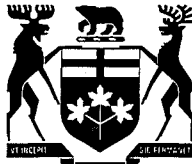


ISSUE DATE:
Oct. 18, 2007
DECISION/ORDER NO:
2748



PL070548

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

IN THE MATTER OF subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Applicant and Appellant: Melanie Maile
Subject: Consent - Appeal of Condition 7 of provisional consent
Property Address/Description: 1265 Rosseau Lake Road 2 Unit 1
Municipality: Township of Muskoka Lakes
Municipal File No.: B-85/06 ML
OMB Case No.: PL070548
OMB File No.: C070141

APPEARANCES:

Parties

Counsel

Melanie Maile

Township of Muskoka Lakes

D. A. Trinaistich

H. Elston

DECISION DELIVERED BY S. J. SUTHERLAND AND ORDER OF THE BOARD

Melanie Maile (Applicant) owns a 22.7-acre waterfront lot with 595 feet of frontage on Lake Rosseau at 1265 Rosseau Lake Road (Subject Property) in the Township of Muskoka Lakes (Township). The applicant applied for three severances in order to sever and add to the abutting lot to create two additional lots. The application involved two parcels of land. The other property is a 34-acre rural lot with over 1500 feet of frontage on Lake Rosseau owned by Andrew Stirvins. This lot is vacant. The Maile lot has an existing cottage and sleeping cabin.

The Township's Committee of Adjustment (COA) granted the severances, combining the two properties and reconfiguring them into four lots. The consents were subject to eight conditions. There was no public objection to the application. The applicant is appealing condition 7 for the following reasons:

- It is onerous and unnecessary.
- The condition imposes certain setbacks and/or rezoning. The basis for condition 7 is to implement the Official Plan (OP) - waterfront designation requirements. It is the applicant's contention that this is an incorrect interpretation of the waterfront designation policies of the OP.
- There is no public interest served by the inclusion of condition 7.

Condition 7 of the COA decision reads: "That either a minimum setback of 300 feet be imposed from the proposed southerly lot lines of Maile retained lot #1, Strivins retained lot #1, and Maile severed lot #2, or an area of this depth be rezoned Open Space (OS2), or lot lines be reconfigured to these points." (Exhibit 10)

John Jackson, a land use planner with considerable experience in the Muskoka Lakes area, gave expert evidence on behalf of the applicant (Exhibit 2). Mr. Jackson told the Board that the approximate distance to the lots to which condition 7 applies, the so-called "red zone" on the map illustrating the effect of condition 7 (Exhibit 7), is 1,459 feet. He said that two new rural lots are created by the consent and that all the lots comply with Zoning By-law 87-87 (ZBL). He emphasized that these lots are currently zoned "rural" and not "waterfront", and that they will be "waterview" not "waterfront" lots. Therefore, the application does not represent "second tier" or "backlot" development, which applies only to waterfront lots.

Even if the lots were judged to be within the Waterfront designation, Mr. Jackson maintained that they could be developed as backlots. He made reference to the Section B 9.4 (b) of the Township OP, which states that one of the two forms residential could take in a Waterfront Development area is "backlot development, consisting of individual dwellings within the Waterfront designation, separated from a waterbody by a legally developable piece of patented land."

Mr. Jackson told the Board that the lots to which condition 7 would apply are the most desirable lots for the location of new residences because they have a view of the water. He said that, because of the narrowness of the bay onto which the residences would face, they would not be visible from the water and would therefore have no impact upon it.

The issue here really turns on whether or not the lots to be created in the "red zone" are, in fact, "waterfront" and not "rural" lots. A key reference in the District Official Plan (Exhibit 2) defines "waterfront" as, "lands which physically or functionally relate to the Waterfront designation, although extending beyond 150 metres (500 feet) from the water body." The District OP continues, "lands which do not physically or functionally relate to the Waterfront designation, although within 150 meters (500 feet) of the water body will be deemed not to be within the Waterfront designation."

The District OP states, "the Rural designation is identified as those lands in the District not directly identified as being subject to any strategic land use designation specified in this plan. Section B 1.3 of the Township's Official Plan states, "The precise limits of the Waterfront designation shall be defined and illustrated in an implementing comprehensive zoning by-law." (Exhibit 2)

If the lots in question are "rural" and not "waterfront" lots, then they cannot and do not constitute "second tier" or "backlot" development.

The key words are "physically or functionally related".



It was Mr. Jackson's contention that the lots in question are neither. They do not physically front on the shoreline and the only relationship they have to the lake is a view over the water. A view does not constitute a functional relationship in Mr. Jackson's opinion. He pointed out that there is no policy provision in the District or Township OP that describes a view over the water as being part of a functional relationship to the waterfront.

"In fact," Mr. Jackson wrote in his evidence outline (Exhibit 2), "given the undulating terrain of Muskoka, this is a policy that would not be practical. Many higher elevations view lower lands, including water bodies, from several kilometres."

Stephen Fahner, Director of Planning for the Township, gave expert opinion in contradiction to Mr. Jackson's. He maintained that the lots to which condition 7 applies have a physical relationship to the water in that they drain into it. He further maintained that a view does indeed constitute a functional relationship.

While acknowledging that water does flow down hill, the Board also notes, as Mr. Fahner admitted in cross-examination, there is no drainage plan for the subject property to illustrate the exact course the water would take. Moving the potential residences further up the slope as recommended by condition 7 would not, in any event, stop water from flowing down hill. If drainage from the property constitutes a physical relationship, that would not be rectified by condition 7.

Does a view constitute a functional relationship, as Mr. Fahner maintains? The Board finds this concept difficult and prefers Mr. Jackson's position that it does not. A view of any body of water can be had from a height of land a great distance from the water. If one extends Mr. Fahner's argument to its logical conclusion, a residence sitting on a hilltop several kilometres from the water would be sitting on a waterfront lot simply because it had a view of the water. The Board does not believe this to be reasonable. Neither can the Board accept Mr. Fahner's assertion that the enjoyment of the breeze off the water constitutes as functional relationship with the water.

More helpful to both applicants and the Board would be a definition in the Official Plans of the District and Township of what is meant by a "functional" relationship to the waterfront.

The Board accepts Mr. Jackson's position that the lots which are the subject of Condition 7 are rural lots, as they are currently zoned, that they are neither physically nor functionally related to the water and are not, therefore, waterfront lots. The Board also accepts Mr. Jackson's position that there is no conflict with the Provincial Policy Statement with the deletion of Condition 7, and that the subject lots comply with the Rural policy for both the District and Township OP.

The Board Orders that the appeal is allowed and that Condition 7 of the Decision of the Committee of Adjustment dated June 4, 2007 is deleted.

The Board so Orders.

"S. J. Sutherland"

S. J. SUTHERLAND
MEMBER