

ISSUE DATE:

April 24, 2012



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL110082

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

Applicant and Appellant: Barbara Percival
Subject: Minor Variance
Variance from By-law No.: 6406
Property Address/Description: 1733 Watts Rd.
Municipality: Municipality of Dysart et al
Municipal File No.: A-020/2010
OMB Case No.: PL110082
OMB File No.: PL110082

APPEARANCES:

Parties

Barbara Percival

Municipality of Dysart et al

Counsel

Barry Percival

Edward Veldboom

**MEMORANDUM OF ORAL DECISION DELIVERED BY M. A. SILLS ON
APRIL 13, 2012, AND ORDER OF THE BOARD**

Barbara Percival (Applicant/Appellant) has appealed the decision of the Municipality of Dysart (Municipality) Committee of Adjustment (CoA) to deny a minor variance for the property located at 1733 Watts Road (subject property).

Background

The subject property has a lot area of approximately 0.74 acres with 100 feet of frontage on Little Kennisis Lake, which is classified as a trout lake by the Ministry of Natural Resources. The property is currently occupied with a seasonal dwelling, a two-storey garage, a garden shed, a gym, and a pump house/storage shed.

The pump house/storage shed does not comply with the required 20-metres from the high water mark. In order to recognize the location of this building and to permit a lot to have a maximum of three accessory buildings, the Applicant/Appellant submitted an application for the following variances:

1. to permit an accessory building to have a minimum water setback of 0 metres, whereas, the minimum water setback permitted is 20 metres;
2. to permit a lot to have a maximum of three accessory buildings, whereas, a maximum of two accessory buildings per lot is permitted.

The CoA authorized the variance with respect to the number of accessory buildings permitted, but denied the water setback variance; this appeal relates to the decision of the CoA with respect to the reduced water setback variance.

The property is designated Waterfront by the Municipality's Official Plan (OP) and zoned Waterfront Residential 4 (WR4) by Zoning By-law No. 2005-120 (ZBL).

The Applicant/Appellant purchased the property in 1991. Since the time of purchase, the site has been the subject of several renovations and/or new constructions. Among other things, the cottage has been moved onto a new foundation, and a garage and various other accessory buildings have been constructed.

The Municipality's original zoning by-law was enacted in 1977, with the current ZBL having been enacted in 2005. The performance standard related to water setbacks is unchanged from the original zoning by-law to the current ZBL. The pump house/storage shed was constructed in about 1985. Consequently, this pump house does not qualify as a legal, non-conforming structure.

There is a remaining dispute with respect to the ownership of an approximate two square foot area of the subject structure. The parties have agreed to obtain an order of the Board with respect to the minor variance prior to pursuing the matter of ownership.

Case presentation of the Applicant/Appellant

Ms. Barbara Percival testified that the pump house/storage shed existed at the current location when the property was purchased in 1991. While the roof of this structure was replaced and decorative siding installed in 1998, the size, shape and use of the structure has not been changed.

In support of this assertion, the Applicant/Appellant provided the Statutory Declarations of Mr. Robert Ashleigh and Mr. Tom Dorey (Exhibit 1 – Tab 5). Mr. Ashleigh has owned the property located at 1739 Watts Road since 1973. To the best of his knowledge, “the pump house structure was first erected at this location in the summer of 1986...and has remained in that same location since that time, and has not changed in size, shape or use.” Mr. Dorey, who has owned the property located at 1268 Wilkinson Road since 1986, confirmed that the pump house as it exists today was present on the property when he visited the site in 1988 or 1989.

Ms. Percival submitted that the property has more than 36 separate gardens. The pump house/shed contains the pumps and controls for the underground irrigation system utilized to maintain these gardens. She contended that it would be impractical and expensive to move the pump house back 20 metres.

Ms. Percival takes further issue with the manner in which this matter has been dealt with by the Municipality. In particular, she takes exception to any insinuation by municipal officials/staff that she may in any way be responsible for the current siting of the pump house.

In view of the fact that the structure “has been in its current location for more than 25 years”, Ms. Percival has difficulty in understanding why this has just now become an issue. She submitted that since the time the structure was erected, circa 1985, the Municipality has conducted numerous buildings inspections at the property (1998-99, 2007-08-09). In this regard, she questions how the non-compliance was only “first noticed” in February 2010.

Ms. Percival further submitted that during a recent inspection of lake properties, she noticed “that there are at least 25 other cottages with structures within 20 metres of the high water mark.”

Mr. Todd Forrestall verified that he took the photographs found at Tab 11 (Exhibit 1) on behalf of the Applicant/Appellant. These photographs are for the purpose of providing visual evidence of other local structures within the 20-metre water setback.

Under cross-examination, Mr. Forrestall conceded that he neither knows when these structures were constructed, nor had he measured any of the setbacks of these structures; in fact, he does not even know how the calculation of the high water setback is determined.

At this point in the hearing, Mr. Percival, counsel for the Applicant/Appellant advised the Board that he intended to call the Municipality's Chief Building Inspector (Mr. Dan Sayers) and Planner (Mr. Jeff Iles) as witnesses.

Mr. Percival confirmed that he did not request summons for these individuals, as Mr. Veldboom had assured him they would be present at the hearing. In response to a query from the Board with respect to the nature of the evidence being sought from these persons, Mr. Percival stated he wished to question them about the extensive exchange of correspondence between the Applicant/Appellant and the Municipality, the fairness and consistency (or lack thereof) of enforcement of the water setback by the Municipality, the inaccuracies contained in the municipal reports/correspondence, and the failure of municipal staff to provide relevant information to the CoA.

In reply, Mr. Veldboom argued that as the testimony of these individuals would not in any way advance the minor variance application, there was no justification for compelling them to be subjected to cross-examination by Mr. Percival.

During the course of the proceedings, the Board clarified that this was a hearing *de novo*. As such, the chain of events and circumstances which led to the Order to Comply, the information provided and used by the CoA in arriving at their decision, and the Applicant/Appellant's perception relative to the inconsistency and/or unfairness of enforcement practises by the Municipality, were not factors which are germane to the Board's determination of this matter.

Alternatively, the Board is compelled to make a finding with respect to the minor variance based solely on the criteria established by subsection 45(1) of the *Planning Act*. The Board finds that the nature of the information hoped to be gleaned by Mr.

Percival in the cross examination of Mr. Sayers and Mr. Iles is not applicable to the statutory requirements, and therefore, is not relevant to the matter at hand.

Accordingly, the Board will not compel these individuals to testify.

Motion for “non-suit”

At the conclusion of the Applicant/Appellant’s case presentation, counsel for the Municipality brought a motion for non-suit. Mr. Veldboom argued that ultimately the Applicant/Appellant has failed to present any land use planning evidence which could support the minor variance. He further submitted that the Applicant/Appellant has failed to address the relevant criteria for the approval of a minor variance, and cannot simply build a case on the cross-examination of the Municipality’s planning witness.

The Board did not grant this motion for the reasons that follow. Notwithstanding the fact that the Board finds the motion for non-suit has merit, there are instances when allowing the entire hearing process to roll-out better serves the interests of all parties involved.

The Board finds this to be one of those instances.

The Municipality has a professional planner in attendance who has fully prepared to present land use planning evidence with respect to the subject variance. The Applicant/Appellant has an obvious perception that she has been treated in an arbitrary and prejudicial manner by the Municipality. She was represented by legal counsel who put forth arguments in this regard during the course of his case presentation. In this particular instance, the Board was hopeful that in hearing the planning rationale which formed the basis of the Municipality’s Order to Comply and the subsequent refusal of the CoA to grant the variance, the Applicant/Appellant would have a better understanding of the actions of the Municipality.

Accordingly, the Board deemed that from accountability, transparency and nature justice perspectives, it would be in the best interests of all concerned to have the Municipality present its case. As Mr. Percival has quoted, *“Not only must justice be done; it must also be seen to be done.”*

Planning evidence

Ms. Patricia Martin is the Director of Planning and Development for the Municipality. She was qualified to provide expert opinion evidence in land use planning.

Ms. Martin submitted that there are a number of key policies of the OP which apply to this application. Subsection 2.1.2 establishes the importance of the natural environment (lakes and forests) to the Municipality, both from an ecological and an economic standpoint. In this regard, the natural environment is recognized as the “most important natural resource in the Municipality; recreation and tourism are and will continue to be the Municipality’s most significant industry”.

Ms. Martin submitted that the primary objective of the OP “is to enhance and preserve those environmental qualities which contribute to the attraction of the Municipality” (subsection 2.2.1). Development within Waterfront areas is expected to promote a healthy and sustainable natural environment and to preserve and protect the natural state and visual characteristics of the shoreline.

The specific purpose of the water setback is to promote the preservation of the visual characteristics, quality and integrity of the shoreline, water quality and fish habitat; in other words, protect and conserve natural heritage features. Ms. Martin stated that it is for this reason that the required water setback must be “strictly adhered to” (subsection 5.1.2).

Ms. Martin contended that the proposed variance is counter to the primary objectives of the OP with respect to waterfront areas; specifically the protection of the natural and visual characteristic of the shoreline, the improvement and restoration of the natural state of the shoreline, and the preservation and protection of water quality and fish habitat.

She submitted that the native vegetation acts as a nutrient sink, absorbing and filtering nutrients that might contribute to the degradation of water quality and impairment of the fish habitat. In this instance, native vegetation has been removed and replaced with man-made gardens. Ms. Martin contended it is “likely” fertilizers and others chemicals are used to maintain these gardens. In Ms. Martin’s professional opinion, the requested

variance does not maintain the intent of the OP, and as such, cannot be considered to be desirable or minor in nature.

The ZBL implements the policy provisions of the OP. Consequently, Ms. Martin contended there is little flexibility with respect to granting variances to the water setback provisions of the ZBL, particularly when the required standard can be met.

In summary, Ms. Martin contended that the Municipality “regularly implements” the water setback standards and enforces the removal of non-compliant small sheds/structures from the shoreline area. The purpose of the pump house/shed is to house equipment for an underground irrigation system for the maintenance of the gardens on the Applicant/Appellant’s property. However, there are a number of other compliant locations on the site where the pump house/storage shed could be located. The requested variance does not permit the primary objective of the OP to be achieved and does not recognize the greater public interests. Ms. Martin opined that the variance does not satisfy any of the four tests and recommended the variance be denied.

Closing submissions of counsel

Mr. Percival took the position that the general intent and purpose of the OP and ZBL have been satisfied. There was no objection to the minor variance by neighbouring property owners or a cottage owners association.

Mr. Veldboom submitted that not one of the four tests has been satisfied. The requested setback from 66 feet to zero feet is substantial and the Applicant/Appellant did not present any planning evidence which could support such a deviation from the zoning standards. The Municipality is requesting the Board dismiss the appeal.

Analysis and disposition

The Board accepts and adopts the uncontradicted expert planning opinion evidence of Ms. Martin and finds that the proposed variance does not satisfy the criteria established by subsection 45(1) of the *Planning Act*. The variance does not meet the general intent and purpose of the OP and ZBL, and consequently, cannot be considered to be desirably or minor in nature.

The statutory provisions require that in order for a minor variance to be authorized, all “four tests” must be satisfied. The Applicant/Appellant completely failed to address the application’s conformity with the OP and the ZBL, and at best, only tangentially addressed the test of desirability and minor. In this regard, Ms. Percival’s contention that the variance is desirable because having to relocate the shed would be very costly, does not satisfy the test of desirability. While such a notion is obviously in her best interest, it fails to give any regard to the public interest; private interest simply cannot be permitted to outweigh the greater public interest.

The Board finds that of particular significance is the failure of the application to meet the general intent and purpose of OP policies with respect to the preservation and protection of the natural environment including shorelines, water quality and fish habitat. Given the importance of the natural resources to the vitality and prosperity of the area, it is both understandable and reasonable that the Municipality would take a strong stance with respect to the enforcement of the 20-metre setback requirement where such a standard can be met.

The Provincial Policy Statement (PPS) recognizes that “Ontario’s long-term prosperity, environmental health, and social well-being depend on protecting natural heritage, water..., for their economic, environmental and social benefits” (Policy 2.0). The policy direction is explicit: “Natural features and areas shall be protected for the long term” (Policy 2.1.1). Municipalities are required to bring local OP policies into conformity with the guiding principles of the PPS. In my view, the associated policies of the Dysart OP implement the objectives and/or statutory requirements of the PPS.

The Board appreciates that Ms. Percival has queries and suppositions arising from the extended period of time that passed between the construction of the pump house at the current location and the enforcement order having been issued (more than 26 years). Add to that, the pump house was there when she purchased the property and the fact that several other area cottage properties have structures located at the water’s edge. Under the circumstances, it is understandable that Ms. Percival perceives that she has been treated unfairly.

On the other hand, the evidence was that a survey sketch of the property provided by Paul Wilson Surveying in 1998 and submitted to the Municipality by the

Applicant/Appellant failed to show the pump house structure. The Board heard that municipal officials addressed the issue of non-compliance with the Applicant/Appellant as soon as they became aware of the existence of the structure. It was the evidence of Ms. Martin that the OP policies direct "strict adherence" to the water setback requirements, and the Municipality "regularly implements" the water setback standards and enforces the removal of non-compliant small sheds from the shoreline area. This contention is supported by the list demonstrating local properties where the Municipality has enforced the water setback by ordering the removal of non-compliant structures (Exhibit 2 – Tab 11).

However, notwithstanding the unusual and/or unfortunate set of circumstances on both sides which has led to this situation, the reality is that not only is the Municipality entitled to enforce its ZBL, it is expected to do so. In the same vein, the Applicant/Appellant is entitled to seek relief of a zoning by-law standard. The Applicant/Appellant did so, and her request for relief was refused by the Municipality. As previously stated, the matter now rests with the Board who must now determine this matter strictly on the planning evidence presented. In this regard, there was no evidence before the Board which could reasonably be expected to support approval of the minor variance.

THE BOARD ORDERS that the appeal is dismissed and the variance is not authorized.

The Board so Orders.

"M. A. Sills"

M. A. SILLS
MEMBER