

ISSUE DATE:

**JULY 16, 2003**

DECISION/ORDER NO:

**0958**



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL010018

At the request of Gary Marquis and Leo Wall, the Minister of Municipal Affairs and Housing has referred to the Ontario Municipal Board under subsection 22 (1) of the *Planning Act*, R.S.O. 1990, c. P.13, a private Official Plan Amendment to the Official Plan for the County of Victoria (now the City of Kawartha Lakes) to redesignate lands situated on Part of Lot 5, Concession A located on Gilson Point Road (former Township of Mariposa), from Agricultural and Environmental Protection to Secondary Plan Area Four (SPA-4) consisting of Nature Reserve and Shoreline designations for the development of a maximum of 64 residential lots on individual sewer and water services adjacent to the shoreline of Lake Scugog  
Minister's File No. 16-OP-0036-A05  
O.M.B. File No. O010073

Gary Marquis and Leo Wall have appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 94-07 of the Township of Mariposa to rezone lands respecting Part of Lot 5, Concession A former Township of Mariposa, now City of Kawartha Lakes from A1 to RR3 and EP-5 Exception to permit the development of 64 single detached dwelling units  
OMB File No. Z010022

Gary Marquis and Leo Wall have appealed to the Ontario Municipal Board under subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from the failure of the County of Victoria, now City of Kawartha Lakes to make a decision respecting a proposed plan of subdivision on lands composed of Part of Lot 5, Concession A former Township of Mariposa, now City of Kawartha Lakes  
City of Kawartha Lakes File No. 16T-98501  
OMB File No. S010001

## APPEARANCES:

### Parties

City of Kawartha Lakes

G. Marquis and L. Wall

South Mariposa Lakefront  
Ratepayers Association

### Counsel\*/Agent

Wm. Koughan\*

R. Arblaster\*

P. Settimi  
N. Lee

## DECISION DELIVERED BY S. D. ROGERS

### **Background**

Mr. Marquis and Mr. Wall own some 88 acres on the north shore of Lake Scugog on Gilson Point. The property is located in the former County of Victoria, the current City of Kawartha Lakes, and is designated under the Official Plan for the County of Victoria for Agricultural, and Environmental Protection uses. To the south and east of the property, along the shore of Lake Scugog is residential shoreline development. To the north and east the lands are agricultural. To the west is the Kings Bay area of Lake Scugog and a Provincially Significant Wetland.

In March of 1990, Mr. Marquis, who was the sole owner at that time, (Mr. Wall having become part owner in 1995), retained a planner to develop a concept plan for a shoreline residential development on the property. This was done, and thereafter commenced a long and unfortunate history of the attempts by Mr. Marquis and his team of professionals to obtain the necessary Official Plan, zoning by-law and plan of subdivision approvals to proceed with the proposed development on the site.

The application for an Official Plan Amendment was finally turned down by the City of Kawartha Lakes in September of 2000. The applicants thereafter requested the Minister of Municipal Affairs and Housing to refer the proposed OPA to the Ontario Municipal Board and appealed the refusal of the City to pass the zoning by-law amendment and approve the plan of subdivision.

### **Hearing**

While there had been a number of pre-hearing conferences, the hearing of this matter commenced the beginning of April 2003 and lasted for most of the month. At the hearing, the City and the local resident's group, the South Mariposa Lakefront Ratepayers Association opposed approval of the development proposal.

The Board heard evidence from planners and environmental experts from all parties. As well the Board heard evidence from an array of government officials, some with particular expertise in various environmental disciplines, who had been involved in the processing of this application, and had commented on it.

## Issues

As a result of the evidence, the Board identified five key issues, which need to be determined, in order for the Board to decide the matter.

- What is the effect of the actions taken by the City while processing this application and managing the appeal, on the outcome of the appeal?
2. Was the environmental evaluation completed by the applicant sufficient to support the finding that there is no undue adverse impact of this development on the provincially significant wetland?
  3. Does the application have regard to the provisions of the Provincial Policy Statement with respect to the significant wetlands in the province?
  4. Does the proposed development conform to the policies of the County Official Plan with respect to shoreline development and represent good shoreline development planning, particularly with respect to the size or density of the development?

There were numerous sub-issues raised by the City related to these key issues. On some of these the Board refused to hear evidence because there was insufficient identification of the issues in the process leading up to the hearing. For example, the Board refused to allow the City and the Ratepayers to call evidence on boating capacity, because it was not an issue that was specifically identified in the issues list, nor could the City or the Ratepayers identify any document during the processing of the application, which identified this specific issue. While the City and the Ratepayers relied on some general wording in one of the policies of the Official Plan, the Board found this was insufficient, given the lack of specificity in the wording of that particular policy.

## Proposal

The subject property is located on the east side of Kings Bay, which is part of Lake Scugog. Most of the bay and the shoreline on the west side of the property is marsh, and is designated as a Provincially Significant Wetland.

The appellants are proposing a 64-lot plan of subdivision for shoreline recreational uses. All of the lots will exceed 1 acre. There will be an internal road having a T shape, with the main leg of the road running north south, parallel to the

shoreline and to Gilson Point Road. Lots are proposed to be located on this road, on Gilson Street, behind the existing shoreline development, along Gilson Point Road opposite the farmland to the east, and along an extension of Algonquin Road to the north.

The proposal is to redesignate the property to Shoreline Residential, with two Blocks, Block 66 and 67 consisting of approximately 7.52 hectares of land, to be designated Environmental Protection and zoned Nature Reserve in order to provide a minimum 30 metre buffer between the wetland boundary and the development. The wetland boundary was initially identified in 1997 by the appellants based on mapping conducted in previous studies. The boundary was then re-surveyed on site in 2002 with the Ministry of Natural Resources, as a result of an agreement reached at a Board pre-hearing on this matter. The survey in 2002 resulted in the wetland boundary moving inland considerably at two points along the shore. It also resulted in the wetland being extended southerly to cover the entire shoreline of the appellant's property.

A seasonal floating dock is proposed to be installed some 12 feet from the southerly property line into Kings Bay, and is to accommodate 32 boats. The dock will be installed in three phases, with approval already obtained from the relevant authority, the Trent-Severn Waterway in conjunction with the Department of Fisheries and Oceans, for a dock for eight boats.

The development proposal has gone through a number of iterations since December of 1990, when the first application for an Official Plan Amendment was made. An application for subdivision approval was submitted in April of 1998, and an application for a zoning by-law amendment was submitted in October of 2000.

Issues related to the conversion of agricultural land, stormwater management, and the potential hydrogeological impacts of storm water and septic system waste disposal on the water quality of Lake Scugog were addressed to the satisfaction of all parties including the Ministry of the Environment and the City of Kawartha Lakes, and were not issues before this Board.

The applicants completed numerous reports relating to the proposal, including a planning report and updates, hydrogeological report, site servicing report, environmental

impact assessment report with several updates and expansions, storm water management report, and agricultural land assessment report.

### **Actions of the Municipality – Processing the Application and on Appeal**

The Board heard extensive evidence about the processing of this appeal both from the planners for the appellants, and from various municipal and other government officials, some of whom were subpoenaed to appear.

The Board is not going to recite the details of the process, which was long and a most unfortunate experience for the appellants and their team of advisors and professionals. However, the Board will make some findings with respect to the processing of the application, and specifically with respect to the actions of the municipality in the process before the Board and the impact of these events on the findings of this Board.

The Board heard evidence from two planners who had worked for the appellants on this application, one who had been involved since the initial concept in 1990, and then one who had taken over the project in or around 1996. Both were consistent in their evidence with respect to the advice received from municipal planning staff as the project evolved. Most of the information was relayed to the planners in meetings with municipal staff, and was, for the most part, oral advice provided by staff. But the advice was recorded in minutes of meetings and to some extent in the first planning report prepared for the project in 1998.

The advice provided to these appellants as they moved through the process was that the proposal was not out of line with the policies of the County Official Plan, and that there were precedent approvals to which the appellants could look, where similar shoreline developments were approved by the County and subsequently the City. The direction provided to the appellants and their development team was that the City would rely on the decisions and comments of the relevant provincial and federal authorities, such as the Ministry of Natural Resources, the Ministry of the Environment, and the Trent-Severn Waterway particularly with respect to the environmental impacts of the proposal. The appellants were advised throughout that if the concerns of those

authorities were addressed, then there would be no issue, as far as the municipality was concerned, with the concept of the proposal, although there may be design issues.

As far back as 1993, after the issue with respect to the conversion of agricultural land had been resolved with the Ontario Ministry of Agriculture, municipal staff requested that the appellant investigate the possibility of servicing the development with communal services. This requirement was later determined to be inappropriate. At a meeting held in October of 1998 with municipal staff, including the departing staff planner having carriage of the matter, and the current City Planning Director, staff made positive representations with respect to the suitability of the proposal in the context of the County Official Plan. Both planning witnesses called by the appellants indicated that precise questions in this regard were put to staff and that staff reassured the appellants and their team that no serious issues relating to the application of the Official Plan remained outstanding, and that the appellants need only deal with the issues raised by commenting agencies.

Given this history, it was a surprise to the appellants, when the final planning report was issued some 10 years after the commencement of the process, recommending refusal of the project because it did not meet the Official Plan policy criteria for shoreline development.

The appellants did ultimately achieve favourable comments from all relevant provincial and federal authorities. Witnesses from many of these agencies gave evidence before the Board, and none of the evidence persuaded the Board of any fact other than that the appellants had satisfied the requirements of each of these agencies, as those requirements were mandated by their respective legislation and the system of planning administration in this province.

The evidence provided to the Board in this regard was not shaken by any cross-examination by counsel for the City. Counsel attempted to obtain professional opinions from representatives of the government agencies about their concerns with the proposal, which contradicted the positions put forward during the planning process. Such opinions, were couched by the witnesses in a form which indicated that the opinions were personal preferences, based on their professional biases. There was in these witnesses' evidence, a consistent recognition that the purity of their professional

preferences had to be balanced against other interests in the planning process, while ensuring that primary legislative mandates and objectives were protected.

Furthermore, the evidence of the planners for the appellants with respect to the advice and direction received from municipal staff during development meetings was not shaken in cross-examination. In disputing the evidence of the appellants' planners, the City relied on the evidence of its staff reports which, while raising issues with respect to Official Plan conformity, consistently refrained from providing any opinion or recommendation on the merits of the application until the final report, preferring to state that a decision on the principle of development would be made after receiving all information from the commenting agencies.

The City staff planner having carriage of the matter up to 1998 was subpoenaed to testify. His recollection of the advice he gave in meetings dealing with this application was foggy at best, and he relied on statements made in staff reports. However, when the Board asked this witness if it had been his practice to encourage a developer to proceed through the planning process and deal with commenting agencies when there was such a clear and insurmountable obstacle to the proposed development contained in the Official Plan policies, the witness advised the Board that this was not a particularly appropriate approach, but that there seemed to be some ambiguity in the interpretation of the Official Plan policies that would allow for this development.

The difficulty here was that the City was not simply relying on information from the agencies to form an opinion, but was going further, and directing the appellants to address the concerns of these agencies, and resolve their issues. The Board accepts the evidence of the appellant's planners that municipal staff had consistently orally represented to them that, should the appellants satisfy the concerns of the relevant provincial and federal agencies, the principle of development raised under the Official Plan could be addressed to the satisfaction of the City. The Board accepts the additional piece of advice from the planners for the appellants, that the appellants were aware that the density of the development was consistently identified by the County as an issue throughout, and properly remained an issue before the Board.

The Board finds that in the end result, the City did not rely on the final resolution of environmental concerns with the relevant environmental and planning agencies.

Instead, the City, once knowing that the appellant had satisfied most, if not all of the concerns of those particular agencies, retained environmental specialists of its own, who proceeded to identify further issues of a nature the appellants could legitimately have expected to have been resolved with the "sign-off" of the relevant provincial and federal environmental agencies. The City claimed that these consultants were retained for the Board hearing. This does not answer the question as to why they were necessary at all, when the advice given to the appellants was that the City would rely on the commenting agencies to resolve the environmental issues.

Only after the City had received confirmation that the primary environmental agencies had been satisfied or that only a few outstanding issues remained, and only in their final report, did the City recommend refusal of the development based on Official Plan policies.

Such action is entirely appropriate in circumstances where the environmental concerns of the municipality are known from the outset and the fundamental issue with respect to the Official Plan is not only identified from the beginning, but also reinforced by staff throughout the process. This is not the case here where the appellants were directed to proceed to satisfy the concerns of the relevant agencies. The actions of the municipality ran counter to the direction given to the appellants and the consequent legitimate expectations of the appellants as they worked their way through the planning process. The actions of the municipality also ran counter to an agreement reached by the parties at a pre-hearing conference before this Board in December of 2001.

On December 3, 2001, the Board attended at what was to be the commencement of a three-week hearing to deal with this matter. At that time, the parties requested that the Board adjourn the hearing sine die, because they had reached an agreement, which could result in the resolution of the issues.

On December 13, 2001, the Board issued Decision/Order No. 2042, which stated the agreement clearly as follows:

"The City has advised that if the following conditions are met, then the staff and solicitor are prepared to take a modified plan of subdivision to Council for approval and recommendation for approval to this Board".



The conditions were that the appellants obtain the requisite permits for dredging the mooring basin and channel connection which are part of the proposal; that the appellants re-survey the boundary of the Provincially Significant Wetland to the satisfaction of the Ministry of Natural Resources; that the appellants address the City's storm water management issues, and that the subdivision plan and the zoning by-law establish an MDS separation distance to the satisfaction of the City.

The evidence is clear that the appellants satisfied these conditions. The evidence was also clear that the staff and solicitor did not take the plan of subdivision to Council for approval. Rather the staff and solicitor took the opportunity to use the results of the appellants' efforts to raise additional issues, and force a full hearing of the matter. They relied on the fact that the permits cited in the settlement agreement were issued for a boat mooring which took a different form than proposed at the pre-hearing in December of 2001, and that the resurveyed boundary of the Provincially Significant Wetland agreed to by the Ministry of Natural Resources was different than the boundary shown in the planning maps and documents relied on by all parties, including the City, up until the date the hearing was originally scheduled to commence.

The Board does not agree with the City that the final form of moorage approved by the Trent-Severn Waterway and Fisheries Canada absolved the City of its obligations under the agreement reached at that pre-hearing, or that the different form of moorage for the development raised any additional issues that were not contemplated by the moorage arrangement proposed in December of 2001.

Furthermore, given how this matter has evolved, the Board will not be bound, in considering this matter, by the revised wetland boundary, insofar as it resulted in an extension of the provincially significant wetland across the southerly portion of the property where the moorage facility has always been proposed to be constructed, and at which location the facility remains, albeit in a different form.

### **Sufficiency of the Environmental Evaluation and Assessment of Impact on the Wetland**

There was no issue before this Board relating to any negative hydrogeological or storm water impacts on the wetland or on the quantity or quality of the Lake water or ground water.

However, there was an immense amount of evidence called by the City and by the Ratepayers, in an effort to demonstrate that the environmental evaluation of the wetland was insufficient and thus, inadequate to assess the impact of this development on the wetland and on the woodlots on site. Methodologies were questioned and doubt was raised about the results of the environmental assessments.

The Board listened carefully to all of the evidence on this issue, which evidence took up most of the hearing. The Board was puzzled throughout as to why these criticisms were being brought to bear on this matter at such a late date in the consideration of this application, and why the issues were not raised at the beginning of the development proposal when the municipality could have provided the appellants with terms of reference and detailed direction on what was expected. The Board is particularly puzzled with the City's approach, given the settlement terms which had been conveyed to the Board at the pre-hearing conference in December 31, 2002.

The environmental assessment of the wetland and site was completed by Phil Niblett and Associates, and included, over the course of the processing of this matter, and in response to issues raised by the City after the appeal of this matter, the following studies:

1. 1997 Environmental Report
2. 2003 Updated Environmental Evaluation
3. Fisheries Addendum Report, 2002
4. Migrant Waterfowl Report, 2002
5. Fish and Aquatic Habitat Assessment – Proposed Dredged Channel, 2002
6. Impact Assessment – Proposed Dock Alternative (2), 2002, 2003

The reasons for the additional studies, the methodologies employed and the results of the studies were carefully explained to the Board. Results gleaned from these studies were translated into recommendations for improvements in the development so as to avoid or mitigate impacts. For example, the floating dock is to be

located so as to avoid identified muskie spawning habitat, and the subdivision has been designed so as to maintain a large buffer between the development and the wetland and so as to preserve much if not all of the woodlot located on the site.

By contrast, the Board finds that the comments and criticisms of the witnesses called by the City and the Ratepayers were unhelpful, picayune, and in some cases, unfounded. The Board does not accept any of the criticisms aimed at the methodologies employed by the appellants' consultant. The Board also finds that the criticisms with respect to the outcome of the studies were of a nature that would require a level of study, which was not merited, given the size and nature of the development proposal.

The Board finds that all of the conclusions of this consultant were supported by appropriate levels of study. None of the criticisms leveled at the environmental work demonstrated that the work was defective or that the conclusions were wrong; only that there were more studies that could be completed and different methodologies that could be employed that might provide additional information. Nothing persuaded the Board that different results or conclusions would be achieved.

The Board finds that the environmental evaluations were more than adequate for the purposes required in this development. A different development might require a different level of study. However, in this case, given the information obtained, the size and design of the development and associated moorage, and the nature of the lake and the environment and adjacent development, the environmental studies were adequate, and met the requirements set out in the Official Plan policies.

The witnesses for the City, however, did provide comprehensive, supplemental information on the impact of motor and air-propelled boating activities on vegetation and fish habitat on the wetland. The Board accepts this information and finds that there may be impacts from boats on aquatic vegetation and, as a consequence, on fish habitat.

However, this information must be placed in the context of the information provided relating to the environmental character of this lake. Lake Scugog is a very shallow lake, much of which is less than 3 feet deep with dense aquatic vegetation. It

was generally acknowledged that it is not a lake where swimming is the most desirable activity. It is part of the Trent-Severn boating system and thus the primary water-based activities for this lake are boating and fishing.

All expert witnesses acknowledged that the muskie population in this lake is thriving. All witnesses acknowledged that a primary resource and recreational objective for this lake was to maintain and enhance the muskie population for recreational fishing purposes. |

The dock for this proposal will be located at the most southerly end of the wetland and of the property, so as to be on the periphery of the wetland, as it has been resurveyed, and so as to be distant from a previously identified muskie spawning locale. It is clear that wild rice, as an aquatic vegetation, has become abundant in Kings Bay, and that this is the preferred habitat for muskie. It is also clear that any impact on this wild rice will be incidental given the barrier such vegetation creates for motorized boats. Furthermore, although there was evidence of the specific potential impact of motorized boats on the wetland, there was no evidence of the significance of such an impact. Given the geographic context of the site, and the current heavy use of this lake by motorized boats for fishing, and boating, the Board finds that the impact of the small number of boats proposed for this development will be negligible.

Furthermore, the Board accepts the conclusions of the Trent-Severn Waterway and the federal Department of Fisheries and Oceans that the proposed docking facility as amended after discussions with these agencies and further study, will not create any harmful alteration, destruction or disruption of fish habitat in the area.

The Board also finds that there are no demonstrated hydrogeological or other construction impacts on the ecological functions of the wetland, due in large part to the thirty metre buffer provided in this development proposal, the size of the lots, and the regulations proposed to be imposed on this development.

### **Conformity with the Provincial Policy Statement**

All parties agreed that there were no outstanding issues with respect to the conversion of agricultural lands to residential shoreline development under the Provincial Policy Statement (PPS). The major area of contention among the parties

was the Natural Heritage Policies. In particular, Sections 2.3.1 and 2.3.2 were raised as issues. !

Section 2.3.1 (a) states:

Development and site alteration will not be permitted in:

- Significant wetlands south and east of the Canadian Shield;

Section 2.3.2 states:

Development and site alteration may be permitted on adjacent lands to a) and b) if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area is identified.

It is agreed that the wetland adjacent to the site is a significant wetland south and east of the Canadian Shield, and is thus covered under this policy. It is further contended by the City and the Ratepayers that the construction of the seasonal floating dock constitutes development and site alteration within the wetland, despite the fact that the dock will be installed within strict timelines to avoid fish spawning season, will be a floating dock with only dock anchors located within the wetland, and on the adjacent land block, and was approved by both the Trent Severn Waterway and the federal Department of Fisheries and Oceans, as a proposal which would not constitute a harmful alteration, destruction or disruption of fish habitat. In fact the TSW and the DFO reviewed several iterations of the dock proposal and had in fact, at one time approved the construction of a moorage basin proposal.

In December of 2001, at the time the hearing of this matter was originally scheduled, the proposal was for a moorage basin for 64 boats with a permanently dredged boat channel. On application for the requisite permits as required by the settlement agreement outlined in the Board's December 13<sup>th</sup> order, a detailed review was conducted by the TSW and the DFO, which resulted in a changed proposal for a floating dock for 8 boats, with subsequent phasing for up to 32 boats, subject to additional environmental assessments.

In considering this issue, the Board starts with the premise, above-described, that it will not be bound by the re-surveyed wetland boundary, which would result in the extension of the wetland along the southerly shoreline, where the moorage facility is proposed. However, the Board finds that, in any event, the proposed moorage facility or

floating dock does not run counter to the policies set out under the Provincial Policy Statement in this regard.

The Board was advised that the owners of this property were currently in a position to construct the dock without any further approvals. Such dock facilities are permitted under the current zoning by-law, subject to the acquisition of the requisite docking permits from the responsible authorities

“Development” under the Provincial Policy Statement means the “creation of a new lot, a change in land use or the construction of buildings and structures, requiring approval under the *Planning Act*”. Although there was some attempt to parse the meaning of this definition, it is clear to the Board that development is considered for the purposes of the Provincial Policy Statement as something that requires approval under the *Planning Act*. This only makes sense, as it is such approvals to which the Provincial Policy Statement applies.

In the case before the Board however, no such approvals are required. The owner could currently construct this dock facility without any approvals forthcoming from this Board. The Board therefore finds that there is no contravention of the PPS in this regard.

Based on the evidence before it, the Board also finds that the installation of a floating dock in the wetland does not constitute site alteration for the purposes of the Provincial Policy Statement. Site alteration is defined as activities such as fill, grading and excavation that would change the landform and the natural vegetative characteristics of the site. No such activities are contemplated. There will be some impact on the vegetation in the wetland as a result of boating activity, which will occur, but the Board finds that such an impact cannot be considered site alteration.

However, the Board accepts the evidence and opinion of the planner for the Ratepayers, who stated that with the introduction of a large number of residents into this area, there is a high risk of damage to the wetland as a result of residents attempting to access the wetland, or to create their own personal access to the water through the wetland.

The Board therefore finds that there is an issue of conformity with the PPS as far as the impacts on the ecological functions of the wetlands arising from the density of development and the resultant number of additional people being introduced into the area.

The Board finds that this type of impact on an adjacent sensitive ecological area is a consideration in the determination of this matter, even in the absence of the PPS policies.

### **Conformity with the Official Plan**

Much of the hearing was taken up with different interpretations of the Shoreline Designation policies of the Official Plan. Two other shoreline developments in the municipality, the Kings Bay development and the Sturgeon Lake development were debated at length. Both the appellants and the City claimed that these developments represented or supported their diverse interpretations of the Official Plan policies.

The Board views the application of the Official Plan as the crux of this matter. It is important to carefully review the purpose and scope of the Official Plan, the growth strategy, the goals and objectives and the general policies as well as the policies for the Shoreline Development designation in order to grasp the essence of the intent of these policies. The Board will therefore outline the key provisions of the Official Plan in order to determine this intent.

However, the Board first wishes to address the environmental issues raised at the hearing in the context of the Environmental Policies of the Official Plan.

### ***Environmental Policies***

There is an emphasis throughout the plan on proper management of natural environmental features, and the sensitive development and use of natural environmental resources. There is contained in the plan, a map of the Sensitive Areas located within the County. Section 5.1.2 requires that an Environmental Evaluation be completed for development proposals adjacent to Sensitive Areas when the Ministry of Natural Resources or a Conservation Authority determines it necessary. The Kings Bay

part of Lake Scugog, adjacent to the subject site, is noted as both a Sensitive Area and as Environmental Protection.

Sections 5.1.3 and 5.1.4 describe what is to be contained in such an evaluation. Section 5.1.5 indicates that the City will consult with appropriate government agencies in determining the exact nature and scope of any evaluation.

The Board finds that City staff directed the appellants to consult with the relevant government authorities to determine the scope of the environmental evaluation and the appellants complied. Such an approach constitutes an environmental evaluation of the nature and scope required under the Official Plan.

Again under the section of the Plan dealing with Resource Management – Recreation and Shoreline Development, there is a requirement that where shoreline is designated as Environmental Protection or shown to be a Sensitive Area, then intensification shall not be permitted until a form of environmental evaluation has taken place which includes a description of actions necessary to prevent, change, mitigate or remedy effects on the sensitive features. The Board finds that such a study was completed and that the study was adequate and supported the conclusions and recommendations of the witnesses who gave evidence before this Board.

Thus the Board finds that the appellants have complied with the policies of the Official Plan relating to the environment, and for the reasons previously outlined have demonstrated that the construction of the dock and the development of the land in and of itself will not create any undue adverse impact on the sensitive wetland.

### ***Shoreline Development Policies***

Section 2.2.1 which is found as part of the “Basis” of the plan states that provision is to be made for a wide range of lifestyles for residents by offering a variety of housing opportunities. Section 2.2.2 acknowledges the role that shoreline areas will play as retirement nodes. And Section 2.2.3 asserts that the utilization of natural resources for recreational uses will be encouraged on *lands best suited for the specific purpose*.



In the “Growth Strategy, Goals and Objectives” section of the plan, Section 4.1 establishes that population growth will, for the most part, be encouraged to take place in urban and hamlet areas where piped services exist.

The plan acknowledges the recreational development potential of the County, but recognizes the limitations of the potential. Section 4.1 states that until more is known about the recreational potential of the lakes, development priority will be given to vacant land which is not designated Environmental Protection, and which is adjacent to shoreline with comparatively high recreational potential. The Section also indicates that cluster shoreline development will be encouraged where a portion of the shoreline is retained as open space.

Section 4.4.2.3 states specifically the intent with respect to future development along the shoreline. It states: “future development proposals in the shoreline areas should be evaluated on the basis of the impact on water quality and related recreational experience”. Section 4.4.6.4 outlines one of the Objectives in respect to recreational development is to optimize recreational opportunities while maintaining a high level of environmental quality, safety, and *user satisfaction*.

The “Shoreline Designation” policies provide that the predominant use of land shall be for single family detached seasonal and permanent residential lots.

Section 6.7.1 states:

Shoreline residential subdivisions should be designed to avoid the complete development of the shoreline with a single or multiple rows of lots. A comprehensive design of large areas shall be encouraged, ensuring the maximum use of the water frontage. In general, a greater number of units will be permitted for a given site, if the units are located in clusters back from the shoreline with a portion of the shoreline being retained as open space.

It was this design policy, which the appellants paid special attention to in the design of the subdivision. The proposal is premised on the contention that it is cluster development with a single access to the water, open space shoreline, and development back from the waterfront, with access to the water.

The debate between the City and the appellants starts with Section 6.7.2. which states:

County Council will consider cluster type development proposals where undeveloped contiguous open shoreline exceeds 100 linear metres.

It is the City's contention that this parcel has no "open" shoreline, because there is a wetland along the whole of the frontage of the shoreline. The appellants say that the whole of the shoreline is open, because it is undeveloped. Both parties referred to the Kings Bay development and the Sturgeon Lake development in making their arguments. Both developments were approved on properties, which were adjacent to shorelines, the vast majority of which was wetland. There was debate about how much shoreline was without wetland, and therefore "open" according to the city, and where the shoreline was located and whether it should be counted.

For a number of reasons, the Board finds that it is not appropriate to interpret this clause as meaning "open water shoreline", but rather that Open Shoreline means undeveloped shoreline.

Firstly, Official Plans are primarily geared to governing land. Generally, (and this is true in this Official Plan), in planning documents the word "open" means without development or structures. Where a planning policy document is intended to deal with water development there is a specific and unusual intent, and it should be explicit in the document. There is no reason why the drafters of this Official Plan would not have expressly indicated that the meaning of open shoreline meant without water vegetation, if that had been the intent.

Secondly, the vast majority of the shoreline of this lake has water vegetation, whether or not it is classified as wetland and therefore, might be suspect as not being "open" shoreline. Thirdly, the examples of the Kings Bay and Sturgeon Lake development, which the Board finds do not meet this policy criteria if interpreted the way the City suggests, indicates that there is some ambiguity or uncertainty about the meaning of this provision. And finally, the evidence given by the staff planner having carriage of this matter in the initial eight years of processing, and the actions of the City in regard to this application, throughout the 10 years of processing, indicate that there is

clearly some difference of opinion about the correction interpretation and application of this provision. Given the experience of the appellants in moving through the process with this development, the benefit of the doubt in interpreting this clause is best given to the appellants.

The Board finds that the proposal conforms with Section 6.7.2.1, which requires that cluster shoreline development should be visually or topographically oriented toward the water body. The site slopes toward the water and provides a view of the water from most of the property. The wetland and woodlots on the property do provide a natural barrier for a large part of the development to a large part of the water body, but the proposal includes a water access solution which is sensitive to and mitigates any impacts on the wetland and woodlots, which has been approved by the government agencies mandated to protect these natural features.

Section 6.5.2.3 sets the maximum density for such cluster development at one single family detached dwelling for every seven meters of "undeveloped open space shoreline". Notwithstanding the City's contention that this phrase means open water shoreline, the Board finds that the plain meaning of this section refers to the portion of the shoreline for which there is no development on the land side of the shoreline. Given the extensive shoreline for this property, the proposed 64 dwelling units, clearly meet this Official Plan criteria. The Board also finds that most if not all of the lots meet the criteria of being located within 300 metres of the waters edge.

The Board now comes to what it views as the crux of the issue with this development. That is the issue of density or size of the development, referred to previously in this decision under the section dealing with conformity with the Provincial Policy Statement.

It is clear to the Board that the policies of the Official Plan dealing with shoreline development, indicate that such shoreline development is acceptable, and encouraged as an appropriate use of one of the City's natural resources. In fact, the Board heard from the planner called for the City that shoreline development is viewed as an appropriate, accepted and intended development of rural agricultural land in the City. However, the Official Plan policies make it clear that shoreline development is to be physically and functionally related to the recreational use and experience of the lakes in

the City. It is NOT to be viewed as simply an opportunity for population growth in the City for a number of reasons, not the least of which is that the Official Plan directs most of the future population development towards hamlets and urban centers, and expresses an explicit intent to limit development outside of these areas to ensure the City's financial ability to service new development and to ensure a quality of use and experience of the natural lake resources.

The Board's view in this matter is explicitly confirmed in Section 6.7.2.4 of the Official Plan under the "Shoreline Designation" policies, which states:

Council will evaluate the density for any specific proposal on the basis of:

- the general suitability of the shoreline for small craft navigation, swimming, and other water oriented activities;
- the planned use of the open space shoreline i.e. natural or man-made recreational facilities;.....
- the topography and vegetation of the site;.....

The Board heard evidence from planners on all sides of the issue with respect to the significance of the recreational use of the lake to the development. It is clear from the evidence, that the significance of this lake for swimming is minimal at best. This can be considered true of the recreational experience being provided by the subject development as well. Given the natural characteristics of the shoreline in this area, boating of both small motorized craft and non-motorized craft would be the key recreational experience for residents of the development.

In the proposed development, water access will be provided for 16 motorized boats, and an additional 16 likely non-motorized boats. Provision for storage for the non-motorized boats is provided in Block 67. The Board heard evidence from the witness from the Trent-Severn Waterway that this provision for boats was typical of boat slip usage in the area for such developments. Generally, he asserted, the use of such mooring facilities equals about 50% of the number of lots.

While the Board respects this information, the Board also accepts the information taken from the City's planning witness and the planner called by the Ratepayers. The concern indicated by both of these witnesses was the pressure brought to bear for

access to the water when development occurs along the shoreline or back from the shoreline.

The Board is aware that most significantly, the recent Kings Bay development does not ensure any water access. However, the Kings Bay development does provide other alternative recreational experiences in the form of a golf course along the shore. Furthermore, the Board adopts the evidence of the planner for the Ratepayers, when she stated that mistakes made in the past do not justify a repeat.

The Board also adopts the concerns of the planner for the Ratepayers that the approval of a development of this size will create undue pressure on the shoreline for additional access to the water along that shoreline, perhaps resulting in irreversible impacts on the sensitive wetland. The fact that the number of residents proposed for this development will outnumber the number of specific accesses to the water, underlines this concern.

The Board further adopts the evidence of the planner for the Ratepayers when she stated that the development was in fact a rural residential development, not a shoreline development because it was not sufficiently connected to the recreational experience of the lakes as required by the Official Plan. It therefore runs counter to the Official Plan policies with respect to channeling development towards hamlets and urban centers.

As well, the Board adopts the concern of the planner for the Ratepayers with respect to the size of the proposed development. It is, quite simply, too large a development to impose on this shoreline community. While the Board is convinced that the financial impacts on the City will be minimal, it is not a proposal, which will be a natural, unobtrusive extension of the existing shoreline development, related to the water recreational experience.

Finally, the Board adopts the opinion of the planner for the Ratepayers that an appropriate density for this development would be in the order of 22 lots.

## Conclusion

The Board therefore finds that a cluster shoreline development in this location with the access proposed by the appellants is appropriate, conforms with the Official Plan policies, and the Provincial Policy Statement and represents good planning, provided the size of the development is appropriately related to the recreational experience that can be provided for this site.

Given that the appellants can provide access, which does not exceed 16 motorized boats and 16 non-motorized boats, the number of lots permitted should be related to this access. The number of lots should also reflect a compact development that is physically and functionally related to the water access being provided.

The Board, will therefore approve an Official Plan Amendment, zoning by-law amendment and plan of subdivision which permits the following:

1. The creation of Block 67 as a water access lot, from which the docking facility shall extend as approved by the Trent-Severn Waterway. Block 67 shall be modified as necessary to provide for the extension of Street B to Gilson Street; a small parking area; an anchor for the docking facility and a storage area for boats. Block 67 will only be designated and zoned Environmental Protection outside of the area required for the aforesaid facilities.
2. The creation of a plan of subdivision including Lots 21, 22, 23, 24, 25, 26, 50, 51, 52, 53, 57, 56, 55, 54, 20, 19, 18, 17, 15, 14, and 13 shown on the plan of subdivision considered at this hearing. It is anticipated that Lot 16 will be required for the extension of Gilson Street, and Lot 15 can be adjusted accordingly. In addition Lots 54, 55, 56, and 57 can be adjusted to reflect the type of lotting found in Lots 17 to 20.
3. Street B extended to Gilson Street, along with a Street A which ends prior to the commencement of the woodlot.
4. No MDS restriction will be required on Lots 56 or 57.
5. Block 66 may be retained or Lots 25 and 26, may be extended, to meet the appropriate setback from the wetland area.
6. Associated storm water management facilities which do not intrude into the identified woodlots.

7. There will be a condition of draft approval which will require that prior to release of the first lot, the first phase of the moorage facility will either be constructed or secured, and the second phase of the moorage facility will be secured to ensure construction of both subject to required approvals.
- 8 The remainder of the property will be designated and zoned for Agricultural uses, and for Environmental Protection uses where the wetland has been identified.

Should the Board receive an Official Plan Amendment, zoning by-law amendment, plan of subdivision and related conditions of draft approval, which reflect the Board's decision in this regard, the Board will issue an order approving these documents. If issues arise with respect to the decision of the Board in this regard, the Board will hold either an oral hearing or hearing by teleconference to resolve the issues at the request of any party.

If the Board does not receive planning documents reflecting the Board's decision by May 31, 2004, the Board will dismiss the appeals.

"S. D. Rogers"

S. D. ROGERS  
MEMBER