

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: September 02, 2020

CASE NO(S): PL190079

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: 2253100 Ontario Inc.
Subject: Application to amend Zoning By-law No. 2014-14 –
Refusal of application by Township of Muskoka
Lakes
Existing Zoning: Community Commercial – Resort Commercial
(C1B) zone
Proposed Zoning: Staff Quarters as an additional permitted main use
Purpose: To permit the accommodation of staff and
contractors employed at any tourist resort in the
Township and is permitted within any building or
structure on the subject property
Property Address/Description: 3063 Muskoka Road 169
Municipality: Township of Muskoka Lakes
Municipality File No.: ZBA-53/18
LPAT Case No.: PL190079
LPAT File No.: PL190079
LPAT Case Name: 2253100 Ontario Inc. V. Muskoka Lakes
(Township)

Heard: July 13 to 16, 2020 by Video Hearing

APPEARANCES:

Parties

2253100 Ontario Inc.
 (“Applicant”/“Appellant”)

Counsel

L.F. Longo

Township of Muskoka Lakes
("Township")

H. Elston

Scott Vickers

S. Watt

DECISION DELIVERED BY JATINDER BHULLAR AND C. TUCCI AND ORDER OF THE TRIBUNAL

[1] This was a hearing conducted using video ("Video Hearing"). It was completed in four days ending on July 16, 2020.

[2] On December 20, 2018, 2253100 Ontario Inc. ("Applicant/Appellant") applied for an amendment to the Township of Muskoka Lakes ("Township") comprehensive Zoning By-law No. 2014-14. The proposed Zoning By-law Amendment ("ZBA") would re-zone lands located at 3036 Muskoka Road 169 ("Site"). This Site houses Bala Bay Inn ("Inn"). The requested ZBA will permit Staff Quarters ("SQ") as an additional principal use. The ZBA will also allow for deployment of additional structures to expand SQ at the Site.

[3] This Video Hearing was conducted within the context of a consolidated issues list agreed to by all parties per Exhibit 1, Tab 10 on file.

[4] For the reasons that follow, the Tribunal finds that the Applicant/Appellant's appeal is allowed.

INTRODUCTION

[5] The Inn was constructed in early 1900s and represented the first such multi-level brick structure in the Muskoka Lakes region. The Applicant/Appellant acquired the Site and the properties located on it around 2017. The Applicant/Appellant also operates the JW Marriott The Muskoka Resort & Spa in Minett ("Marriott").

[6] The Applicant/Appellant has used the rooms in the Inn on floors two and above for accommodating their permanent and temporary staff since around 2018. Part of the

ground floor has been converted to allow for a staff kitchen (“Luxe” room in Exhibit 15). and a separate smaller portion for laundry facilities. The remainder of the ground floor had been used for commercial hospitality purposes till around March 2020 when the lease for the operating entities providing hospitality services expired.

[7] The Applicant/Appellant also brought on to the Site prefabricated modular units (“PMU”) to increase the capacity of the site for SQ. The Township has ordered the Applicant/Appellant to remove these PMU from the Site as being an unauthorized deployment. Overall the Applicant/Appellant wants, through a new addition to the Inn building, to construct structure(s) to add 29 new rooms for staff use and one area for sanitary service needs of staff. The PMU have remained on Site but have stayed unused.

CORE AREAS OF CONTEST

[8] There are three key issues before the Tribunal;

- a. Does the Changes cause a degradation in the character of Bala as an urban centre?
- b. Does the PMU deployment degrade the Site or the surrounding areas or are otherwise inappropriate?
- c. Does the ZBA as requested meet the necessary statutory tests?

Bala Character

[9] The Township of Muskoka Lakes Official Plan (“MLOP”) provides the meaning of character in section 4.1.1. While this section was not specifically in the issues list, it became a point of substantial discourse during the hearing.

[10] Stefan Szczerbak, a register professional planner, was called by the Applicant/Appellant to provide expert land use planning opinion evidence. Mr. Szczerbak

submitted that Bala is a small community and one of the two urban centres in the Township. Mr. Szczerbak added that Bala is a community with a variety of buildings, one main street, and a CP rail line that passes through it. He added Bala has small shops, restaurants and other like entities commonly found in small urban centres. Mr. Szczerbak further stated that there is no unique architectural or other like attribute that is prevalent or encompassing of Bala. Mr. Szczerbak further elaborated that the Inn is a multi-storey brick building without any specific or defining architecture or like features.

[11] Mr. Szczerbak was extensively and at length cross-examined by the Township Counsel Harold Elston. Mr. Elston inquired of Mr. Szczerbak to further refine the character of Bala as to the description of the same in section 4.1.1. Mr. Szczerbak reiterated his primary description without any variation.

[12] Mr. Elson questioned Mr. Szczerbak if the plans by Applicant/Appellant to build a berm barrier so that the PMU were not visible from Highway 169 was an admission that the PMU were out of character to the area. Mr. Szczerbak stated that berms are used to enhance sites and their use is quite common in architectural conditioning and improvement of sites. Mr. Szczerbak concluded that the PMU do not alter the character as deduced by Mr. Elston.

[13] Wayne Simpson, a registered professional planner, was called by the Township to provide expert land use planning evidence. Mr. Simpson focused a substantial amount of time as to how the PMU, which Mr. Simpson called trailers, doesn't fit into the character of Bala. Mr. Simpson could not provide a reference to any policies or architectural guidelines that will support his assertions. Mr. Simpson provided substantial commentary how the travelling and vacationing public is the mix that integrates into the character of Bala. Mr. Simpson, in contrast for staff and others, provided the following in his witness statement (Exhibit 12);

“74. The aggregation of youthful, exuberant, transient resort staff in off-resort locations, where constant oversight is not provided by the management of the resort, will likely result in nuisance impacts on neighbouring properties, especially in a small urban setting like Bala.”

[14] The Tribunal noted that similar comments were part of some participant submissions. The Tribunal asked Mr. Simpson to elaborate if the character of Bala is being linked up to such underlying elements. Mr. Simpson provided no clear answer or provided a specific opinion in due respect to his area of expertise.

[15] In cross-examination, the Applicant/Appellant asked Mr. Simpson to describe the character of Bala. Mr. Simpson described Bala in terms and descriptions congruent to Mr. Szczerbak. However, Mr. Simpson added that there are also three historic churches in Bala, and that the Inn is on the Township register entry 53 (Exhibit 1, Tab 17). Mr. Simpson clarified that the Inn does not have a heritage designation under the *Ontario Heritage Act* and is one of 53 properties on the heritage register.

[16] Scott Vickers was called as a witness by the counsel for Vickers as a party. Mr. Vickers was not qualified by the Tribunal, he had not submitted a previous witness statement and these concerns were raised by the Applicant/Appellant. Mr. Vickers described that he would be participating as a multi-decades resident of Bala with two businesses in Bala and was planning to provide his experiences and anecdotal evidence only. The Tribunal allowed Mr. Vickers under these premises for his evidence.

[17] Mr. Vickers described Bala as a quaint but vibrant town. Mr. Vickers described how the Kee is a great facility that hosts concerts as well as “Resort Nights” for resort workers across the Township who are bussed to the facility to unwind and party. When asked to reconcile his description of the Kee “Resort Nights” with rather unwelcomed comments about the same by Ms. McDavitt (identified as co-fundraiser in Exhibit 13) in her participant statement, Mr. Vickers did not respond.

[18] Mr. Vickers was asked to elaborate on the vibrant assertion for Bala and he added that a Pub and a larger restaurant are open till about 10 p.m. where people come with their boats and dock to enjoy and relax with food and fare.

[19] Stephen Fahner, a registered professional planner, was called by party Vickers. Mr. Fahner was also asked to describe the character of Bala. In the land use planning

context, Mr. Fahner agreed with both relatively similar submissions made by Mr. Szczerbak and Mr. Simpson.

[20] Mr. Fahner reviewed the photo evidence that he gathered (Exhibit 1, Tabs 22, 23 and 24). Mr. Fahner described it as a typical small town in Ontario with small businesses, a bank branch, a liquor store and small servicing business coupled with residential areas and other extended rural areas. Mr. Fahner stated that whereas the pictures show rather low to no activity in the Bala downtown, were it not for the Covid-19 situations, the streets are bustling with crowds at times shoulder-to-shoulder on some days.

[21] In reference to section 4.3.3 of the MLOP, Mr. Fahner submitted that the Township has not established any architectural guidelines.

[22] In considering all the evidence, the Tribunal finds Mr. Szczerbak's submissions, answers to the questions and deduction to be preferred over that of Messrs. Simpson, Vickers, and Fahner.

[23] The Tribunal finds that the Applicant/Appellant proposal does not impinge on the character of Bala or creates associated discernible and substantive negative impacts.

Deployment of PMU

[24] The Applicant/Appellant plans to use PMU to provide for 29 bedrooms for SQ as well as part of a unit for common sanitary purposes. Mr. Szczerbak explained that these are not winterized units and are strictly required to handle staffing quarter needs for the peak tourist season. Mr. Szczerbak explained that the units will be connected to existing services on the Site and located on a hard surface, previously paved tennis court. Mr. Szczerbak explained that during the Site planning stage, the Applicant/Appellant plans to review landscaping and other measures with the Township to meld these into the surrounding landscape.

[25] Trailers and abhorrence of having a trailer park in Bala are the issues much identified by the participants. The Township witness, Mr. Simpson, calls these trailers as well. The Applicant/Appellant espoused that these were PMU.

[26] The Township Zoning By-law No. 2014-14, Consolidation 2017 (“ZBL”) select and applicable excerpts are in Exhibit 1, Tab 16. The definition in ZBL that informs regarding the phrase “tent and trailer park” is as follows;

11.178 Tent and Trailer Park: Shall mean a parcel of land used and maintained as an overnight *tenting* or camping ground where people are temporarily accommodated in *tents, travel trailers, cabins, recreational vehicles* or other similar facilities, whether or not a fee or charge is paid for the rental thereof, but does not include *mobile homes*.

Mr. Fahner when elaborating on use of the phrase “trailer park” or “trailers” confirmed that the proposed deployment of PMU does not fit with these definitions in the ZBL and these definitions do not apply.

[27] Under cross-examination by the Applicant/Appellant, Mr. Fahner and Mr. Simpson both confirmed that the District of Muskoka Official Plan (“DMOP”), MLOP or the ZBL do not forbid or disallow structures like the ones proposed by the Applicant/Appellant. Mr. Fahner and Mr. Simpson also confirmed that there is nothing prescriptive having such structures on-site and to be at specific locations.

[28] Mr. Elston during cross-examination of Mr. Szczerbak speculated that a combination of existing 35 rooms in the Inn combined with 29 rooms in the PMU could lead to 256 possible dwellers if bunk beds were used. Mr. Szczerbak stated that the Applicant/Appellant plans to have no more than two people to the room.

[29] The Tribunal notes that DMOP (Exhibit 1, Tab 14) covers the aspect of aesthetics in section k.67 and directs in k.68 that to improve or maintain the long-term aesthetic appeal of the District of Muskoka, maintenance and occupancy standard By-laws, section 210(13) of the *Municipal Act* and Part VI of the *Environmental Protection Act* be used as tools.

[30] Based on a review of all evidence presented by the witnesses, the Tribunal finds that the deployment of PMU does not violate DMOP, MLOP or the ZBL other than to be subject to site plan review and approval by the Township as appropriate.

ZBA Statutory Tests

Provincial Policy Statement 2020 (“PPS 2020”)

[31] The Township staff provided a report to Council dated February 15, 2019 (Exhibit 1, Tab 6). In this report “Planning Considerations” under section 2, the Township staff declares having reviewed the matter and found it to be consistent with the PPS.

[32] The external consultant, Mr. Simpson, was asked if he had reviewed any of the staff report details with the Township staff, he stated that he has not. Mr. Simpson went on to provide his opinions based on his less than two months engagement in the matter as he stated to have been retained like Mr. Fahner near the end of May 2020.

[33] Mr. Simpson presented that the result of approval caused an erosion in the employment area attributes of current zoning for the Site contrary to section 1.3.2 of the PPS 2020. Mr. Simpson submitted that a comprehensive review was required by the Township to allow the changes requested in Applicant/Appellant application.

[34] Mr. Szczerbak countered in detailed review of sections 1.3 and subsections 1.3.1, 1.3.2 and 1.7.1 that commercial activities are maintained, and a variety of employment uses are supported. Mr. Fahner did not methodically address issues but rather went on to postulate a thesis around the impact of the proposal as to downzone the existing uses to dwelling unit type or residential equivalent purposes. In his analysis, Mr. Fahner failed to show to the Tribunal if any of his hypothetical possible designation applied to the Site.

[35] Mr. Simpson citing section 4.6 of the PPS 2020 stated that official plans were the most important vehicles for carrying out PPS 2020 direction. Mr. Szczerbak offered no

disagreement on this point and the appropriate official plans MDOP and MLOP were reviewed by the witnesses.

[36] Weighing all the evidence provided by all the witnesses, the Tribunal prefers the evidence of Mr. Szczerbak as being well substantiated. Mr. Szczerbak's evidence was also unfettered under cross-examination by all parties.

[37] Accordingly, the Tribunal thus finds that the proposal is consistent with PPS 2020.

MDOP and MLOP

[38] The MDOP in section C.19 very strongly and succinctly states that the second home population has a significant influence on the economy of the District of Muskoka. Development and re-development as well as the provision of goods and services that support this sector will be encouraged.

[39] There was no dispute that this second home population is composed of many varieties of people. These include seasonal residents, short term vacationers, special event visitors like the famous cranberry festival of Bala; no less are the people who support the fulfillment of accommodation and other service needs for these people i.e. seasonal workers who may be permanent residents in the area for seasonal peaks, etc. Whether it is the MDOP; letter of support from Muskoka Tourism (Exhibit 1, Tab 4) or Marriott staffing manager's letter breaking down staffing levels and seasonal surges in temporary workers (Exhibit 4); these all speak of dire needs for attracting, training and retaining staff to provide services to seasonal population surges.

[40] Mr. Simpson submitted that the proper approach for providing accommodative facilities to staff in resorts is to have each resort create its own on-site SQ. This stood no ground as Mr. Simpson could not furnish any basis in MDOP or MLOP for this stipulation. This aspect is also further reviewed by all parties in the context of zoning change requested by the Applicant/Appellant.

[41] Mr. Simpson reviewed the proposed use of the PMU and stated that functionally it holds little resemblance to other resorts due to separation of sleeping, washroom and dining areas. Other than proposing a uniformity of a design plan, Mr. Simpson sites no supportive plan policies where such directions are set.

[42] Mr. Szczerbak citing section c. 23 submitted that the proposal specifically upgrades and expands upon an underutilized commercial property.

[43] The Tribunal finds based on a review of all the evidence presented by witnesses, including extracting from Witness Fahner's general submissions, that the proposal is consistent with the MDOP and MLOP.

ZBL

[44] Mr. Szczerbak, Mr. Simpson and Mr. Fahner all agreed that the staff report (Exhibit 1, Tab 6) is supportive of the Applicant/Appellant application.

[45] Despite the staff report recognition, the opposing parties continued to submit or argue that the Applicant/Appellant is downzoning or that the proper zoning should be dwelling units or residential or in the likeness to a rooming house. When tested for elements of C1B zoning of the property, Mr. Simpson and Mr. Fahner failed to take any of their hypothesis to a successful conclusion. Mr. Simpson and Mr. Fahner fail to establish how, in any which way, they could rezone the Site as residential dwelling units when tested against the definitions of the same in the ZBL. The definitions in section 11 of the ZBL (Exhibit 1, Tab 16) consistently always failed the propositions of pushing the application as a more fitting dwelling unit or dwelling (definition 11.48); definitions of dwelling multiple (definition 11.44); residential (definition 11.143); rooming house (definition 11.152).

[46] Mr. Szczerbak convincingly argued and showed that the only usage fitting the proposal was SQ (definition 11.156). Moreover, the only application of SQ in the whole

ZBL is in the context of “Community Commercial Zone, Permitted Accessory Uses” in Table 5.2.2 of the ZBL.

[47] The only question remains is whether for this application making an accessory use as an allowable main use overpowers the designation intent for other main and accessory uses already allowed?

[48] Mr. Szczerbak submitted that the accessory use elevation to main use for SQ adds to the viability and successful operation of a commercially zoned property. It does not make uses, not exclusive but complementary, providing greater choices for a commercial enterprise to contribute to the economy in Bala, the Township and the District of Muskoka as a whole. The Applicant/Appellant showed an article to Witness Vickers how the previous owners were in a death spiral economically with the Inn. There are many participant statements mentioning the continuous degradation of the Inn in the decade of 2010. The glorious days are well in the past with the policy framework in place not being able to prevent commercial decline for this Site.

[49] Mr. Vickers as a lay witness expressed concerns relating to the modular buildings sinking into the asphalt and causing problems around water flow/drainage. These were noticed by Applicant/Appellant as issues beyond the issues list agreed to which governed this hearing. Regardless, Mr. Szczerbak indicated that much can be addressed working with the Township under the s. 41 discussions for site plan approvals.

[50] Except for the change in accessory use to main use for SQ. Applicant/Appellant does not request any other modifications to the ZBL.

[51] Based on evidences of all witnesses, the Tribunal finds that the requested ZBA complies with the ZBL intent and purpose.

SUMMARY

[52] In conclusion, the Tribunal finds based on the preferred evidence of Mr. Szczerbak that ZBA is consistent with PPS 2020, is in conformity with the District of Muskoka and Township of Muskoka Lakes Official Plans, complies with applicable zoning, represents good planning and is desirable for meeting the staff quarter needs.

ORDER

[53] The Tribunal orders that the appeal is allowed, and the Township is directed to amend By-law No. 2014-14 as set out in Attachment 1 to this Order.

[54] So orders the Tribunal.

“Jatinder Bhullar”

JATINDER BHULLAR
MEMBER

“C. Tucci”

C. TUCCI
MEMBER

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

Local Planning Appeal Tribunal

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ATTACHMENT 1

THE CORPORATION OF THE TOWNSHIP OF MUSKOKA LAKES

BY-LAW – 2018-159

Being a By-law to amend Comprehensive Zoning By-law 2014-14, as amended, in the Township of Muskoka Lakes

WHEREAS the authority to pass this by-law is provided by Section 34 of the *Planning Act, R.S.O. 1990, Chapter P. 13* and amendments thereto;

AND WHEREAS By-law 2014-14 was enacted by the Corporation of the Township of Muskoka Lakes to regulate land use within the Municipality;

AND WHEREAS the Council of the Corporation of the Township of Muskoka Lakes deems it advisable to further amend By-law 2014-14;

NOW THEREFORE the Council of the Corporation of the Township of Muskoka Lakes enacts as follows:

1. Section 12 of By-law 2014-14 is hereby further amended by the addition of the following subsection:
 - 87-1853 i) The lands affected by this amendment are described as Concession 7, Part Lot 33 (Former Township of Wood), now in the Township of Muskoka Lakes, more specifically described as Plan 2, Part Lot 20, on Plan 35R-3291, Parts 1 to 3, as shown hatched on Schedule I to By-law 2018-159.
 - ii) Despite the provisions of Section 5.2.1 of By-law 2014-14, as amended, for lands described as above, Staff Quarters shall be permitted as an additional main use in the Community Commercial – Resort Commercial (C1B) zone. For the purposes of this by-law, *Staff Quarters* shall permit within any building, the accommodation of staff and contractors employed at any Tourist Resort located in the Township of Muskoka Lakes.
 - iii) Despite the provisions of Section 5.2.10, for lands described above, *Staff Quarters* shall be included in the calculation of the number of units per acre allowed.

All other provisions of By-law 2014-14 apply.

2. Schedule I attached hereto is hereby made part of this By-law.

READ A FIRST AND SECOND TIME THIS ____ day of _____ 2020.

READ A THIRD TIME AND FINALLY PASSED this ____ day of _____ 2020.

Phil Harding, Mayor

Cheryl Mortimer, Clerk