

ISSUE DATE:

Feb. 26, 2009



PL081405

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

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| Applicant and Appellant: | Don & Nadine Bell |
| Subject: | Minor Variance |
| Variance from By-law No.: | 06-10 |
| Property Address/Description: | Part Lot 19, Concession 7, former Township of Lutterworth, Gull Lake |
| Municipality: | Township of Minden Hills |
| OMB Case No.: | PL081405 |
| OMB File No.: | PL081405 |
| Municipal No. | A-13/2008 |

APPEARANCES:

Parties

Donald Bell and Nadine Bell

DECISION DELIVERED BY M. C. DENHEZ ON FEBRUARY 12, 2009 AND ORDER OF THE BOARD

This matter was uncontested. Donald Bell and Nadine Bell (the Applicants) applied for a variance to increase the width of an existing 1956 accessory structure on Gull Lake, in the Township of Minden Hills (the Township). The Committee of Adjustment (COA) turned down the application, and the Applicants appealed to the Board. At the hearing, neither the Township nor anyone other than the Applicants appeared.

The structure was called a "boathouse" because it was used to store boats; but it was what some people call a "dry-land boathouse" because the structure was actually some two metres from the water's edge, and was not connected to a dock. The existing structure measured 14 feet by 24 feet. The proposal was to widen it by 10 feet, to 24 feet x 24 feet. The existing 1956 structure is made of boards, and was described as "not

in very good shape”. Photographic evidence corroborates that assessment. The Applicants argued that their new structure would be an aesthetic improvement.

However, in 2006, the Township adopted By-law 06-10 prohibiting new boathouses, although the Board was supplied with no definition of a “boathouse” under either the applicable By-law or the applicable Official Plan, and was not advised of whether the application was covered by the relevant definitions.

For *existing* boathouses, the By-law stated the general principle that they could not be enlarged [Section 4.7.2], but then created an exception [Section 4.7.4], namely that “enlargement” would be permissible as follows:

Nothing in this By-law shall prevent the reconstruction... of an existing legal non-complying building or structure on a lot provided such enlargement... does not increase the extent of non-compliance by... increasing the coverage of the legally non-complying building or structure by more than 25%”.

In this case, the increase in the footprint would be more than 25%: it would be 71.43%.

According to the Applicants, there were at least 50 existing boathouses on Gull Lake.

Variations are governed by Section 45 of the *Planning Act*. Most variations are addressed by Subsection 45(1), whose criteria (often called “the four tests”) provide that a variance from the applicable By-law may be authorized if it is minor, desirable for the appropriate development or use of the property, and maintains the general intent and purpose of both the Zoning By-law and of the Official Plan.

There is, however, a different provision at Subsection 45(2), to grandfather legal non-conforming uses and related non-complying structures that existed at the time of adoption of the by-law. It permits:

- (i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed... continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed....

The Township's unsigned planning report to the COA alluded to none of the typical difficulties that surround so many shoreline applications, e.g., ecological impact, side setbacks, lot coverage (the lot measures 1.5 acres), or vistas from the water. It referred to no obstacles in the Official Plan. The only substantive proposition in the report was that

In this application, any approval given to allow the expansion must be specific and a maximum number of sq. ft. or m written into any decision. It is not legal non-complying, therefore the 25% rule does not apply.

The report cited *Planning Act* Subsection 45(2)(a)(i). However, the report apparently provided the COA with neither a recommendation nor a rationale. Such materials are not in the Board's file either.

Furthermore,

- although the report treated Subsection 45(2)(a)(i) as the relevant provision, it did not recommend that the application be assessed in that light:
- instead, it proposed that the application be assessed under the four tests of *Subsection 45(1)*.

The COA's Decision then stated that the application was being turned down because it failed all four tests. The only explanation for this conclusion, in the Minutes, was an oblique reference to

Concerns regarding boathouses overall and reference made to staff report that they are not a permitted use so no longer considered legal non-complying. Relocation not permitted. Repairs can occur but expansions not permitted.... Also the four tests must be applied to each application which cannot be met in this situation. The Official Plan and Zoning By-law do not allow boathouses and expansions are not permitted.

Through the telegraphic language, it appears that the COA was under the impression that the possibility of variances had been written out of existence by

municipal authorities. That is not how the Board interprets the planning report, nor is it the Board's own view. Section 45 of the *Act* continues to apply, variance applications remain a statutory right, and the outcome in this case would be little different regardless of whether the application was assessed under Subsections 45(1) or 45(2).

Matters might have been different if the planning report had alluded to an ecological issue with the "ribbon of life" which surrounds most lakes, but there was no such allusion. Indeed, there was no apparent mention of any difficulty concerning desirability for the appropriate development or use of the property, and compliance with the general intent and purpose of the Official Plan. As for the intent of the Zoning By-law, the latter appeared to specify the possibility of "enlargement".

On the question of whether the proposal was minor in terms of its impacts on neighbours, on this bay of Gull Lake, there are only three neighbouring dwellings within sight (the owner directly across the bay has his own prominent boathouse on the water). All three owners provided letters of support for the application.

The Board is satisfied that the application meets the terms of the *Planning Act*.

THE BOARD ORDERS that the appeal is allowed and the variance to By-law 06-10 of the Township of Minden Hills is authorized.

It is so Ordered.

"M.C. Denhez"

M. C. DENHEZ
MEMBER