

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: September 9, 2015

CASE NO(S): PL892420

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

Appellant:	Macey Bay Developments Corporation
Subject:	By-law No. 91-19
Municipality:	Township of Georgian Bay
OMB Case No.:	PL892420
OMB File No.:	R940201
OMB Case Name:	Macey Bay Developments Corporation v. Georgian Bay (Township)

PROCEEDING COMMENCED UNDER section 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended, and Rule 33 of the Board's Rules of Practice and Procedure

Request by:	Macey Bay Developments Corporation
Request for:	Request for Directions

Heard: August 17 and 18, 2015 in Toronto, Ontario

APPEARANCES:

Parties

Macey Bay Developments Corp.
("Macey Bay")

Jean DeMarco

Township of Georgian Bay
("Township")

Counsel

M. Bull
A. Sadvari

J. DeMarco

K. Mullen

**MEMORANDUM OF ORAL DECISION DELIVERED BY BLAIR S. TAYLOR ON
AUGUST 18, 2015 AND ORDER OF THE BOARD**

INTRODUCTION

[1] The parties had appeared before the Board on a Motion and Cross Motion related to the lands known as 380 Macey Bay Road (“Subject Lands”) on August 10, 2015, at which time the Board adjourned the matters to be heard via *viva voce* evidence commencing on August 17, 2015, with the direction that such evidence would include consideration of the 2014 Provincial Policy Statement (“PPS”).

BACKGROUND AND CONTEXT

[2] The Motion for Directions and the Cross Motion arise out of a 1996 Board decision concerning the proposed zoning in the then new comprehensive zoning by-law for the Subject Lands.

[3] The Board differently constituted found that the comprehensive zoning by-law should be amended to permit the development shown on the draft site plan (which was Exhibit 19 to the hearing). Hence it was necessary to amend the zoning, and the Board found that it was preferable for reasons of certainty to do that on the zoning map.

[4] The Board decision states that its Final Order shall be withheld pending the satisfaction of four matters:

1. Determination of all remaining appeals of the Comprehensive Zoning By-law;
2. Submission to the Board of a draft amendment to the Comprehensive By-law, satisfactory to the Township and substantially in the form of Exhibit 33, which includes within the proposed CT-2 exception zone all and only the lands within the “draft site plan boundary on Exhibit 19;
3. Execution by the proponent and the Township of a site plan agreement, including a site plan substantially in the form of Exhibit 19; and

4. Submission to the Board by counsel for the proponent of written confirmation of the issuance of certificates of approval for the sewage disposal system, and approval by the MNR of the environmental impact assessment prepared by the proponent's biologist.

[5] It is accepted by all the parties that only the first condition has been satisfied. It is accepted by all the parties that Exhibits 19 and 33 referenced in the Board's 1996 decision have been lost or destroyed.

[6] In these circumstances Macey Bay brought a Motion for Directions to amend conditions 2, 3, and 4 referenced above as follows:

2. Submission to the Board of a draft amendment to Comprehensive By-law 91-19, satisfactory to the Township, which includes within the proposed CT-2 exception zone all and only the lands with the "site plan boundary" on the 1995 site plan prepared by Galbraith, Vollick Surveyors Ltd. (the "1995 Site Plan");
3. Submission to the Board of a draft site plan, satisfactory to the Township, which includes all and only the lands within the "site plan boundary" on the 1995 Site Plan; and
4. Submission to the Board by counsel for the proponent of written confirmation of:
 - A) the issuance of an environmental compliance approval for the sewage disposal system by the Ministry of the Environment and Climate Change; and
 - B) approval by the Township of an environmental impact assessment prepared by the proponent's biologist.

[7] The Cross Motion sought firstly an Order that the Motion be dismissed as an abuse of process; alternatively that after the passage of almost 20 years since the 1996 Board decision, that the Board consider itself "*functus*"; an Order that the Motion was redundant in light of the forthcoming Board hearing commencing in September 2015 concerning appeals against the new Township official plan and new Township comprehensive zoning by-law concerning the Subject Lands; alternatively if the relief requested above was not granted, an Order postponing the hearing of the Motion until after the September 2015 hearing; if the first three grounds of relief were not granted that the Board adjourn the Motion hearing and order disclosure from the Township,

order cross examinations on the affidavits including a representative of the Township with personal knowledge of the Subject Lands, and an Order that Macey Bay submit a complete rezoning application prior to any rehearing under Rule 106 of the Board's *Rules of Practice and Procedure*; further that if a rehearing is ordered pursuant to Rule 106 that it be consolidated with the pending hearing in September 2015; that if a rehearing is ordered that there be ample public notice; that the Board Order the requested disclosure on a timely basis so that the appellants can properly prepare their issues list, and provide proper instructions to expert witnesses; that a procedural order be established for the September 2015 hearing; that an interim Order be issued that the Township not enter into any Site Plan or Site Plan Agreements or issue any permits with regard to the Subject Lands, pending the hearing of all outstanding issues; and an Order if necessary granting party status to all parties involved in any of the three proceedings.

[8] The Township took no position on either the Motion or the Cross Motion, except to indicate that it was important to the Township to understand the "status" of the 1996 decision, and that that understanding would be an important step in the Board dealing efficiently with the appeals relating to the Subject Lands scheduled to be heard commencing September 21, 2015.

MOTION HEARING

[9] The Board heard *viva voce* evidence from three land use planners (Robert Lehman on behalf of Macey Bay, Gregory Corbett on behalf of Ms. DeMarco, and Jamie Robinson on behalf of the Township), and Ms. DeMarco was cross examined on her affidavit.

[10] The Board then gave an oral decision. The reasons for which follow.

DECISION

[11] The Board will give an oral decision in this matter in order to assist the parties in the preparation for the hearing set down for September 21, 2015, and in the preparation of the Issues List to be attached to the Procedural Order which is due on August 21, 2015.

[12] The Board will allow the Motion in part and dismisses the Cross Motion.

[13] The 1996 Board decision had four conditions of approval.

[14] The Motion seeks to amend three of the four conditions due either to the loss or destruction of Exhibits 19 and 33, and to reflect the current roles of the Ministry of Natural Resources and Forestry and the Township with regard to the site plan process.

[15] The amended Cross Motion seeks the following relief: an Order that the Motion is an abuse of process; that the Board is *functus*; in the alternative that the Motion is redundant in light of the forthcoming September 21, 2015 hearing; and in the alternative that the Board Order pursuant to Rule 106 a rehearing.

[16] The Township takes no position on either the Motion or the Cross Motion except to submit that it would be helpful for the September 21, 2015 hearing to know the "status" of the 1996 decision.

[17] The 1996 decision appears to have been an appeal against the Township's then new comprehensive zoning by-law. At the hearing, both the then owner of the Subject Lands and the Township were represented by counsel. The Board heard at least the following witnesses: three land use planners (two of which on behalf of the Township), a biologist, and two former owners of the Subject Lands. One of the former owners was John Moreau whose family had owned the Subject Lands from the late 1800s to 1976. Another was Gordon McKay, a principal of a corporation that had owned the Subject

Lands from 1987 to 1994.

[18] Based on the evidence heard at the hearing, the Board made certain findings of fact with regard to the use of the Subject Lands, and the Board found that the zoning for the Subject Lands should be extended north of the line that the Township had drawn the zoning line, as depicted on Exhibit 19.

[19] The Board's decision was subject to the aforementioned four conditions of approval.

[20] Due to the loss or destruction of Exhibits 19 and 33, it is not possible to produce the zoning map, and the Ministry of Natural Resources and Forestry supports the proposed change to the fourth condition as it relates to its role in the site plan process.

DeMARCO

[21] Ms. DeMarco submits that the passage of time from 1996 to 2015 is beyond a reasonable time as set out in Rule 106. As a result she submits with the passage of time, the "application is deemed to have been dismissed or abandoned" (retroactively) such that the 1991 zoning by-law as adopted by the Township (with the old zoning line) is in force and effect.

[22] Ms. DeMarco has no authority she can refer to in support of this submission.

[23] Additionally she argues that for the Board to now amend the conditions to the 1996 decision constitutes "development" under the 2014 PPS, and based on the evidence of Mr. Corbett, such action by the Board would not be consistent with the PPS due to the presence of the Provincially Significant Wetlands.

[24] Finally Ms. DeMarco submits that her overall concern is with "due process". She argues that this is a significant rezoning and there is a process for rezoning, and that

process would entail public notice and very likely public involvement.

MACEY BAY

[25] Macey Bay apparently acquired the Subject Lands in 2012. The Board finds that it made a concerted effort to find the missing exhibits but to no avail.

[26] Macey Bay did however find the 1995 Site Plan (Exhibit H, page 74 of Mr. Lehman's affidavit found in Exhibit 1) which obviously predates the 1996 decision. Macey Bay advances the 1995 Site Plan as the best available evidence in support of the 1996 Board decision. The Board finds that Mr. Lehman's evidence in this regard was uncontroverted.

TOWNSHIP

[27] The Township takes no position on the Motion or Cross Motion but submits that if the Board were to allow the motion that the proposed conditions are acceptable with one recommended addition.

REASONABLE TIME

[28] With regard to the issue of the lapse of reasonable time, the Board finds that it is not simply the passage of time that is determinative. The Board prefers the evidence of Mr. Lehman that one must also consider the context, the changes in circumstances if any, and the policy regime.

[29] Dealing with the latter, both Mr. Lehman and Mr. Robinson opined that the result of the Motion if allowed would be consistent with the PPS. The Board agrees.

[30] With regard to changes in circumstances, the Board finds that in the intervening years there have been other owners, and Macey Bay took ownership in 2012 and has

acted in a diligent and forthright fashion since that time.

[31] With regard to the physical conditions, it would appear to the Board that while the trailers have gone, the Subject Lands remain relatively unchanged.

[32] The Board does not accept the proposition by Ms. DeMarco that due to the lapse of time that the appeal of the 1996 Board decision is deemed to have been dismissed or the appeal abandoned.

FINDINGS

[33] The Board finds that in 1996 a full and open public hearing was held and the Board Member heard the evidence of the parties and rendered a decision in accordance with the evidence that was heard.

[34] The Board accepts the evidence of Mr. Lehman and Mr. Robinson that the conditions proposed in the Motion if allowed would be consistent with the PPS.

[35] The Board notes that a further Board hearing is set for September 21, 2015 at which time the appeals of the Township's new official plan and new zoning by-law will be heard. The parties will have the opportunity at that time to contest those planning instruments.

[36] Accordingly the Board does not find the Motion for Direction to be an abuse of process, nor does it find that it is *functus* in this matter.

[37] The Board finds that Rule 106 allows for a "reopening" of a hearing event, but not a "rehearing" as is found in the original Cross Motion pleadings at paragraphs 5(d), 6, and 7.

[38] The Board finds that the purpose of the Motion is to implement the original intent

of the 1996 Board decision, by modifying the conditions of approval using the best available evidence.

[39] The Board finds that the best available evidence is found at Exhibit H of Mr. Lehman's affidavit: the 1995 Site Plan.

[40] The Board finds in an abundance of caution that the proposed conditions of approval advanced by Macey Bay should be modified as suggested by the Township to include the following clause for conditions two and three:..."adjusted to reflect the Provincially Significant Wetlands as shown on Exhibit 7 to this hearing".

[41] Finally the Board confirms the evidence of Mr. Robinson that there was an error with regard to the "September 18, 2006" date with respect to the new zoning by-law for the Subject Lands.

[42] Attached to this decision is Schedule 1, being the amended conditions of approval, which are in accordance with Exhibit 8, but as modified by the aforementioned clause advanced by the Township for conditions two and three.

"Blair S. Taylor"

BLAIR S. TAYLOR
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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SCHEDULE 1

Schedule 1: Revised Conditions

2. submission to the Board of a draft amendment to Comprehensive By-law 91-19, satisfactory to the Township, which includes within the proposed CT-2 exception zone all and only the lands within the “site plan boundary” on the 1995 site plan prepared by Galbraith, Vollick Surveyors Ltd. (the “1995 Site Plan”) adjusted to reflect the Provincially Significant Wetland (the “PSW”) as shown on Exhibit 7 to this hearing;
3. submission to the Board of a draft site plan, satisfactory to the Township, which includes all and only the lands within the “site plan boundary” on the 1995 Site Plan adjusted to reflect the PSW as shown on Exhibit 7 to this hearing; and
4. submission to the Board by counsel for the proponent of written confirmation of:
 - (a) the issuance of an environmental compliance approval for the sewage disposal system by the Ministry of the Environment and Climate Change; and
 - (b) approval by the Township of an environmental impact assessment prepared by the proponent's biologist.