

**POLICY 5.24(d) OF THE
TOWNSHIP OF MUSKOKA LAKES
OFFICIAL PLAN
AND
THE REQUIREMENT THAT ADEQUATE
LONG TERM PARKING AND DOCKING FACILITIES
BE "SECURED"**

Abstract: This White Paper argues that the current practice by the Township of accepting, at face value, letters from marinas to the effect that long term parking and docking facilities have been secured by an applicant for severance of lots with respect to water access only or island properties, is improper. The essence of the argument is that, under Policy 5.24(d) of the Township of Muskoka Lakes Official Plan, the Township should not delegate to another person the conclusion that such facilities have been "secured" or that the arrangements are sufficiently "long term," and that this determination should be made exclusively by the Township, based upon a review by the Township of the underlying contractual documents executed between the applicant and the marina.

Introduction

Policy 5.24(d) of Section B (“Policy 5.24(d)”) of the Township of Muskoka Lakes Official Plan (the “Official Plan”), provides that creation of separate lots on water access only or island properties will be permitted, provided that adequate long term parking and docking facilities are “secured” to the satisfaction of the Township. The word “secured” has two interpretive aspects. The first is the purpose and intention of the Township in using that word in the Official Plan; the second is the implementation, by the applicant, of steps to ensure that such long term parking and docking facilities have, in fact, been so secured so as to give effect to the purpose and intent of the Official Plan.

“Secure” - Purpose and Intent

The purpose and intent of the Official Plan in requiring that long term parking and docking facilities be secured is likely multifold, including that public landings not be overwhelmed by the regular and frequent use of such landings for private purposes; to prevent uncertain and non-legally binding side deals between owners of mainland properties and owners of islands (imagine that a mainlander informally rents a part of its property to an island owner – a mainland neighbour could rightfully object to such a misuse of the property; and imagine the fracas that would result if the mainlander decided to terminate the arrangement or if the mainland property was sold). We note, also, in considering the meaning of securing such “long term” facilities, that Council endorsed the August 12, 2020 Policy Directions paper (the “TML Policy Directions Paper”), including Item 18, which speaks of “perpetual access rights.”

“Secure” – Implementation of the Purpose and Intent

The word “secure” in the Official Plan is not prescriptive. In using the word “secure,” the Township necessarily allowed for flexibility. There can be many ways to “secure” such long term facilities. For instance, owning an associated deeded property on the mainland is one. (Indeed, the TML Policy Directions Paper, Item 18, and the associated Discussion, recommends that deeded access rights to the mainland be required for new waterfront lots.)

A long term lease could be another way to “secure” such facilities. (Query how long the term needs to be to satisfy this requirement.)

Since methods of acquiring or accessing such long term facilities can be numerous, it is not sufficient for an applicant to simply assert that such facilities have been “secured” in accordance with the Official Plan, without evidence that the purpose and intent of Policy 5.24(d) of the Official Plan have been met in the particular instance. Rather, for an applicant to assert that such facilities have been “secured,” the onus must be on the applicant to clearly show to the Township how the particular arrangements satisfy the purpose and intent of the Official Plan.

Section 7.3 of the Final Draft of the Muskoka Lakes Official Plan Review Background Discussion Paper, dated February 6, 2020 (the “Discussion Paper,” and, together with the TML Policy Directions Paper, the “Planning Papers”), observes:

“The current policies for water access simply require proof that there is a location for access somewhere on the mainland, likely a marina.
Historically, the process has been that with a letter from a marina accompanying an application for consent for a water access property, proof has been provided.”

Importantly, we are aware anecdotally, that there are extremely few available landing spots at existing marinas on, say, Lake Muskoka. Competition for such spots is intense. Waiting lists are measured in multiples of years and, for a number of marinas, there is no concept of a waiting list – that is, there will not be spots available at any time in the foreseeable future.

Given the absolute scarcity of docking facilities at marinas, and given the rising concern about the need for longer term access rights to mainland for new waterfront lots (expressed as “perpetual” access rights in the TML Policy Directions Paper), it should no longer be adequate for an applicant to simply provide a letter from a marina which states that access to parking and docking facilities have been “secured.” It should not be up to the marina to make the determination as to whether the docking and parking facilities have been “secured” in accordance with the purpose and intent of Policy 5.24(d), or that the arrangement with respect to such facilities is sufficiently “long term.” By accepting such a letter as dispositive of the matter, the Township is effectively delegating to the marina the decision as to whether such facilities have been “secured” on a “long term” basis. However, this determination is reserved to the Township under the Official Plan, and should not be delegated to anyone else. The

Township should insist on production by the applicant of relevant executed contractual documentation between itself and the marina as the basis of the Township's decision, and not a naked, unsupported statement contained in a letter from a marina based on its own interpretation of what is required under Policy 5.24(d). To accept the marina's conclusion is to allow the marina to substitute its interpretation of what constitutes "secure" or "long term" in place of the required interpretation by the Township. In addition, the marina is possibly self-interested and conflicted in the matter. There is the very real risk that the marina will allow its own commercial interests in relation to the applicant to influence its decision in stating that the parking and docking facilities have been "secured."

The following are examples (some trite, admittedly, but they serve to make the point) of circumstances where a marina might consider it appropriate to sign a letter to the effect that long term parking and docking facilities have been secured, but which circumstances are clearly not consistent with the purpose and intent of Policy 5.24(d):

1. The marina agrees to give to the applicant a one year, non-renewable, non-exclusive access to docking and parking facilities. The marina might reason that most residential leases are for one year, so this period could be considered to be "long term." On this basis, the marina writes a letter stating that long term docking and parking facilities have been secured. But this arrangement would clearly not be consistent with the purposes and intent of Policy 5.24(d) or the current thinking as expressed in Planning Papers.
2. The marina agrees to give to the applicant long term (whatever that means) access on the first and third Tuesday of every month, between the hours of 9:00 AM and 11:00 AM. On this basis, the marina could write a letter stating that long term docking and parking facilities have been secured. But, the family that resides at the island property would clearly need to access the island on numerous other occasions during the month (e.g. at least every weekend and at multiple times during the day). Once again therefore, this arrangement would clearly not be consistent with the purpose and intent of Policy 5.24(d) or the current thinking as expressed in Planning Papers.
3. To meet the overwhelming demand for parking and docking, the marina is planning to build additional docking and parking facilities in the future. The marina says to the applicant, "don't worry, Bob, when they are built, I will take care of you." A creative interpretation would allow a marina to write a letter stating that long term docking and parking facilities have been secured. But, once again, this arrangement would clearly not be consistent with the purpose and intent of Policy 5.24(d) because of the uncertainty as to when (or if) the facilities will be constructed, or the impact of intense competition from other potential tenants at the time the facilities become available.¹

¹ Note that, under Ontario law, in order for a contract or agreement relating to land (including leases or commitments to lease) to be enforceable, the contract must be in writing. As a result, in the arrangement described in this example 3, the verbal promise to take care of Bob is not enforceable, and the marina

4. A marina grants a long term lease to the applicant, but the lease is revocable by the marina on 60 days-notice to the applicant. Clearly this arrangement is not consistent with the purpose and intent of Policy 5.24(d), but the marina may still feel justified in writing a letter to the effect that long term parking and docking facilities have been secured, since it has actually granted a long term lease.
5. In the worst case, perhaps, the applicant says to the marina, "hey Jill, we have a long relationship going back many years. Please give me a letter that says long term parking and docking facilities have been secured, so that I can check that box under the Official Plan, and then we will work it out later." This would not be compliant with the purpose or intent of Policy 5.24(d).

Of course, some of these examples may not be, to some degree or other, realistic. However, they do serve to make the point that without reviewing the underlying written contractual documents relating to the securing, the Township cannot be sure that the parking and docking facilities have been "secured" on a "long term" basis, in a manner that satisfies the purpose and intent of Policy 5.24(d) or the current thinking as expressed in the Planning Papers.

In order to give effect to the requirement that the Township determine whether the particular arrangements satisfy Policy 5.24(d) (and not someone else), the Township should insist that the applicant produce, as part of its application to sever a property into a number of lots (and at the time of making such application), relevant documents and binding executed contracts that demonstrate compliance with the purpose and intention of Policy 5.24(d), as follows:

1. In the case of a securing by means of deeded mainland docking and parking, evidence that (i) the applicant currently owns such deeded property, without any restrictions (contractual or registered on title) on the ability of such property to be used for such purpose and (ii) the property has been appropriately zoned to allow such use.
2. In the case of a lease from a marina, a copy, with respect to each new lot proposed, of a current written, exclusive and assignable (to an ultimate lot owner) long term lease (say, in excess of 5 years), renewable by the lessee at the end of the term.
3. In the case of a marina, where no such current lease exists, a current written, irrevocable, commitment to the applicant by the marina to enter into an exclusive, assignable (to the ultimate lot owner) long term renewable lease relating to the relevant lot, at the time that the individual lot is approved by the Township; any such executed lease should be presented to the Township as a condition of such approval.
4. In the case of a marina, where the proposed parking and docking facilities have not yet been constructed, (i) an assurance and undertaking by the marina to each of (a) the applicant and (b) the Township, to the effect that the facilities will be fully constructed

could turn around and lease the facilities to other competing potential lessees when the facilities become available.

and available for lease as of the time that the individual lot is approved by the Township, and (ii) a current written, irrevocable commitment to the applicant by the marina to enter into an exclusive, assignable (to the ultimate lot owner) long term renewable lease relating to the relevant lot, at the time that the individual lot is approved by the Township; any such executed lease should be presented to the Township as a condition of such approval.

Without production of these sorts of written documents by the applicant at the time that its application is filed with the Township, the Township cannot be assured that the parking and docking facilities have been "secured" on a "long term" basis in the manner contemplated by the purpose and intent of Policy 5.24(d).