**Ontario Land Tribunal – Landmark Decision for the Protection of Wetlands and Fish Habitats**

The purpose of this article is to provide a case study on the recommended planning application process for municipalities to follow, clearly confirmed, in this case, by both the experts who opined and the Ontario Land Tribunal. The need to follow the right process has become even more important following the introduction of Bills 109 and 23 in Ontario.

**INTRODUCTION**

Some years ago, a purchaser bought a lot in Honey Harbour at a distressed price from an estate sale. The lot was wide, but very shallow in depth, and was fronted by a Wetland and Type 1 Fish Habitat (FH-1). Based on advice from the Ontario Ministry of Natural Resources and Forestry, the Township of Georgian Bay placed an Environmental Hold (H-1) on the property.

More recently, the purchaser made application to the Township of Georgian Bay for removal of the Environmental Hold and for a zoning by-law amendment to allow a dock in the wetland and fish habitat. Included with the application was an Environmental Report. Based on a peer review from Sarah Mainguy of North South Environmental, which stated that the required studies for endangered species and species at risk had not been undertaken, Planning Council of the Township of Georgian Bay did not approve the application. In response to this action by Planning Council, the applicant appealed the matter to the Ontario Land Tribunal.

Eastern Georgian Bay Protective Society Inc. had retained North South Environmental for Sarah Mainguy’s report. In view of this, it was agreed that the Township of Georgian Bay and Eastern Georgian Bay Protective Society Inc. would collaborate on the defence of the Planning Council decision. The Township of Georgian Bay retained Allan Ramsay for expert planning evidence and Dr. Andrea Smith, Ph.D. and Sarah Aiken of Hutchinson Environmental Sciences Ltd. for peer review and expert environmental evidence. Eastern Georgian Bay Protective Society Inc. retained David Donnelly of Donnelly Law as legal counsel, Sarah Mainguy of North South Environmental, for expert terrestrial evidence, and Dr. Pat Chow-Fraser of McMaster University for expert aquatic evidence.

**THE EVIDENCE**

1. It was the evidence of Allan Ramsay (professional planner) that the appellant’s Planning Submission did not comply with the provisions of the Provincial Policy Statement, the Official Plan of the District of Muskoka, and the Official Plan and by-laws of the Township of Georgian Bay. Furthermore, matters such as the environmental impact and the development feasibility needed to be determined prior to the issuance of a site plan - not afterwards through site plan control.

The reference for this approach was presented by Alan Heisey, QC, and his associate Michael Krygier Baum in their opinion of August 26 2020, addressed to the Township of Georgian Bay.

2. It was the evidence of Sarah Mainguy (terrestrial biologist) of North South Environmental, that the appellant’s Environmental Impact Assessment did not include the prescribed studies for endangered species and species at risk, to support the conclusions submitted.

3. Dr. Pat Chow-Fraser (aquatic biologist) of McMaster University, did a comprehensive study of the wetland and fish habitat, and determined that it was a flourishing nursery for fish, turtles, and other aquatic life.

4. It was the evidence of Dr. Andrea Smith (terrestrial biologist) and Sarah Aiken (aquatic biologist) of Hutchinson Environmental, that they agreed with the report of Sarah Mainguy and the study and report of Dr. Pat Chow-Fraser.

5. It was the evidence of David Fancher (professional engineer) that due to the very gentle slope of the bay bottom, a dockage would need to be 55m (170’) in length to achieve a 2m (6’) water depth at the end in low water – 175.2CGD. As well, due to the restricted dimensions of the building envelope, it had not been determined that the lot could support both a cottage and the needed septic system.

**THE DECISION**

The Appeal was heard by Ontario Land Tribunal members G. Burton and D.S. Colborne, who are both Vice Chairs. In their Decision dated June 29 2022 they stated:

[75] “It is insufficient to rely on the site plan stage to rectify any problem of even potential harm to protected wildlife or fish habitat.”

[83] “The test of no negative impacts on high quality fish habitats has not been met. Potential impacts have not been fully conducted, and no specific mitigation methods have been recommended.”

[84] “The Tribunal orders that the appeal is dismissed and the requested amendments to Zoning By-Law No. 2014-75 of the Township of Georgian Bay are refused.”

The applicant then made a Section 23 Request for Review (appeal) of the June 29 2022 Decision. The Decision was reviewed by Michael Kraljevic, Interim Chair of the Ontario Land Tribunal. The request for a rehearing was dismissed and the Decision remains in full force and effect as at October 12 2022.

**CONCLUSION**

“This case represents a triumph for environmentalists in showing ‘no negative impact’ cases can still be won at the Tribunal; developers cannot rely on inadequate environmental studies and species survey methods; and environmental studies are to be performed at the zoning stage rather than as an afterthought as a condition of site plan approval.” - David Donnelly