

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: March 16, 2017

CASE NO(S): PL140356

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Catherine Cooper
Appellant: Marc Kemerer
Appellant: Macey Bay Development Corp.
Subject: Proposed Official Plan for the Township of Georgian Bay
Municipality: Township of Georgian Bay
OMB Case No.: PL140356
OMB File No.: PL140356
OMB Case Name: Cooper v. Georgian Bay (Township)

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Macey Bay Development Corp.
Appellant: Jean DeMarco
Subject: By-law No. 2014-75
Municipality: Township of Georgian Bay
OMB Case No.: PL140356
OMB File No.: PL141430

Heard: January 25 to February 8, 2017 in Port Severn, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Macey Bay Developments Corp.

M. Bull* and R. Kehar*

Township of Georgian Bay

K. Mullin*

Jean DeMarco

Self-represented

DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD

[1] This was a hearing of appeals against the new Official Plan (“TOP”) of the Township of Georgian Bay (“Township”) and Comprehensive Zoning By-law (“ZBL”) No. 2014-75 as it relates to the proposed zoning of a property at 380 Macey Bay Road (“Subject Property”).

[2] The issue was one of land use and land use permissions. Macey Bay Development Corporation (“MBDC”) maintained that it is permitted to operate a trailer park comprising 180 sites on the Subject Property. Jean DeMarco, who describes herself as “a community volunteer representing a large group of area residents,” maintained that no commercial use is permitted on the property, and that no commercial use should be permitted. The Township’s position is that the ZBL and the TOP permit MBDC to operate a trailer park on the Subject Property, but that, for the purposes of clarification, it would be prudent to amend both documents.

[3] An Order of the Board, issued December 9, 2016, lists those persons, together with the Eastern Georgian Bay Stewardship Council, granted participant status to this proceeding on the condition that such participants as a group be represented by Ms. DeMarco.

BACKGROUND

[4] In 2010, the Township adopted the TOP, which allows “tent and trailer parks which existed at the time of the adoption of this Official Plan” within the Waterfront designation. In November 2014, the Township enacted the ZBL, which zoned the south-central portion of the Subject Property Tourist Commercial Type 2 (“CT2”). CT2 zoning permits an “existing trailer or recreational vehicle park.”

[5] The Subject Property is located at the end of Macey Bay Road, a year-round municipally maintained municipal road, which extends approximately 1.4 kilometres from Muskoka Road No. 5 (Honey Harbour Road). It contains and is adjacent to Tobies Bay Wetland, a Provincially Significant Wetland (“PSW”).

[6] The Township’s planning consultant, Jamie Robinson, who gave expert land use planning evidence on behalf of the Township, outlined the zoning history of the property (Exhibit 86).

[7] In 1972, the Township passed ZBL No. 72-53, which recognized and permitted existing uses, and required an amendment for any new development. The entire Subject Property was zoned “Recreational” (RE). Permitted uses included an existing tourist establishment, as defined in regulations under the Department of Tourism and *The Tourism Act* (Exhibit 2A, Tab 4).

[8] ZBL No. 72-53 was amended in 1980 by ZBL No. 80-450, which limited existing tourist establishments to the number of licensed units and the area they occupied at the time the by-law was passed (Exhibit 2A, Tab 4).

[9] In 1991, ZBL No. 91-19 was enacted by the Township as its first comprehensive zoning by-law. It zoned a portion of the Subject Property “Tourist Commercial Type Two” (CT2). The permitted uses included “tent, travel trailer and recreational vehicle parks” (Exhibit 2A, Tab 5).

[10] The then owner of the Subject Property appealed ZBL No. 91-19. While the appeal was pending, ZBL No. 93-90 was enacted, which amended ZBL No. 91-19 to restrict permission for tent and travel trailer parks in the CT2 zone to those that were “existing” (Exhibit 2A, Tab 6). “Existing” was defined in the by-law as “legally existing, being a reality of an actuality as of the date of passing of this by-law” (Exhibit 2A, Tab 5).

[11] Mr. Robinson testified that the term “existing” was added because the Township did not want any new trailer parks; but, that if a property was zoned CT2 and had a trailer park use as of the date By-law No. 93-30 was enacted, that use “existed” and could continue.

[12] In 1996, the Board issued a decision on the appeal of ZBL No. 91-19 by the then owner of the Subject Property (“1991 Decision”) (Exhibit 2A, Tab 10). The appeal concerned the boundary of the CT2 zone. The Board found that a tent and trailer park was a permitted use on a portion of the Subject Property based on its historic use. The Board further determined that the boundary of the CT2 zone under ZBL No. 91-19 should be amended to show the boundary identified as Exhibit 19 to that hearing, which later went missing. The Board withheld its order pending the owner’s satisfaction of four conditions:

- (a) determination of all remaining appeals from ZBL No. 91-19 and ZBL No. 93-30;
- (b) submission to the Board of a draft amendment to ZBL No. 91-19, satisfactory to the Township, which includes within the CT2 zone the lands shown on Exhibit 19 to the hearing;
- (c) execution of a site plan agreement by the owner and the Township, including a site plan substantially in the form of Exhibit 19; and
- (d) submission to the Board of written confirmation of a certificate of approval for the sewage disposal system and approval of the environmental impact assessment by the Ministry of Natural Resources Forestry (“MNR”).

[13] In November 2010, a site plan agreement was entered into between the Township and the owner of the Subject Property at that time, Macey Bay Realty Inc., for the development of a “cottage establishment”. Phase 1 of the site plan agreement provided for 82 cottage units with an indication of a total build out of 144 units. A sales office and two model units were constructed on the property, but the commercial cottage establishment was never built.

[14] The property currently consists of the sales office, the two model units, a storage building, a pool building, a construction trailer, three derelict structures, a boat launch, and a dock.

[15] A decision by the Board in 2015 (“2015 Decision”), granted a motion by MBDC to amend the conditions of the 1991 Decision, specifically the second and third conditions to refer to a 1995 site plan that appeared to be consistent with the missing Exhibit 19 (Exhibit 2C, Tab 40). The 2015 Decision also amended the fourth condition of the 1991 Decision, so as to require the Township rather than the MNRF to approve MBDC’s impact assessment.

[16] Ms. DeMarco argued that the 2015 Decision cannot be relied upon since it is subject to a judicial review application filed shortly before this hearing by the Georgian Bay Association. This is the fourth time the 2015 Decision has been challenged, and each of these challenges has been considered and denied. Ms. Bull, counsel for MBDC, submitted that the Judicial Review Application is an attempt to re-litigate issues that have already been adjudicated. The Board finds no reason not to rely on the 2015 Decision irrespective of the judicial review application.

MOTION

[17] On January 18, 2017, the Board received a Motion Record by Ms. DeMarco. In it, she moved a motion for “an order that Summonses to Witnesses be forthwith issued for the persons listed above, or suitable alternate individuals. The “persons listed above” included the Township Mayor, the Township Clerk, the Vice President of Commercial Development for MBDC, and Mary Bull, counsel for MBDC. The Motion was returnable on January 23, 2017, the first day of the hearing.

[18] On November 10, 2016, Ms. DeMarco requested a number of Summonses to Witnesses, some of which the Vice Chair of the Board authorized. Others, the ones named in Ms. DeMarco’s January 18th motion, were not authorized.

[19] Board Rule 38 in the *Ontario Municipal Board Rules of Practice and Procedure* states, “A notice of motion and all supporting material, as set out in Rule 37, shall be served at least 10 days before the date of the motion to be held in person or by electronic hearing unless the Board orders otherwise.”

[20] The dates for this hearing had been set a considerable period of time in advance of the hearing. The Procedural Order laid out clear directions for the Parties. The Board found no reason to depart from the Procedural Order.

[21] Ms. DeMarco’s motion was served five days, including two weekend days, before it was to be heard. There was no request to abridge the time.

[22] This late filing prejudiced the other Parties and left little time for the Board to be able to review all the materials. The other Parties had to scramble to respond to the motion before the end of the day on Friday, January 20, 2017, and the Board had no time on the weekend to adequately consider their responses, one of which was quite lengthy.

[23] While it is true that the Board’s Rule, as set out in Board Rule 3, “shall be liberally interpreted” they are, at their root, established to ensure a fair and efficient hearing. Board Rule 3 makes this clear when it goes on to say that the liberal interpretation is “...to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.”

[24] This late filing does not meet either the letter or the intent of the Board’s Rules.

[25] The Board found no merit in issuing summonses to any of those individuals for whom a summons had been refused previously. For example, the Township Clerk could provide no information that was not obtainable from other witnesses, such as the Township’s planner. To summon Counsel for the Applicant was inappropriate and smacked of intimidation.

[26] The Board dismissed the motion.

[27] The Board also dismissed an attempt by Ms. DeMarco later in the hearing to reintroduce a motion for a summons to one of the individuals listed in her initial motion.

HEARING

[28] At the hearing, the following were qualified to give expert evidence and opinion:

On behalf of MBDC:

- Robert Lehman in the area of land use planning;
- James Mallett in the area of traffic engineering;
- Gordon Nielsen and Jamie Nairn, as a panel, in the area of ecology; and
- Dan Hurley, in the areas of land development, civil servicing and surface water resource, and Jason Murchison, in the areas of hydrogeology and geo science, as a panel.

On behalf of Jean DeMarco:

- Gregory Corbett in the area of land use planning;
- John Northcote in the area of transportation;
- Michael Varty in the area of on-site sewage distribution and Gary Hendy in the area of hydrogeology, with particular expertise in drinking water, as a panel;
- Dr. Patricia Chow-Fraser in the area of wetland ecology

Ms. DeMarco called the following witnesses under summons:

- Andrea Ellis Nsiah, a district planner with the MNRF;
- Tom Teske, a Senior Environmental officer with the Ministry of Environment and Climate Change (“MOECC”); and
- Nicholas Popovich, Director of Developmental Services for the Township.

[29] Ms. DeMarco also called John Moreau, a lifetime resident of the area and former owner of the Subject Property, and another resident, Heinz Ratz.

On behalf of the Township:

- Kris Menzies, in the area of land use planning; and
- Jamie Robinson, in the area of land use planning.

[30] The following spoke as Participants:

- Bob Duncanson on behalf of the Georgian Bay Association;
- Peter Koetslier on behalf of the Honey Harbour Association;
- Bob Snider on behalf of the Cognashene Cottages Association;
- Tom Bain on behalf of the Easter Georgian Bay Association;
- Catherine Cooper on behalf of the Georgian Bay Preservation Alliance;
- Alf Howat; and
Anne Fitzgerald.

The residents' groups who spoke as Participants at the hearing were primarily concerned about the potential impact of the proposed development on the environment. This concern is understandable, and their participation in the hearing commendable.

EVIDENCE AND FINDINGS

[31] Much of the focus of Ms. DeMarco's case was on the proposition that MBDC has not established a current right to use the Subject Property as a trailer park. Even if it had such a right, she argued that MBDC did not provide sufficient evidence to find that such a use represents good planning for the property.

[32] She submitted that, given the circumstances existing with respect to the Subject Property at the time the ZBL was passed in 2014, the proper zoning of the property

would be an extension of the SR5 and Rural zones over the entire area of the Subject Property, with the areas proposed as CT2 deleted. Alternatively, she submitted that the Subject Property be placed in a non-development zone, requiring a rezoning application for any future development of the property.

[33] Ms. DeMarco suggested a further alternative for the Subject Property – that it be zoned “Environmental Protection” “unless and until there is ample proof that portions of the Property can be developed without negative impact to the adjacent provincially significant wetland.”

[34] Ms. DeMarco submitted that the 1996 Decision by then Member Melling was “based upon questionable evidence” and, in her opening statement at this hearing stated that the 1996 Decision “contained major errors of both law and fact” (Exhibit 3). The Board finds that a rather remarkable accusation to make. The 1996 Decision was never appealed. Ms. DeMarco suggests “possibly because (the Township) knew that compliance with the MOECC and MNRF conditions would not be possible by the owner.” She had no evidence to support that statement.

[35] In her submission to the Board at the close of this hearing, Ms. DeMarco stated that “a close reading” of the 2015 Decision of Member Taylor “indicates that the decision is completely consistent with the OMB Member wishing to assist MBDC in proceeding with its Site Plan Agreement for ‘cottage establishments’.” Reading Member Taylor’s decision it is clear that he appreciated that the zoning permission related to a trailer park. It is not the Board’s role, and certainly not its practice, to “assist” any Party with any particular objective, but rather to arrive at a decision by the judicious application of the correct planning legislation of the Province and the municipality.

[36] A great deal of time was spent at this hearing determining the permissions attached to the Subject Property. The Board concurs with Mr. Lehman’s statement, supported by Ms. Menzies and Mr. Robinson, that “the effect of the September 2015 Board Decision is to confirm the land use permission for CT2 uses, including a tent and trailer park with 180 sites, subject to the conditions set by the Board.”

[37] It was the position of three planners, Mr. Lehman, Ms. Menzies and Mr. Robinson, that the word “existing” meant “legally existing”. Ms. Menzies testified that the purpose of the TOP policies relating to trailer parks was not to permit new trailer parks, a continuation of the policy in s. B.22.4 in the previous TOP (Exhibit 2A, Tab 1). She explained that the identification of “tent and trailer parks existing at the date of the adoption of this Official Plan in s. F.3.4.1.1 was to identify that tent and trailer parks that were permitted to exist by zoning at the time of the adoption of the OP were allowed.”

[38] “Existing” was determined by reference to what was zoned at the time of the adoption of the TOP.

[39] Mr. Robinson testified that one of the key principles in the drafting and enacting of the new ZBL was to carry forward use permissions that existed in 1993, subject to recognizing natural heritage features. He outlined the extensive public participation process that took place before the TOP and the ZBL were passed by the Township’s council, including a winter meeting in Vaughan for seasonal residents.

[40] Mr. Lehman also testified that it was not the intent of the Township to take away existing zoning rights. Ms. Menzies agreed. She specifically disagreed with Mr. Corbett’s opinion that the term “existing” must mean *in situ*. In fact, she stated, if that interpretation is accepted it would mean that illegal or non-conforming uses *in situ* at the time of the adoption of the OP would have greater rights than permitted uses that were not *in situ*.

[41] Ms. Menzies, Mr. Lehman and Mr. Robinson were convincing on this point. It is well established that existing zoning confers land use permission and it is not necessary for the permitted use to be physically present on the property.

[42] The 1996 Decision concerned the proper boundary of the CT2 zone. In it, the Board concluded that a tent and trailer park was a permitted use on a portion of the Subject Property based on the historic use of the property, and that the boundary of the CT2 zone under ZBL No. 91-19 should be amended to reflect the boundary shown on

Exhibit 19. This decision clarified the intensity and area of use for a trailer park on the Subject Property.

[43] By the 1996 Decision and the 2015 Decision (“Previous Decisions”), the Board found that the Subject Property should be zoned to permit a trailer park with 180 sites subject only to the fulfillment of certain outstanding conditions. Mr. Robinson testified that the 2010 Site Plan Agreement for a cottage establishment between the Township and MBDC’s predecessor does not determine the permitted uses on the Subject Property.

[44] Ms. Demarco, in effect, asked the Board to reverse the Previous Decisions by removing development rights granted by those decisions. Even Mr. Corbett did not agree with this position. In his evidence, Mr. Corbett suggested that one of the alternatives for the Subject Property is that it be zoned to permit a cottage establishment on the basis that would be consistent with the Township’s intent to carry forward existing development rights under ZBL No. 91-19. By Mr. Corbett’s own analysis, the same existing development rights apply to a trailer park.

[45] Exhibit 89, agreed upon by the Township and MBDC, sets out the details of the proposed modifications to the TOP and amendment to the ZBL that is now before this Board. Exhibit 89 uses a “belt and suspenders” approach to the implementation of the Previous Decisions by requiring both a holding zone as well site plan approval. In addition, the proposed Special Policy Area provides additional direction regarding such matters as the requirement for a boat impact study, endangered and threatened species and the use of the holding zone.

[46] The holding zone, in addition to incorporating the conditions of the Previous Decisions, includes additional conditions such as approval of a traffic impact study, a stormwater management report, a phosphorous management plan, a visual analysis, and a landscape plan to be addressed before the zoning on the Subject Property is in place.

[47] The proposed amendment to the ZBL permits the continued use of a seasonal park model trailer (CSA Z241) as a permitted use in the Subject Property’s CT2 zone. Mr.

Lehman and Mr. Robinson testified that ZBL No. 91-19 considered a seasonal park model trailer to be a “trailer, travel or tent” use, permitted in the CT2 zone. The definition of “mobile home” was limited to dwellings constructed in accordance with CSA Z240, and did not include a CSA Z241. The 1996 Decision found as a fact that there were park model trailers on the property at that time (Exhibit 2A, Tab 10).

[48] The change of the definition of “dwelling, mobile home” was changed in the ZBL to include a CSA Z241, leading to an inconsistency in the definition, as it intended to define dwellings that provided a permanent residence. By definition, a seasonal park model trailer (CSA Z241) is not a permanent residence, and is therefore no longer considered to be a “trailer, travel or tent” and is not permitted in the CT2 zone (Exhibit 2A, Tab 8).

[49] The Board agrees with Mr. Lehman and Mr. Robinson that this is a technical issue and that it is appropriate to make an amendment to the ZBL to permit a seasonal park model trailer (CSA Z241) on the Subject Property.

[50] The proposed mapping changes reflect the PSW boundaries as identified by the MNRF, as well as the additional wetlands identified by MBDC’s consultants which should be included in the PSW.

[51] In her concluding submission to the Board, Ms. Mullin, counsel for the Township, stated, “Ms. DeMarco raised a number of issues relating to the appropriateness of [the Subject Property] for development from an environmental and servicing perspective. These are all issues that can be addressed through the site plan, MNRF and MOECC processes.”

[52] She made reference to Mr. Corbett’s position that the Adjacent Lands to the PSW should be placed in a zone that restricts development, or that a 120-metre (“m”) setback from the EP-PSW zone should be imposed, and to Dr. Chow-Fraser’s position that Adjacent Lands to the PSW should be zoned EP-PSW.

[53] Ms. Mullin then turned to Ms. Menzies' testimony in which she outlined the protection of adjacent lands is addressed in Policy D.1.49 of the TOP (Exhibit 1, Tab 5), which requires an Environmental Impact Assessment ("EIA") be prepared before development is permitted on lands within 120 m of a PSW, as well as Policies F.4.4.4.4 and F.3.6.1.1, which require site plan approval for Waterfront Commercial development. Ms. Menzies further identified for the Board the implementation policies of the TOP which set out what kind of matters the Township can address through site plan control and through the use of holding provisions.

[54] Ms. Mullin pointed out that the District of Muskoka ("District") ultimately agreed (Exhibit 2B, Tab 32) with Mr. Robinson's position regarding the imposition of a holding zone for lands within 120 m of a PSW, which, if put into effect, would make most of the existing cottage development in the Township non-complying, was undesirable and unnecessary since the Township's OP policies and site plan control by-law (Exhibit 2A, Tab 7) require site-plan approval for all non-residential and all residential development requiring approval under the Act.

[55] Ms. Mullin concluded that "Ms. DeMarco's witnesses all effectively conceded on cross-examination that the concerns they had raised could be addressed through site plan process, or through other processes, such as the MOECC review for and Environmental Compliance Approval ("ECA"). In this, the Board agrees with Ms. Mullin. The evidence of the witnesses speaks to this point.

[56] Mr. Corbett agreed, on cross-examination, that details of the servicing of the proposed development were best dealt with through the MOECC and site plan processes.

[57] Mr. Northcote conceded that the Township's peer review of the transportation impact study would provide a valid second opinion.

[58] Mr. Hendy and Mr. Varty agreed that the Township's peer reviews and the technical studies would identify any deficiencies in site servicing.

[59] Mr. Corbett acknowledged that MBDC's EIA would have to be approved by the Township before development could proceed.

[60] Dr. Chow-Fraser acknowledged that MBDC's EIA would be peer-reviewed and stated that she had no reason to think that the Township would not take any concerns raised by that review seriously. She also agreed that MBDC would have to obtain MNRF approval under the *Endangered Species Act* for the final design of the development.

[61] Andrea Ellis Nsiah, an employee of MNRF, who testified under summons, confirmed that it is no longer MNRF's usual role to review EIA. Since the adoption of the one-window approach to planning, such reviews are performed by the local municipality.

[62] The Board heard extensive evidence on all the relevant issues: land use planning, ecological, environmental, traffic, and servicing. In each, the Board preferred the opinions of the witnesses for the MBDC and the Township over those for Ms. DeMarco.

[63] Mr. Lehman's evidence was thorough, consistent, clear and convincing, whereas Mr. Corbett's contained inconsistencies and was generally less convincing. For example, Mr. Corbett suggested that the ZBL should be amended to put all Adjacent Lands in a non-development zone or require a 120 m setback from PSWs. This is inconsistent with the approach Mr. Corbett and his firm took in preparing zoning by-laws for other municipalities.

[64] In Severn Township, PSWs are in an Environmental Protection Zone, and Mr. Corbett advised that it was unlikely that the Environmental Protection Zone included any buffers to the PSWs. The Adjacent Lands to the PSW are not placed in a non-development zone (Exhibit 43).

[65] In Gravenhurst, his approach is the same (Exhibit 45).

[66] In West Nipissing, PSWs are in a separated Provincially Significant Wetland Zone, and Adjacent Lands are not placed in a non-development zone. There is no setback requirement to a PSW (Exhibit 46).

[67] The setback from a PSW is designed to protect the PSW. The size of the setback is appropriately based on the specific case.

[68] Mr. Corbett did not provide one example where a zoning by-law places Adjacent Lands in a non-development zone or requires a 120 m setback from a PSW, nor did he provide any persuasive evidence that a 120 m setback is necessary in this case.

[69] Mr. Lehman, Ms. Menzies and Mr. Robinson did not agree with Mr. Corbett's suggestion of a non-development zone or the requirement of a 120 m setback from PSWs. The Board finds that a 120 m setback from the PSW is not necessary.

[70] Without providing a planning rationale to support his position, Mr. Corbett agreed with Ms. DeMarco's suggestion that the Subject Property should be zoned SR5 Seasonal residential 5 and Rural. Under cross-examination by Ms. Mullin, he agreed that this would constitute a downzoning of the property from a commercial to a residential zone by taking away existing permissions. Such a downzoning would not conform to the policies of the DOP or the TOP.

[71] The DOP provides that the tourism sector should be strengthened, enhanced, expanded and diversified, and that large landholdings will be encouraged to be maintained and redeveloped where appropriate (Exhibit 1, Tab 4).

[72] Both OPs provide that the preservation of the quality tourist commercial land base is essential to the long term health of the local tourism industry.

[73] Ms. Menzies told the Board that both OPs provide that downzoning of resort commercial properties will not generally be supported and will only be considered in extenuating circumstances where the impact of the loss of the commercial land base has

been analysed and it has been demonstrated that it would not negatively affect the critical mass of the tourism infrastructure and land base in Muskoka and the Township.

[74] Mr. Corbett suggested that technical studies for the Subject Property must be completed and peer reviewed prior to zoning. In cross-examination, he admitted that he has not taken this position with respect to any other property in the Township. It appears to the Board that the rationale for his position that a more onerous standard be applied to the Subject Property is to prevent or delay the development.

[75] The Board is convinced by Mr. Lehman's evidence that the technical studies undertaken by MBDC, which were presented to the Board, confirm that the development of the Subject Property can occur in a manner that is consistent with the PPS, conforms to the DOP and to the OP, as modified.

[76] Mr. Nairn and Mr. Nielsen, representing two independent firms, had prepared an Environmental Impact Study ("EIS") (Exhibit 17), which was the result of extensive investigations and field work regarding the Tobies Bay PSW, vegetation and all types of species, including species at risk, undertaken on and around the Subject Property over a period of 24 years. They had a thorough understanding of the area.

[77] The EIS made detailed recommendations regarding mitigation and avoidance measures relating to buffers, the development footprint, phosphorous management, stormwater, construction timing and procedures, and environmental education for the occupants of the trailer park. Their recommendations, if implemented, will guarantee that the proposed development will be consistent with the PPS.

[78] Their recommendation of a 30 m buffer to the PSW will be determined through a peer review of the EIS by the Township and its peer review consultant prior to the lifting of the holding zone and approval of the site plan.

[79] Dr. Chow-Fraser was at a disadvantage in that she was not familiar with the redevelopment site, all of her fieldwork having been carried out in the PSW. In cross-

examination, she agreed that the proposed use of the Subject Property is an important factor in determining appropriate buffers. She also indicated that she did not understand the nature of the proposed development. The Board did not find her evidence helpful.

[80] Mr. Hurley outlined detailed stormwater management proposals for the Subject Property, and gave evidence that a sewage system with tertiary treatment is proposed and will provide adequate servicing in accordance with the relevant planning documents, including the PPS, the DOP, the TOP and the ZBL.

[81] Mr. Varty agreed that the details of the sewage system should be dealt with through site plan approval and the MOECC ECA approval process.

[82] Both Mr. Murchison and Mr. Hurley held the opinion that there would be no groundwater impact from the sewage disposal system since any fissures in the rock under the tile beds would be sealed. This design matter will be addressed by the MOECC during the ECA approval process and the peer review of the servicing report by the Township.

[83] Regarding water supply, Mr. Murchison's evidence was that there is a sufficient groundwater supply available to service the development and that a Permit to Take Water is required from the MOECC. Since the PSW is hydraulically connected to Georgian Bay, its water levels are related to the water levels of the Bay, not groundwater levels.

[84] Mr. Hendy maintained that sufficient testing has not been done to determine whether there is a sufficient groundwater supply for the proposed development. There was, however, general agreement among the experts that surface water could be used if a sufficient groundwater source was unavailable.

[85] Mr. Mallett's detailed traffic impact study ("TIS") concluded that the traffic from the proposed development could be accommodated on the existing road network (Exhibit 13). He identified deficiencies on Macey Bay Road and recommended remedial

measures such as traffic calming and signage to address these issues. The TIS will be peer reviewed by the Township, which will have an opportunity to secure remedial measures prior to the removal of the holding zone and through site plan approval.

[86] Mr. Northcote did not raise concerns regarding the condition of Macey Bay Road in his witness statement, his evidence being that there should be no more than 100 household on Macey Bay Road, since there is only one access. He supported this opinion by a reference to a table in a National Fire Prevention Association (“NFPA”) publication (Exhibits 15 and 50).

[87] The NFPA publication, however, has not been adopted by the Province, the District or the Township. It is intended to be used in jurisdictions that do not have a building or fire code, which is not the case in this instance. And, it relates to emergency evacuation in areas susceptible to wildfires, which has historically not been the case for the Subject Property.

[88] Mr. Mallett’s evidence is preferred and the Board relies upon it.

[89] The issue of the number of boat slips was raised by Mr. Corbett, who suggested that a boat impact study should be required prior to the approval of any zoning on the property, maintaining that the number of boat slips cannot be limited through the site plan approval process. The Board accepts the position of MBDC that Mr. Corbett is incorrect in this assertion. The ZBL only sets out a maximum number of boat slips. If more than 15 are proposed, the TOP requires the submission of a boat impact assessment as part of the site plan process (Exhibit 1, Tab 5). Since the site plan must conform to the TOP, the number of boat slips can be limited by the site plan in accordance with the findings of the Boat Impact Assessment (Exhibit 2A, Tab 8, Table 11.3).

[90] The Subject Property is adjacent to Georgian Bay Islands National Park to the west, and is surrounded on three sides by the provincially significant Tobies Bay Wetlands.

[91] The Board finds that the EIS, the requirement for peer review and approval of the EIS prior to the lifting of the holding zone on the Subject Property, the mitigation measures secured through site plan approval, and the approvals required under the ESA will address the environmental issues of concern expressed by the residents' groups. All the approvals are required to take into account current Provincial and municipal policies, regulations and legislation.

MS. DEMARCO'S CONDUCT AT THE BOARD PROCEEDINGS

[92] Ms. DeMarco is not a lay person. She is a lawyer of considerable experience, and a senior partner in one of this province's leading law firms. Ms. DeMarco may not be experienced in matters of planning law, but it is in matters of procedure and conduct related to this hearing that require comment, not substantive principles of planning law. Conduct and respect for procedure are not determined by the particular area of law in which the lawyer is expert.

[93] Paragraph 7 of the Procedural Order directs that experts should meet prior to the hearing to try to resolve or reduce the issues at the hearing. Additionally, the experts must prepare an agreed statement of facts.

[94] Two of the experts called by Ms. DeMarco, Mr. Varty and Dr. Chow-Fraser, testified that they were told by Ms. DeMarco that they should not agree to reduce the issues at the hearing.

[95] In addition, Mr. Varty testified that Ms. DeMarco instructed him to strike out most of the 16 items in the Agreed Statement of Facts – Sewage to which he had already agreed (Exhibit 31). In an e-mail to Mr. Hurley dated December 16, 2016, Mr. Varty wrote, "Dan, for reasons unknown to me, I have been informed that the attached are all the facts that I am authorized to agree to. This is obviously a deviation on our previous conversations (Exhibit 33)."

[96] “The attached” to which Mr. Varty referred reduced the number of agreed facts from sixteen to five, of which three were partial facts (Exhibit 34).

[97] Each expert witness appearing before the Board is required to sign an “Acknowledgement of Expert’s Duty” in which, among other commitments, the witness acknowledges his or her duty “to provide expert evidence that is fair, objective and non-partisan. The expert witness further acknowledges “that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.”

[98] Mr. Varty signed such an acknowledgement (Exhibit 27), and, to his credit, honoured it at the hearing despite Ms. DeMarco’s attempt to interfere by disassociating himself from her direction and, in response to a question from the Board, acknowledging that his evidence was in relation to the original agreed-to statement of facts.

[99] The Board finds that Ms. DeMarco has attempted to subvert the Board’s requirements that are designed to ensure a fair and efficient hearing and has interfered with the evidence of a witness the Board qualified to provide independent expert opinion evidence in these proceedings. Ms. DeMarco’s actions constitute an abuse of the Board’s procedures and a clear attempt to have an expert witness mislead the Board.

[100] Ms. Bull listed several examples of conduct on Ms. DeMarco’s part which she felt unreasonable and which she submitted resulted in an unnecessary expenditure of time and resources by the other Parties including:

- (a) failing to adequately answer the reasonable requests of the other Parties regarding the summoned witnesses she intending to call;
- (b) failing to respond to reasonable requests for documents that she intended to put to the summonsed witnesses;
- (c) failing to respond to reasonable request to identify the summoned witnesses;
- (d) failing to respond to requests to provide documents relating to the evidence of her expert witnesses; and

- (e) making a last minute suggestion that the hearing be adjourned without bringing a formal motion or request.

[101] Ms. Bull also expressed concern that in her opening statement (Exhibit 3) Ms. DeMarco made specific reference to discussions that took place in a Board-led mediation prior to the exchange of witness statement.

[102] This is simply unacceptable. Board Rule 69 states:

The details of proceedings during a mediation are confidential. Any information or documents provided or exchanged during the mediation or any suggestion for resolution of the issues or offer to settle made during a mediation shall remain confidential and cannot be disclosed in evidence in the same or other proceeding, nor be placed in the Board file.

[103] Ms. Bull asked the Board to provide direction regarding the manner in which costs can be considered in this matter. Any request for costs should be made by written motion in accordance with Board Rule 98 (ii).

[104] On March 8, 2017, a month after the hearing concluded and as this decision was being finalized, the Board received a letter from Peter J. Osborne, counsel to the Georgian Bay Association (“GBA”), requesting that the Board withhold its decision on this matter until the GBA’S APPLICATION for judicial review is heard and determined by the Divisional Court,, or that a motion be scheduled for consideration of this request. The GBA was a Participant in these proceedings and this issue was raised by the GBA in its Participant statement.

[105] This issue was also raised by Ms. DeMarco in her opening statement and closing submission at the hearing. No motion was brought before the Board. The Board has already dealt with this matter and will release its decision as it normally does.

ORDER

[106] The appeals of Macey Bay Development Corp. are allowed in part. The Board modifies the new Official Plan for the Township of Georgian Bay and amends Zoning By-law No. 2014-75 in the manner set out in Attachment 1 to this Decision.

[107] At the request of the Township, the Board's Order is withheld with respect to the extent of the EP-PSW zone until such time as the MNR has confirmed the extent of the PSW. The Board requests that the MNR act expeditiously to confirm the boundary of the PSW.

"Sylvia Sutherland"

SYLVIA SUTHERLAND
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

A constituent tribunal of Environment and Land Tribunals Ontario
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ATTACHMENT “1”

Part A – Official Plan

- a) Section F.3.1.1 b) be modified by adding the following to the end of the last sentence “including 380 Macey Bay Road (Lakehome Landing) subject to the policies of F.3.4.4.5 (Special Policy Area – Lakehome Landing);”
- b) Section F.3.4.1.1 be modified by adding the following at the end of the first sentence ““including 380 Macey Bay Road (Lakehome Landing) subject to the policies of F.3.4.4.5 (Special Policy Area – Lakehome Landing);”
- c) A new Section, Section F.3.4.4.5 be added to the Official Plan recognizing a Special Policy Area for 380 Macey Bay Road. Section F.3.4.4.5 shall read as follows:

“F.3.4.4.5 Special Policy Area – Lakehome Landing

The Lakehome Landing development located at 380 Macey Bay Road is recognized as an existing trailer park that may permit a maximum of 180 trailer sites within the Special Policy Area boundary shown on Schedule A and A1.

- (i) Development of the trailer park is subject to the applicable policies of this Plan and:
 - a) Site plan approval,
 - b) Approvals for any required sewage and water system by the Ministry of the Environment and Climate Change;
 - c) Any approvals, if required, from the Ministry of Natural Resources and Forestry;
 - d) Appropriate zoning, including zoning of any environmental features and applicable buffers which provide appropriate setbacks and limits the number of trailer sites to a maximum of 180;
 - e) All trailer sites are to be held in a common ownership and cannot be separately conveyed;
 - f) No land division is permitted;
 - g) Expansion of the Special Policy Area is not permitted;
 - h) Any planning approval to increase the number of permitted trailer sites is not permitted;

- (i) Revegetation of the shoreline of Georgian Bay, where feasible; is required;
 - (j) Camping establishments and tent sites are not permitted; and
 - (k) The trailers are permitted to a maximum of one storey.
- (ii) One dock currently services the site. Any increase in the number of docks adjacent to the Special Policy area which services the trailer park will not be permitted without the approval of a Boat Impact Assessment by the Township.
- (iii) The sewage system for the Special Policy Area shall be an individual, autonomous disposal system that is owned, operated and managed by the owner or operator of the trailer park. It will not service any lands outside of the Special Policy Area and will service all of the trailer sites within the Special Policy Area.
- (iv) The water supply system for the Special Policy Area shall be an individual, autonomous system that is owned, operated and managed by the owner or operator of the trailer park. It will not service any lands outside of the Special Policy Area and will service all of the trailer sites within the Special Policy Area.
- (v) The sewage and water supply system shall comply with all of the policies of the Plan that apply to *Individual On-Site Sewage Service* and *Individual On-Site Water Services*.
- (vi) Although the sewage system is not an *Individual On-Site Sewage Services*, it shall comply with all of the policies of the Plan that apply to *Individual On-Site Sewage Services*.
- (vii) The implementing by-law may be structured as a holding by-law to implement the policies of this Section.
- 1) Schedule A to the Official Plan is updated to identify location of the Special Policy Area - Lakehome Landing and a new Schedule to the Official Plan, Schedule A1 is added to identify the boundary of the Special Policy Area - Lakehome Landing.
- 2) Section D.1.3 of the Official Plan is modified as follows:

- i. Modifying the title of Section D.1.3 to “Significant Wildlife Habitat and Habitat of Endangered Species and Threatened Species”.
- ii. Modifying Section D.1.3.1 to change “Significant Wildlife Habitat and Significant Threatened and Endangered Species” to “Significant Wildlife Habitat and Habitat of Endangered Species and Threatened Species.”
- iii. Modifying Section D.1.3.2 to change “Significant Wildlife Habitat and Significant Threatened and Endangered Species” to “Significant Wildlife Habitat and Habitat of Endangered Species and Threatened Species.”
- iv. Modifying Section D.1.3.3 to change “Significant Wildlife Habitat and Significant Threatened and Endangered Species” to “Significant Wildlife Habitat and Habitat of Endangered Species and Threatened Species.”
- v. Modifying Section D.1.3.4 to change “Significant Wildlife Habitat and Significant Threatened and Endangered Species” to “Significant Wildlife Habitat and Habitat of Endangered Species and Threatened Species.”
- vi. Modifying Section D.1.3.5 to change “Significant Wildlife Habitat and Significant Threatened and Endangered Species unless authorized under the Endangered Species Act” to “the Habitat of Endangered Species and Threatened Species as defined by the Provincial Policy Statement, except in accordance with provincial and federal requirements.”

- 3) The definition for Significant Habitat of Threatened and Endangered Species is deleted and replaced with a new Definition for Habitat of Endangered Species and Threatened Species as follows:

Habitat of Endangered Species and Threatened Species – Means with respect to a species listed on the Species at Risk in Ontario List as an endangered or threatened species for which a regulation made under clause 55(1)(a) of the Endangered Species act, 2007 is in force, the area prescribed by that regulation as the habitat of the species; or with respect to any other species listed on the Species at Risk in Ontario List as an endangered or threatened species, an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding, as approved by the Ontario Ministry of Natural Resources and places in the areas described herein, whichever is applicable, that are used by members of the species as dens, nests, hibernacula or other residences.

- 4) The reference to “Significant Habitat of Threatened and Endangered Species” be modified to the “Habitat of Endangered Species and Threatened Species” in Policy D.1.3 as well as in the following policies of the Official Plan:
1. D.1.3 (Index)
 2. D.1.1.4
 3. D.6.1.4
 4. F.5.10.3.5
 5. F.5.10.8.11
 6. I.5.1.7
 7. Section J: Glossary of Terms, “Natural Heritage Features and Areas”
- 5) The following policies of the Official Plan are approved:
1. All of D.14
 2. All of F.2.2
 3. F.2.3.4
 4. F.2.3.6
 5. F.3.1.1 (subject to the modifications referred to above)

6. F.3.4.1.1 (subject to the modifications referred to above)
7. F.3.4.1.2
8. F.3.4.1.9
9. F.3.4.1.10
10. F.4.1.12
11. G.1.3.16
12. I.2.4.3
13. All of I.5.1
14. Section J, Glossary of Terms, “Private Communal Sewage Services” and “Private Communal Water Services”

Part B – Zoning By-law

With respect to 380 Macey Bay Road, it is appropriate to carry forward the zoning for the site as detailed by By-law 91-19 and amended by the 1996 OMB Decision and the 2015 OMB decision.

1) That the appeals Zoning By-law 2015-75 be allowed in part and that Zoning By-law 2014-75 be modified to apply site specific zoning to the site as detailed in the following Table and that Zoning By-law 2014-75 be modified in accordance with this Table:

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Exception Number	Additional Permitted Uses	Only Uses Permitted	Uses Prohibited	Special Zone Requirements	Other Special Provisions
CT2-6-H	Park Model Trailer Park			<p>Table 11.3 shall apply to Park Model Trailer Sites</p> <p>Maximum number of Sites - 180</p> <p>For the purposes of this site specific zone:</p> <p>A Park Model Trailer means a recreational vehicle that is designed to be mobile, and constructed or manufactured to provide a seasonal residence for one or more persons in accordance with CSA Z241, but does not include a travel trailer or tent trailer or trailer otherwise defined in this by-law; and,</p> <p>A Park Model Trailer Park means lands used for recreational purposes on which are located seasonally occupied Park Model Trailers.</p>	<p>The Holding Provision shall be removed when the following conditions have been satisfied:</p> <p>a) Approval of a Site Plan, and execution of a Site Plan agreement.</p> <p>b) The issuance of an environmental compliance approval for the sewage disposal system by the Ministry of the Environment and Climate Change.</p> <p>c) Approval by the Township of an Environmental Impact Assessment.</p> <p>d) Approval by the Township of a Traffic Impact Study.</p> <p>e) Approval by the Township of a Functional Servicing Report.</p> <p>f) Approval by the Township of a Stormwater Management Report.</p>

				<p>A maximum of one Park Model Trailer Unit shall be permitted per site and the maximum size of said unit shall be 100 square metres.</p>	<p>g) Approval by the Township of a Phosphorous Management Plan. h) Approval by the Township of a Visual Analysis. i) Approval by the Township of a Landscape Plan.</p>
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- 2) That Maps 137 and 138 of Schedule “A” be modified to include the redevelopment site within the CT2-6-H Zone and that the PSW be identified as EP-PSW, but that this updating mapping not occur until such time that the Township has approved the limits of PSW on the Macey Bay Site. This Order is withheld with respect to the geographic extent of the Zoning of the EP-PSW and CT2-6-H Zone, until such time that the Township has confirmed the limits of the PSW.

- 3) That footnote (1) to Table 11.1 be deleted and that notation (1) in column 3 of Table 11.1 be deleted.