

MEMORANDUM

March 30, 2023

To: The Boards of Directors of the Muskoka Bay Property Owners' Association (MBPOA), the Muskoka Lakes Association (MLA) and the Gull and Silver Lakes Residents' Association (GSLRA)

From: Ken Pearce (Vice-President and Director, MLA), Ron Goldenberg (Director, MBPOA) and Clarke Smith (Committee Member, GSLRA)

Re: Proposed Starboard/Cherokee Lane development - Issue regarding construction of boathouse complex and docks in Lake Muskoka

You have asked us to review and consider the above-noted issue and report back to our respective boards. Please note that we are retired lawyers in the non-practicing category and are not providing legal advice or legal opinions.

1. Background

The applicant, The Rosseau Group, acquired several parcels of land on Cherokee Lane in Gravenhurst, together with water lots (collectively, the "Water Lot").

Our understanding is that the primary lot on the mainland, referred to in the deed as the mill lot, was used for a sawmill operation in the late 1800's and early 1900's and the Water Lot in front of the mill lot was used for storing logs in the winter and for running and rafting logs in the summer. The original grant from the Crown alludes to this. Of course, such use would not require ownership of the bed of the lake.

The applicant proposes to construct a mixed-use (residential and commercial) tower on one of the mainland lots and the initial proposal also proposed a 192 m (630 ft.) two storey boathouse complex with a height of up to 16 m (52.5 ft.), including a two storey restaurant and boathouses with retail on the second level and a separate 27 m (89 ft.) dock, with the boathouse complex and docks having a total of 55 boat slips. Please see Exhibit 1.

The revised proposal appears to reduce the length of the boathouse complex to 130 m (427 ft.) and reduce the length of the separate dock to 15 m (49 ft.) and reduce the number of boat slips to 25. Please see Exhibit 2.

There is some indication the applicant may be prepared to further reduce the boathouse complex length and height.

2. The Issue

Is the applicant entitled to construct the boathouse complex and docks in Lake Muskoka?

3. Analysis

It should be noted that the analysis involves both the Ontario government and provincial legislation (*Beds of Navigable Waters Act* (Ontario) and the *Public Lands Act* (Ontario)) and the federal government and federal legislation (*Navigable Waters Protection Act* (Canada)).

(i) Ownership of the bed of the lake - *Beds of Navigable Waters Act* (Ontario)

Section 1 of the *Beds of Navigable Waters Act* states that:

“Grant to be deemed to exclude the bed

1. Where land that borders on a navigable body of water or stream, or on which the whole or part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.”

Please see Exhibit 3.

The grant of land (the “Grant”) we reviewed in respect of the Water Lot would not appear to include an express grant of the bed of the lake. Please see Exhibit 4 attached.

Please also see the analysis set out in Section 1.0 of the Ontario government’s “Ownership Determination - Beds of Navigable Waters Act - policy” (the “Ontario Policy”), a copy of which is attached as Exhibit 5.

(ii) Reservation for navigation - *Navigable Waters Protection Act* (Canada)

It would appear that Lake Muskoka is a navigable body of water. We refer to Sections 2.0 to 4.0 of the Ontario Policy.

Navigability depends on public utility. There are at least four directly affected groups who demonstrate public utility, being actual or potential commercial or recreational use or other socially beneficial activity:

- (a) the Steamships Wharf is adjacent to the Water Lot and the Steamships require a significant amount of room for maneuvering when docking; the Steamships are a significant tourist draw for the Gravenhurst Wharf; the Muskoka Steamships and Discovery Centre, comprised of the Steamships and the Discovery Centre are the bookends on the wharf which draw in tourists;

- (b) the public swims off the rocks at the adjacent public park, Lookout Park; swimming and the view of the lake from the park will be negatively impacted by the proposed boathouse complex and dock;
- (c) swimmers, boaters, personal watercraft users, kayakers and canoeists will be negatively impacted by the proposed boathouse complex and dock, including access to the private boathouse between the Steamships Wharf and the Water Lot; and
- (d) we understand Mr. Christopher Thain's nearby cottage property is designated as a federal aerodrome and will be negatively affected by the proposed boathouse complex and dock.

The Grant for the Water Lot, in typical fashion, reserves the right of navigation to the Crown:

“saving excepting and reserving nevertheless unto us our heirs and successors the free uses passage and enjoyment of in over and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted”

Section 4.3.3 of the Ontario government's “Release and voidance of restrictions in land grants” policy states that:

“4.3.3 Navigability clause

Many Crown grants, especially those for waterfront lands, include a reservation similar to the following: “the free use, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the” lands granted.

This type of reservation reflects the common law right of navigation. The province cannot release this reservation as navigation is the responsibility of the federal government and the right is granted by the common law.”

Please see Exhibit 6.

Page 48 of Real Estate Practice in Ontario, 6th Edition, by D.J. Donahue, P. D. Quinn and D. C. Grandilli states that:

“If a body of water is navigable, then it may be used by any member of the public who has a legitimate reason to pass over it including particularly other owners of land fronting on that water. Anyone who attempts to build an impediment to the use of such water without approval of the Minister of Transport will be in breach of the Navigable Waters Protection Act, R.S.C. 1985, c. N-22. This includes construction of docks. Section 5(1) states:

- (1) no work shall be built or placed in, on, over, under, through or across any navigable water unless

- (a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;
- (b) the construction of the work is commenced within six months and completed within three years of the approval referred to in paragraph (a) or within such further period as the Minister may fix; and
- (c) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (a).

Section 6(1) states that “[w]here any work ... is built or placed without having been approved by the Minister, ... the Minister may ... order the owner of the work to remove or alter the work”.

It should be noted that the Crown, through the Ministry of Natural Resources, in the 1980's, embarked on a “Water Lot Program”. Sections 13 and 26 of the *Public Lands Act*, R.S.O. 1990, c. P.43, make it an offence for anyone to erect a building or make an improvement on Crown land without authority.”

Please see Exhibit 7.

We note that the exception for single storey boathouses in Section 10 of Regulation 161/17 of the *Public Lands Act* (Ontario) would not appear to apply to the proposed boathouse complex, since the boathouse must be a single-storey building and the interior of the boathouse must be designed and used solely for the purpose of storing and docking boats and related equipment and the person who erects, places and uses the boathouse on public lands must do so solely for private, non-commercial purposes.

4. Conclusion/Recommendation

It would appear that the applicant does not own the bed of the lake for the Water Lot and, therefore, does not have the ability to construct the boathouse complex or the dock. We recommend that written confirmation be obtained, in this regard, from the Legal Services Branch, Deputy Minister's Office, of the Ministry of Natural Resources and Forestry, Whitney Block, 6th Floor, 99 Wellesley St. W., Toronto, Ontario.

It would also appear that Lake Muskoka is a navigable body of water and that construction of the boathouse complex and dock would not be permitted, absent approval from Transport Canada. We recommend that written confirmation be obtained, in this regard, from the Ministry of Transport. We further recommend that the proposed holding provision be amended as follows:

“The Holding can only be removed once the following matters have been addressed:

c. All applicable Ministry of Natural Resources and Forestry, Ministry of the Environment, Conservation and Parks, **Transport Canada** and Department of Fisheries and Oceans approvals have been obtained to the satisfaction of the Town of Gravenhurst.”

We are concerned that there is no “as of right” entitlement to build the boathouse complex and dock and that the applicant would likely require permits/permissions from the Ministry of Natural Resources and Forestry (Ontario government) and Transport Canada (federal government) in order to do so. We recommend contacting these government entities to confirm that our analysis is correct and to obtain information as to whether and under what circumstances approvals/permits might be granted.

For the reasons noted above, we would not be supportive of any such approvals or permits being granted.

Respectfully submitted,

Ken Pearce

Ron Goldenberg

Clarke Smith