

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 22, 2016

CASE NO(S): PL151021

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Donald Johnston
Subject: Request to amend the Official Plan - Refusal of request by the Corporation of the Township of Seguin

Existing Designation: Shoreline Area and Environmental Protection
Proposed Designated: Special Policy
Purpose: To permit one new residential lot on Oastler Lake

Property Address/Description: 254 Brooks Road
Municipality: Township of Seguin
Approval Authority File No.: OP-2015-0001-F
OMB Case No.: PL151021
OMB File No.: PL151021
OMB Case Name: Johnston v. Seguin (Township)

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Donald Johnston
Subject: Consent
Property Address/Description: 254 Brooks Road
Municipality: Township of Seguin
Municipal File No.: B-2007-0016-F
OMB Case No.: PL151021
OMB File No.: PL151022

Board Rule 107 states:

107. Effective Date of Board Decision A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

Heard: July 13, 2016 and
October 5-7, 2016, in Seguin, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Donald Johnston

H. Elston*, L. Martin*, A. Anderson*

Township of Seguin

K. Mullin*

Rankin Lake Property Owners' Association Inc.

Thor Eklund

Participants

David Minas

Self-represented

John Lynch

Self-represented

Duncan Fremlin

Self-represented

Karen Buck

Self-represented

Otter Lake Ratepayers' Association

Art Coles

Three Lakes Ratepayers' Association Inc.

John McCash

**DECISION DELIVERED BY STEFAN KRZECZUNOWICZ AND SYLVIA SUTHERLAND
AND ORDER OF THE BOARD**

INTRODUCTION

[1] Donald Johnston (the "Appellant") has appealed decisions of the Township of Seguin (the "Township") to deny his applications to amend the Township's Official Plan (the "OPA") and to sever his property (the "subject property").

[2] The subject property is 5.9 hectares and has approximately 250 metres of shoreline frontage on Oastler Lake. The OPA and severance would create one new seasonal

residential lot, with an area of 2.5 hectares and lake frontage of 118 metres. The retained lot would be 3.4 hectares with 134 metres of lake frontage.

Procedural Matters

[3] At the outset of the hearing, the Board granted party status to the Rankin Lake Property Owners' Association, which was represented by its President Thor Eklund.

[4] Participant status was granted to David Minas, John Lynch, Duncan Fremlin, and Karen Buck, as well as the Otter Lake Ratepayers' Association and Three Lakes Ratepayers' Association. The associations were represented by Art Coles and John McCash.

[5] The Appellant was to have been represented by Counsel Harold Elston. At the start of the hearing Mr. Elston was made aware that he had previously represented one of the participant ratepayer organizations. To avoid any perception of a conflict of interest Mr. Elston recused himself from the proceedings and secured new Counsel for his client in the person of Aynsley Anderson. With the parties' consent the Board adjourned the hearing until October 6 to allow Ms. Anderson to familiarize herself with the case.

[6] During the hearing, the Board heard evidence from two experts, John Jackson and Anthony Usher, whom the Board qualified to provide independent opinion evidence in matters of land use planning.

THE PROPOSAL IN CONTEXT

[7] A key point of disagreement at the hearing was how official plan policies that apply to Oastler Lake have evolved since the 1970s. As such, certain historical facts that are referred to in the analysis that follows are set out below.

Oastler Lake

[8] Oastler Lake is situated in cottage country about 10 minutes' drive southeast of the Town of Parry Sound. As of September, 2015 the lake accommodates 71 waterfront properties in private ownership, many with seasonal residences. There is a Provincial Park containing 148 camp sites, and a commercial property containing 10 motel units and a disused restaurant on the south shore (Exhibit 12a, p. 266). The lake also has two public access points, including a boat launch.

[9] Prior to 1998 Oastler Lake was located in the Township of Foley. In 1998 the Township was amalgamated, with other municipalities, into the new Township of Seguin ("Seguin"). The current Seguin Official Plan (the "OP") came into effect on April 24, 2007.

First Severance Application

[10] The subject property was created as part of a four-lot severance in 1979, together with five other lots on a private road running along the north end of Oastler Lake.

[11] In October 1979 the Township of Foley rezoned a small waterfront portion of the subject property to allow a seasonal residential dwelling to be constructed. The balance of the property remained in a rural conservation zone.

[12] The Appellant and his wife purchased the subject property in 1980.

[13] In 1981 the Appellant applied for a consent to sever the subject property into two. The Committee of Adjustment for the Township of Foley denied the severance noting in its decision that the land "had previously been severed by consent application into four lots with the understanding that no further severances would be applied for." The decision was upheld by the Ontario Municipal Board.

[14] From 1982 until the current Seguin OP came into force in 2007 various in-force official plans expressly prohibited any subdivision of the nine lots on the north end of Oastler Lake, including the subject property.

Second Severance Application

[15] Over the last 25 years, the Appellant allowed the eastern part of the subject property to be used exclusively by a family friend. During that time two trailers with wood-frame enclosures and decks were built as dwellings on this eastern part, without building permits and in contravention of the zoning by-law, together with other structures. The dwellings and decks were recently demolished. On June 16, 2016 the Appellant got permission to build a “bunkie” on the eastern part of the property.

[16] On April 5, 2007 the Appellant filed a second application to sever the subject property, this time under the framework of the current (2007) Seguin OP. The following background studies were filed in support of the application:

- a. Environmental Impact Study (October, 2007)
- b. Environmental Impact Study Addendum, Fish Habitat Mapping (2008)
- c. Supplementary Planning Report by John Jackson (June, 2008)
- d. Environmental Impact Study Update re: Bat Species At Risk (June, 2016)

[17] The application was held in abeyance for eight years because of concerns that it did not conform to the Recreational Carrying Capacity policies in the Seguin OP. Council reviewed and reaffirmed these policies in 2009/2010.

[18] On January 21, 2015 Mr. Johnston applied for an OPA to facilitate his severance application. The OPA application was deemed “complete” under s. 22 of the *Planning Act* (the “Act”) on April 14, 2015 and a public meeting on both applications was held on August 24, 2015.

[19] On October 5, 2015 Council denied the OPA and severance applications. On October 13, 2015 Mr. Johnston appealed Council’s decisions to the Board.

LEGISLATIVE TESTS

[20] In considering the OPA, the main adjudicative tests before the Board are whether the application has sufficient regard to the Provincial interests listed in section 2 of the Act and whether it is consistent with the Act's Provincial Policy Statement 2014 ("PPS").

[21] These tests must also be applied in adjudicating the merits of the proposed severance; however, in considering the severance, the Board must also have regard to the lengthy list of subdivision evaluation criteria in s. 51(24) of the Act, including s. 51(24)(c), which speaks to whether the severance conforms to the official plan.

[22] The Board must also have regard to the decisions of Council on both applications and the information that Council had when making its decisions. In this last respect, two reports prepared by Township planning staff were entered into evidence as Exhibit 1, Tabs 22 and 24. The second report, dated October 5 2015, recommended that Council approve both applications.

CORE ISSUES

[23] The Board's conclusions on the applications are rooted in its findings on two core issues:

- a. The legitimacy and applicability of the Township's OP Recreational Carrying Capacity policies.
- b. Whether the public interest in protecting wetlands is upheld by the approving the OPA and severance.

RECREATIONAL CARRYING CAPACITY

[24] The 2015 OPA application was triggered by the Appellant's understanding that his 2007 severance application would fail because it contravened the Recreational Carrying Capacity (RCC) policies in the Seguin OP. The OPA would exempt the subject property from these policies.

[25] RCC is the ratio of residential units on a lake to the lake surface area, with adjustments made for shoreline shape and tourist development. The Seguin OP uses RCC to, among other things, restrict development on lakes. Under OP policy B.3.3 d), new development on a lake is prohibited when the RCC is exceeded. This policy, if strictly applied, would prohibit the Appellant's severance as the amount of development on Oastler Lake is well above the lake's RCC of 54 residential units (see Appendix III of the OP).

[26] RCC is referenced in other OP policies, notably Policy B.12.2.4 dealing with the creation of new waterfront lots by consent:

New waterfront lots shall only be permitted where it is demonstrated...that the abutting waterbody can sustain the impact associated with the additional lot(s) and shall not exceed the lower, or most precautionary, of the recreational or biological capacity of the waterbody.

[27] The Board heard conflicting expert testimony on the applicability of these policies. Mr. Usher supported the proposition that the policies, including the RCC measure itself, form legitimate grounds for denying the OPA and severance applications. Mr. Jackson was opposed.

Mr. Jackson's Evidence

[28] According to Mr. Jackson, RCC is a blunt and unscientific measure that does not necessarily reflect the actual recreational capacity of lakes, particularly on Oastler Lake. Planning policies that use RCC to limit development should therefore be applied flexibly rather than rigidly.

[29] Mr. Jackson summarized how RCC has been used in the Township. He stated that in 2007, when the policies were introduced, RCC was intended to be a "guideline" for limiting lakeshore development rather than a "hard cap". As such, the new policies represented a more permissive approach to severances on the subject property than the previous outright ban; hence the Appellant's second severance application. In Mr. Jackson's view, Council's recent use of RCC as a "hard cap" is an unreasonable

response to pressure from ratepayers seeking to restrict development rather than an application of sound planning principles.

[30] Mr. Jackson testified that RCC, while purporting to be an empirical measure, is in fact unscientific because the relationship between a lake's RCC and its capacity to support development is variable. He cited a journal article that stated that "no [recreational] carry capacity formula is right for every lake" (Exhibit 7b, Tab 3) and the opinion of the Township's planning consultant who, during the 2009/2010 RCC review, questioned the "hard cap" approach. Mr. Jackson also testified that the RCC calculation method used in the Seguin OP is flawed. For example, it does not consider a decline in boating activity which, in Mr. Jackson's opinion, is likely to occur in the future. Nor does it account for a lake's unique characteristics, such as the Oastler Lake Provincial Park.

[31] According to Mr. Jackson, the actual recreational use of Oastler Lake is lower than suggested by the RCC measure of 54 units. To support this claim, Mr. Jackson provided the Board with a Boating Impact Study that ostensibly showed that Oastler Lake is "not a boating lake". The Board notes that Township staff used the results of the Boating Impact Study to support their recommendation that the OPA and severance applications be approved. Mr. Jackson also testified that, even though the Oastler Lake RCC does not account for recreational activity arising from the park, official statistics show that use of the park is in decline.

[32] Mr. Jackson concluded that, because RCC is a defective measure in evaluating land use proposals, denying an otherwise exemplary severance solely on the basis of RCC is bad planning. In his opinion, the Township would be better served by controlling lake development using planning powers other than RCC—for example zoning, development agreements, and site plan control, all of which were less sophisticated when the Appellant made his first severance application in 1981. Moreover, approving the applications is unlikely to generate more recreational activity on Oastler Lake because the subject property has effectively been used as two lots for some time (albeit illegally). In any case, Oastler Lake can accommodate additional recreational use.

The Evidence in Support of RCC

[33] Where Mr. Jackson sees change brought about by the introduction of the RCC policies in 2007, Mr. Usher sees continuity. In Mr. Usher's opinion, by implementing RCC as a mechanism for controlling lake development, the Seguin OP extended rather than rescinded the ban on severances on Oastler Lake that had previously applied only to the nine lots created in 1979. He pointed to a letter from the Township planner to the Appellant, dated October 24, 2012 that confirmed his view that policy B.3.3 d) was always to be rigidly applied:

There was no flexibility in the policy before the review [of RCC policies in 2009/2010] and there is no flexibility in the policy after the review. The policy was not changed. (Exhibit 12a, Tab 16)

[34] Mr. Usher's opinion was reinforced by Mr. McCash, who participated in the 2009/2010 RCC review and testified that RCC had the support of numerous ratepayer groups, residents and Council as a "hard cap".

[35] Mr. Usher testified that RCC has a long history. It was conceived in the 1960s as a way of limiting development in wilderness lands that were becoming increasingly used for recreation. It was soon afterwards applied to lakes where, in his view, it has evolved into an acceptable form of development control. According to Mr. Usher, the RCC policies at issue are not unique to the Seguin OP. Similar policies are in force in other municipal OPs in Ontario.

[36] Mr. Usher gave a robust defense of the RCC policies in the Seguin OP. In his opinion, because policy B.3.3 d) is both unequivocal and non-discretionary, approving the OPA application would set a bad precedent by undermining what is, in fact, a legitimate "hard cap" on development. His concern about precedent was echoed by the participants.

[37] Mr. Usher accepted Mr. Jackson's claim that the Oastler Lake RCC of 54 units is an imperfect estimate. However, in his view, part of its imperfection is that it *underestimates* recreational activity on the lake because it ignores the effect of the park and the boat launches (despite the OP requirement that tourist accommodation units be included in the

RCC calculation). Mr. Usher provided research and analysis into park statistics to show that, accounting for weather conditions, and contrary to Mr. Jackson's claim, park usage has been stable in recent years.

[38] Mr. Usher's views were supported by Mr. Eklund and the participants. Messrs. Minas, Lynch, and Fremlin, who all own property on or near Oastler Lake, spoke of the lake as being very busy, with swimmers, paddlers, and motorized watercraft all vying for space on the water. Mr. Fremlin provided photos of the public boat launch and the park shoreline where numerous motor and paddle boats were in evidence (Exhibit 1). Ms. Buck added that, as well as omitting the park and boat launches, the Oastler Lake RCC calculation underestimates recreational activity by not accounting for day users who access the lake from the Seguin Marina and other connecting lakes.

Disposition of the Board

[39] The Board accepts that RCC is an imperfect estimate of the capacity of a lake to accommodate recreational uses. Moreover, it is clear that its efficacy as a land use control is evolving. Nevertheless, the Board heard no credible evidence to show that, in this matter, RCC is unreliable in assessing how much development Oastler Lake can sustain. More generally, the Board finds that Council's use of RCC to limit development that would exceed the recreational capacity of a lake represents good planning.

[40] The Board finds Mr. Jackson's position that RCC is intended to be applied flexibly rather than as a "hard cap" on development cannot be sustained. It is true that the language in policy B.3.3 b) of the Seguin OP speaks of *guidelines* for calculating RCC; there is certainly flexibility afforded in the calculation. However, the OP is also clear that the result is to be used as an *absolute* cap on the amount of permitted development.

[41] Moreover, the Board finds that RCC figures are not arbitrary. They are based on a standard calculation that has been developed out of years' of research and experimentation. The RCC policies are applied consistently throughout the Township and are used by planning authorities in other jurisdictions.

[42] The Board observes that Council's use of RCC as one of its threshold tests for development approval results from careful study and considerable public consultation over the last 10 years. As such, Council's decision to refuse the Appellant's OPA and severance applications on the basis of RCC was informed and reasonable.

[43] The Appellant's Boating Impact Study, whose methodology may charitably be described as inadequate, does not provide this panel with credible evidence that the Oastler Lake RCC is too low. Indeed, the Board finds the very premise of the study - that boating is the leading indicator of the RCC - to be misleading because it ignores other recreational activities on the lake, such as swimming and paddling.

[44] The Board is not persuaded by Mr. Jackson's opinion that recreational usage on Oastler Lake will fall. Ms. Buck has observed that the use of wake boats, which have an enormous capacity to damage shoreline habitats, is on the rise. Mr. Eklund was of the view that increased occupation of private dwellings on the lake by people working from home and retirees is likely to increase recreational use in the future. The Board finds this testimony to be sensible and credible.

[45] The Board finds that, if anything, the Oastler Lake RCC is too high. The testimony of the participants who own land on and near the lake, supported by Mr. Usher's research and forensic analysis of park usage data, demonstrate that the Provincial Park has and will continue to generate recreational activity on the lake that is not reflected in the RCC. The Board is sympathetic to the view expressed by Mr. Eklund, an experienced civil engineer, that the standard practice of calculating infrastructure capacity based on maximum peak usage should also apply to RCC calculations.

[46] The Board notes that the RCC of a lake is not fixed. Council has the ability to update RCC calculations to reflect current levels of development and to refine how the RCC policies are to be applied. In this last respect, Council passed an OP amendment in 2012 to exempt lakes under 40 hectares from the RCC policies (Exhibit 11). There is no reason why a similar amendment could not be passed should the Oastler Lake RCC later

prove to be inaccurate. In the meantime, the current RCC of Oastler Lake means that the severance application is premature.

[47] The Appellant has twice tried to sever the subject property over the last 35 years. Various approval authorities, including this Board, have denied his applications on the basis that the property was created with the specific intention that it would never be divided. The Board finds that the RCC policies that were introduced in 2007 have reinforced this ban rather than relaxed it.

[48] The Board gives no weight to the argument that the applications should be approved because they simply formalize an existing use. The merits of the applications are to be considered “without prejudice”, that is, as though the use did not exist. In considering the merits, the Board will not penalize the Appellant for prior infractions. Nor will it favour the fact that the existing use is longstanding and, according to the Appellant, benign.

[49] In conclusion, the subject property is located on a lake that, according to the RCC measure, is over capacity even without accounting for the public uses. The Board finds that the subject property has no special characteristics that would justify exempting it from the RCC policies that prohibit development on the lake. The Board sees no valid land use planning grounds for exempting the subject property from the RCC policies.

[50] The Board finds that the OPA and severance applications do not adequately protect the ecological systems of Oastler Lake and do not represent the orderly development of safe and healthy communities. The applications do not therefore have sufficient regard to s. 2 (a) and (h) of the Act. Moreover, the severance application is premature and does not conform to the Seguin OP. As such, the severance application does not have sufficient regard to the subdivision evaluation criteria in s. 51(24) (b) and (c) of the Act.

WETLAND PROTECTION

[51] The subject property is adjacent to, and indeed extends slightly into, an area identified as an “Unevaluated Wetland” by the Ontario Ministry of Natural Resources and

Forestry. Mr. Usher contends that the background studies submitted in support of the applications are deficient because, while they appropriately address wildlife and fish habitat near the subject property, they do not analyze the wetland.

[52] Terminology is important in assessing Mr. Usher's concern. The Board must review the applications in light of "the protection of ecological systems, including natural areas, features and functions" per ss. 2 (a) of the Act as well as the natural heritage policies in s. 2.1 of the PPS. The latter prohibit development and site alteration in, among other protected areas, significant wetlands, fish habitat and habitat of endangered species and threatened species, and on adjacent lands to significant wetlands and fish habitat:

unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological function.

[53] It is not known whether the wetland that extends into the subject property is "significant" under the PPS because it has not yet been evaluated. As such, the Board finds that the OPA and severance applications cannot be denied solely on the basis of inconsistency with the PPS.

[54] Can the same be said with respect to conformity of the severance to the Seguin OP? The first goal of the OP is instructive. It aims to protect and enhance significant natural heritage features and ecological functions by adopting an "Environment-First" principle. This principle trumps development on lands containing these features and functions.

[55] The Board is struck by how the Seguin OP both mirrors and breathes life into the PPS natural heritage protection requirements. Under the OP, the subject property is designated as a "Shoreline Area" and the wetland that extends into the property is designated as "Environmental Protection Area". Because of these designations, the OPA and severance applications trigger the need for an Environmental Impact Study ("EIS") and a Site Evaluation Report ("SER"). The requirements for EISs and SERs are rigorous and are listed in OP policies B.15 and C.3.1.3.3.

[56] The main purpose of an EIS is to satisfy PPS policy 2.1.8 (see above). As such, the OP requires that an EIS evaluate a proposed development in relation to “*significant* natural features and ecological functions [emphasis added]”. An SER is to focus more on the impact of a development on a lake shoreline. Among the SER requirements is that it identify and analyze environmentally sensitive areas, including significant fish habitat, wildlife habitat, and wetlands. It is noted that, for SERs, there is no requirement in that wetlands be “significant” as defined in the PPS.

[57] The Seguin OP does not automatically prohibit development on the basis that it will negatively impact the natural environment. However, the OP clearly puts into place stringent policies to minimize those impacts including requiring detailed studies to be prepared in cases where development is proposed near wetlands, whether significant or not, and other areas deemed worthy of special protection.

Expert Opinion Evidence

[58] Mr. Usher’s concern is that insufficient information - insufficient at least when compared to the Seguin OP requirements - is available to properly assess the impact of the severance application on the wetland. His opinion is that the Appellant’s EIS and SER reports do not address the impact of the location of a future dwelling and its septic system on the wetland water quality. He also noted that the staff reports, which claim the Appellant met the EIS and SER requirements, make no mention of the need to consider the wetland.

[59] Mr. Jackson disagreed. He testified that the Seguin OP’s requirements to examine the wetland were adequately addressed by the EIS and SER reports. The reports were prepared by a qualified ecologist who assessed the fish and wildlife habitats which, in Mr. Jackson’s view, are the only natural heritage features that would be affected by the proposed development. They were accepted by Township planners as satisfying the OP requirements, and without need for a peer review. He was surprised that Mr. Usher, who is not a natural scientist, would object to scientific research that has been reviewed and accepted by staff.

[60] Mr. Jackson noted that a proposed condition of severance approval would require the Appellant to submit an updated EIS to address the requirements of the PPS and Seguin OP (Condition 9, Exhibit 7B, Tab 14). The condition would, in his opinion, ensure that any remaining natural heritage issues were addressed.

Disposition of the Board

[61] First, the Board notes that this hearing is an enquiry into the merits of the OPA and consent applications with regard to *all* matters of Provincial interest, not just the ones that may have led directly to this hearing. In this regard, the Board is free to question the judgment of the Township's planners on the adequacy of the EIS and SER reports.

[62] The Board finds that the EIS and SER reports submitted by the Appellant do not address the wetland and therefore do not meet the SER requirements of the Seguin OP. The reports are very specific about their scope. They examine the proposed development with reference to some, though not all, of the natural heritage features defined in the PPS. For example, the 2007 EIS states in its Executive Summary that the proposal "will not impact the natural heritage features identified in the scoped EIS" which are identified as "Species at Risk" and "Significant Wildlife Habitat". Additionally, the 2008 Fish Habitat Study focuses only on the impact of the proposed development on Type 1 and Type 2 fish habitat. There is no assessment of the impact of the development on the wetland in any of the reports.

[63] The Seguin OP requires that EIS and SER reports be submitted "as part of the local planning application review process...in order to satisfy the goals and strategic objectives of this Plan". This ensures that Council has all the technical information necessary to assess the impact of the proposed development in advance of granting draft approval. The Board finds that the proposed condition of approval that the Appellant submit updated reports would come too late for Council to determine whether the "Environment-First" principle in the Seguin OP has been satisfied.

[64] Over and above the SER requirements, the Board finds that the "Environment-First" principle should lead the wetland that straddles the subject property to be evaluated, even

if its “significance” as defined by the PPS is unknown. The concerns about precedent in relation to RCC have already been noted. In this panel’s view, a more troubling precedent is that environmental studies that are required by the Seguin OP are undertaken without sufficient scope or rigour.

[65] For these reasons, the Board finds that the OPA and severance applications do not have sufficient regard to s. 2 (a) of the Act. Moreover, the severance application is premature because it does not conform to the Seguin OP. As such the severance application also does not have sufficient regard to the subdivision evaluation criteria in s. 51(24) (a), (b), and (c) of the Act.

CONCLUSION

[66] The Board finds that the RCC policies in the Seguin OP are an appropriate tool for limiting development on Oastler Lake. The policies reflect Council’s reasonable and longstanding desire to prohibit severances on the subject property. They also uphold the Provincial interest set out in s. 2 of the Act and in the PPS.

[67] The Board finds that the OPA is premature because the wetland adjoining and extending into the subject property has not been properly evaluated.

ORDER

[68] The Board orders that the appeals are dismissed and the provisional consent is not to be given.

“Stefan Krzeczunowicz”

STEFAN KRZECZUNOWICZ
MEMBER

“Sylvia Sutherland”

SYLVIA SUTHERLAND
MEMBER

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Ontario Municipal Board

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