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PL101312

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Greg Woynarski has 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 66-1996 of the Township of North Kawartha to rezone lands respecting Part Lot 3, Concession 7, Plan 8, Lot A with a Shoreline Residential Zone to permit the development of a two-storey seasonal dwelling.
OMB File No. PL101312

APPEARANCES:

Parties

Greg Woynarski

Township of North Kawartha

Counsel

A. Eizenman

J. Ewart

Participant

Ian Maclaren

DECISION DELIVERED BY M. A. SILLS AND ORDER OF THE BOARD

The matter before the Board is an appeal by Greg Woynarski (Applicant/Appellant) of the refusal by the Council of the Township of North Kawartha to approve a Zoning By-law Amendment (ZBA) for the property described as Concession 7, Part Lot 3, Plan 8, Lot A, in the Township of North Kawartha.

The proposed ZBA would facilitate the development of an L-shaped, 1.5 storey seasonal dwelling (with walkout basement) having a building footprint of 325 square metres, and being located no closer than 53 feet from the high water mark of Stony Lake.

At the commencement of the hearing, Mr. Ian Maclaren requested and was granted Participant status. He is opposed to the proposed ZBA.

Description of the Property

The subject property is an irregular-shaped parcel of approximately 1.7 acres in size extending to the point of a large peninsula that juts into Stony Lake. This site is the largest lot in the immediate area, and one of the largest properties on the lake. The shoreline in this area consists of several mature trees and other forms of natural vegetation; the only shoreline opening of the property is at the point at which the boathouse/dock is situated.

The property rises slightly upward from the shoreline to a plateau area where the new seasonal dwelling is proposed to be located. The placement of any dwelling on the property is somewhat restricted by the natural topography of the land which features mature trees, dense vegetation and scattered rock outcroppings.

Stony Lake is home to several seasonal and permanent residential dwellings of various designs and sizes; many of these are replacement cottages which have been built to the size of the dwelling being proposed by the Applicant. The subject property was previously developed with a single-storey cottage (approximately 1700 square feet in size), a sleeping cabin accessory structure (bunkie), and a dock. The original cottage had established water yards of 53 feet on the southerly shoreline, and of 67 feet on the north easterly shoreline.

The property is designated RS - Seasonal Residential by the County of Peterborough Official Plan (OP), and zoned Shoreline Residential (RS) by Zoning By-law No. 66-1996 (ZBL).

Background – Proposal/Application

In January 2010, the Township issued a permit for the demolition of the existing cottage. This demolition was needed in order to permit machinery/equipment necessary for the construction of a new boathouse/dock to gain access to the shore area. A building permit was obtained, and the boathouse/dock has now been constructed. The Applicant proceeded to develop the new boathouse/dock prior to finalizing approvals for the construction of the dwelling, due to restrictions related to seasonal limitations for which work within a shoreline/water body can take place.

In May 2010, the Applicant applied for a ZBA to facilitate the construction of a new seasonal dwelling on the property. The original design proposal provided for a V-shaped, 2.5-storey cottage with walkout basement having a footprint of 360 square metres. Specifically, the original development proposal included a two-storey replacement seasonal dwelling having a walkout basement area of 2146 square feet, a first floor living area of 2146 square feet, a second floor living area of 3014 square feet, a 266 square-foot screened porch, a 240 square-foot covered porch, a 280 square-foot open deck, and a 945 square-foot 3-bay garage. The new dwelling would not be sited closer to the shoreline than the previous cottage (i.e. 53 feet).

A public meeting to consider the associated ZBA was held on June 15, 2010, at which time the Township's Planning Committee deferred the application "to give the applicant time to provide a revised design." The specific concerns expressed by local residents and members of Council included the height and massing of the proposed structure, and the resulting visual impact to the shoreline.

At this time, the Applicant retained the services of Mr. Kevin Duguay (registered professional planner) for the purpose of bringing forward a proposal that may be more acceptable to Council, and to provide an associated planning justification report. In an attempt to address the concerns expressed by Council and Mr. Maclaren, the original design proposal was modified by decreasing the massing, lowering the height, and re-orientating the building on the property. The revised design proposes an L-shaped, 1.5-storey cottage with walkout basement and 3-car garage, to be setback 16.15 metres (53 feet) at its closest point from the high water mark of the lake. These changes would result in the majority of existing trees being preserved. Additional landscaping is being proposed for the area between the cottage and the shoreline.

The revised design proposal was before Township Council at a meeting held on September 7, 2010, at which time the application was again deferred to allow the Municipality to obtain an independent peer review of Mr. Duguay's planning analysis. Council's resolution further directed "that an agreement be prepared to address the vegetation and landscaping."

Ultimately, at a meeting on October 19, 2010, the following resolution was passed by unanimous vote of Council:

That Council deny Zoning By-law Amendment #ZA-07-10 (Wojnarski) as the built form is too concentrated, too dominating and the visual impact is huge and beyond the original footprint and does not conform to the intent of the zoning by-laws and the official plan.

In a letter dated June 24, 2010, Parks Canada advised they had no concerns with the application.

The Municipality has not requested that an environmental analysis be completed by the Applicant.

The Issues

Essentially, the issues in dispute as identified by the Parties were as follows:

1. the effects of the size of the proposed seasonal dwelling relative to the creation of adverse impacts related to the natural environment and visual aesthetics of the shoreline;
2. the proposal's resulting conformity with the intent of the Official Plan;
3. the proposal's resulting conformity with the intent of the Zoning By-law;
4. the appropriate interpretation of "across the front" as it relates to the frontage measure of the dwelling as proposed;
5. the legal non-conforming status of the property/structure.

The dispute with respect to Issue 4 arises as a result of the language contained in Section 7.2(o) - Shoreline Building Enlargements of the ZBL, which states:

Notwithstanding Sections 3.16(a)(ii) and 3.27, existing main buildings situated within the water setback may be enlarged towards the side lot lines provided such final enlarged main building, including decks is not wider across the front than forty percent (40%) of the existing shoreline lot frontage to a maximum of 18.3 metres (60 feet). Applicable side yard requirements as stated for this zone must be complied with, provided however no building enlargement shall take place within 9.0 metres (29.5 feet) of the high water mark.

The ZBL defines lot frontage for properties abutting a navigable waterway to be "the straight line distance between the two most widely separated points on any one

shoreline.” In this instance, the Parties agree the lot frontage of the property is 259 feet (79 metres). However, the ZBL does not provide a definition or otherwise set out the method of calculation for “across the front”.

The revised design proposes to site the dwelling on the property in such a manner that the connecting corner of the northeast (side wall) and the northwest (front) wall points towards the tip of the peninsula; consequently, a portion of both the side wall and front wall faces are angled towards the lake in this direction. The side wall of the structure measures approximately 27 metres (88 feet) while the front wall is approximately 24 metres (79 feet). The distance between the most widely separated points of the proposed building (at its northerly and southerly limits) is 32 metres (105 feet).

The Township takes the position that pursuant to Section 7.2(o), the correct calculation of “across the front” is the aggregate length of both the northeast (side) and the southeast (front) faces of the building. Using this method of calculation, the Township has determined that the “across the front” measure is 51 metres (166 feet).

The Applicant submits that the appropriate calculation for “across the front” is either the length of the building’s front wall, or the length of the building’s side wall. In the alternative, the Applicant submits that the straight line distance between the building’s most widely separated points is an appropriate method of calculation.

There was no dispute that the development proposal is consistent with the directives of the GP and the PPS.

The Peer Review Report

The peer review report authored by County Planner Keziah Holden (Exhibit 3 – Tab 11) acknowledges “that the writer generally agrees with the interpretation provided in the August 2010 Planning Report” of Mr. Duguay with respect to the proposal’s conformity with the relevant policies of the County Official Plan (COP), the Local Component of the County Plan (LCCOP), the Provincial Policy Statement (PPS) and the Growth Plan (GP).

The report further sets out the peer reviewer’s opinion that:

a ZBA is needed..... to provide for relief from the following Sections of the Township's Zoning By-law:

- Section 3.16 – Non-Complying Buildings, Structures and Lots – allows for the reconstruction or enlargement of an existing non-complying building, provided such reconstruction or enlargement is on the same footprint and is to the same size as the building that existed prior to demolition. Since the proposal contemplates a much larger cottage, both in terms of height and building footprint, an amendment to this section is required.
- Section 7.2(o) – Shoreline Residential (RS) Zone Provisions: Shoreline Building Enlargements – states that notwithstanding Sections 3.16 and 3.27 of the By-law existing main buildings situated within the water setback may be enlarged towards the side lot lines provided such final enlarged main building, including decks, is not wider across the front than forty percent (40%) of the existing shoreline lot frontage to a maximum of 18.3 metres (60 feet).

With regard to Section 3.27.1 of the Zoning By-law (Water Setbacks – Permitted Exceptions), it was Mr. Holden's opinion that "this section does not need to be amended in order to permit the enlarged reconstruction; with respect to the matter of placement on the same footprint, if other sections of the Zoning By-law are amended.... (i.e. Sections 3.16 and 7.2(o)), this would negate the need for such change to Section 3.27.1."

The property is designated Seasonal Residential in the Local Component of the County Official Plan, and seasonal cottages are a permitted use. Section 6.2.5.3(h) establishes the authority for permitting enlargements in the circumstance where a pre-existing development encroaches into the 30 metre water setback. It was Mr. Holden's opinion that as the subject proposal is to replace a legally existing structure, and no part of the enlarged replacement cottage will be closer to the water than the setback established by the original cottage, the "amendment conforms to the Local Component of the County Plan."

Mr. Holden's report further recommends that in deciding this matter, Council should consider whether or not the proposed amendments are in conformity with the Shoreline policies of the COP. In this regard, he referenced Section 4.4 – *Shoreland Areas and the Waterfront* (COP) which sets out objectives intended "to improve and

protect waterfront areas in Peterborough County.” The purpose of these policies is summarized as follows:

- Section 4.4.2 – to ensure the built form along the shoreline is not overly concentrated or dominating to the detriment of the natural form and to ensure that the natural and built form associated with the lakes and rivers in the County be maintained and that development occurring in the Shoreline Areas should enhance and protect, where possible, those qualities that contribute to the areas character
- Section 4.4.3 – a local municipality may require, where it deems appropriate, an environmental analysis as described in Section 4.1.3.1 for any proposed shoreline development that does not require an environmental impact assessment.

Mr. Holden’s report went on to caution Council that while the current By-law allows for an enlargement of up to a maximum of 18.3 metres (60 feet) in width (Section 7.2(o)), the proposed amendment to permit an enlargement of up to 50.72 metres (166.41 feet) in width “could have Township wide implications in the future.” He does not agree with Mr. Duguay’s contention that there are two separate shorelines to be considered for the purpose of determining the lot frontage. The By-law is clear that the entire shoreline is the front lot line and for a standard waterfront lot, the frontage is measured as “the straight line distance between the most widely separated points on any one shoreline of a lot.” However, he does acknowledge “that certain policies within the Zoning By-law are open to interpretation – calculating the width of the front of the building for example.”

Mr. Holden further recommended that in order to ensure the proposed vegetation/landscaping plan is adhered to, Council may wish to require an agreement registered on title to this effect.

Planning Evidence

Mr. Kevin Duguay and Mr. Ian Mudd were qualified to give expert opinion evidence in land use planning.

Applicant's Planning Evidence

Mr. Duguay proffered evidence in support of the application. He is of the opinion that the revised design “represents good planning that is consistent with the policy directives of the applicable planning documents.”

Mr. Duguay submitted that Council's reasons for refusing the application were premised on their position that the proposed building is “too concentrated, too dominating and too much building”, which would essentially “overwhelm the shoreline.” He does not agree.

The proposed new seasonal dwelling as revised is designed and sited in a manner that is respectful of the Stony Lake shoreline. This is a developed area of the lake and there are a range of dwellings types located in the vicinity of the subject property; many of these are sited within the 30 metre water setback or at the waterline.

The revised design and re-orientation of the dwelling effectively decreases the height and massing of the structure, resulting in a building form which is more compatible with other dwellings in this area. The dwelling will not be located closer to the high water mark than was the previous cottage. The revised footprint will preserve existing trees and vegetation, and the incorporation of new landscaping features will contribute to the natural form of the shoreline. The revised built-form is compatible with the natural and built environment and does not pose a danger to the environment or ecological systems. Consequently, the proposal has regard for the COP Goals and Objectives with respect to shoreland and waterfront areas; the related policies are being met in an appropriate manner.

Mr. Duguay submitted that the reorientation of the building was intended to address concerns related to the “prominent” appearance of the cottage. The height of the structure has been reduced in order to mitigate the perception of a building which dominates the shoreline, and alters the pristine vista of the area. Specifically in

response to Mr. Maclean's concerns, the dwelling has been pulled back from the northeasterly shoreline, providing a greater setback from the south shore waterline.

In response to the concerns related to the size of the dwelling, Mr. Duguay conceded that while this is a large cottage, it is being built on a large property. He stated that it has been his experience that larger properties tend to host larger cottages. It was his contention that the older rustic cottages on Stony Lake are now being replaced with larger structures similar in size to the subject dwelling. In support of this contention he referred the Board to several photos of cottages in this area (Exhibit 2 – Tab 17).

It was his opinion that the concerns related to visual impact and privacy are unfounded. He does not agree that the structure as proposed will give the appearance of a dominating, over-bearing structure, nor will it overwhelm the shoreline vista. The building will blend in well with the natural environment, and the existing trees/vegetation along with the planned additional landscaping will serve as a visual barrier between the structure and the waterfront. The view of the shoreline from the lake is not negatively impacted and the privacy of neighbouring property owners, including Mr. Maclaren, will not be compromised. In this regard, he referred the Board to simulated photo renderings of the proposed seasonal dwelling (Exhibit 2 – Tab 18).

Mr. Duguay commented that neither the municipality nor any department/agency having jurisdictional responsibility for environmental matters have indicated a need for any environmental analysis or study.

Mr. Duguay opined that concerns related to setting a negative precedent are unfounded. To the contrary, the application would clarify how a peninsula property could be developed in an appropriate and responsible manner. Further yet, his interpretation of "across the front" may assist the Municipality by helping to avoid hearings such as this.

Municipality's Planning Evidence

Mr. Ian Mudd is the Manager of Planning for Peterborough County. He became involved with this application after the Applicant filed the appeal to the Ontario Municipal Board. He gave expert opinion evidence in opposition to the application.

Mr. Mudd submitted that as a result of the extent of relief required, the proposal does not meet the intent of the COP and ZBL, and does not represent good planning. The built form represents a large structure that is "well within the 30 metre water setback" and "well beyond modest." As such, the relief required "exceeds acceptable" tolerance levels.

Mr. Mudd takes the position that the proposal fails to meet the objectives of the COP with respect to Shoreline Areas and the Waterfront, which intended "to ensure that the built form along the shoreline is not overly concentrated or dominating to the detriment of the natural forms" (Section 4.4.2).

The COP Seasonal Residential policies set out that the preservation of naturally-vegetated shoreline is encouraged in order to minimize destruction to the shoreline and wetbeach habitat, minimize visual impact on the waterbody, maintain wildlife habitats and corridors, and improve water quality (Section 6.2.5.3 (h)). The corresponding implementing ZBL provisions are set out in Sections 3.27.1 and 7.2(o). Mr. Mudd conceded that while there would appear to be a conflict between Section 3.27.1 and Section 7.2(o) of the ZBL it was his opinion that it is Section 7.2(o) which more appropriately implements the intent of the COP.

Under cross-examination, Mr. Mudd conceded that the footprint of the proposed dwelling represents lot coverage of approximately 7% (whereas the ZBL permits lot coverage of 10%), the proposed structure does not exceed the height standard permitted by the ZBL, and no issues related to fish habitat or shoreline erosion have been identified.

Concerns of the Participant

Mr. Maclaren's family owns Ackerman Island which is directly across the channel from the subject property. Their family cottage is situated at the shoreline with a corner portion of the structure encroaching into the lake.

Mr. Maclaren is a principal with the firm of Hicks Partners Architects. Although he is not a registered architect, he has been designing cottages in this and various other areas for the past ten years. He told the Board he has no objection to the Applicant constructing a cottage on his property, he just has a problem with the current design.

In his opinion, the design being proposed demonstrates a "blatant disregard for neighbours and the neighbourhood." In view of his considerable experience with designing cottages, he suggested "there is a myriad of changes which could be made which would rectify his concerns." In fact, he met with Mr. and Mrs. Woynarski to discuss potential design change options after the meeting of the Planning Committee (June 15, 2010), at which time the Applicant was requested to consider providing a revised design plan.

Mr. Maclaren told the Board that he essentially has three issues with the proposal as presented; 1) the size of the structure, 2) the setback from the lake, and 3) the siting of the structure on the property. In this regard, he submitted that the proposed structure is very tall and much larger than the previous cottage. However, it was his opinion that if the size of the proposed cottage was reduced, it wouldn't give the appearance of dominating the shoreline. He told the Board that "if the cottage was moved back on the lot, they wouldn't have an issue with it."

Mr. Maclaren was also concerned that approval of the application would set a negative precedent for this area.

Analysis and Disposition

After carefully considering the submissions of the Parties, and conducting a thorough review of the exhibits and file documents, the Board is satisfied that the proposed Zoning By-law Amendment is appropriate. The proposal is consistent with the

policy directives of the Growth Plan and the Provincial Policy Statement, and meets the general intent of both the County Official Plan and the Local Component of the COP.

The proposed development is sensitive to, and compatible with, the character of the natural and built environments of this area. There was no evidence before the Board to indicate that the water quality, ecological systems, or shoreline of Stony Lake would be adversely impacted as a result of the size or location of the proposed dwelling. Consequently, the Board finds that the natural environment of the area is being appropriately preserved, and the public interest is being protected. As such, the proposal does not offend the principles of good land use planning.

The proposed ZBA is specifically for the purpose of permitting a structure having a building frontage greater than that which is permitted by the ZBL to be located within the water setback. It was evident that the central issue in this dispute arises as a result of differing opinions with respect to the influence the “size” of the dwelling would have on the aesthetics of the shoreline in this area of the lake.

In reviewing the various meeting minutes it would appear that some members of Council assessed this ZBA application in accordance with criteria established for the approval of a minor variance; specifically, the criterion with respect to “is the relief being requested minor in nature?”

Similarly, Mr. Mudd’s evidence referred to the “large built form” as “well beyond modest.” Consequently, he argued that the “extent of the relief sought” does not comply with the COP. Both Mr. Mudd and Mr. Maclaren alluded to the notion that the structure would impair the visual aesthetics of the shoreline and result in an unacceptable intrusion of the natural environment in this area of the lake. However, the Board finds their evidence failed to provide any substantive rationale which could explicate the basis for having drawn such a conclusion.

Other than cautioning Council that approving the application could set a negative precedent, the peer review report did not identify any specific adverse impacts directly attributable to the size of the proposed structure. Mr. Duguay proffered detailed evidence in support of his position that the development proposal would not adversely impact either the natural environment or the surrounding properties.

While the Board agrees that the size of a structure could be an important factor in the assessment of the planning merits of a ZBA, the underlying principle for such a proposition must be premised on the impacts directly attributable to size. A mathematical degree of size variation alone does not constitute legitimate planning rationale for the refusal of a ZBA application and it is not enough to simply offer an opinion.

Photos submitted by Mr. Duguay (Exhibit 2 – Tab 17) reveal that there are several dwellings in the vicinity of the subject property featuring contemporary design elements, suggesting these are either recent builds or cottage enlargements. Many of these dwellings appear to be similar in size to that which is being proposed by the Applicant. Some of these dwellings appear to be located well within the required 30 metre water setback, while others are sited right at the shoreline. In many instances, these properties have little to no shore area vegetation cover, leaving the entire building frontage open to view from the lake.

Aerial and shoreline photos (Exhibit 4) confirm that the shoreline of the subject property is heavily treed. The revised proposal does not result in any additional tree removal and the Applicant is prepared to add further landscaping amenities to the shoreline area. Parks Canada did not have any concerns with regards to the Trent-Severn Waterway.

While Mr. Maclaren asserted that the proposed cottage “is very tall”, it would appear that he was unaware that the revised design proposal complied with the existing ZBL standards relating to height. He went on to say that he wouldn’t have an issue with the size of the proposed structure if it was moved farther back on the lot. In this regard, the Board notes the Minutes of the June 15, 2010 Council meeting where Mr. Powell (Chief Building Official) stated that “the proposed structure will not fit further back but if it could they could obtain a building permit.”

Mr. Maclaren further cited a loss of privacy to his property as a specific impact resulting from the location and “towering” height of the proposed dwelling. The developed portion of his property is somewhat exposed as a result of their cottage being located at and/or over the shoreline. As such, there is no vegetation cover which could mitigate privacy concerns.

In viewing the simulated conceptual photos provided by Mr. Duguay (Exhibit 2 – Tab 18), the Board found that with little exception, the proposed structure would be barely visible from the lake and/or Ackerman Island. More importantly, the visual exposure to Mr. Maclaren’s property would be at no greater a degree than that which is currently available to boaters navigating through the channel separating the two properties. Neither the Municipality nor Mr. Maclaren raised any concerns with respect to the accuracy of these photos, and no other property owners expressed concerns at the hearing with respect to issues of privacy or view.

On the issue of whether or not the proposal complies with the general intent of the COP, the Board finds that it does.

Mr. Duguay was of the opinion that the proposal conforms with the general intent of the COP. Mr. Holden “generally agrees with the interpretation” provided in Mr. Duguay’s planning report in this regard. Mr. Mudd does not share the same opinion.

The Township does not employ expert planning staff. However, in a report to Council dated September 2010, the Township Chief Building Official (Mr. Tim Powell) provided the following comments for Council consideration:

The aspect that is important to consider, is the basis of the application with these proposed changes in compliance with policy requirements of the Official Plan, and does it

1. Maintain the intent of the Official Plan regarding Environmental Objectives;
2. Is it desirable and appropriate for the area; and
3. Has the owner/applicant demonstrated that this proposal does not negatively affect the waterfront environment to the satisfaction of the Township.

During the course of his evidence, Mr. Mudd referred to the Shoreland Areas and the Waterfront policies of the COP. The goal of these policies “is to improve and protect the waterfront areas in Peterborough County as a significant cultural, recreational, economic and natural environment resource and enhance land areas adjacent to the shore” (Section 4.4.1). The objective is “to ensure that the built form along the shoreline is not overly concentrated or dominating to the detriment of the natural form” (Section 4.4.2 – bullet 6).

In consideration of the evidence before me and failing to hear any convincing evidence to the contrary, the Board is satisfied that the subject application conforms to the general intent of COP policies related to the protection and preservation of water bodies and the natural environment.

In view of the Board's findings with respect to the GP, the PPS, and the COP (including the Local Component), I am satisfied that the proposed ZBA appropriately implements the relevant Provincial planning directives, and local planning policies. Having arrived at these conclusions, it is not necessary for the Board to make a finding with respect to the correct interpretation of "across the front" (building frontage).

In the same vein, there was an argument put forth that as the old cottage has already been demolished, the proposed dwelling is not be considered a "replacement structure" or an "enlargement" in accordance with the provisions of the ZBL. Therefore, the legal non-conforming status does not apply to this application. As the intent of the proposed ZBA is for the very purpose of allowing an exception to Sections 3.16, (3.27.1) and 7.2(o) of the ZBL, this argument is not germane to the disposition of this matter.

The concern related to setting a negative planning precedent is baseless. This is an application for site-specific exceptions to existing ZBL standards for a property which is unique in that it is a large peninsula property. Despite this being one of the largest properties on Stony Lake and the largest in the immediate area, development is somewhat restricted by the natural topography of the land. In any event, each planning application must be assessed on its own merits.

The Board's disposition of this matter is relative to the revised design proposal. In consideration of the differing interpretations related to the building frontage measure, the Board will leave it to the Parties to determine the final form of the required ZBA. The final Order will be withheld until such time that the Board is notified that the Parties have reached an agreement on the wording of the ZBA.

THE BOARD ORDERS that the appeal is allowed and the Municipality is directed to amend By-law No. 66-1996 in accordance with the Board's decision.

And further, the final Order is withheld until such time that the Board is notified that the Parties have determined the final form of the Zoning By-law Amendment. Such

notification is to be provided no later than sixty (60) days from the date of issue of this Order.

If difficulties arise, the Board may be spoken to further.

The Board so Orders.

"M. A. Sills"

M. A. SILLS
MEMBER