Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: September 09, 2019 **CASE NO(S).:** PL171040
PL171041

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Appellant:	Temagami First Nation
Applicant:	Nancy Reid
Subject:	Consent
Property Address/Description:	130 Lake Temagami, Island 992
Municipality:	Township of Temagami
Municipal File No.:	C-17-03
OMB Case No.:	PL171040
OMB File No.:	PL171040
OMB Case Name:	Temagami First Nation v. Temagami (Township)

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

Appellant:	Temagami First Nation
Applicant:	Nancy Reid
Subject:	Consent
Property Address/Description:	44 and 50 Lake Temagami, Island 970
Municipality:	Township of Temagami
Municipal File No.:	C-17-02
OMB Case No.:	PL171041
OMB File No.:	PL171041

Heard: February 20, 2019 in Temagami, Ontario and June 7, 2019 by final written submission

APPEARANCES:

Parties	**Counsel**
Temagami First Nation	Edward Veldboom
Municipality of Temagami	G. Stephen Watt
Nancy Reid	Brigid Wilkinson

DECISION DELIVERED BY THOMAS HODGINS AND ORDER OF THE TRIBUNAL

INTRODUCTION

Disposition

[1] The Tribunal allows the appeals and refuses to give the provisional consents.

Background

[2] Nancy Reid ("Applicant"), through agent Karen Beauchamp of Clearwater Planning Inc., submitted two Applications for Consent (Application Numbers C-17-02 and C-17-03) to the Municipality of Temagami ("Municipality") for permission to:

A. create two lots on Island 970 in Lake Temagami. Lot 1 is about 1.14 hectares ("ha") in size with about 160 metres ("m") of water frontage. Lot 2 is about 1.2 ha in size with about 96 m of water frontage. Jamie Robinson , the Municipality's retained planning consultant, advised the COA in a Planning Report that "Lot #1 and Lot #2 were previously created by consent, however when the owner purchased the crown reserve along the waterfront, the lots merged on title due to Section 50(3) of the Planning Act where two patented lot [sic] in the same ownership cannot be conveyed separately …a consent is required to essentially re-create the two separate lots so that they can be separately conveyable"; and

B. create four lots on Island 992 (sometimes referenced in the material provided to the Tribunal as Island 922) in Lake Temagami. Each of the four lots exceed 1 ha in area. Lots 1, 2 and 4 each have more than 136 m of water frontage while Lot 3 has about 59 m of water frontage. According to the Planning Report "The subject lands are comprised of four separate parcels with separate PINs, however cannot be conveyed separately because when the owner purchased the crown reserve along the waterfront, the parcels merged on title due to Section 50(3) of the Planning Act where patented lots in the same ownership cannot be conveyed separately".

[3] Islands 970 and 992 ("Sites") are, as noted, in Lake Temagami about 15 kilometres south west of the Temagami village area on Highway 11. The Sites abut Crown Land and are in the vicinity of Bear Island Nation Reserve No. 1 which is part of the Temagami First Nation ("TFN"). The Reserve includes a year-round population of about 250 persons, an elementary school, a central water and sewage system and other features and facilities.

[4] The Municipality's Committee of Adjustment ("COA") granted both applications for consent subject to the following three conditions: "1. Two copies of the Reference Plan, in compliance with the application; 2. Confirmation from the Timiskaming Health Unit that the lots are suitable for installation of Class IV sewage disposal systems; and 3. The standard conditions of the Municipality". The details or nature of the "standard conditions of the Municipality" are not identified in the COA decisions.

[5] The TFN appealed both decisions of the COA pursuant to s. 53(19) of the *Planning Act* ("Act").

[6] In approving the consents, the COA did not follow Mr. Robinson's recommendations. He recommended that the applications be deferred pending the results of an archeological assessment and in the event the applications were not

deferred a set of conditions which required an archeological assessment as a condition of approval.

Legislative Framework

[7] In order for a consent application to succeed, the Tribunal must be satisfied that a plan of subdivision is not necessary for the orderly development of the municipality pursuant to s. 53(1) of the Act and that the application has regard to the criteria listed in s. 51(24) of the Act.

[8] In making its decision, the Tribunal must also, in accordance with the Act: have regard to matters of provincial interest; have regard to any decision made by the municipal council or COA and any information and material that the municipal council or COA considered in making its decision; ensure that any decision is consistent with the Provincial Policy Statement, 2014 (“PPS”); and ensure that any decision conforms with, or does not conflict with, an applicable provincial plan which in this case is the Growth Plan for Northern Ontario, 2011 (“Northern Growth Plan”).

THE HEARING

Appearances

[9] Edward Veldboom appeared for the TFN and G. Stephen Watt appeared for the Municipality.

[10] Upon request, and without challenge, Party status was granted to the Applicant who was represented by Brigid Wilkinson.

[11] There were no additional requests for Party status and no requests for Participant status. Six Observers were identified.

[12] The appeals and related applications were consolidated and heard together.

Witnesses

[13] In support of the appeals, Mr. Veldboom called Robin Koistinen, the TFN's Lands & Resources Director. She was not asked to be qualified by the Tribunal to give expert opinion evidence. The Tribunal recognizes that Ms. Koistinen, by virtue of her current job and previous job with the Municipality, has a sound understanding of the subject area, land use planning, the planning process, the PPS and the Municipality's Official Plan ("OP").

[14] Ms. Koistinen presented mapping kept and compiled by the TFN, through the knowledge and activities of its elders and members, that shows fish spawning, fish netting and "reel fishing" areas in the waters around the Sites and areas in which medicinal plants are harvested around the Sites. The veracity of the mapping was not challenged. Her testimony focused on explaining why, in her opinion, the approval of the consents would not be consistent with the PPS or comply with the OP because of the features shown in the TFN mapping as well as for other reasons.

[15] In opposition to the appeals, Mr. Watt called Jamie Robinson who was qualified by the Tribunal, without challenge, to give independent expert opinion evidence in land use planning. At the end of the hearing, following a review of the TFN mapping and in response to certain other issues raised, Mr. Robinson recommended that the Tribunal approve the consents subject to the following four conditions:

1. That the Municipality be provided with three copies of the reference plan that is deposited with the Registry Office.

2. That draft transfer documents be prepared and provided to the Municipality for approval.

3. That all lots comply with the Zoning By-law.

4. That an EIS [Tribunal Note: Environmental Impact Study] be undertaken, to the satisfaction of municipal planning staff, to consider natural heritage features and the TFN features identified on TFN mapping. The EIS shall identify mitigation measures, as required, to ensure protection of features in accordance with the policies of the PPS and the Municipality of Temagami Official Plan . The EIS shall also identify docking envelopes for each of the lots.

[16] Ms. Wilkinson did not call a witness on behalf of the Applicant in support of the approval of the consents.

ANALYSIS AND FINDINGS

[17] The Tribunal has carefully reviewed all of the evidence and submissions in this matter.

[18] Lake Temagami and its islands are a special place, with special attributes, to be planned and administered in a prudent and careful way. Mr. Robinson noted that the applications for this number of lots, in the context and in comparison to other applications, are significant in scope. The Vision at the start of the OP, although not formally part of the actual OP itself, establishes some context for this case and states that:

> Temagami is enjoyed by the residents of Ontario as well as visitors to the area from around the world. They are drawn by the resources, the beauty of the area, the solitude, quiet and the pristine environmental it offers…The environment is the foundation upon which the community rests... The Municipality will permit carefully planned development to occur that conserves wilderness and semi wilderness values in the rural neighbourhoods...

[19] The creation of the subject lots must be assessed and considered based on the current, applicable planning regime. The proposed lots do not get a pass simply because of the merging issue and, notably, the former lotting structure was created

almost 40 years ago based on some unexplained rationale and in a different planning context.

[20] The Tribunal was advised that an archeological study was prepared by a qualified firm in advance of the hearing with no concerns identified.

[21] Mr. Robinson examined imagery showing the topography and terrain of the Sites prior to the hearing but has never inspected or visited the Sites - neither in advance of preparing his Planning Reports in 2017 nor in preparation for this hearing. This is a significant factor, in this instance and in this context, in weighing his opinion regarding site conditions, site suitability and certain other matters associated with the proposed consents. Further, neither the Applicant's agent/planner nor the Applicant provided evidence with respect to the pertinent site conditions and characteristics and no planning justification report was provided, whether based on a site inspection or not.

[22] As noted, the veracity of the TFN mapping was not challenged at the hearing and, accordingly, the Tribunal finds that there is potential fish habitat adjacent to the Sites as well as medicinal plants of interest and importance to the TFN.

[23] The TFN mapping was new to Mr. Robinson and he accepted it, acknowledged its value and relevance and responded with a recommendation that an EIS be required as a condition of approval. In this Member's opinion, conditions of approval are appropriately applied to confirm certain matters and are not to be used in place of a proper planning process. A reasonably comprehensive front-end planning process informs the preparation of an application and justifies and supports a proposal, in a manner consistent and compliant with the applicable legislative and policy planning regime, to the interested public, stakeholders and the approval authority. Conditions of approval can be used to appropriately follow up on or "button down" certain detailed matters but should not be so broad or significant as to call into question the basis of the application or a decision to approve an application in the first place. Further, studies or assessments that are provided to a municipality as a condition of approval are generally not made available to the interested parties or the public in any proactive, meaningful

way so as to build confidence in a proposal or to allow legitimate issues with the studies to be raised based on scrutiny by an interested party, such as the TFN in this instance, or the public. The Tribunal will not accept a recommendation in this case that the applications be approved subject to the four conditions identified by Mr. Robinson. The Tribunal finds that the conditions applied by the COA to its approvals and the conditions of approval recommended by Mr. Robinson at the hearing are not, under the circumstances and in this context, reasonable pursuant to s. 51(25) of the Act.

[24] The Tribunal is satisfied that a plan of subdivision is not required pursuant to s. 53(1) of the Act but is not satisfied that the applications have appropriate regard for all of the criteria found in s. 51(24) of the Act, which are as follows:

> **Criteria**
> (24) In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,
>
> (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2;
>
> (b) whether the proposed subdivision is premature or in the public interest;
>
> (c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
>
> (d) the suitability of the land for the purposes for which it is to be subdivided;
>
> (d.1) if any affordable housing units are being proposed, the suitability of the proposed units for affordable housing;
>
> (e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;
>
> (f) the dimensions and shapes of the proposed lots;
>
> (g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;
>
> (h) conservation of natural resources and flood control;
>
> (i) the adequacy of utilities and municipal services;

(j) the adequacy of school sites;

(k) the area of land, if any, within the proposed subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes;

(l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and

(m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41 (2) of this Act or subsection 114(2) of the *City of Toronto Act, 2006*. 1994, c. 23, s. 30 part; 2001, c. 32, s. 31(2); 2006, c. 22(3),(4) ; 2016, c. 25, Sched. 4, s. 8(2).

[25] In respect to s. 51(24)(a) of the Act, the Provincial interest includes the protection of ecological systems, including natural areas, features and functions, the conservation and management of natural resources and the appropriate location of growth and development. The proposed consents are not based on any meaningful assessment or examination of the information in the TFN mapping and as such do not have sufficient regard to the aforementioned matters of Provincial interest.

[26] Certain natural heritage features reflected in the TFN mapping are a shared public resource and it is in the public interest to take these into account before approving any consents. These features have not been assessed and, accordingly, the Tribunal is not satisfied that s. 51(24)(b) of the Act has been adequately addressed with respect to these consents. For the same reason, the Tribunal finds that the consents are premature and that s. 51(24)(h), the conservation of natural resources, has not been appropriately addressed.

[27] With respect to s. 51(24)(c), which is OP compliance, the Tribunal is not satisfied that the consents comply as required. The Sites are designated Special Management Area in the OP and are located in the Lake Temagami Neighbourhood. Permanent or seasonal dwellings are permitted. The applications do not address the information in the TFN mapping or the potential cumulative impact of individual sewage systems in this part of the lake and, accordingly, cannot be said to conform with certain goals in the OP for the Lake Temagami Neighbourhood, including to protect ecological functions and

fish resources and to maintain or improve water quality, fisheries habitat and fisheries management. Policy 5.3.2 indicates that "…it shall not be assumed that all islands in Lake Temagami are suitable for development. The suitability of an island or portion of an island for development will be assessed on a site by site basis in accordance with the policies of this plan." A site by site assessment, quite simply, was not done.

[28] The applications do not comply with the policies in the OP for Lot Creation Through Consent on Private Land. One of these policies indicates that the applicant, when required, shall provide a study or studies acceptable to the Municipality that include an inventory of all existing natural heritage features on the site and in the water adjacent to the site, including the shoreline characteristics such as type of littoral community and physical characteristics, the anticipated impact of the development and any measures proposed to satisfactorily mitigate the anticipated impacts of the development on the features. In an instance like this - given the age and general nature of the information in the OP schedules on natural heritage features, the context of the Sites and the PPS's direction on protection - this OP policy becomes of paramount importance and relevance and the OP can be reasonably interpreted to require some type of study or assessment to ensure that the principles and objectives on which it is based are being met. No such study, however, was deemed necessary or completed. Mr. Robinson acknowledged that the natural heritage information in the schedules of the OP is dated, may not reflect the current situation on the ground and agreed that certain important natural features, for example nesting sites, could be established on a property in the years since the information in the OP was produced. The latter being an example of something relevant that might get identified in a site inspection or a study done by an applicant.

[29] The applications also fail to conform with the above-noted consent policies because they are not supported by the required information which shows that: soil, drainage and slope conditions are suitable or can be made suitable for the proper siting of buildings and a Class IV sewage system; the proposal will not negatively impact fisheries habitat, steep or unstable slopes, environmentally sensitive areas and other

bio-physical aspects; and that suitable dock locations are available on the lot. No site visits or studies on these topics were deemed necessary or completed. Notwithstanding the Timiskaming Health Unit's advisement that with the addition of suitable fill material areas could be made suitable for a Class 4 Sewage System on each proposed lot, the Tribunal was not provided with any evidence to suggest that the lots, as designed, could reasonably accommodate such fill and construction without unnecessary impact and disruption. Further, Mr. Robinson agreed that the Health Unit's letter does not address potential impacts from individual or multiple septic systems on Lake Temagami in this area.

[30] The Tribunal cannot conclude, pursuant to s. 51(24)(d), that the Sites are suitable for the purpose for which they are to be divided. There was no persuasive evidence that conditions allowed for access (e.g. docking structures) to be appropriately established on the waterfront of each of the proposed lots based on the existing physical characteristics and constraints and in accordance with good planning principles and any applicable legislation and/or regulation. The Tribunal's concerns with respect to the lack of information on the ability of the proposed lots to accommodate septic systems and potential septic system impacts on the lake equally apply to this item.

[31] The Tribunal is not confident that the dimensions and shapes of the proposed lots are appropriate in accordance with s. 51(24)(f) of the Act. The proposed lotting is based largely on previously established lot lines and no rationale for the original design, and its applicability today, was provided. No evidence was provided, for example, to indicate that the proposed lotting pattern was designed: to accommodate appropriate building sites/envelopes which avoid important natural features and constraints; to take into account the need for well located and feasible individual docking sites; to accommodate constructible and well-located septic systems that avoid important natural features and constraints; etc.

[32] In the PPS, the Sites are designated Rural Lands and recreational dwellings are a permitted use. The Tribunal is not satisfied, however, that the applications are

consistent with the PPS. No evidence was given to indicate that the site conditions are suitable for the long-term provision of individual on-site sewage services with no negative impacts, including cumulative impacts around the islands, or that fish habitat, natural features and ecological systems identified in the TFN mapping have been taken into account consistent with the PPS.

[33] For the reasons set out above, the Tribunal will allow the appeal by the TFN and will not give the provisional consents. In arriving at its Decision, the Tribunal had regard to the COA decision and the information and material the COA considered in making its decision as provided and finds that its Decision conforms to the Northern Growth Plan.

[34] The Tribunal may have decided differently on the subject consents had the appropriate consultation and assessments been completed and reported with positive results in terms of impact and consistency/conformity with the prevailing policy documents. The applications failed largely because of a lack of information and evidence to satisfy the Tribunal that all of the appropriate matters had been addressed.

[35] In the Tribunal's mind, the applications were not approached in the proper manner and were considered the simple reestablishment of a previous lotting pattern that did not require much attention or consideration.

[36] In this Decision, the Tribunal does not identify each applicable policy or issue considered relevant or give an opinion on the applications' consistency or conformity with each. As such, this Decision is not a menu or checklist of matters to be addressed as part of any re-submission of the applications. The applicable policy documents and the principles of good planning and thorough and meaningful consultation should inform and guide any efforts in this regard.

ORDER

[37] The Tribunal orders that the appeals by the TFN are allowed and the provisional consents are not to be given.

"Thomas Hodgins"

THOMAS HODGINS
MEMBER