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

R 920103

IN THE MATTER OF Section 34(18) of the Planning Act, 1983

AND IN THE MATTER OF an appeal by Ambrose Moran against Zoning By-law 114-1991 of the Corporation of the Township of Burleigh and Anstruther

C O U N S E L :

G. H. T. Farquharson - for Stony Lake Development Ltd.

DECISION delivered by D. M. ROGERS AND ORDER OF THE BOARD

By-law No. 114-1991 of the Township of Burleigh-Anstruther is before the Board on appeal, opposed by Ambrose Moran it is supported, not by the Township, which has not repealed the by-law but which is taking no part in these proceedings, but rather by Stony Lake Developments Ltd.

Mr. G. H. T. Farquharson appeared for this company. The company owns some 110 acres of land on or above the north shore of Stony Lake and applied to sever parts 1 and 2 on a reference plan filed as No. 45 RH733 from the balance of their holdings. The Land Division Committee approved of Part One subject to a by-law being passed by the previous Council to change the zoning from Rural to Recreational Residential and further to establish a water yard setback of 70 feet from the lake shore. This 70 yard water yard setback simply brings this lot into conformity with a by-law later passed which established a 70 yard water lot over the entire area.

This by-law was passed, unchallenged and the severance of Part One is then a fait accompli.

Part Two is on the easterly side across from part 1, of one of the four bays known as the St. Julien Bays. The current by-law

before the Board makes the above two changes, the 70 foot water yard set back now being required by the new by-law for all of the Township and also provides for a change in the frontage on the water from 125 feet to 115 feet.

The severance of Part Two was approved by the Land Division Committee conditional on the by-law such as By-law 114-1991 being passed by Council and coming into force.

In effect the Board is dealing then with the appeal against of the severance which is the end result.

The decision of the Land Division Committee was not challenged but if this hearing does not result in an approval of a by-law passed to implement that decision, then the approval would be of little value.

This by-law was passed after a new Official Plan was approved but the severance application was made during coverture of the old Official Plan filed as Exhibit 25 in these proceedings. It was argued that the severance should be considered under the old Official Plan as it was in force at the time the application was made, but that the by-law having been passed when the new Official Plan was in force the by-law would have to be in conformity with the new Official Plan. The Board finds that the law at the time the application was made must govern the entire approval process relating to the severance.

This former Official Plan section 1.44.1 precludes more than one severance from each land holding in existence at the time the Official Plan was passed. We are not certain what other severances there may have been, but most certainly the severance of Part One on Reference Plan 45RH733 has been completed so it would appear that this severance could not have been properly allowed as not being in conformity with the Official Plan.

The Board also cannot see how the severance could conform to Section 1.44.2 which reads as follows:

"1.44 If the consent to sever the individual parcel of land is in the Recreation Dwelling area;

1.44.1 Only one severance should be permitted for each land holding existing at the time of the passing of the Official Plan.

1.44.2 It should only be granted where it contributes to the infilling of existing development, and if for a new dwelling it is between existing dwellings that are no more than 90 metres apart."

The applicant attempted to firstly use the proposed house on part one as being an existing dwelling for the use of this section and secondly drew straight lines as opposed to following shore lines to attempt to show that the dwellings were in fact less than 90 metres apart.

Regretfully the Board cannot subscribe to this theory. The applicant also took out the word "should" in 1.44.1 indicating that this was not then an absolute prohibition but that there was some leeway.

Any leeway which would be granted would have to be as a result of a very minor variance indeed. Simply to avoid a serious miscarriage of justice as if for example, the proposal was an inch or two by the frontage or area in the opinion of the Board this does not occur in this case.

If the Board is in error and the relevant Official Plan was the new one which was in force when this by-law was passed, then we must examine Section 3.6.3(i) of this new plan which reads as follows:

"Proposed new Shoreline Residential development adjacent to water bodies which are identified by the Minister of Natural resources as supporting cold water or muskellunge fisheries shall be reviewed to ensure the continued health of the existing fishery. Where Council deems it desirable to allow limited new Shoreline Residential development adjacent (to) cold water lakes, an amendment to this plan shall be necessary. It is intended that for lakes containing cold

water fisheries substantial water frontages and building set backs from the high water mark be included in the implementing zoning by-law."

Several professional witness were called by Mr. Morin representing the Trent Severn Waterway and a Professor Dr. Frances Pick from the University of Ottawa who indicated her qualifications in the field of Wetlands and Fisheries and they indicated that this bay in fact did constitute Wetlands, and perhaps more importantly, constituted a fish habitat and it was brought to the Board's attention that the Fisheries Act precluded the use of land where it would result in a net loss of habitat for fish.

At the very least then it would seem that this proposed severance could not conform to the Official Plan unless and until a study was made or to identify it as an area where there would be no loss of fish habitat. One of the witnesses indicated the obvious that it would not be possible to use this land even for wading and swimming without disturbing the wetlands and the fish habitat.

The Ministry of Natural Resources has not made any identification in this lake as it had turned its responsibility over to the Trent Severn Waterway. In the opinion of the Board these plans as well as all other Official Plans make provisions that as long as the intent of the plan is clearly being followed, then one should not attempt to treat the words in their exact meaning so it would seem that the identification by the person who had taken over from the Ministry of Natural Resources could make any decision they might have made in order to conform to the intent of the Official Plan.

Section 50(4) of the Planning Act, 1983 indicates that the Board should consider subsection (b) whether the proposed subdivision was premature or in the public interest and subsection (d), the suitability of the land for the purposes for which it is to be subdivided. This was of course not applicable to this hearing unless

one considers as the Board has done that it is in fact dealing with the severance of a parcel of land. It is clearly however not suitable to be severed and sold when its access to water is severely restricted by the necessity of an impact study and in the opinion of the Board it is also premature to place this lot in a saleable position. The applicant argued of course that no dredging could take place without the approval of the Trent Severn Waterway but it is not the intent of this Board in any case of which the writer is aware, to provide for a lot to be placed on the market when it cannot be used for the purposes for which it would normally be intended. It is clear of course that the agreement is to be registered on title, indicating to any proposed purchaser that a permit would be required providing the purchaser has the title searched. It should come to his attention. It would not seem to the Board to be an answer to the concerns raised that the lot is inappropriate for sale purposes and premature, when an impact study is to be required, particularly when evidence was given before the Board that Mr. Orr, a neighbour, had already made application to dredge the area and had been refused.

The Board is required to consider government policy expressed in the Wetlands Policy Statement when dealing with this by-law.

The wording of Section 3(5) of the Planning Act is as follows:

> "In exercising any authority that affects any planning matter ... the Ontario Municipal Board shall have regard to policy statements issued under Section 3."

In page 5 of the Wetlands Statement it is said to "take effect on the date of publication in the Ontario Gazette and applies to all planning applications under the Planning Act." This does not except pending applications. The Board feels that this must apply to all applications including those pending consideration as at the present. What wording in the policy then affects this case? Section 2.1 on page 10:

"Development shall not be permitted within provincially designated lands."

We cannot find that there has been any provincial statement as to whether or not these lands are provincially designated so we could not accept that section as precluding construction on these lands. "Wetland Management Plan for Stony and Clear Lakes" "Trent Severn Waterway" published in 1990 prepared for the Trent Severn Waterway by Joan Chamberlain who gave evidence in this hearing was filed as Exhibit 1. This is not government policy but it is a statement prepared for a public body whose responsibility it is to govern the use of and protect the wetlands and fish habitats in this lake. As a result of their studies the North Shore Stony Lake was designated Sensitivity Level 3 Class 4 to 5 Wetlands. As indicated above these were not inventoried by the Ministry of Natural Resources who had turned over the control to Trent Severn Waterways. The indication is that these parcels need further protection and further study.

Dr. Pick of the University of Ottawa referred to two definitions on page 9 of the Wetlands Policy Statement.

Wetland complex means two or more individual wetlands areas along with their adjacent lands that are related in a functional manner and grouped with a common wetland boundary. The whole complex is evaluated and classified, not in individual wetland components. The witness called by the applicants suggested to the Board that the various bays referred to as the Bays of St. Julien do not form a complex so we are discussing whether this particular bay could be known as a wetland. Also on page 9 we find the following definition:

"Wetlands means lands that are seasonally or permanently covered by shallow water, as well as lands where the water table is close to the surface, In either case the presence of abundant water has caused the formation of hydric soils and this favoured the dominance of either hydrophysic or water tolerant plants."

The four types of wetlands are swamps, marshes, bogs and fens. It was Dr. Pick's opinion that the subject lands were indeed wetlands

and there is a further definition of adjacent lands "those lands within 120 metres of an individual wetland area" so it would appear then that the lands adjacent to these wetlands were referred to in the objectives on page four of the Wetlands Policy. They indicate that the objective of the province with regard to wetlands is: 1) To insure no loss of wetland function or wetland area of provincial significance in wetlands in the Great Lakes St. Lawrence Region. Paragraph 3 indicates that they should encourage the conservation of other wetlands classes four to seven throughout Ontario. In Dr. Pick's opinion these lands were not noted anywhere as being provincially significant lands but the opinion of professionals such as she and Ms Chamberlain should be considered. The Board should make the decision as to whether it would accept their evidence that these lands should be protected under the wetlands policy or whether to take the opinion of the witness called by the applicant David Cunningham who is well qualified .

The Board believes that it must accept the evidence of Mr. Moran's witnesses that these lands are in fact wetlands and that the encouragement to conserve these wetlands should be accepted as one of the objectives of the wetlands policy and accordingly the Board is bound to have regard to these issues in dealing wih the appeal of with the appeal of this by-law.

For the various reasons above set forth then the Board orders that the appeal is allowed and that By-law 114-1991 of the Township of Burleigh Anstruther is not repealed.

DATED at TORONTO this 20th day of October, 1992.

"D. M. Rogers"

D. M. ROGERS
MEMBER

DB # 94 FOLIO # 91
ORDER ISSUE DATE
OCT 22 1992
OB # R92-1 FOLIO # 150

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C O U N S E L :

G. H. T. Farquharson - for Stony Lake Development Ltd.

AMENDING DECISION delivered by D. M. ROGERS
AND ORDER OF THE BOARD

This decision and Order of the Board issued October 20, 1992 under DB # 94, Folio # 77 and OB # R92-1, Folio # 147 is hereby amended as follows:

Page 7, Paragraph 2

For the various reasons above set forth then the Board orders that the appeal is allowed and that By-law 114-1991 of the Township of Burleigh Anstruther is repealed.

The word "not" has been deleted.

DATED at TORONTO this 22nd day of October, 1992.

"D. M. Rogers"

D. M. ROGERS
MEMBER