have utilities, road access, and mechanized transport, but where there is limited disturbance to the natural environment. Individual on-site water and sewage systems would have approved design.

**Wilderness**

Physical Characteristics of Wilderness – areas with no development that have no utilities (i.e. phone or electricity) and where there is no road access, where access is by trail or water and where the common mode of transport is by non-mechanized means. There would be little disturbance in the natural environment and development would be sparse. Water and sewer facilities would be rudimentary if they exist at all. [emphasis added]

[57] The intent and purpose of these definitions are weaved through the policies of the Official Plan.

[58] The Board also finds that the intent of the Zoning By-law mirrors the intent of the Official Plan to minimize built form on the Lake. Section 6.06 of the Zoning By-law, applicable to boathouses, accomplishes this intent, in part, by limiting both the number of boathouses and the number of boat slips permitted on any properties, and by limiting the length, width and height of boathouses and the uses permitted in boathouses, including a prohibition on bathrooms and accommodations. The Zoning By-law intent is also accomplished by limiting water-based boathouses to within 3 metres of shore.

[59] In reading the Official Plan and the Zoning By-law, the Board finds that it must reject the evidence of Mr. Robinson that the Zoning By-law intends that the size of a

boathouse may be commensurate with the “frontage” of the island on which it is proposed. The Board finds the policies of the Official Plan and the standards of the Zoning By-law clearly intend that development, whatever the size of an island property, be minimized or limited to preserve the semi-wilderness character of the island areas.

[60] With regards to the massing of the proposal, the Board finds that the deck itself is not to be considered in the calculation of the variance required, but notes that the length of the proposal, when considered in combined with the other parts of the existing boathouse structure, exceed the Zoning By-law standard for length. In all dimensions therefore, from the perspective of a member of the public who is not familiar with how the Applicant has scoped his application, the entire boathouse structure that will result from the application exceeds the Zoning By-law standards. The Board finds that the overall massing of the proposed structure does not meet the intention of the Official Plan and the Zoning By-law to minimize development as a result.

[61] With the boathouse being situated in a cove, the impact of its being located 37 metres from shore is somewhat alleviated. However, the Board finds that its location does not justify expanding it further in height and width.

[62] The Board has considered the wording of s. 6.28 of the Zoning By-law and the evidence of Mr. Robinson and Mr. McNair interpreting it. The Board finds nothing inappropriate with the Applicant reconstructing the existing structure with its current dimensions if it is in need of repair. However, the Board finds that expanding the non-complying structure beyond the Zoning By-law standards as currently proposed is not in keeping with the Zoning By-law or the Official Plan.

[63] With regards to the question of whether the application is desirable and appropriate development for use of the land, the question is one of compatibility in relation to its surroundings and the question of whether the variances are minor asks the question of whether any unacceptable adverse effects will result from the proposal. Since the Board has already found that the application for the variances fails the first

two tests under s. 45(1) of the Act, and considering that a failure to meet any one of the four tests is fatal to an application for a variance, the Board finds that it is unnecessary to consider the application through the lens of these final two tests in detail.

[64] In conclusion therefore, the Board finds that the Applicant has not met the onus of establishing that the variances meet the four tests under s. 45(1) of the Act. The Board finds that the appeal should be allowed and the variances should not be authorized.

## **ORDER**

[65] The Board orders that the appeal is allowed and the variances are not authorized.

*“Justin Duncan”*

JUSTIN DUNCAN  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://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](http://www.elto.gov.on.ca) Telephone: 416-212-6349 Toll Free: 1-866-448-2248