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DECISION/ORDER NO:

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Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL010867

James R. Webster and Black Bear Estates Inc. have appealed to the Ontario Municipal Board under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Minister of Municipal Affairs and Housing to approve Proposed Amendment No. 94 to the Official Plan for the County of Victoria (now the City of Kawartha Lakes)

Approval Authority File No. 16-OP-00036-094

OMB File No. O010156

At the request of Black Bear Estates Inc., the Minister of Municipal Affairs and Housing has referred to the Ontario Municipal Board under subsection 17 (11) of the *Planning Act*, R.S.O. 1990, c. P.13, portions of Proposed Amendment No. 31 to the Official Plan for the County of Victoria

Minister's File No. 16OP-0036-31

O.M.B. File No. O020190

APPEARANCES:

Parties

James R. Webster and
Black Bear Estates Inc.

Ministry of Municipal
Affairs and Housing

Counsel

James R. Webster

B. Linington

DECISION DELIVERED BY ROBERT D. M. OWEN

This hearing was the culmination of some 20 years of planning applications for the development of approximately 220 acres of land, part of which front onto the Burnt River in what is now the City of Kawartha Lakes, formerly the Township of Somerville. Mr. Webster seeks the approval of that part of Official Plan Amendment No. 94 that would designate what has become known as the "peninsula lands" for residential development. For the purposes of this decision, the peninsula lands are Lots 1 to 9 on the draft plan of subdivision prepared by William Coe OLS and dated May 22, 1998

(Exhibit 12). The Ministry of Municipal Affairs and Housing oppose this *Residential* designation on the basis that these lands are within the flood plain and floodway of the Burnt River. The text and part of the schedule of Official Plan Amendment No. 94 was approved in August, 2001. There was “no decision” on the designation of the peninsula lands. Mr. Webster appealed this “no decision” to the Board. The City of Kawartha Lakes took no position and did not participate in the hearing.

The saga began in 1980 when Mr. Webster and others expressed interest in residential development along the Burnt River. The then County of Victoria was concerned about the amount and nature of the development on this river and wanted a study done because the Burnt River has a long history of flooding. The evidence is that the Burnt River experiences a major flood at least every eight years. There have been severe floods on the river, the last two in 1991 and 1998. A video of the 1991 flood and pictures of the 1998 flood attest to the fact that despite some filling of the peninsula lands, they are inundated during these flood events. The evidence of a property owner, whose cottage is on the other side of the river from the peninsula lands, was that the river floods each year. This was not disputed. The river itself is slow moving and the banks are low creating a broad flood plain.

Mr. Webster’s first development application was an Official Plan Amendment in 1981 for these and other lands. A flood engineering study was done at that time and discussions took place with the Ministry of Natural Resources. In the spring of 1982, the river flooded again. Without detailing all of the history, Mr. Webster revised his plans to delete the peninsula lands from that Official Plan Amendment. The Official Plan Amendment was approved as Official Plan Amendment No. 8 and Plan 584 eventually registered, which subdivided the lands that are adjacent to the west of the subject lands and most are outside the flood plain. Mr. Webster continued his efforts to have the peninsula lands redesignated and more studies were done. Suffice it to say that the issue of the floodplain and its impact on these lands remained in issue.

Two things are clear from the evidence and correspondence; the peninsula lands were in the flood plain of the Burnt River and Mr. Webster sought to remove them from the flood plain.

In 1987, the County proposed Official Plan Amendment No. 31. It was to bring all the lands in the Townships of Somerville, where the subject lands are located, and Bexley, into the County Official Plan. In addition, it designated the peninsula lands and certain adjacent lands, as well as other lands in the Township bordering the river, as *Environmental Protection*. Mr. Webster objected and when the Minister approved the Official Plan Amendment No. 31 in 1989, the schedule designating both the peninsula lands and other lands in Plan 584 was deferred. Official Plan Amendment No. 31 as to these deferred lands is also before this Board.

As Official Plan Amendment No. 31 was working its way through the process, Mr. Webster submitted what was to become Official Plan Amendment No. 42. Originally this included the peninsula lands and again to “get on with it” Mr. Webster agreed to defer the peninsula lands; however, in approving Official Plan Amendment No. 42, the Minister deleted those lands. Mr. Webster failed to notice this and did not appeal the decision of the Minister given in 1993. Hence Official Plan Amendment No. 42 is not before the Board.

Official Plan Amendment No. 94 was initiated by the County of Victoria in June of 1999 and introduced the two-zone approach to the flood plain in the area of the peninsula lands. The Official Plan Amendment covers the peninsula lands and other lands. As noted before, Official Plan Amendment No. 94 was approved and the two-zone approach is in place. It is that part of Schedule “A” to the Official Plan Amendment that designates the peninsula lands as *Residential* and *Flood Reserve* that is at issue, as those lands were “excepted” from the approval.

Mr. Webster did not give up his quest for these lands to be developed. The Board is satisfied that by the actions of the Ministry of Natural Resources, Mr. Webster was, if not encouraged, at least led to reasonably believe that with additional studies and the proper flood proofing, development could occur. This is the Board’s finding on the basis of the evidence heard and the letters of August 13, 1987; April 18, 1996; April 29, 1996; and May 12, 2000. The Ministry of Natural Resources reversed its position in a memorandum to Ministry of Municipal Affairs and Housing on February 16, 2001, commenting to the Ministry on Official Plan Amendment # 94. A civil lawsuit is pending by Mr. Webster against the Ministry of Natural Resources. In the Board’s view, this coloured the testimony of the Ministry of Natural Resources’ witnesses and in part may

explain their lack of recall of events or their evasiveness when questioned on the history of the various applications. A considerable amount of time was spent in the hearing on history and at times seemed to be a discovery of witnesses for the civil proceeding. The parties mutually prepared four very large binders and much of their content involved the history. The binders were but one of the 114 exhibits filed at the hearing. As the Board reminded counsel, from time to time during the 19 hearing days spread over three months, this is a land use planning hearing. The Board "stands in the shoes of the Minister of the Ministry of Municipal Affairs and Housing". It is the provisions of the *Planning Act* that guide the Board in coming to its decision and the Provincial Policy Statement is an integral part of that process.

Flooding of lakes and rivers and the consequent damage to property and imperiling of lives has been an ongoing concern of the Governments of Canada, the provinces and their municipalities and joint flood damage reduction programs have been established. In Ontario, in 1978, Environment Canada and Ministry of Natural Resources, entered into the Canada/Ontario Flood Damage Reduction Program. Over the years various lakes and rivers have been studied under this program. This program sought the reduction of potential damage in flood plains, along rivers and lakes and emphasized a preventative approach by discouraging new development, vulnerable to flood damage in flood plains. Technical flood risk maps were produced and the governments agreed to apply certain policies to the development of the flood plain lands identified on these maps. Under this program MacLaren Plansearch studied the Burnt River, beginning in January, 1989, with the final report issued in March, 1992. They produced the flood plain mapping for the river. The Timmins Storm was considered the Regional Storm event and flows from the storm were used to map the limits of the flood risk areas. There was no dispute about the mapping of the flood plain itself or the validity of the study.

The issue before this Board was whether you could create a flood fringe within the floodway of the river. A flood plain is an area, usually low lands, adjoining a watercourse which has been, or may be, covered by flood water. A flood plain consists of a flood fringe and a floodway. A flood fringe is the outer portion of the flood plain between the floodway and the limit of the regulatory flood, here the Timmins storm. Flood depths and velocities are generally less severe in the flood fringe than those experienced in the floodway. The floodway is the channel of a watercourse and that

inner portion of the flood plain where flood depths and velocities are generally higher than those experienced in the flood fringe. The floodway represents that area required for the safe passage of flood flow and/or that area where flood depths and/or velocities are considered to be such that they pose a potential threat to life and/or property damage.¹

The peninsula lands are composed of lots 1 to 9 on the proposed plan of subdivision prepared in 1998. It is lots 2 to 9 that are in serious contention. It is agreed that Lot 1 has an area in the flood fringe that can be developed, but the Ministry of Municipal Affairs and Housing seeks to have fill removed from that portion of the lot that is in the floodway. Mr. Webster, by dredging the pond at the rear of these lands and joining the pond to the river, created the "peninsula". As noted before, parts of the peninsula lands were also filled during the early 1980's and remained in that state at the time of the MacLaren Plansearch study and today. In determining the flood lines for the flood fringe and floodway, the MacLaren Plansearch study used certain accepted criteria and the most conservative of the criteria were used to establish the floodway. As a result of a review by the consultant for Mr. Webster, a further encroachment study was requested specific to the area of the peninsula lands. MacLaren Plansearch did this study. The study assumed that fill would be placed on the peninsula lands with a setback of 20 metres from the river. The amount of fill placed on these lands would be sufficient to raise the level of the peninsula lands and effectively remove the peninsula lands from the floodway. At the request of the County's consultants, Mr. Webster's consultant did another, more detailed, report. A lot of time was spent on whether the peninsula lands could be adequately flood proofed to protect any residential development on the lands. The Board is satisfied that with proper engineering a solution could be achieved. This, of course, presupposes that the peninsula lands should be filled despite being in the floodway. One witness described this as an engineering solution to a planning problem. The Board concurs. For the Board, the main issue from these reports is the amount of off-site impact that this proposal would cause.

The experts giving evidence at the hearing did not dispute that there is an increase in upstream impact. The position of Mr. Webster's expert, and Mr. Webster, is

¹Definitions from the Provincial Policy Statement

that the impact is less than a 0.1 metre rise and so within the guidelines of the study used to establish the flood lines of the river. The Ministry of Natural Resources' expert opined that even a small increase was unacceptable given the local conditions of this river which regularly floods and the substantial residential development that exists immediately upstream of the peninsula lands, most of which is in the floodway of the Burnt River. The maximum rise upstream was .11 metres or 4.3 inches at the north end of the peninsula lands and reduces as it moves north upstream. The rise is still 3.5 inches and 2.75 inches in areas of substantial development.

Exhibit # 52A is the Public Information Flood Risk Map and commentary for the Burnt River. The Board decision in this matter hinges in large part on the characteristics of the Burnt River. The evidence heard at this hearing supports the quote from this exhibit prepared in 1992:

The Burnt River periodically floods. Most frequent flooding occurs in the lower stretch of the river between the community of Burnt River and Cameron Lake where the riverbanks are fairly low and the flood plain is wide; this type of river valley topography increases the potential for flooding. In recent years more recreational development has taken place along the river, which has greatly increased flood damages due to flooding such as in 1960, 1976, and 1981 spring floods. The flood plain mapping identified the potential areas for flooding and the need to protect future development from flood damages. That need became evident during the 1991 spring flood when the river rose 5 metres at Burnt River and over \$500,000 of flood damages to dwellings occurred and many access roads were flooded.

The peninsula lands are located in this lower reach of the Burnt River. The MacLaren Plansearch report in discussing the encroachment criteria of no more than a 0.1 metre rise in the flood level due to any new development discusses this stretch of the Burnt River in Somerville Township. The report notes that there are some 350 buildings and 220 outbuildings in the flood risk area. Unregulated future development by infilling and construction near the river banks along the Burnt River would likely increase flood levels and flood damages to the 570 structures already at risk and could raise water levels to a point where additional structures, not now at risk, would become prone to flood damage. The study does recognize that some new development can encroach into the flood risk area provided it does not have a significant effect on existing flood levels and does not significantly increase flood damages. In the specific study mentioned before, MacLaren Plansearch did find the upstream water levels to rise, but

as it did not breach the 0.1 metre criteria, it was considered acceptable. Mr. Webster's consultant's study found a possible maximum increase of 0.11 metres in water levels upstream, but opined that, as an engineer, it was acceptable. What may be acceptable from an engineering point of view does not mean that it is acceptable from a land use planning perspective.

The *Planning Act* governs these proceedings and it is to the *Act*, its provisions and the related Provincial Policy Statement, that this Board "shall have regard".

Section 2 of the *Act* states that: "... The Municipal Board in carrying out their responsibilities under this Act shall have regard to, among other matters, matters of provincial interest such as;

- (h) the orderly development of safe² and healthy communities,
- (l) the protection of the financial and economic well being of the Province and its municipalities,
- (o) the protection of public health and safety.

Section 3 of the *Act* speaks to the issuance of policy statements on matters of provincial interest and when such are issued, the Municipal Board "shall have regard" to them. Such a policy statement was issued in 1996, replacing previous ones. Based on the extensive evidence heard at this hearing, a quote in the preamble to the Provincial Policy Statement sums up the issue: "Doing things right the first time can avoid the need for costly remedial measures to correct problems". In this case the evidence is that the Burnt River floods regularly. There is substantial existing residential development upstream of the peninsula lands already situate in the floodway of the river. There would be an impact on this upstream development if the peninsula lands were developed. To experience any additional flooding, even if only by inches, caused by the development of the peninsula lands would create an unacceptable adverse impact for those existing properties. It is a principle of the Provincial Policy Statement to reduce the potential for public cost or risk to Ontario's residents by directing development away from areas where there is a risk to public health, or safety, or of property damage. This principle embodies the matters of provincial interest referred to above. The suggestion

² Board emphasis

by the planner for the proponent, that the Provincial Policy Statement policies for efficient use of land, and encouraging varying house forms and densities, and improving the economic prosperity of the Township by allowing the development of the peninsula lands, simply does not outweigh the risks involved in permitting development in the flood plain of this river. The policy statement, when speaking to the “Efficient, Cost Effective Development and Land Use Patterns” states the development and land use patterns, which may cause environmental or public health and safety concerns will be avoided³.

For this decision the key policy in the Provincial Policy Statement is Policy 3 “Public Health and Safety”. In dealing with natural hazards, development will generally be directed to areas outside of hazardous lands adjacent to river systems which are impacted by flooding and/or erosion hazards. Based on the evidence of the Ministry of Natural Resources’ engineer and the Ministry’s expert in floodplain and watershed management which evidence the Board found to be compelling on this point, the Board finds that the peninsula lands are clearly hazardous lands as defined by the Provincial Policy Statement. The Provincial Policy Statement goes on to state that development and site alteration will not be permitted⁴ within a floodway. The policy does permit development on hazardous lands if all of the five criteria set out in Section 3.1.3 are met. Even if the Board were to find that the peninsula lands were not in the floodway, by virtue of the existing filling and that proposed, the Board finds that new hazards will be created and existing hazards will be aggravated upstream by such development. This breaches the specific criteria in 3.1.3 (b). For each bucket of fill, a bucket of water must go somewhere else. This simple statement of fact by a Ministry witness illustrates the impact that filling in a floodplain has on other lands in the floodplain. In this case, the features of the Burnt River in this location, having low banks and a wide floodplain, makes this statement particularly applicable.

As to how this Board should deal with the Provincial Policy Statement and the issue of “shall have regard for”, both counsel referred to the *Re Ottawa-Carleton (Regional Municipality) Official Plan Amendment No. 8* [1991] O.M.B.D. No. 1427, online: QL (Ontario Municipal Board). That panel of the Board at page 25 made the following statement, which this panel adopts:

³ ibid

⁴ Board emphasis

The Board is not bound to follow them; however, the Board is required to have regard to them, in other words, to consider them carefully in relation to the circumstance at hand, their objectives and the statements as a whole, and what they seek to protect.

Having carefully considered the Provincial Policy Statement and the *Planning Act* provisions in the circumstances “at hand”, the Board finds that to permit development of the peninsula lands located as they are in the Burnt River which floods regularly, would not be good land use planning. It would have the very real probability of putting the lives and properties of existing residents at risk. Frankly, there is simply no compelling reason to develop these lands despite the unfortunate past actions of the Ministry of Natural Resources. The protection of public safety must be paramount in these circumstances.

The Official Plan contains policies that guide the development of the municipality and seeks to direct development away from those areas where natural environmental hazards exist. In the purpose of the Official Plan there is a telling statement that the Plan provides for correcting existing situations where past development trends have jeopardized the health and safety of residents. It is clear to the Board the *Environmental Protection* designation and policies brought in with Official Plan Amendment No. 31 and the reference to the Burnt River Flood Damage Reduction Program shows that the municipality is concerned about development that may put residents, present and future, at risk. Official Plan Amendment No. 94 implements the two zone approach for this area and no building in the floodway is permitted. The definitions of floodway and flood fringe are incorporated in the Official Plan from the definitions in the Provincial Policy Statement. The Board accepts the evidence of the planner for the Ministry of Municipal Affairs and Housing that the policies that must be given the most weight in considering this application, are the policies on the environment. The planner for the proponent spoke to the housing policies encouraging a variety of housing types and affordability. He also referred to the shoreline policies, but they do not apply to this site. Again the Board is satisfied that the importance of public safety outweighs any need or demand for what is eight new lots. The proponent’s planner agreed that he relied on the engineering opinions of the consultants for the proponent. If a dangerous living environment were created or the development

would cause damage on or off site, he would not support the development. This is the finding of the Board.

As to Lot 1 also known as Block 8, Ministry of Municipal Affairs and Housing originally had no objections to its approval, subject to Official Plan Amendment No. 94 schedule being revised to show the flood fringe line. Nevertheless, at the hearing Ministry of Municipal Affairs and Housing, through its engineering witness, required that the fill placed on that lot in the 1980's be removed. The reasoning was that it might impact the river waters during a flood. Mr. Webster objected on the grounds that the fill had not caused any discernable problems in the intervening 20 years. The removal of the fill would put the now existing vegetation at risk or require its removal. Such removal is contrary to the specific provision in Official Plan Amendment No. 94 that states that the unauthorized removal of vegetation "shall not be permitted" in the flood reserve and encourages the retention of natural vegetation on all shore lands. The Board agrees with Mr. Webster on this point. The Board is not satisfied that there are sound reasons for this eleventh hour reversal of positions. It is clear from the evidence that the Ministry of Natural Resources knew fill was being placed on the lands and have not raised the objection until this hearing. There is no request for the removal of fill on the peninsula lands and there have been at least two major floods since these lots had fill placed on them. In addition, there was no permission required at the time the fill was placed on the lots and the Board is not convinced there is any real danger to property or lives if the fill remains as it has for the past 20 years. It is the fill that would be required to raise the peninsula lands above the flood line to allow for development that would create the unacceptable impact downstream. There was no evidence that the existing conditions of the peninsula lands adversely impacted the upstream properties over the last 20 or more years.

Official Plan Amendment 31, as noted before, is before the Board. The parties have agreed that for the lands deferred in Official Plan Amendment No. 31 that are owned by Black Bear Estates/ Webster, Official Plan Amendment No. 94 supercedes that amendment. Accordingly, the lands owned by Black Bear Estates/Webster will not be designated *Shoreline or Environmental Protection*. They will be as designated by Official Plan Amendment No. 94 which is in force for certain lands, but not for the peninsula lands Lots 1 to 9. By this decision Lots 1 to 9 will be designated as set out

below. The Board will schedule the balance of the lands involved in the referral of Official Plan Amendment No. 31 for a prehearing conference.

Mr. Webster reserved the right to request costs. The Board has considered this request as this decision was prepared and the evidence reviewed. The Board is satisfied that the conduct of Ministry of Municipal Affairs and Housing, in the course of this hearing, does not warrant an award of costs. The actions and positions of the Ministry of Natural Resources, over the past 20 or so years, are not something this Board can consider on the question of a cost award. The conduct of the various witnesses from the Ministry of Natural Resources and their apparent memory lapses, while frustrating to Mr. Webster and at times annoying to the Board, did not meet the test for an award of costs.

The Board allows the appeal of Black Bear Estates, in part, and modifies Schedule "A" to Official Plan Amendment No. 94 so that it designates Lot 1 as *Residential* to the limit of the flood fringe line and *Flood Reserve* below the flood fringe line, in accordance with the flood plain mapping done by MacLaren Plansearch for the Flood Damage Reduction Program. The peninsula lands lots 2 to 9 will be designated *Flood Reserve* on the Schedule "A".

The Board now expects that the proposed zoning by-law that is also before the Board (Z020140) to be amended by the City and passed without objection from the Ministry of Municipal Affairs and Housing to implement this decision. In the event appeals do result from whatever source, this panel of the Board is seized of that hearing. The Board also expects that Mr. Webster's appeal of By-Law 96-14 (R960292) should be resolved without the necessity of a hearing.

The Board order will be withheld pending receipt of the revised Schedule "A" to Official Plan Amendment No. 94, to be prepared by the City and approved by Counsel for the parties, and a draft order implementing this decision for both Official Plan Amendment No. 94 and Official Plan Amendment No. 31. In the event that problems arise this member may be spoken to.

ROBERT D. M. OWEN
VICE-CHAIR