

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 02, 2017

CASE NO(S): PL170618

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

Appellant: Darick Battaglia
Subject: By-law No. 17-025
Municipality: Township of Tiny
OMB Case No.: PL170618
OMB File No.: PL170618
OMB Case Name: Battaglia v. Tiny (Township)

PROCEEDING COMMENCED UNDER subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Motion by: Township of Tiny
Purpose of Motion: Request for an Order Dismissing the Appeal
Appellant: Darick Battaglia
Subject: By-law No. 17-025
Municipality: Township of Tiny
OMB Case No.: PL170618
OMB File No.: PL170618

Heard: August 29, 2017, Perkinsfield, Township of Tiny

APPEARANCES:

Parties

Counsel/Representative*

Darick Battaglia

Self represented*

Township of Tiny

K Mullin, A. Flarity

**MEMORANDUM OF ORAL DECISION DELIVERED BY RICHARD JONES ON
AUGUST 29, 2017 AND ORDER OF THE BOARD**

MOTION TO DISMISS WITHOUT A HEARING

[1] The Township of Tiny (moving party) initiated a motion to dismiss an appeal without a hearing in accordance with s. 34(25) of the *Planning Act*. The responding party was Darick Battaglia, a beachfront property owner in the Township who had appealed By-law No. 17-025. (“ZB”). The ZB was enacted by Township Council in order to rezone beach lands, previously owned by Mr. Battaglia (“Appellant”), from Private Open Space to Public Open Space.

[2] In its Oral decision, after hearing submissions from the Township solicitor Kim Mullin and Mr. Battaglia, who was self represented, the Board allowed the motion and dismissed the appeal.

[3] There were no other appeals in respect of the ZB.

SUBJECT LANDS

[4] The subject lands were transferred by agreement to purchase to the Township on May 11, 2015 and are collectively comprised of beach lands along the edge of Georgian Bay and a strip of land described as Block B, which is located behind the aforementioned beach lands. The subject lands are described in a registered plan of survey (Exhibit 3).

[5] At the time of purchase, the subject lands were zoned Private Open Space (“OS1”). The permitted uses of lands zoned OS1 are identical to the permitted uses of the Public Open Space Zone except that lands zoned OS1 may be used as a private park, but not a public park; whereas, lands zoned OS may be used as a public park, but not a private park.

[6] According to the submissions of the Township (Exhibit 5), the subject lands were initially zoned Public Open Space in the Township’s first zoning by-law and continued to be zoned as such in subsequent zoning by-laws until 2006.

[7] At that time, a dispute between the Appellant and the Township involving the subject lands was eventually resolved by rezoning the lands to OS1 in recognition of their privately owned status.

[8] The Appellant has a right-of-access over the intervening strip land previously described as Block B, but possesses no other specific rights or privileges over the subject property. The Appellant's residence is located immediately east of Block B along with a strip of other vacation properties

[9] Furthermore, the Board heard that the Township has provided maintenance operations of the subject lands despite their recent history of private ownership and these operations continue to this day. It was the Township's intention in enacting the ZB that the subject lands, which are now publically owned, be accorded recognition as a public park, as opposed to a private open space use which the current OS1 zone signifies.

[10] The Appellant's appeal of the ZB was based entirely out of a concern that his rezoning would interfere with his private enjoyment of the subject lands, including boat launching using an ATV, the ability to host parties with alcoholic beverages and conduct recreational activities including volleyball, horseshoes and other "typical beach activities".

[11] The Appellant expressed concerns that the rezoning would extinguish his legal rights which are "unique to the property", and oblige cohabitation with "the transient public". The Appellant also expressed the apprehension that access to the beach lands would in some manner be encumbered despite an acknowledged right-of-way permission over the intervening strip of land described as Block B.

[12] The motion to dismiss was sought by the Township because those aforementioned concerns expressed by the Appellant in his appeal form and reiterated in his submission during the hearing, do not express any land use planning considerations, but are instead based on the the private use of publically owned lands.

Accordingly, as such, the Township considered the appeal “frivolous and vexatious” and on that basis should be dismissed.

[13] In the Affidavit of Shawn Persaud, the Township’s planning Director (Exhibit 2, tab 2), the planner stated that the OS zone is consistent with the century-long history and use of the subject lands. Further, as almost all the beach front lands of Plan 656 is now municipally owned, “the proposed zoning of the Subject Lands as Public Open Space simply reflects the current ownership and current and historical use of the lands”.

[14] The planner went on to state in his affidavit that: “in my professional planning opinion, the rezoning of the subject lands by By-law No. 17-025 represents good planning, conforms with the Township Official Plan and the County of Simcoe’s Official Plan and is consistent with the Provincial Policy Statement (2014). In my opinion, it is good planning to have the lands in public ownership to recognize such ownership and to permit public uses.”

[15] In the Board’s view, the planner’s support for the ZB was founded on sound planning principles and these principles were not disputed by the responding party in his submissions before the Board.

FINDINGS

[16] The Board adopts and relies upon the submissions of the Township for the following reasons:

[17] Although part of the appeal was based on the Appellant’s concern that access over Block B would be negatively affected by the rezoning action, no such impact would be realized. Mr. Battaglia has legal right-of-way access which the rezoning action does not encumber, even if the ZB was intentionally designed to so. The right-of-way is a legal matter, not one connected to a rezoning action, nor is it one which this tribunal could change or modify in any event, lacking the jurisdictional authority to do so.

[18] Mr. Battaglia did not dispute the matter with planning evidence. Despite being in possession of the Township's motion materials in advance of the hearing, the Appellant as the responding party in these proceedings did not respond with planning considerations in writing or in person. Although he did submit that perhaps planning evidence would be necessary at the hearing convened in response to his appeal, this acknowledgement was belatedly made in the Board's view and did not camouflage or supersede his original apprehensions as stated in his appeal form that his private interests and activities should be maintained on publicly owned lands pursuant to s. 34 (25) (i) of the *Planning Act* the Board may dismiss all or part of an appeal without holding a hearing if: "the reasons set out in the notice of appeal do not disclose an apparent land use planning ground upon which the Board could allow all or part of the appeal". The Board finds that the Township has met this onus. Although the Township also submitted that the decade's long dispute between the parties (litigation which had evidently coloured their relationship in a less than satisfactory manner) also suggested a vexatious or frivolous intent on the part of the Appellant, this history was not determinative. The Board cannot decide on matters which are now settled, and which were in any event also beyond the authority of the Board.

ORDER

[19] The motion by the Township is allowed and the appeal by Darick Battaglia with respect to By-law No. 17-025 is dismissed without the necessity of a hearing.

“Richard Jones”

RICHARD JONES
MEMBER

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please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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