

by Smith's Bay and on the southwest, by Shannon Bay. Both Bays are relatively shallow, and provide significant fish habitat, although the habitat in Smith's Bay is considered most significant.

Along the westerly and southerly edge of the peninsula and on a smaller peninsula which juts westerly from Victoria Point are a mixture of seasonal and permanent homes; all of which are on private services. Victoria Crescent follows the shoreline of the Point from its northwest corner, along its western and southern edge, to its most easterly edge. Forest Avenue runs down the easterly side of the Point.

To the north of the Point is a canal which is owned by Victoria Point Homes, and was constructed in the late 1970's along with the community to the north of the Point. The homes built to the north of the Lankin Canal back onto a boardwalk which runs along the north shore of the canal. The north shore wall is made of wood. The south side of the canal consists of the material dredged out to make the canal, and dumped onto the south shore of the canal. The shore wall and boardwalk are now in a seriously decrepit state of repair, and the ownership of the boardwalk, the shorewall, and the rights to use the canal are in dispute between the owners of the homes and Victoria Point Homes.

Victoria Point Homes Inc. owns the lands east and west of Forest Avenue, including part of the marsh in Smith's Bay. The proposed development is to be located on the interior of the Point, on some 40 hectares of land between Victoria Crescent and Forest Avenue. Although it owns the lands and marsh to the east of Forest Avenue, it is not proposing to develop them at this time, and has not provided to this Board any proposals for the future use of this land.

The lands which form the site for this proposed project are a wetland paradise, consisting of a mix of swamp, marsh, treed swamp, bog and treed bog, scattered throughout the property. There are also areas of upland forest at certain peripheral locations of the site. The evidence was clear that the bog on the property is considered rare for Southern Ontario. Southern Ontario is defined as those lands south of the

Canadian Shield. These lands are approximately 15 miles south of the Shield. The evidence also revealed that swamps and marshlands are rare in the Canadian Shield.

The site provides habitat for a wide variety of wildlife. It provides a nesting ground for some birds and a resting location for migratory birds. It houses animals as large as deer, and as small as frogs. Vegetation is that typically found in the types of wetlands located on the site.

The Proposal

Victoria Point Homes proposes to construct 678 townhouse units which will be situated on stilts, raised above ground level to avoid methane gas hazards, and located in small clusters around an internal, man-made inland waterway which will be dredged out of the interior of the site. The site will be buffered from the surrounding community by natural vegetation, and the townhouses will be located either immediately adjacent to the waterway, or a short distance back. All but some small forested areas on the north east of the site and on the south of the site will be required for the waterway, the housing, the roads, the access to docks, and the stormwater management system. Although the condominium plan will include the Lankin Canal, that canal is not integrated into the plan, except that the outlet of the new waterway system is to the canal.

In order to construct the development it was estimated that some 65,000 truckloads of fill would be required to be imported to the site and placed on the peat. Peat is an organic soil and therefore, some time delay is required in this process to allow the peat to compact and then to fill the site to the required grades to construct the waterway edges, the homes, the roads and the sanitary and water services. It is hoped that the peat which will be dredged from the interior of the site can be used for fill purposes, but it may have to be trucked off site. In addition, the rock fill necessary to construct the waterway edge will have to be imported.

The edges of the waterway will be designed so as to emulate natural conditions,

with a variety of rocky slopes and rock revetments, constructed by sophisticated engineering techniques. It is anticipated that the construction of these slopes will both avoid the problems of waterway shore slumping and create fish habitat for panfish. The design of the waterway itself is also aimed at re-creating a natural waterway rather than a series of straight, clearly man-made canals. There was no evidence of this kind of engineered waterway edge having been successfully created in another location.

The inland waterway will house a substantial number of docking facilities, as it is anticipated that the access to Lake Simcoe will be the key attraction for the development. Boats will access Lake Simcoe through one opening from this waterway into the Lankin Canal. From Lankin Canal, boats must pass through a narrow opening under a low bridge over Lankin Canal into Shannon Bay. Victoria Crescent runs over that bridge. Only one boat can pass under that bridge at a time, and only smaller boats or large boats of a low profile are capable of passing through the opening at all. It is proposed that a navigation channel be dug in Shannon Bay, and a speed limit posted to keep boats exiting this development from boating in Shannon Bay and disturbing the fish habitat. It is unclear who can make application for such a channel, whether it requires the approval of the City of Orillia, who will maintain the channel, and who will enforce the speed limit.

The most conservative estimate of the number of people who will be added to this area is 1,376, with the possibility that that number could be in the range of 2,700 people. It is likely that every household will have 2 cars, and it was estimated that every household will have approximately 1.9 boats.

The evidence was that the amount of water exchange between the Lankin Canal and Shannon Bay is minimal, because of the prevailing current. It was deemed desirable that there be minimal exchange of water from the inland waterway, in order to protect Lake Simcoe from impacts of the poorer water quality which will inevitably exist in the inland waterway. There would be minimal flushing of the waterway, if any. There will be no water access to Smith's Bay, and the project will apparently be designed so that the ditch and

culvert that currently runs under Forest Avenue, connecting the interior wetland to Smith's Bay, will not be directly connected to the inland waterway. It is proposed that there be a boat size restriction on the boats using the internal waterway, and that a speed limit be enforced in the waterway to ensure that no water from the lagoons laps over into the culvert to Smith's Bay.

There is currently no sewage treatment or water supply capacity for this development in the City of Orillia. The current sewers cannot handle the sewage to be generated by this development and the proponent is proposing to extend over-sized sewers along both Victoria Crescent and Forest Avenue to the sewage treatment plant which is some distance to the west of the site. Because of the unique characteristics of the site, it is proposed that the sewer will work with flexible pipes and grinder pumps at each house, which must be maintained, repaired and periodically replaced. The type of system that has been proposed has been used in northern parts of the Province where there is rock and little ground cover. There was no evidence of this system having been used in a wetland such as the subject one.

The proposed storm water management system is an innovative system designed to ensure that no phosphorous reaches the lake system. It consists of trenches along the edge of the site and along the edge of the waterway, filled with a soil which has particularly strong phosphorous retention capabilities. Some of the trenches will be located under the town homes. The stormwater from a normal storm (rainwater of no more than 1 inch) will be directed to these trenches and eventually filter through the material which will extract the phosphorus from the water and retain it. Eventually the material will have to be replaced and a monitoring system will have to be in place to determine when the phosphorus retaining capability of the soil has diminished, and replacement is necessary. It is anticipated that replacement will not be required for 20 to 25 years. Any excess rainwater will be directed to the treed "preserves" and buffered areas around the site, or will flow directly into the inland waterway or into the ditches adjacent to the two roads. The Ministry of Environment and Energy (MOEE) has expressed some reservations about the

system.

It is proposed that all vegetation will be indigenous and natural. The proponent plans to replant the area which has been filled with local vegetation, to give the project a natural feel. Lawns and grass will be discouraged, and fertilizers and pesticides will also be discouraged. It will be left to the condominium corporation to enforce these principles.

There are other key features of this proposal which will require ongoing monitoring, maintenance, and specialized care by the condominium corporation. These include the harvesting of weeds that will inevitably grow in the lagoons; the installation and maintenance of oxygen diffusers in the waterways to prevent fish kills in the winter, and to prevent freezing around stilts and dockways; monitoring and repairing slumps or slippage of the waterway edges; periodic lagoon dredging; monitoring the efficacy of the stormwater management system and providing for the replacement of fill material when necessary; maintaining the natural preserves and natural landscaping, ongoing substantial maintenance and resurfacing of internal roadways; repair and maintenance of docks; the monitoring and repair of the sewer system and the related grinder pumps. The quantum of the ongoing costs of such requirements are unknown.

Motion

At the conclusion of the applicant/appellant's case, the City of Orillia brought a motion for the adjournment of the matter, sine die. The wording of the motion was agreed to by both counsel for Victoria Point Homes Inc. and counsel for the City, and was submitted to the Board on agreement by both parties.

The motion was a two part motion and was stated as follows (Exhibit 79):

1. Is the Board satisfied on the basis of the evidence introduced by the appellant only, that the appellant has made a prima facie case establishing that the proposed development can be generally permitted as shown on the draft plan of condominium?

2. If the answer to Question 1 above is no, directions on the matters that must be addressed in order to permit the residential development of all or part of the subject lands.

It was agreed that should the Board decide that a prima facie case has not been made, then it would not immediately dismiss the appeals, but rather adjourn the matter sine die, to be dealt with in the following way:

- i. If the appellant writes to the Board at any time between now and June 30, 1999, that it wishes this Board to dismiss the appeals, it will so do and issue an order to that effect.
- ii. If the appellant wishes to have the matter brought back on to present a revised proposal to this panel of the Board, it may so indicate by no later than June 30, 1999.
- iii. If the Board has heard nothing from the appellant by June 30, 1999, then it will dismiss the appeals pursuant to the decision on the motion and issue an order to that effect.

If the Board were to find that a prima facie case had been made, then that finding is subject to the Board hearing the evidence of the City of Orillia and the participants (already heard, but not considered on this motion), and being persuaded that, notwithstanding a prima facie case had been made, there was sufficient evidence to indicate that this proposal ought not to be approved.

The matter is a complex one, with the Board having heard 10 days of evidence on behalf of the appellant alone. It was understood that the benefit of such a motion was to avoid the considerable time and expense involved in a further 10 to 14 days of hearing time, should the Board find that a prima facie case has not been made.

Decision

The appellant has completed its case in chief. The appellant submits to this Board that if, at this point, the Board were to hear no further evidence, the Board would be in a position to approve the project generally, subject to whatever minor adjustments the Board feels are appropriate.

In the course of presenting its case, the appellant called seven expert witnesses, to wit: a land use planner, an architect with expertise in urban design, an environmental planner, a plant ecologist, a geo-technical engineer, an expert in condominium law, and a municipal servicing engineer. Each of these witnesses provided the Board with information on the extensive work they had completed in their respective disciplines in support of the proposal. In respect to the planning justification for the project, the planners relied for the most part on the designation of this property for residential development, which took place in 1981 by virtue of Official Plan Amendment No. 18 to the City of Orillia Official Plan.

The planners freely admitted that this proposal did not meet some of the provisions of the Provincial Policy Statement, 1996; in particular the provisions of the Natural Heritage sections of the Policy. However, both the planners and counsel submitted that the municipality was under an obligation pursuant to the Provincial Policy Statement and provincial policies past, to amend its Official Plan to reflect the fact that this property was a provincially significant wetland. Failure by the municipality to do so meant that the appellants were entitled to rely on the residential designation and the 17 year old planning proposal which underlay that amendment.

Furthermore, counsel urged that provincial policy is not binding; is not the pre-eminent planning policy; and that the most important guide, and in fact the document which binds this Board, is the Official Plan. It was urged on this Board that it need only "have regard to" the provincial policy and need not worry if the development did not conform with the words, substance or intent of those policies. The Official Plan, on the other hand,

particularly one that had been untouched for 17 years, established "rights" to develop, which could not be abrogated by the provincial policy.

In any event, both the planners and counsel stated that the proposal represented an appropriate balance between the provisions of the Provincial Policy Statement and the provisions of the Official Plan.

In making a decision with respect to a plan of condominium, the Board is required to have regard to the matters set out in Section 51(24). These are statutory obligations.

Among the matters, the Board is required to have regard for, are:

"(a) the effect of the development of the proposed subdivision on matters of provincial interest as referred to in section 2;....

(c) whether the plan conforms with the Official Plan and adjacent plans of subdivision, if any."

Section 51(24) requires that the Board only "have regard for" for these matters, among others. There is no pre-eminence given to the Official Plan. Matters of provincial interest and the governing official plan are given equal weight.

In addition, the Board is again directed by Section 2 of the *Planning Act*, to have regard to matters of provincial interest in carrying out its responsibilities under the *Act*. Section 3 of the *Planning Act* requires the Board to have regard to provincial policies adopted under the auspices of the *Planning Act* in exercising any authority that affects planning matters.

The Board holds what it considers a practical view of the meaning of "have regard for". Although this direction provides flexibility in the consideration of matters of provincial interest and in the application of provincial policy by the approving authority, it does not mean that the Board should disregard these matters and policies.

Therefore, having regard to those matters, which this Board is obligated in law to

consider, and having regard to the potential impacts of this proposal, both on the natural environment and on the community, this Board has decided that the appellant has not made a prima facie case for the approval of this development, and therefore, the Board cannot approve it. The Board arrives at this conclusion for the following reasons:

1. The development does not respect matters of provincial interest, and is not supported by applicable and relevant planning policies, or planning documents, including the Orillia Official Plan. The appellant has therefore, failed to achieve a balance between the public interest and the private interest.
2. In the design of the plan, there has been insufficient consideration of the values and functions of this site and the conservation, protection and ongoing sustainability of those values and functions. The development is therefore not responsive to the unique natural heritage features of the site, and the appellant has failed to achieve a balance between the ecological losses and gains.
3. The development fails to properly protect the undeveloped wetland in Smith's Bay.
4. The development fails to integrate into the existing community.
5. The internal waterway system is inappropriate for this site in view of the limited remaining boating capacity of the nearby lake; the limitations of the only available access to the larger lake; the complex environmental characteristics of the area, as well as the current knowledge of the ongoing requirements of such an inland waterway, and the refusal of the City of Orillia to assume any responsibility for that waterway.
6. It is neither good planning nor good sense to burden a condominium corporation with extraordinary responsibilities and costs that equate in their

complexity and sophistication to the responsibilities taken on by municipalities. (Policing boat and road traffic, waterway maintenance, specialised road care, sophisticated sewer and storm management systems.)

7. Some of the proposals for servicing seem premature, uncertain, or have not been sufficiently tested for this type of environment; and monitoring and contingency plans have not been sufficiently investigated. While these issues may well be appropriately left to be dealt with by other agencies through conditions of draft approval in ordinary developments, the Board does not consider this an ordinary development. Thus, in a case such as this, contingencies and uncertainties must be dealt with to a far greater degree of confidence than might otherwise be the normal course.

The Board makes no finding on whether, or what kind of residential development can take place on this site. There has clearly been an expression by the City of Orillia, that it seeks some form of residential development on this site, which expression of intent has not been changed in 17 years. It may be that there exists a form of development which responds more positively to the stated objectives of this province and more sensitively to the unique natural features of the site.

To assist in determining whether development can take place, and if so, what form that development might take, this Board is setting out some general findings on this aspect of the case, in answer to the second part of the motion. These findings may, if desired, be referred to in developing any future proposals for this site. However, the Board wishes to be clear that it will assess any future alternative development proposal on the merits of the proposal, having regard to its statutory obligations.

It is the view of the Board, based on the evidence heard to date that:

- Any development of this site should not include a new internal waterway, except

perhaps, some minor expansion of the Lankin Canal, which should be part of a scheme to rehabilitate that waterway.

- Any development of this site should integrate with the surrounding community rather than producing an exclusive enclave.
- Any development of this site should be of a substantially lower density to reduce the number of people introduced into the area, and impacting the sensitive natural features of the area. This does not mean that the appropriate housing form is necessarily single family dwellings.
- Any development of this site should include concrete plans for the long term protection of the marshland to the east of Forest Avenue.
- The documentation prepared in support of any such development should include a detailed hydrogeological study.
- Any plan developed for this site should be constraint-based, and provide for long-term preservation and maintenance of most, if not all of the wetland features on the site. While not all of each of the features need necessarily be preserved, the open bog, some marsh and some swamp should be preserved on site.

Reasons

1. "The development does not respect matters of provincial interest, and is not supported by applicable and relevant planning policies, or planning documents, including the Orillia Official Plan. The appellant has therefore, failed to achieve a balance between the public interest and the private interest."

Mr. Scott Burns gave planning evidence on behalf of the appellant. Mr Burns provided a chronology of the essential planning events related to this proposal. The key themes were the development of Official Plan Amendment No. 18, and the subsequent designation of this site for residential development in 1981; the development of provincial

policies over the relevant time frame; and the evolution of the appellant's planning applications.

Mr. Burns then asked himself certain questions which he felt had to be addressed in order to ascertain whether the development represented good planning. Although he indicated in cross-examination that he had turned his mind to the requirements of the *Planning Act*, he did not advise the Board of his specific conclusions in respect to those considerations.

Mr. Burns indicated that the Board need only "have regard for" the the Provincial Policy Statement issued under Section 3 of the *Planning Act*. He pointed out that past provincial policies defined the words "have regard for" as allowing an approval authority to be flexible in the application of the policies. Mr. Burns urged the Board to consider the totality of the Provincial Policy Statement and pointed to certain provisions which he felt supported the development. He also urged the Board to consider the balance between the "rights" conferred by the Official Plan designation and the provisions of the Provincial Policy Statement. In his opinion the proposal represented a good balance between the constraints on the developer imposed by the public interest in the provincial policy, and the private interest represented by the provisions of OPA 18.

Mr. Burns further indicated that the "equity" of the situation favoured approval of the proposal. He pointed to the lack of guidance provided by the City of Orillia in advising the appellant what would be appropriate on the site. Both Mr. Burns and Mr. Michalski, the environmental planner called by the appellant, indicated that there had never been any indication of what the City and the government Ministries sought to preserve or protect on the site, and that the appellant had carried on in good faith, responding to comments from the Ministries but keeping to its goal of implementing the proposed design.

However, the Board finds that the written evidence provided to this Board does not support the conclusions of Mr. Burns or Mr. Michalski on these matters.

In 1977, the area to the north of the Point was developed for a mixture of single family and multi-family residential purposes. Lankin Canal was created in conjunction with that development. Sometime thereafter, the owner of the lands before the Board, presented a plan to the council of the day for the City of Orillia. The plan was supported by some environmental studies and engineering reports. The plan proposed 411 single family homes, and 68 multiple family dwellings, a commercial site, a public school site, and a public park, located on both sides of Forest Avenue. The marsh in Smith's Bay was shown as an environmental protection area, and there was a buffer between that area and the homes located on the west side of Forest Avenue, south of the marsh. The homes on the west side of Forest Avenue were located on a system of canals of the traditional kind.

The plans and the studies supporting that proposed development were attached as appendices to Official Plan Amendment No. 18. The effect of OPA 18 was to change the designation of the lands west of Forest Avenue, and the southern portion of the lands to the east of Forest Avenue, from Open Space to Residential. The amendment itself referred only to the change in designation, and set a cap on the density of any multi-family residential development on the land. Although some of the text accompanying the OPA made reference to the development being on a system of canals, the portion of the amendment with legal effect made no reference to the proposed plan, nor to a canal-based residential community.

No zoning by-law reflecting the plan was ever passed between 1981 and the present day. The site remains zoned for Open Space uses. For whatever reason, the development plan was never acted on, and no specific development rights were ever created.

However, over the ensuing 17 years, knowledge about the environmental benefits, and sensitivities of wetlands increased significantly. In conjunction with that expanded knowledge, the planning policy environment changed radically. As early as 1984, the provincial government issued "Guidelines for Provincial Wetlands", which provided general

criteria for development. The guidelines did not have the legal effect of a provincial policy statement, but gave those involved in development a clear idea of the direction the provincial government was taking in respect to development in wetlands. Also, and significantly, this wetland was identified as being of provincial significance.

In 1989, Victoria Point Homes had purchased the property, and filed its first development application, which involved development of only the northwest corner of the interior of the Point. By that time a proposed provincial policy statement on development in wetlands was in general circulation. The 1989 rezoning application was filed by Victoria Point Homes with a letter indicating that the applicant wished to meet with residents in the area, and to complete more studies, and requested that the City hold the application in abeyance.

In 1992, the Wetlands Policy Statement was issued pursuant to Section 3 of the *Planning Act*. The policies then had legal effect, and approving authorities were directed to have regard to these policies. The policy states clearly at page 4, under the heading "Goals", that the goal of the policy is *"To achieve no loss of Provincially Significant Wetlands."* Furthermore, on page 5, the policy states *"Having abundant Wetlands in northern Ontario does not compensate for loss of Wetlands in the south."* On page 6, the policy states, *"In contrast to the south, bogs in broad areas of northern Ontario are extensive and well-dispersed."* The policy then states at page 10, that in this region "Development shall not be permitted within Provincially Significant Wetlands." The policy also goes on to restrict development on lands adjacent to provincially significant wetlands.

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This policy was in place and in effect before 1994, which was when the appellant submitted the first version of the plan which is before the Board. Importantly, the scarcity of bogs in southern Ontario is referenced; as is the fact that the proximity of other wetlands is immaterial. This is a complete answer to Mr. Michalski's and Mr. Burn's contention that they had never heard concern expressed about preserving the bog, as well as their argument that the presence of bogs in Longford Township some miles north of the site, in

Northern Ontario, negated the concern about the loss of the bog on this site.

Mr. Burns pointed to a number of provisions in the 1992 Policy and in the related "Manual of Implementation Guidelines" which direct and encourage municipalities to incorporate the provisions of the Policy into their Official Plans. Although this was not done, for reasons, which this Board has not heard (the City not having called its case), the failure to redesignate these lands does not detract from the statutory obligation to have regard to this policy. The 1992 Policy states on page 4, that it "is to be applied to Provincially significant Wetlands and lands adjacent to them, throughout Ontario." Furthermore, the Manual of Implementation Guidelines states that, "*The Wetlands Policy Statement applies to any proposed plan of subdivision which has not been draft approved...*".

It is important to review the history of this policy, because one of the arguments made by the appellant is that the appellant had no notice of the fact that development in this wetland was undesirable. A provincial policy with legal effect was in place before the appellant submitted its rezoning application in August of 1994. Furthermore, the Ministry responses to the 1994 application left no doubt that development in this wetland was a problem.

In response to the rezoning application submitted in 1994, both the Ministry of Natural Resources (MNR) and the MOEE expressed concern, and recommended against approval of the application. By letter dated February 7, 1995, the MNR indicated that it objected to the proposal, because of the wetland. On January 18, 1996, the MOEE, supported the comments made by the MNR. Pointing to the type of environmental problems experienced by developments on other man-made waterways, the MOEE recommended that the City of Orillia not pass the zoning by-law being requested by Victoria Point Homes. They also indicate that should the City of Orillia pass the by-law, they wished to be notified, so that "*we may continue our involvement with this proposal*".

There was further correspondence with the MOEE with respect to the internal

waterways, and with respect to the phosphorus loading generated by the site, and the storm water management system proposed to deal with that issue.

In June of 1997, in response to a request from staff that a peer review be conducted of some reports submitted by the appellant, the Council of the City of Orillia passed a resolution indicating that it would refuse to consider the proposal because it did not have sufficient regard for matters of provincial interest as stated in the Provincial Policy Statement. The fact that City staff never provided a comprehensive planning report, is, perhaps regrettable, but is not a reason for this Board to approve this plan. In any event, it was not extraordinary for the City to rely on comments provided by Ministries with expertise in areas affected by a development proposal.

The substance of the 1992 wetland policies was carried into the Comprehensive Set of Policy Statements under Bill 163, and into the current Provincial Policy Statement. It is the latter policy statement which applies to this application, because the appellant withdrew the 1994 rezoning application, and resubmitted both a rezoning application and application for condominium approval in 1996.

Mr. Burns urged the Board to consider the totality of the Provincial Policy Statement, including references to the encouragement of a range of housing uses, and urban intensification. To consider the Provincial Policy Statement in its totality requires the approving authority to read the various policies contained in the Policy together. Considering this policy as a whole, therefore, it is clear that while housing and urban intensification are encouraged, the Natural Heritage portion of the Policy provides that neither development nor site alteration will be permitted in significant wetlands south and east of the Canadian shield, and that development in areas of significant wildlife habitat was only to take place, *"if it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the area is identified."*

Thus read together with the housing policies, it is clear that a range of housing forms are encouraged, as is urban intensification, but not in provincially significant wetlands, and

only in areas having significant wildlife habitat, if it can be demonstrated that there will be no negative environmental impacts. This interpretation accords with the stated principles on page 1 of the Provincial Policy as follows:

"Ontario's long term economic prosperity, environmental health and social well-being depend on:

- 1. managing change and promoting efficient, cost-effective development and land use patterns which stimulate economic growth and protect the environment and public health;*
- 2. protecting resources for their economic use and/or environmental benefits; and*
- 3. reducing 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."*

The Board, therefore, does not accept that the equity of this application is in favour of the appellant because it was somehow led to believe that the development proposal before this Board was acceptable. All the relevant planning policies were in place before the first full application was submitted. Provincial ministries had expressed concern. The City of Orillia had rejected the proposal outright, based on the comments made by the various Ministries. Notwithstanding all of these indicators, the appellant proceeded, relying on the commentary, and appendices of OPA 18.

The appellant asserts that the plan before this Board is an improved version of the 1981 plan. However, the only similarity between the 1981 plan and the current plan, is that there is an internal waterway. The density of the current plan is considerably higher. It lacks a school site; any specific community commercial site, and until half way through the hearing, it lacked a public park. The previous plan consisted primarily of single family suburban-type lots, while the current plan boasts clustered multi-family dwellings. Despite these vast differences, the appellant relies on this plan as establishing some entitlement to develop as it has proposed.

When Mr. Koughan pointed out to Mr. Burns that the reference to a canal-based development was not included in the words of the amendment itself, Mr. Burns replied that he would not expect that to be the case. Mr. Koughan then correctly pointed out, that if the legal part of the amendment makes no reference to canals, then the “right” to develop a canal-based plan cannot be established by the amendment. It is the Board’s view that in order to establish an entitlement to develop a water-based development on a site with no waterfront, a reference to that intent ought to be included in those parts of the Official Plan having legal effect.

In view of all of the evidence, the Board finds that OPA 18 does not establish a right to develop as proposed. The Board finds further that the proposal does not conform with the Medium Density policies of the City of Orillia City Plan. In Section 5.1.1(b)(v) of the OP, there are certain locational criteria which are set out, as follows:

“As far as possible medium density housing shall be permitted in close proximity to local commercial outlets, to parks, schools and social service facilities and to public transportation facilities.”

Mr. Burns dismissed these criteria by referring to a qualification in Section 5.1.1 of the OP which states as follows:

“Council may consider proposals for residential development in the form of multi-family housing, at densities substantially less than that normally permitted for that type of housing, notwithstanding the locational guidelines specified for that type of housing, when site conditions warrant such special consideration”.

Mr. Burns gave no evidence as to whether the proposed density was substantially less than that normally permitted for this type of housing, or what site conditions warranted special consideration and why. In any event, the Board finds that even if the site warranted this development, some or all of the location guidelines should be applicable, in view of the large numbers of people the development would house.

Section 3 of the *Planning Act* requires the Board to have regard to policy statements

issued under that section of the *Act*, in exercising any authority that affects a planning matter. A policy statement issued under Section 3 of the *Act* reflects objectives and directions on planning matters that are considered of particular interest and priority for the province. Thus the policy statements articulate larger, more global priorities and policies than might be found in local planning documents. Some of these provincial policies are of general application, and some, such as the policies on wetlands, are more specific.

In the Board's view, a requirement to have regard to a statement of provincial planning policy means more than considering whether a completed design has met a provincial objective, and if it has not, deciding not to apply the policy. Having regard to these policies requires a careful consideration of the planning objective and a determination of how to meet that objective in a particular situation; or alternatively, determining if circumstances make it inappropriate or impossible to meet that objective in a particular situation.

The Board has already stated its view of the intent of the Provincial Policy Statement, considered as a whole. The applicant admits that it is proposing to develop in a provincially significant wetland, and that it cannot demonstrate that there will be no negative impact on the natural features or ecological functions of the significant wildlife habitat on the site. However, the applicant advances the position that this provincial objective is inappropriate for these circumstances, given the provisions of OPA 18, the history of the development of the project concept, and the fact that that portion of the wetland west of Forest Avenue is not presently proposed to be developed. The Board has indicated that it does not believe that OPA 18 supports the current proposal nor that the equities of the situation favour the appellant. Furthermore, the preservation of the wetland west of Forest Avenue is not secured, and the complete destruction of the wetland to the east of Forest Avenue, including some rare wetland features cannot be justified. The Board therefore finds it appropriate and possible to apply the provincial policy to the provincially significant wetlands in this case.

The Board has also had regard to the matters of provincial interest which it is required to do under Section 2 of the *Planning Act*. With respect to those matters of provincial interest required to be considered, the Board feels that that there has been no long term protection of ecological systems, either in Smith's Bay or in the interior wetland; the appellant has failed to provide a sufficient level of comfort to this Board that the development will be safe and healthy, and in fact provided evidence that this may not be the case (i.e. methane gas, road subsidence, weed growth and fish kills); has provided for an inappropriate distribution of recreational facilities in private ownership; has failed to take into account the financial and economic concerns of the municipality; and, has resolved a perceived planning conflict in favour of a private interest at the total expense of a key and important public interest by locating development in an inappropriate location.

With respect to those matters the Board is required to consider under Section 51(24) of the *Planning Act*, the Board finds that the proposal is not in the public interest; that the lands are not suitable for the purpose for which they are to be developed; that the applicant has failed to properly address the conservation of the site's natural resources and has failed to convince the Board of the adequacy of the lands to be conveyed for public purposes.

Given all of the foregoing, the Board finds that this proposal is not supported by the relevant planning documents or policies, and serves the private interests of the landowner to the exclusion of the public interest.

2. "In the design of the plan, there has been insufficient consideration of the values and functions of this site and the conservation, protection and ongoing sustainability of those values and functions. The development is not responsive to either the unique natural heritage features or the potential hazards of constructing on such low lying lands. The appellant has therefore failed to achieve a balance between the ecological losses and gains."

3. "The development fails to properly protect the undeveloped wetland in Smith's Bay."

In asserting that the plan had achieved a balance between ecological losses and gains, the appellant pointed to the natural vegetative landscaping, the naturalization of the shoreline of the inland waterway, the re-creation of some marshlands in the inland waterway, the absence of a connection to Smith's Bay, and the fact that the proposal did not include any development on the east side of Forest Avenue near Smiths Bay.

However, virtually the entire inland wetland would be obliterated by this proposal. Only 10 percent of the site to be developed would remain in its natural state. It was admitted in cross-examination that any remnant wetland features would ultimately disappear. And although a habitat might be created for panfish, most of the wildlife on the site would disappear along with the habitat. Moreover, there was no evidence demonstrating that the proposed shoreline had been constructed elsewhere and would continue to work as planned.

It was left to the condominium corporation to ensure that no owner replanted the area with more traditional vegetation forms, using traditional fertilizers which could further impact the water quality of the inland waterway. Furthermore, there was a risk that the water from the inland waterway would spill into the area serviced by the culvert connected to Smith's Bay if the waterway speed limits were not observed or enforced by the condominium corporation. This water would affect the quality of water in Smiths Bay.

Mr. Michalski advised that no hydrogeological studies had been completed. He indicated that it was his observation that the roads bordering the site had compacted the peat so that there would be no hydrogeological connection between the site and the lake. However, detailed hydrogeological testing was not done to confirm this observation. Developing on a site with these environmental sensitivities requires a detailed understanding the complexities of the site.

While the applicant pointed out that this proposal did not include development in the Smiths Bay area, no action was taken by the appellant to ensure that no development would be proposed in that area in the future.

Finally, Mr. Michalski indicated that the only impact on the very significant fish habitat in Smiths Bay would be an increase in angling, which he considered unimportant. Given the number of people to be introduced into the area, with the express purpose of enjoying the activities and amenities afforded by the lake, it is hard to imagine that the impact would be insignificant. Impacts on the Smith's Bay wetland habitat and on the fish stock could be expected, but no analysis of the effect of those impacts was completed.

The Board does not accept that an ecological balance has been obtained. In fact, based on the evidence before it, the Board finds that the ecological losses, and the inevitable ecological problems that would develop as a result of this project, all add up to a substantial ecological loss.

4. "The development fails to integrate into the existing community."

The appellant indicated that the vegetation buffer around the perimeter of the site was to buffer the development from the surrounding community. The appellant relied on this design principle to move the development into the interior of the site, thereby impacting some of the most significant features of the wetland.

The Board finds that this design principle was given an inappropriate degree of priority, at the expense of the significant wetland features. Furthermore, the Board finds that the effect is to produce an exclusive enclave for the residents of the development. Rather than buffering, it serves to remove the development from the rest of the community; creating a separate and private development that is not connected in any way with the existing and established community in the area.

5. "The internal waterway system is inappropriate for this site in view of the limited remaining boating capacity of the nearby lake; the limitations of the only available access to the larger lake; the complex environmental characteristics of the area, as well as the current knowledge of the ongoing requirements of such an inland waterway, and the refusal of the City of Orillia to assume any responsibility for that waterway."

The Board has reviewed why OPA 18 provides no "right" to develop a canal-based

community. Many years have passed since many of the canal-based communities in this area were first constructed. Much is now known about the problems, and environmental risks involved in basing a development on man-made internal waterways. The Lankin Canal provides immediate proof of the kinds of problems that can develop, and Mr. Michalski gave extensive evidence on the problems that developed in Lagoon City, and which might be expected here, such as fish kills, stagnant water, weed overgrowth, and the desire to use herbicides to control vegetative growth in the waterway.

The site is not a waterfront site, and there is no inherent ability to access Lake Simcoe by boat. The complexities of the site do not lend themselves to a canal-based development. The proposed exit to Lake Simcoe demonstrates the unsuitability of the site for canal-based development. It was clear that no connection could be made between Smith's Bay, and the inland waterway, in order to preserve the water quality and fish habitat in Smiths Bay. This forces inhabitants to exit the development via the Lankin Canal, through a passage under the Victoria Crescent bridge that is clearly inadequate for accommodating this level of boating.

Furthermore, in order to mitigate the impact of the increased number of boaters on the fish habitat in Shannon Bay, the appellant proposed to dredge a navigation canal, mark it with buoys, and post a speed limit for boats exiting the development. The appellant's witnesses indicated that the City of Orillia would have to apply for permission to do this, but there was no clarity on who would maintain the channel, and who would police it.

A boating impact study was conducted in 1993, and updated in 1997. The study depended on previous studies to conclude that there would be an average of 2 boats per household (resulting in a total number of boats in the development of 1356). Assuming that only 10 to 25% of the boats were out at any one time, the study determined the impact on Shannon Bay, and on the Atherley Narrows to the north. The conclusion was that the number of times during the day that Shannon Bay would be overcapacity would increase, and that the Atherley Narrows was so over-capacity in any event, that the increase in traffic

would represent a small percentage increase. The conclusion was that the boating impact was not significant.

However, the Board finds that the study demonstrates that there is limited boating capacity in this area, and that there is no need or justification to add another 1356 boats to this water system.

6. "It is neither good planning nor good sense to burden a condominium corporation with extraordinary responsibilities and costs that equate in their complexity and sophistication to the responsibilities taken on by municipalities. (Policing boat and road traffic, waterway maintenance, specialised road care, sophisticated sewer and storm management systems.)"

The list of responsibilities to be handed to the condominium corporations (of which there will be an unspecified number) and their members would be extensive. These include policing boat speeds and landscaping activities of members, maintaining and repairing the sewage grinder pumps, monitoring sewage and water pipes to ensure there was no breakage as the ground subsided, monitoring, maintaining and replacing the stormwater infiltration trenches, monitoring and maintaining the shore walls, monitoring and maintaining air diffusers to prevent winter fish kills, harvesting or otherwise controlling weed growth in the canal, repair of areas of ground subsidence, and specialised road repair and repeated re-surfacing.

The activities would have to be coordinated between the various condominium corporations. The more corporations, the more complex the management of these responsibilities.

The City of Orillia has indicated it will resist any involvement with the waterway operation, as has the MOEE. There is no fallback, should the condominium corporations or its members be unable to continue to meet their responsibilities. The site presents some unique and complex challenges to maintain, and there was no evidence led to indicate that these responsibilities are affordable, or acceptable risks for a condominium corporation to

undertake or coordinate.

While it is open to the condominium corporations to hire experts, decisions must be made on a wide variety of matters that equate in complexity to responsibilities assumed by municipalities. The directors are volunteer and are not paid for assuming these responsibilities. Some of the decisions could have significant impacts on the surrounding environment and community, to which the corporations may not necessarily be accountable. For all of these reasons, the Board finds that this type of development is inappropriate to leave to a number of condominium corporations to manage.

7. "Some of the proposals for servicing seem premature, uncertain, or have not been sufficiently tested for this type of environment; and monitoring and contingency plans have not been sufficiently investigated. While these issues may well be appropriately left to be dealt with by other agencies through conditions of draft approval, in ordinary developments, the Board does not consider this an ordinary development. Thus, in a case such as this contingencies and uncertainties must be dealt with to a far greater degree of confidence than might otherwise be the normal course."

There is no sewage treatment capacity available for this development, and no availability of water. Studies must be done and solutions found. The solutions may require substantial capital construction. While the appellant has proposed constructing a brand new sewage pipe from the Point to the treatment plant, there was no evidence that this is necessarily the acceptable or preferred solution, or whether it will completely solve the capacity problem.

There was no evidence as to whether the sewage system servicing the project has been used in a similar environment, or whether the MOEE would accept this system in this type of environment. There are risks for this system, given the potential for substantial subsidence of the fill.

The approval of the stormwater management system by the MOEE is uncertain. While some monitoring and contingencies plans were suggested, no details were provided.

There are a number of unknowns with respect to the viability of the navigation channel to be created in Shannon Bay. This is a critical component of the development for it is the sole means of exiting the project for the hundreds of boats anticipated to be housed there. The City of Orillia is not prepared to support such a navigation channel, nor is there any certainty that it would be approved or who would police the channel or maintain it.

Given the complexity of the site and the sensitivity of the surrounding environment, the Board would have preferred to have had concrete plans to overcome these obstacles and more detail on how those plans would be implemented. Given the nature of this project, the uncertainties are significant and make the application for this development premature.

For these reasons, therefore, the Board grants the motion requested and adjourns this hearing sine die, on the conditions provided for on page 7 of this decision. The Board so orders.

"S. D. Rogers"

**S. D. ROGERS
MEMBER**