

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



ISSUE DATE: March 05, 2019

CASE NO(S): PL170824

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

Applicant and Appellant:	Frank Lippa and Elizabeth Lippa
Subject:	Request to amend the Official Plan - Refusal of request by Township of Muskoka Rural Area (Area 2 – Low Density)
Existing Designation:	Rural Area (Area 2 – Low Density)
Proposed Designated:	Area of Resource Potential – Mineral Resource
Purpose:	To permit the establishment of a new pit and quarry
Property Address/Description:	1089 Butler Mill Road
Municipality:	Township of Muskoka Lakes
Approval Authority File No.:	OPA #46
OMB Case No.:	PL170824
OMB File No.:	PL170824
OMB Case Name:	Lippa v. Muskoka Lakes (Township)

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

Applicant and Appellant:	Frank Lippa and Elizabeth Lippa
Subject:	Application amend Zoning By-law No. 2014-14 - Refusal of Application by Township of Muskoka
Existing Zoning:	Rural (Ru2)
Proposed Zoning:	Rural Industrial – Extractive (RuM3), Open Space (OS2), and Environmental Protection (EP1)
Purpose:	To permit the establishment of a new pit and quarry
Property Address/Description:	1089 Butler Mill Road

Municipality:	Township of Muskoka Lakes
Municipality File No.:	ZBA-13/12
OMB Case No.:	PL170824
OMB File No.:	PL170825

Heard: November 26, 2018 in Port Carling, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Frank and Elizabeth Lippa	John Ewart*
Township of Muskoka Lakes	William Thomson*
Skeleton Lake Cottagers Organization	David Donnelly*
Ross Earl	Tom Newman
Mike Newman	Self-represented

DECISION DELIVERED BY C.J. BRYSON AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This was the third Pre-Hearing Conference (“PHC”) regarding an appeal by Frank and Elizabeth Lippa (“Applicants” and Appellants) of the Township of Muskoka Lakes’ (“Township”) refusal of the Applicants’ request to amend the Township’s Official Plan (“OP”) and its Zoning By-law No. 2014-14 (“ZB”), to permit the establishment of a new aggregate pit, quarry and associated operations at 1089 Butler Mill Road (“Subject Lands”).

[2] Counsel for the Applicants informed the Tribunal that a decision on their application for a licence pursuant to the *Aggregate Resources Act* (“ARA”) remains outstanding. The Applicants are awaiting a traffic and a noise study to submit in support of their ARA licence application. Should an appeal be brought from the eventual ARA

licence decision of the Ministry of Natural Resources and Forestry (“MNRF”), it is the intent of the Applicants to seek a form of consolidation of that appeal with the within OP and ZB amendment application appeals. All parties agreed that the within appeals should not proceed to a hearing until the MNRF decision has been made and it is known whether there is any appeal therefrom.

[3] Counsel for the Applicants also informed the Tribunal that they have obtained a second planning opinion in regard to the proposed development and the concern of Ross Earl and the Skeleton Lake Cottagers Organization (“SLCO”) that the Subject Lands are impacted by the OP Waterfront designation arising from the nearby Lambert’s and Mud Lakes. An OP Waterfront designation precludes rock crushing within two kilometres of the waterfront of the Lakes, if applicable to those water bodies. The Applicants originally understood that the two small lakes near the Subject Lands were not included in the OP Waterfront designation. The Township view of the designation arising from Lambert’s and Mud Lakes was not clear and it rejected the Applicants’ OP and ZB amendment applications on other bases. The Applicants now agree, based upon the second planning opinion obtained, that the Subject Lands are impacted by the OP Waterfront designation and the proposal is therefore impacted by the related prohibition of rock crushing within two kilometres of the waterfront of each of the Lakes. All parties agree a further OP amendment application is required to address this policy issue for it was not addressed in the OP amendment application and is not minor in nature.

[4] On the bases of the outstanding ARA licence decision and the need to submit a further OP amendment application for site specific relief from the OP Waterfront designation policy on rock crushing, the Applicants request the Tribunal to adjourn the within appeal proceedings *sine die* to allow for the second OP amendment application to be processed and any appeal therefrom to come forward to the Tribunal and to allow for the MNRF decision on its licence application and any appeals therefrom to come forward to the Tribunal. It is the Applicants’ position that there will be an appeal from any Township decision on its supplementary OP amendment application and that such appeal will necessarily be heard and determined by the Tribunal ahead of the within

appeals, due to the recent enactment of the *Local Planning Appeal Tribunal Act* (“LPATA”) and changes to the *Planning Act* (“Act”), as a result of *Bill 139, Building Better Communities and Conserving Watersheds Act, 2017*.

[5] Ross Earl brought forward a motion to dismiss at this third PHC on the basis that the OP and ZB amendments applied for do not address the impact of the OP Waterfront designation applying to Lambert’s and Mud Lakes, which arguably would preclude rock crushing on the Subject Lands. Mr. Earl did not wish to withdraw his motion in face of the Applicants’ stated intent to bring forward a second OP amendment application to address the OP policy basis of the motion to dismiss. SLCO and Mike Newman supported Mr. Earl in this regard. The Township took no position on the motion to dismiss.

MOTION TO DISMISS

[6] The authority for the Tribunal to dismiss the within OP and ZB amendment appeals on the submitted bases that the appeals are frivolous and vexatious arises from s. 22(11) and 17(45), and s.34 (25) of the Act, respectively, as it read at the time of the applications.

[7] Mr. Earl served and filed a Motion to Dismiss the within appeals on November 9, 2018. Mr. Earl submitted that the appeals are frivolous since the Subject Lands and proposed rock crushing operations are within two kilometres of Lambert’s Lake and Mud Lake. Mr. Earl submitted the within appeals should be dismissed as frivolous since rock crushing on the Subject Lands is a necessary aspect of the proposed development, is prohibited by the current OP and not addressed by the within OP amendment application appeal. Mr. Earl and Mr. Newman maintained this ground in further written submissions to the Tribunal.

[8] SLCO acknowledged that the Applicants will now bring a second OP amendment application to request a site specific policy change to permit the rock crushing operations on the Subject Lands but continued to support the Motion to Dismiss on its alternative ground that the within appeals are vexatious. SLCO submitted that the

second OP amendment application and inevitable appeal therefrom will create a multiplicity of proceedings due to the foreseeable second OP amendment application appeal taking place under the new LPATA system, which will preclude consolidation of the new appeal with the existing appeals. SLCO submitted that the effort and expense to deal with a second proceeding was vexatious given that the issue of OP Waterfront designation was raised from the outset of these appeals, but only recently addressed by the Applicants and the Township.

[9] The Applicants submit the OP and ZB applications continue to have separate merit despite the now acknowledged need for a further OP amendment application to address the need for site specific relief for the proposed development, as directed by the Township upon its change of opinion in this regard. They also note that the Official Plan for the District of Muskoka does not prohibit resource management within the Waterfront designation. The Affidavit of Gary Bell, submitted on behalf of the Applicants, contends the absence of Township residential use permissions on Lambert's and Mud Lakes negates the purpose and intent of the two kilometre prohibition as it may apply to the Subject Lands. He proposes the following further OP amendment:

On the land Parts of Lots 3 & 4, Concession 4, Geographic Township of Cardwell, now Township of Muskoka Lakes, rock crushing in a licences quarry is permitted closer than two kilometers from the Waterfront designation of Lambert's Lake and Mud Lake. These lakes are more than 700 m from the specified property and do not include the waterfront zones and uses intended to be separated from crushing.

[10] The Applicants further submit that no prejudice arises from the need for a second OP amendment application since the within appeals are far from ready to be scheduled and any second OP application appeal would necessarily be determined ahead of the within appeals. Finally, they submit there would be undue prejudice to the Applicants should the within appeals be dismissed for they address many planning merits aspects of the proposed development outside of the interpretation of the Township OP regarding permitted locations for rock crushing operations.

[11] The Tribunal finds the within appeals are not frivolous in face of the Applicants' intent to bring forward a second OP amendment application to the Township forthwith to

address the now agreed upon OP Waterfront designation applicable to Lambert's and Mud Lakes and impacts arising therefrom. The arguments put forward by the moving parties on the Motion go to the merits of this matter but do not dispose of it conclusively. Notably, the Tribunal has no evidence regarding the Township's intent or understanding of two kilometre rock crushing prohibition in its OP.

[12] Further, the Tribunal finds there is nothing vexatious arising from a further OP amendment application and likely appeal absent evidence of bad faith or ulterior motive on the part of the Applicants in taking this approach. No evidence was brought forward or arguments made suggesting that the Applicants were guilty of anything but changing their mind upon challenge by the moving parties on the Motion and obtaining a second planning opinion on the matter. The Tribunal notes the Township also obtained a second opinion on the matter, which led to its position that a further OP amendment application is required.

[13] The foreseeable appeal from any decision on the second OP amendment application will necessarily be heard first not only due to the outstanding ARA licence decision and LPATA timeline and process requirements, but also due to the need to establish the OP policy intent prior to determining the merits of the within OP amendment and the ZB amendment appeals.

[14] If the Applicants are unsuccessful in regard to an appeal of their second OP amendment application, the within appeals likely become moot. If the Applicants are successful in regard to the supplementary OP amendment application, then the within appeals will proceed to be heard on their merits. No interim steps will be required of the parties as a result of the second OP amendment application, other than to update the Tribunal as to the Council determination and any appeals arising. Any LPATA appeal of the second OP amendment application will be narrow as to the intent of the OP rock crushing policy and will not require duplicative expert evidence regarding the merits of the proposal in view of environmental and other planning concerns. Finally, the Tribunal is of the view that the necessity of a separate LPATA appeal hearing, due to legislative prerogative, is not a basis upon which to claim the within appeals are vexatious in

nature.

ORDER

[15] The Tribunal orders that the Motion to Dismiss the appeals is denied.

[16] The Tribunal further orders that the within appeals are adjourned *sine die*.

[17] This Member is seized of case management of this proceeding and may be spoken to in regard to matters arising.

“C.J. Bryson”

C.J. BRYSON
MEMBER

If there is an attachment referred to in this document,
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Local Planning Appeal Tribunal

A constituent tribunal of Tribunals Ontario - Environment and Land Division
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