



PROPOSED HOUSEKEEPING AMENDMENT - PLANNING REPORT #2

To: Reeve Tallman and Members of Council
From: Chris Jones
Date: July 4, 2006
Re: Regulation of land under water
Our File No: 3028

1.0 PURPOSE

This technical report was prepared for the Municipality of Highlands East in order to review the issue of the development of buildings and structures on piers or footings that are attached to the land under water. This report reviews the Provincial regulatory context in regulating these areas and also summarizes recent decision of the Provincial Court as well as planning policies and zoning provisions of a number of municipalities that currently regulate buildings and structures on lakes or lakebeds.

2.0 PROVINCIAL AND FEDERAL REGULATION OF DEVELOPMENT IN AND AROUND WATER

2.1 The Conservation Authorities Act

Conservation Authorities have historically been empowered to administer resource conservation programs in partnership with municipalities and the Province of Ontario. In fulfilling this role, many Authorities have established registered flood lines and administered a permit process for activities such as filling, construction and alteration occurring within flood plain areas. In addition, Conservation Authorities have also been recently entrusted with the implementation and enforcement of the new Generic Regulation. This intent of the Generic Regulation is to achieve province-wide consistency in the regulation of development and interference with wetlands and alteration to shorelines and watercourses.

The only watershed in the Municipality of Highlands East currently under the jurisdiction of a Conservation Authority is the Crowe River System. However, this jurisdiction only applies to about 20% of the municipality and at this time the Crowe Valley Conservation Authority is not able to implement the new Generic Regulation due to staff limitations.

2.2 The Public Lands Act

Public lands are defined in the *Public Lands Act* as Crown lands, school lands and

clergy lands. Section 24 of the *Public Lands Act* has regulations regarding taking possession of public lands. In that section, “lands” means public lands and includes public lands covered with water. Therefore, the beds of most lakes, rivers and streams would be considered public land in Ontario and would therefore be subject to the regulations of the Act.

Section 14(1) establishes regulations regarding work permits. Under that section of the Act, the Lieutenant Governor in Council may make regulations:

- (a) *prohibiting an activity specified by the regulations on public lands or shore lands unless the activity is carried on in accordance with a work permit;*
- (b) *defining “shore lands” for the purpose of clause (a);*
- (c) *governing the issue, refusal, renewal and cancellation of work permits and prescribing their terms and conditions;*
- (d) *providing for and governing appeals from a refusal to issue or renew a work permit, from the cancellation of a work permit or from the imposition of terms and conditions in a work permit.*

Activities such as dredging and filling on public lands may also require a work permit. Specifically, Section 27(1) states that:

No person shall deposit or cause to be deposited any material, substance or thing on public lands, whether or not the lands are covered with water or ice, except with the written consent of the Minister or an officer authorized by the Minister.

Under the *Public Lands Act*, the Ministry of Natural Resources has work permit requirements when working on shore lands. MNR requires that certain types of docks and boathouses built on shore lands require a work permit from MNR prior to construction. MNR defines shore lands as “*lands covered or seasonally inundated by the water of a lake, river, stream or pond*”. Table 1 summarizes instances where permits are required.

Table 1 - Work Permit Criteria for Docks and Boathouses

Docks and Boathouses that DO NOT Require a Work Permit	Docks and Boathouses that DO Require a Work Permit
<ul style="list-style-type: none"> • Cantilever docks where the footings are located off the shore lands. • Floating docks and floating boathouses. • Docks and/or boathouses supported by posts, stilts, poles, cribs or other supporting structure - provided that the area of the supporting structure on the bed of the lake or river does not exceed 15 square metres. • Boat lifts and marine railways where the occupied area of the bed of the water body is less than 15 square metres. • Removal of an old dock or boathouse. 	<ul style="list-style-type: none"> • Any docks and/or boathouses where the total surface area of cribs or other supporting structures to be constructed or placed on the bed of the water body exceeds 15 square metres.

Structures built at the shoreline or in the waterbody could also have an impact on fish habitat or public navigation. To assess the impact of projects on the environment, a Ministry of Natural Resources representative may visit project sites. Work permit applications for projects that can affect fish habitat are referred to the local Conservation Authority or the Federal Department of Fisheries and Oceans. If there is concern that a project may impact the navigation of a waterway, the Navigable Waters Protection Branch of the Canadian Coast Guard is required to review and clear such projects.

2.3 Department of Fisheries and Oceans

The Federal *Fisheries Act* provides for the protection of fish habitat. Under the *Fisheries Act*, individuals are not allowed to conduct any work or build any structure that results in the harmful alteration, disruption or destruction of fish habitat, unless authorized by the Minister of Fisheries and Oceans.

An applicant would need to contact the Department of Fisheries and Oceans (DFO) if a dock, boathouse or boat launch is proposed in the following circumstances:

- In a federally owned small craft harbour;
- In an area that may affect boat navigation (Canadian Cost Guard must also be contacted); and/or,
- Construction requires the use of explosives in or near water.

Additionally, if a dock or boathouse proposal is a cantilever design and is proposed to be removed from the water on a seasonal basis, approvals are generally not necessary unless the structure is large or to be used for commercial purposes.

3.0 MUNICIPALITIES THAT ZONE WATER OR LAND UNDER THE WATER

There are a number of municipalities which currently zone land under water. A summary of several municipalities and their related zoning controls is provided in Table 2.

Table 2 - Examples of Municipal Zoning Provisions Restricting Use of the Lake Bed

Municipality	Zone Category	Permitted Uses	Other Regulations
Municipality of Dysart et al	Lake and River "LR" Zone	<ul style="list-style-type: none"> • Conservation uses • Public park • Marine facility • Flood control works 	No structures are permitted in conjunction with a public park or a conservation use
Township of Tay	Lake Side "LS" Zone	<ul style="list-style-type: none"> • Boat launching ramp • Conservation or wildlife sanctuary • Public use • Recreational uses not including buildings or 	All structures permitted shall be with the written permission of the appropriate government authority having jurisdiction.

		structures	
		<ul style="list-style-type: none"> • Uncovered private dock • Water intake pipes 	
Town of Kearney	Open Space (OS) Zone	<ul style="list-style-type: none"> • Cemetery • Golf course • Outdoor recreation • Private recreational park • Public park and accessory structures • Public recreation centre • Uses that legally existed as of the date of passing this By-law 	All lands situated below the surface of a waterbody or watercourse shall be deemed to be in the Open Space (OS) Zone. The only permitted uses of such land shall be marine facilities and boathouses accessory to permitted uses on the appertaining lands where such a use is permitted on the appertaining zone in accordance with Section 3.1. In addition, the Regulations for Permitted Uses shall not apply to lands under water
Township of Georgian Bay	Environmental Protection (EP) Zone	<ul style="list-style-type: none"> • Agriculture • Conservation • Timber activities • No buildings or structures • Public/private parks 	All lands situated below the surface of a waterbody or watercourse shall be deemed to be in the Environmental Protection (EP) Zone. Notwithstanding the permitted uses in Section 4.26.1 to the contrary, the only permitted uses of such land shall be marine facilities and boathouses.
Township of Muskoka Lakes	Waterbody Open Space (WOS)	<p>In the Waterbody Open Space (WOS) Zone the use of any lot or land covered by water, or construction or use of any building for any purpose is prohibited except for the following:</p> <p>a. in the case of lands under water abutting lots zoned Residential and Commercial: Docks or boathouses if they are an Accessory Use to the permitted uses of the nearest abutting zone above the High Water Mark and subject to the provisions of the abutting zone.</p> <p>b. in the case of lands under water abutting land zoned Waterfront Landing (WL) or Marine Commercial (WC2, C2): the permitted uses of the nearest abutting zone above the high water mark, excluding dwelling units and subject to the provisions of that zone for Docks and Boathouses.</p>	<p>The Residential, Commercial, Waterfront Landing, Marine Commercial and Environmental Protection Zones each have specific provisions for structures over water.</p> <p>A Boathouse is defined as an accessory building built or anchored near the shore for the berthing and sheltering of boats or other marine related equipment and enclosed by more than one wall. The second storey of the boathouse may include a sleeping cabin or other recreational uses, unless prohibited by the applicable zone requirements.</p>

In addition, the City of Kingston places the waters surrounding the City in a Harbour (HR) Zone. In the HR Zone permitted non-commercial uses are limited to:

- A Ferry Dock, including ancillary administrative offices and parking; and,
- Waterfront Docks, Piers and Landing Places

In the definitions of the By-law, “boathouses” are included within the definition of a “Landing Place”. Therefore the City has zoned these lands in order to regulate uses that are attached to the land under the water.

4.0 PROVINCIAL COURT DECISIONS

There have been a number of Provincial Court decisions made in the last 25 years which required a legal interpretation of whether a municipal corporation had the ability to regulate the land under water. The following four Court cases all lend support to the notion that a municipality has the legal ability to restrict land use in the water.

4.1 Hamilton Harbour Commissioners vs City of Hamilton

- The City passed zoning control over the harbour. The Harbour Commission thought they had exclusive jurisdiction to regulate and develop the lands under the Navigable Waters Act.
- Court upheld zoning by-law as land use control within a harbour has both Provincial and Federal aspects.

4.2 Township of Moore vs Hamilton

- Hamilton obtained a permit to build a dock under the Navigable Waters Act.
- The Township’s zoning by-law did not permit a commercial dock in proposed location.
- The first Court said the Navigable Waters Act must prevail.
- The Court of Appeal did not agree stating the by-law was not attempting to regulate matters relating to shipping and municipalities may zone lands covered by water.

4.3 Township of Humphery vs Robinette

- The Township charged Robinette with occupation of a boathouse.
- The Provincial Court ruled: “It is clear the municipality has the jurisdiction to zone land covered by water, This is by virtue of the fact that “land” within Section 1 of the Municipal Act includes land covered by water.

Galway and Cavendish vs Windover

- Windover converted an existing dock into a boathouse.
- The Court ruled that the Public Lands Act recognizes a municipalities right to have some control of lands covered by water.

5.0 OFFICIAL PLAN POLICIES

Neither of the current Official Plans for the County of Haliburton or Municipality of Highlands East, provides specific policies regarding development of buildings and structures on the lake or lake beds, however, the Highlands East Plan is clear in Section 3.3.1.4 that, “the “*natural state of the shoreline be maintained to the greatest extent possible*”.

In a cursory review of Official Plans in areas predominated by lakes, the District of Muskoka Official Plan and the Dysart et al Official Plan both contained policies regarding the jurisdiction and use of lands under water.

5.1 District of Muskoka Official Plan

The current Official Plan for the District of Muskoka (2004) has a variety of requirements for lands designated Waterfront. For floating residences, the Plan requires that:

Although municipalities do not presently have jurisdiction over surface water usage, this is an issue directly related to land use planning. Therefore, as a statement of policy, floating dwellings or similar structures, supported by a barge type hull capable of remaining in the water year round and are substantially unpowered and which are used for either residential or commercial purposes, will not be permitted on waterbodies within Muskoka. (District of Muskoka Official Plan, Policy D22).

In the Implementation Section, there are additional requirements for approval of development applications for structures or works on public property below the normal or controlled high water mark. The Plan recognizes that forms of development may be permitted on or along the shoreline and on the bed of such waterways subject to policies of this Plan. The specific policies found in the Plan include:

K.56 As authorized by provincial and federal legislation, no structure or work including facilities such as docks, boathouses, retaining walls, breakwalls, piers and groins, among others, will be permitted beyond the normal or controlled high water mark without the prior written approval of the Ministry of Natural Resources and other required and authorized approval agencies. Such additional agencies shall include the Area Municipality and may include Transport Canada (if a navigable waterway) and the District of Muskoka (if District property).

K.57 No dredging, filling or other alteration of the shoreline of any natural water course or waterbody shall be permitted without the prior written approval of the Ministry of Natural Resources and any other authorized approval agency.

K.58 Buildings, structures, or works extending beyond the normal or controlled high water mark or located at the shoreline shall be designed and located in a manner which:

- a) does not have a significant detrimental effect on critical fish and wildlife habitat;*
- b) does not have a significant detrimental effect on property by facilitating erosion;*
- c) minimizes the obstruction to the natural flow of water;*
- d) minimizes potential damage from flood and ice heaving; and*
- e) implements shoreline and resource development and environmental policies of the affected agency.*

These policies clearly establish that any development on a waterbody or watercourse requires the approval of the Ministry of Natural Resources (MNR).

5.2 Municipality of Dysart et al Official Plan

The Official Plan for Dysart et al was approved by the Ministry of Municipal Affairs in 2003. All of the major lakes in the Plan have been placed in the Lakes and Rivers land use designation. The corresponding policies for the Lakes and Rivers designation are provided in Section 17 of the Plan. Specifically, the following policy establishes the applicability of the designation and permitted uses:

Lakes and Rivers consist of all lakes and rivers below the high water mark and outside of Algonquin Provincial Park.

The lands in this designation are dedicated to water resource protection and public use and enjoyment. The following uses may be permitted: conservation, fish and wildlife management, docks and water access facilities and outdoor recreational facilities.

Most lake beds are Crown lands and the MNR is responsible for their management. Although the Ministry is not bound by any policy of this Plan, the Municipality expects the Ministry to have regard for this Plan in its management of Crown lakes and waters.

6.0 CONCLUSIONS

1. There are various Provincial and Federal agencies that have statutory responsibility to regulate development in the lakes or at the shoreline of lakes.
2. A number of municipalities have chosen to establish local zoning regulations or restrictions upon the development of buildings and structures on the surface of

the lake and/or the lake bed.

3. In instances where shoreline development requires a municipal building permit, the development of local restrictions or regulations would assist in implementing official plan objectives aimed at maintaining natural shoreline areas.

7.0 RECOMMENDATIONS

The following recommendation are provided for Council's consideration:

It is recommended that:

1. This report be received; and,
2. That the housekeeping amendment to Zoning By-law 2005-29 include provisions to regulate the placement of buildings and structures on lakes or lake beds.

8.0 REFERENCES

Ministry of Natural Resources. Accessed Online:

<http://www.mnr.gov.on.ca/MNR/crowland/p7973590.html>

Department of Fisheries and Oceans, "What You Should Know About Fish Habitat". Accessed Online:

http://www.dfo-mpo.gc.ca/regions/central/pub/fact-fait/info_e.htm

Department of Fisheries and Oceans, "Fact Sheet C-1: Fish Habitat and Docks, Boathouses and Boat Launches". Accessed Online:

http://www.dfo-mpo.gc.ca/regions/central/pub/fact-fait/c1_e.htm

Respectfully Submitted,

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