

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 18, 2017

CASE NO(S): PL160402

PROCEEDING COMMENCED UNDER subsection 51(39) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Minaki Cottagers Association Inc.
Appellant:	Alex Rheault
Subject:	Proposed Plan of Condominium
Property Address/Description:	Part of Registered Plan M-222
Municipality:	District of Kenora
Municipal File No.:	60-CD-15406
OMB Case No.:	PL160402
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Heard: July 17-26, 2017 in Kenora, Ontario

APPEARANCES:

Parties

Alex Rheault
Minaki Cottagers Association Inc.

Counsel

David Bronskill and Richard Handlon

Minaki on the River Inc.

Ira Kagan and Alexandra De Gasperis

Ministry of Municipal Affairs

Janice Page

DECISION DELIVERED BY SHARYN VINCENT AND ORDER OF THE BOARD

INTRODUCTION

[1] Alex Rheault and the Minaki Cottagers Association (“MCA”) appealed the decisions of the Minister of Municipal Affairs (“Minister”) to grant draft approval of proposed plans of condominium for a portion of the lands commonly known as the former Minaki Lodge (the “Lodge”) site located in the unorganized northern Ontario community of Minaki on the Winnipeg River.

[2] After almost ninety years of operating as a principal attraction for those seeking the wilderness recreational experience, the main lodge was completely destroyed by fire on Thanksgiving weekend in 2003. The Lodge had been sited on a promontory at the apex or gateway to four lakes within the river, and represented a significant landmark and/or destination for those originally travelling by rail and boat, and later mid-century by road.

[3] The fire left behind the two 3 and 4 storey clusters of hotel rooms added during the short term ownership/economic stimulus effort by the Province of Ontario to create a conference centre destination in 1974-87.

[4] Nine of the original cottage cabins, the firehall and the sewage treatment plant (“STP”), all which share the wilderness/vintage log cabin vernacular of the lost Lodge, a contemporary freestanding water side restaurant, also added, and a nine-hole golf course which had operated as a complementary draw to the Lodge from 1927-2003 also survived the fire.

[5] Minaki on the River Inc. (“MOTR”) acquired the site in 2010 and seeks to renovate and convert the former 120 hotel suites into 56 standard condominium units,

while creating 83 vacant land condominium units, one of which is a commercial unit for the former restaurant. A total of 138 opportunities for new seasonal recreational condominium ownership are proposed.

[6] The vacant land condominium units are parcels of varying sizes, generally in the area of 500 square metres and having lot widths of 13-15 metres aligning the existing driveways servicing the site. A new cul-de-sac subdivided for 20 units is proposed in the general area of the sixth and second fairway of the nine-hole golf course. Only the lands dedicated to five of the nine holes has been incorporated into the lands subject to the applications for draft condominium approval, although the owners do have ownership interests in balance of the golf course lands and beyond.

[7] Over the course of 10 days, the Board heard evidence in support of the appeals from four experts: Tony Usher, planning; Ken Drysdale and Anne Egan, engineering; and Kristen Brown, cultural heritage and landscape matters. Two representatives of First Nations; Marvin McDonald on behalf of the Wabaseemoong Independent Nation and Allan Anderson on behalf of the Ochiichagwe'Babigo'Ining Ojibway Nation expressed concerns about potential impacts on fishing from the Winnipeg River. In addition to the evidence lead by one of the Appellants, Alex Rheault, the Board also heard lay evidence from seven other local businesses and cottagers including Peter and Ben Barber, Mark Engebretson, Grace Tindall, Elaine Friesen, Karen Eastwood, Gary Bouton on behalf of the local Historical Society and Don Parfitt on behalf of the Lake of the Woods Cottager Owners, in support of the MCA.

[8] MOTR brought four expert witnesses in support of the proposed development: Paul Johnston, planning; Wayne Morgan, cultural heritage matters; Robert Thompson, golf courses; and Alf Poetker, engineering.

[9] Victoria Kosny from the Ministry of Municipal Affairs was the sole witness of the Province, on behalf of the approval authority.

[10] Four other individuals from the broader Minaki community addressed the Board

in support of the proposal: Shelley Cristie, the owner of the marina; Curtis Batiuk, owner of Jack's Live Bait, and Bruce Mahaffey and Ron Olsen.

THE APPEALS AND THE ISSUES

[11] Alex Rheault, on behalf of ten year round Minaki residents and business owners, together with the MCA, an association of a mix of 396 owners of seasonal and year round recreational properties on the various bodies of water accessed through Minaki, appealed the decisions of the Minister of Municipal Affairs to grant conditional approval to the two draft plans of condominium proposed by MOTR.

[12] Underlying the sentiments to the broad ranging apprehensions about the impacts of the proposed form and density of development was the still very real sense of loss of the Lodge and the role that it had played in anchoring the sense of place that the appellant stakeholders depicted of Minaki.

[13] Both Appellant groups shared the opinion that the renovation of the clustered hotel suites and the introduction of the proposed vacant land parcels which would be individually developed with ready to move units, would result in a built form not in keeping with the remote wilderness setting. The proposed number of units would introduce a number of new seasonal households rivalling the full time population of the Town, which in the eyes of the Appellants, as a group, would not likely share the same local interests as the full time residents and business owners, and which could not be adequately serviced by the limited local services such as the volunteer fire department.

[14] The Appellants and their planner regard the proposal as a fundamental change in land use from a wilderness tourism based resort, to seasonal recreational residential ownership concentrated on the former Lodge site. The Appellants also expressed concerns that the new seasonal owners would create demands and potential stresses on the use of the Winnipeg River, the lifeline to both local fishing camp operators and the First Nations communities, with little to no local economic or employment benefit as had been realized when the Lodge and golf course were operating.

[15] With respect to the golf course, the Appellants maintain that the proposal as designed fails to conserve the significant cultural historical landscape of the Stanley Thompson golf course.

[16] After hearing 11 days of evidence and argument, it is clear to the Board that the crux of the Appellants' case however focuses on public health and safety, together with that of the environment. The redevelopment is dependent on the proposed resurrection of the dormant, private STP which serviced the Lodge and remains on site to deal with all of the solid waste to be generated by the proposed redevelopment of the lands.

[17] Throughout the consultation process, the Appellants retained and relied upon professional engineering advice to challenge the suitability of bringing the infrastructure back on stream and were successful in requiring amendments to the most recent conditions of approvals with the Ministry of Environment and Climate Change ("MOECC") and the resulting conditional Environmental Compliance Approval ("ECA").

[18] The Appellants, now through the appeal rights created by the Applicants desire to be able to sell off individual condominium units, which invokes the requisite approvals under the *Planning Act*, are challenging whether proposing development dependent upon a private communal STP in an unorganized territory is consistent with the Provincial Policy Statement 2014 ("PPS").

[19] The Applicants and the Ministry of Municipal Affairs ("Ministry") counter that: with the ECA in hand, because Minaki and the site are located within unorganized territory, and there is no municipal governance, no planning board and no official plan or zoning by-law to restrict development, the redevelopment as proposed could proceed without any form of approval other than compliance to the Ontario Building Code. The approval of the Minister and the imposition of the conditions of draft plan approval are required only to permit the proposed ownership tenure pursuant to s. 51(24) of the *Planning Act* and s. 9 of the *Condominium Act*.

[20] MOTR and the Ministry reject the Appellants' argument that s. 1.6.6, the

hierarchy of sewage, water and storm water policies of the PPS, permits only municipalities to exercise their discretion to allow the use of private communal sewage service.

[21] The Ministry further counters and argues that it is unreasonable to read the PPS and determine that the Minister does not have the same authority extended to municipalities in s. 1.6.6.3.

[22] What is clear to the Board however is that there have been MOECC guidelines in place for decades to assist municipalities in exercising their discretion to allow private communal STPs as public authorities responsible for protecting public health of both the users of the private systems and the environment.

[23] To ensure that there are adequate funds secured up front to resolve maintenance default or a system failure, municipalities exercise their authority and oversight to require Responsibility Agreements with developers pursuant to the *Environmental Protection Act R.S.O, 1990, and the Ontario Water Resources Act R.S.O., 1990.*

[24] As there is no municipal authority in Minaki to exercise this authority, the responsibility is to rest with two private condominium corporations and the operational reporting requirements of the ECA.

[25] The requirement in the conditions of draft condominium approval that satisfies the Minister that the protection of the environment had been adequately safe guarded is a requirement that the Condominium Boards notify individual owners to evacuate the premises until such time as the system failure is remedied, presuming that there are reserve funds sufficient to bring the system back on line.

[26] The Ministry argues that the Board cannot compel the Minister, standing in the shoes of the non-existent municipality, to require, hold or administer if necessary, the financial assurances that a municipality has the authority to require if it chooses to allow

development dependent upon a private communal system.

[27] The pivotal issue before the Board is therefore the determination of whether development dependent on private communal STP is consistent with the PPS, and, if so, whether the evacuation condition reasonably addresses the matters and criteria under ss. 2 and 51(24) of the *Planning Act* which speak to the adequate provision of waste management systems, the suitability of the lands for the purpose for which it is being subdivided, whether the proposed subdivision is in the public interest, and the adequacy of municipal services.

EVIDENCE, ANALYSIS AND FINDINGS

[28] MOTR contend that there is much to be gained through the conditions of approval to allow the ownership tenure.

[29] However, aside from securing the implementation of the recommendations of a Cultural Heritage Conservation Plan, the main focus of the draft conditions address the STP.

[30] In order for the Ministry, MOECC and the MOTR to advance that the proposal is consistent with the PPS, which was clarified in 2014 to specifically permit recreational dwellings, the Ministers' approval requires both the agreements of purchase and sale and the declaration for the condominium units to include the warnings that the units:

shall not be occupied or used between November 15 and April
15.(Seasonal Use Restriction)

thereby, in the absence of a definition in the PPS, distinguishing the use of the dwellings from a permanent residence capable of being occupied year round.

[31] The declaration and agreements of purchase and sale must contain further warnings that:

in order to protect health and safety, purchasers are required to immediately vacate their units

should the water and sewage treatment services fail, until such time as the services are restored. The condominium corporation will be responsible for undertaking the necessary repairs or remediation. It is these clauses in the agreements of purchase and sale and the condominium declarations that the Ministry is relying upon for the oversight of a private communal STP servicing 138 recreational dwelling units together with a free standing restaurant.

[32] Other than a general condition of draft approval which re-iterates the requirement in the ECA issued by the MOECC, that a professional engineer annually verifies the operation and maintenance of the STP, there are no other conditions of approval addressing the sustainability of the STP than those set out above.

[33] The Appellants argue that development serviced by a private communal STP is not consistent with the PPS, and the Board is persuaded by their evidence.

[34] In support of their analysis the Appellants led evidence through Tony Usher who was qualified to give expert opinion evidence in matters of land use planning, the focus of which was the PPS.

[35] Mr. Usher's evidence was preceded by the engineering analysis provided by Ken Drysdale, whose particular expertise is in engineering forensics, and Anne Egan whose evidence brought to light concerns with respect to potential shortcomings of the existing system to deal with quantity and quality of effluent.

[36] Through Mr. Drysdale's evidence in particular, there was much discussion about the inter and intra ministerial circulation process extracted from emails obtained through a Freedom of Information request, and whether the analysis provided by MOTR was sound, and ultimately whether the STP would be capable of processing the flows and meeting the EPA requirements/objectives.

[37] Suffice it to say that the evidence and cross examination of all of the witnesses, including the witness for the Ministry, raised questions with the Board. The Board is not however in a position to look behind the granting of an ECA. The MOECC is the public guardian of the environment and associated approvals and any decision of the Director is subject to a separate appeal.

[38] The Board however must be, and is not satisfied that the proposed use of communal infrastructure is consistent with the servicing hierarchy outlined through s. 1.6.6.2, s. 1.6.6.3, s. 1.6.6.4, and s. 1.6.6.5. of the PPS and that the development is appropriate to the infrastructure planned or available.

[39] It is Mr. Usher's evidence that addressed the hierarchy and in particular, the various implementation guidelines which, as described on their face are:

intended to guide municipal land use planning for sewage and water servicing such that planning decisions shall have regard to the Provincial Policy Statement under Section 3 of the Planning Act

and which assisted the Board in its determination.

[40] The various extracts and citations following from Procedure D-5-2 and Guideline F-15 demonstrate that private communal STP are considered to be acceptable infrastructure when the proper maintenance and operation of the system is for all intents and purposes insured through the execution of a Responsibility or Financial Assurance Agreement with a public oversight authority. Section 6.5.9 of F-15 suggests sufficient funds to be in the order of 100 percent (“%”) of three years of undiscounted operating costs plus 15% of the capital costs for upgrading or clean up:

D-5-2 Application of Municipal Responsibility for Communal Water and Sewage Services Last Revision March 1995 (Exhibit 1, Tab 13, pp.437-440)

Areas without Municipal Organization (4.2)

Developments proposing to use communal services should be encouraged to locate in municipalities where there are local public authorities to assume responsibility for these services and undertake remedial action in the case of default.

As a rule, the planning authority will comment negatively on proposals for new or expanded communal services in areas without municipal organization that are to be served by uses described in Section 3.0 of this document. The rationale for this position is that in the absence of a municipal government organization the long term liability of communal services, and hence protection of the environment and public health, cannot be assured.

Communal services in areas without municipal organization will only be considered in the situation where they are required to address remediation of failed individual on-site services.

Section 3.0

The document shall apply to:

Expansion to existing multi-lot/unit residential development or new multi-lot/unit residential development to be served by communal water and sewage services and or requiring approval under Sections 52 & 53, *Ontario Water Resources Act, R.S.O. 1990* and Part VIII, *Environmental Protection Act, R.S.O. 1990.*"

F-15 Financial Assurance guideline

3. Statement of Principles
 - 3.3 financial Assurance is required to ensure that funds are available for, but not limited to the following:
 - b. Decommissioning, clean-up, rehabilitation, monitoring and perpetual care of facilities such as private waste processing...
 - c. The operation of private water or sewage treatment facilities until they can be assumed by a municipality
 - 4.3 Financial assurance should normally be required in an order or approval for the types of facilities listed in Sections 4.3.1 and 4.3.2 including
 - 4.3.2a. Private communal sewage works in unorganized areas where there is no agreement with the Ministry of Municipal Affairs and Housing for a local government agency (for example, an area services board or a municipality to be created, or an existing municipality to be expanded) to take over the works in the event of a default

[41] Both documents are founded on the operating premise that ultimately the public authority which executed the agreement will avail itself of the funds secured through the agreement to step in to address the environmental threat if and when necessary.

[42] The proposal before the Board comes with no such assurance other than the oversight of two private volunteer Boards of owners 'ordering' evacuation of private property, and the lay administration of reserve funds sufficient to remedy a system failure, including presumably, complete replacement.

[43] While the Board is aware that the Director (MOECC) may exercise discretion to not require financial assurance on a case by case basis, the rationale must be clearly set out on the file. There was no such evidence brought before the Board.

[44] Looking beyond the conditions put forward by the Ministry in support of the Minister's decision, there is no evidence on the face of the ECA that any consideration of adequate assurance was given other than the condition that the owners or occupants would somehow be required to vacate their residence in case of system failure.

[45] The Board therefore finds in the absence of appropriate public oversight as a back stop to ensure public safety and health and that of the environment, the proposed private communal STP is not consistent with s. 1.6.6.3 of the PPS, and approval of the draft plans of condominium as such, do not represent good planning and are not in the public interest.

[46] The proposal and conditions of draft approval fail to satisfy the criteria of s. 51(24) of the *Planning Act*.

ORDER

[47] The Board orders that the appeals are allowed and the proposed plans of condominium are not approved.

"Sharyn Vincent"

SHARYN VINCENT
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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