

ISSUE DATE:

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PL091051

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

R. Douglas and Gail Gillies have appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 99-18 of the Township of McNab/Braeside to rezone lands described as Part of Lots 6 and 7, Concession 4 from Residential One (R1) to Open Space-Exception Four (OS-E4), Residential One-Exception Forty-Four (R1-44) and Residential One-Exception Forty-Five (R1-45) to permit future residential development
OMB File No. PL091051

APPEARANCES:

Parties

Counsel

Douglas and Gail Gillies

Township of McNab/Braeside

J. Bradley

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

1. INTRODUCTION

This zoning dispute originated after Douglas and Gail Gillies (the Applicants), waterfront landowners in the Township of McNab/Braeside (the Township), acquired an abutting unopened road allowance from the Township, with a six-metre easement for a future drain. The Applicants then applied to the Committee of Adjustment (COA) to redraw the internal lot boundaries. The COA ultimately agreed – with Conditions including rezoning.

So the Applicants applied for a Zoning By-law Amendment (ZBA). During that process, however, municipal staff inserted a provision in the draft ZBA for a four-metre buffer *next* to the drain easement. The Applicants objected. A stand-off ensued, the ZBA was not adopted and the Applicants appealed the refusal to the Board.

At the hearing the Applicants were not represented by Counsel and called no expert witnesses. The Applicant Mr. Gillies testified. The paper trail, however, was

ample, if not always transparent. The Township was represented by Counsel, and its planning case was outlined by the County's Planner, Mr. Howarth, who handles planning matters on behalf of the Township. There was also one Participant (a neighbour).

The Board has carefully considered all the evidence, the able submissions of both sides, with regard for the position of Council, and the information on which it was based. The Board finds the proposed ZBA premature, in the absence of a hydrogeological assessment, as recommended by the Ministry of Natural Resources (MNR). That assessment, however, was described as "routine", and is expected to be in hand soon enough. In due course, the ZBA and lot reorganization could be expected to proceed together, at which time a buffer area *beyond* the path of the easement could also be expected – though at a width of two (2) metres, not the four (4) metres proposed by staff.

This is not a matter of splitting the difference: there are substantive reasons why an Open Space buffer (or the like), specifically identified at two metres, is supportable – but a four-metre buffer is not. The details and reasons are set out below.

2. BACKGROUND

This dispute involved three properties:

- Parcel 1:** The Applicants' original pie-shaped lot (Parcel 1) had wide frontage on Waba Creek to the north, but narrow frontage on Alston Street to the south. Indeed, the street frontage was legal non-conforming, meaning it was narrower than allowed by current zoning (which calls for 30 metres), but predated it and was hence "grandfathered".
- Parcel 2:** Under the name of the Applicant Gail Gillies, the Applicants acquired a second lot of record (Parcel 2), abutting Parcel 1 to the west. It was much smaller but on the water. It was, however, separated from Alston Street by an unopened 66-foot road allowance.
- Parcel 3:** In 2005, they acquired that road allowance from the Township (Parcel

3), to the west of Parcel 1 and south of Parcel 2. It too had street frontage narrower than the 30 metres required by the current zoning.

However, the Township had not entirely finished with the road allowance. The Township pondered an eventual drain, to run some 400 feet from Alston Street to the creek. This would be a difficult proposition, because the prevalence of solid rock might call for blasting. Nonetheless, the contract provided for an easement for the eventual drain:

- It attached a *map* illustrating this *six-metre* easement;
- But the *text* referred to a substantially wider area, i.e. the width of the ditch *plus eight* metres (four on each side):

THE TRANSFEROR covenants and agrees with the Transferee to maintain those parts of the Lands used by the Transferee as a ditch, drain, culvert or subject to a fixture or equipment, and four (4) metres on either side of such drain, ditch, culvert or fixture or equipment, free of any building or structure or other obstruction of any nature whatsoever, including new shade or ornamental trees.

The Board was told that for decades (if not more), it had been routine municipal practice to reserve some four metres on each side, as maintenance space for drainage ditches. The Board was not told, however, how the parties proposed to deal with these two separate provisions, or how those provisions were supposed to interlock.

Meanwhile, the Applicants applied to reconfigure the lots, to merge Parcels 2 and 3, and add a lot addition from Parcel 1. Instead of one substantial lot and two narrow parcels in tandem, they wanted two lots of similar water frontage and lot area (about 1¼ acres each). However, the then planner's report to the COA (January 2006) raised questions about three aspects: water setback, street frontage, and: "The Township (should) consider requiring a minimum setback along the drainage easement to be potentially utilized for access and a work area".

But there was a more serious problem. The easement ran along the west edge of the 66-foot Parcel 3; but when it reached Parcel 2, which was wider, it continued to run straight across the parcel, bisecting it. The Parties agreed it would be preferable for the

easement to dog-leg and run along the edge. In 2009, a new agreement was signed accordingly. It attached a map, illustrating the new location for the six-metre easement – but this time, there was no textual mention of four metres on either side of the ditch. The Board was not told the rationale for this omission at the time, nor even how it occurred; but apparently, municipal staff regretted it later.

Meanwhile, the proposed lot reconfiguration had proceeded to the COA, and was approved, subject to Conditions including rezoning, with the purpose (in the words of the County’s planner) of “cleaning up” (i.e. normalizing) the non-conforming street frontage:

This severance is granted on condition that:

1. The applicant successfully obtains a rezoning of the newly created lot to reduce the minimum lot (street) frontage from 30 metres to 20.1 metres.
2. The land created by this lot addition is subject to a drainage easement registered on title....

The Applicants therefore applied for a ZBA. It would normalize street frontage, which was never a subject of dispute. The questions that became problematic, however, pertained to (a) space next to the easement, and (b) water setback.

As for (a), it was after the Applicant submitted the ZBA application to the Township that the Roads Superintendent commented on the absence of a contractual four-metre space. He suggested: “That the draft By-law for this zoning amendment be amended to stipulate a four-metre setback on either side of the easement is required and be kept free of any building or structure or other obstruction of any nature whatsoever, including new shade or ornamental trees”. The application went to the County Planner, Mr. Howarth, who handles such matters on behalf of the Township. He translated the ZBA application into draft By-law language. In the drafting process, he also inserted a four-metre buffer area, in the form of a “four-metre strip on the northeast side” (of the easement), to be zoned “Open Space”.

As for water setback, the application was also circulated to other agencies, notably the MNR. MNR had an interest and expertise in water setback; it called for a “routine geotechnical inspection”.

Shortcomings in communication then intervened. The Applicant, Mr. Gillies, said he was physically at the door of Council's Public Meeting, with the intention of (a) supporting his ZBA, but (b) opposing insertion of the four-metre "Open Space" buffer. However, because of an agenda misunderstanding, he did not speak. Council supported the ZBA as drafted by staff – with the four-metre buffer recommended by the Superintendent of Roads – but subject to the precondition of the geotechnical inspection recommended by MNR.

The Applicant, Mr. Gillies, told the Board he did not arrange for a geotechnical inspection, fearing that it might be interpreted as acquiescence to the four-metre buffer.

Meanwhile, the Township's rationale for that buffer changed: it was allegedly necessary not for drain *maintenance*, but to provide a safer distance in the event of *blasting* for ditch construction. At the hearing, that was the only rationale advanced.

The Applicants said they had no planning reason for wanting to build on the disputed Open Space buffer near the drain, nor was that *necessarily* their intention. Their argument at the hearing was essentially philosophical, to the effect that the Township was proposing to encroach on the development potential of their private property, without valid or obvious reason.

3. OBSERVATIONS AND FINDINGS

This proposed rezoning was at the Applicants' initiative. The focus of dispute was on the open space next to the drain easement. There was no substantive dispute, at the hearing, about the MNR's recommended HGA – which, in the MNR's own words, was "routine". Measures to deal with water setback have nothing to do with "Open Space" near the drain.

However, if one accepts the necessity of a "routine" precondition for an HGA, that means that the proposed rezoning is premature, so long as that precondition remains unfulfilled.

It would therefore be possible for the Board merely to dismiss the Applicants' appeal, with the expectation that there would be a new application after the HGA was in hand. Furthermore, the Township advised that there were technical errors in the draft

(e.g. incorrect references to the existing zoning of the road allowance), so that some rewording would be necessary anyway. On the other hand, the Board does not wish simply to prolong this dispute, and foster a proliferation of later proceedings, repeating the same arguments. The following is therefore intended to provide parameters.

First, the Board finds no dispute on the desirability of rezoning, to normalize street frontages and water setbacks – at least between the Township and the Applicants. The Participant, Ms Bancroft, did express concern about street frontages; but those frontages are longstanding, and the Board was shown no evidence that acknowledgement of those 20-metre frontages, in a future zoning by-law, would have any visible negative impact on the neighbourhood.

The next reality is that this entire exercise, to normalize the lots via a ZBA, is based on the premise that it is desirable to reorganize them. That exercise includes rebalancing their size, to produce an outcome with lots of similar water frontage and area, in accordance with documents submitted. If that proposed reorganization were to change – e.g. if there were no longer a lot addition to shift land from Parcel 1 as the Applicants originally proposed – then applicable considerations could change, and the entire arrangement (including the prospective ZBA) would need to be re-evaluated.

That leaves the question of buffer space near the ditch. It was submitted – and not rebutted – that for as long as anyone could remember, it had been local municipal policy to provide for four (4) metres of maintenance space, next to the physical ditch itself. The Board heard no evidence why that longstanding policy might have been intrinsically inappropriate; and the Board heard no hard evidence or planning reasons why the Township should be precluded from pursuing that same longstanding policy now.

The question is extent.

Even if one assumed a drainage ditch physically over a metre wide (the Board was not told of any more ambitious plans), and off-centre on the easement, there would still be typically *two* metres of space remaining beside the ditch, *within* the boundaries of the easement itself. To guarantee *four* metres, one would need to look beyond of the easement for a *further two* metres.

However, a buffer of a full four metres *beyond* the edge of the easement would bring total distance from the ditch to six metres – half again the distance which staff considered necessary for drain maintenance.

The Township argued, however, that this larger space was supportable – not for drainage reasons, but to provide greater distance from potential blasting. Though well-intentioned, there are difficulties in that argument.

First, there was no evidence in the paper trail that this rationale figured in the intent of the proposed By-law. Blasting space was certainly not mentioned by the COA, or the Road Superintendent.

More importantly, there was no actual evidence that blasting would necessarily occur, let alone that the selected blasting distance corresponded to any standard. Instead, the premise (stated at the hearing) was simply that if some distance was appropriate, then more distance would be more appropriate.

In the absence of any evidence or standard, the Board can only take notice that:

- if excavation is done professionally, it may be feasible at relatively modest distances;
- but if it is done unprofessionally, then even a separation of six metres – or more – guarantees nothing.

In short,

- although the Township enjoyed decades of precedent in calling for a *total of four* metres of maintenance space (e.g. two metres within the easement next to the ditch, plus two metres of buffer outside),
- the Board was shown no authoritative planning ground or standard, on which to extend that space to *six* metres (i.e., with four metres of buffer outside the easement), as supposed blasting space. The figure is arbitrary. Although the Township has clear authority to address safety issues, the Board was shown no substantive evidence that this was

the way to go about it.

4. CONCLUSION

The proposed ZBA is not ready to proceed and therefore the Township's refusal to adopt it was correct. A hydrogeological assessment should be done first; there are also other minor technical corrections to be done. The Applicants' appeal is therefore dismissed – but without prejudice to the right to resubmit, once the HGA has been properly done.

When that occurs, the Board would expect the process to respect certain basic parameters. One would be that the ultimate objective remains, i.e. to have two proper lots balanced more evenly.

Another is to have an appropriate buffer (by whatever name) next to the future ditch; but that supplementary buffer, beyond the boundary of the easement itself, would be expected to be two metres wide, not four metres.

The appeal is dismissed accordingly.

It is so Ordered.

“M. C. Denhez”

M. C. DENHEZ
MEMBER