

ISSUE DATE:

April 13, 2012



PL111067

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

Applicant and Appellant: William A. Bélanger
Subject: Minor Variance
Variance from By-law No.: 2005-06
Property Address/Description: Conc.1, Part Lot 9,2918 R29, Rideau Lake
Municipality: Township of Rideau Lakes
Municipal File No.: A-5-2011
OMB Case No.: PL111067
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APPEARANCES:

Parties

William Bélanger

Township of Rideau Lakes

Counsel

A. E. Fleming
S. Miller (Student-at-law)

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

William Bélanger (“Applicant/Appellant”) has appealed the decision of the Township of Rideau Lakes Committee of Adjustment (the “CoA”) to deny minor variances for the property described as Concession 1, Part Lot 9, 2918 R29, in the Township of Rideau Lakes (“Township”).

Background

The subject property has 275 feet of frontage on Big Rideau Lake and extends for a depth of approximately 2.5 acres. These lands are designated Rural in the Township’s Official Plan (OP), and zoned Waterfront Residential (RW) by Zoning By-law No. 2005-06 (ZBL).

The property is currently developed with a sleeping cabin (13 feet by 16 feet) having a setback from the high water mark of 50 feet; a one-and-a-half story cabin (14 feet by 20 feet) having a setback from the high water mark of 50 feet; a detached garage (17 feet by 20 feet) having a setback from the high water mark of 100 feet; and an overwater single-storey boathouse (24 feet by 32 feet).

The applicant proposes to further develop the property with a 2500 square foot dwelling and a 400 square foot greenhouse, both of which are proposed to be located within the required 30 metre setback from the high water mark. In order to proceed, the Applicant/Appellant requires authorization of the following minor variances:

1. to permit a setback of 15.84 metres from the high water mark, whereas the minimum setback permitted is 30 metres (dwelling); and
2. to permit a setback of 29.9 metres from the high water mark, whereas the minimum setback permitted is 30 metres (greenhouse).

In effect, the CoA approved a setback of 25.9 metres from the high water mark for the dwelling, and denied the variance related to the greenhouse.

The Applicant/Appellant was not prepared to accept the reduced setback for the dwelling as approved by the CoA; consequently, he appealed that decision to the Ontario Municipal Board.

The Rideau Valley Conservation Authority provided the following comments:

Given the existing development, we cannot support additional incremental development on the property at 15 metres from the water.

We would look to a compromise, to situate a new residence at approximately 85-90 feet from the water...

As the Applicant/Appellant was not represented by legal counsel and did not intend to call any expert witnesses, the Board provided an overview of the hearing process and the requirements for authorization of minor variances as established by subsection 45(1) of the *Planning Act*. In particular, the Board clarified that should the Board find that the requested variances do not fully satisfy the statutory requirements (four tests), the appellant will be required to meet the full extent of the setback standard established

by the ZBL. In other words, the 25.9 metre setback for the dwelling approved by the CoA will no longer be an option.

Case presentation of the appellant

Mr. Bélanger told the Board that several years ago he purchased a heritage building (known as the Stagecoach Inn), which he has always intended to locate on the subject property. The subject building would be used for residential purposes. In this regard, in 1991 he applied for, and received, authorization for a minor variance which would allow the building to be set back 52 feet from the high water mark (100 feet required). Consequently, he had an area blasted for the buildings' foundation at the proposed siting location during the construction of the boathouse, which occurred in 1992-93-94. However, due to illness, he was unable to proceed with this development until recently.

Mr. Bélanger submitted that when he applied for the requisite building permit in 2010, he was advised by Township staff that as a new ZBL had been adopted, the variance approved in 1991 was void. After receiving an independent legal opinion supporting the position of the Township in this regard, (Exhibit 2 – Tab 5), the associated minor variance application was submitted.

In his view, the proposed variance with respect to the dwelling satisfies the four tests. He wants to build a heritage property and he believes his development proposal will be an enhancement of the property. The OP intended for the property to be used for residential purposes, and the proposed heritage building will present a unique sight and serve as an interesting shoreline attraction for this area. Accordingly, his development proposal is in the public interest.

He contended that there are other properties with buildings having similar setbacks from the high water mark, with at least one of these having been approved since the new ZBL was adopted; albeit, he understands there were mitigating factors with respect to that application.

Under cross-examination, Mr. Bélanger conceded that there are several locations on the property that the building could be sited in compliance with the ZBL.

Planning evidence

Mr. Michael Dwyer, the Manager, Development Services for the Township, was qualified to provide expert opinion evidence in land use planning.

Mr. Dwyer submitted that the subject property primarily consists of a cedar/pine/birch vegetation mix which, for the most part, has been undisturbed. The site contains several exposed bedrock outcroppings, and slopes moderately downward from the road, with the slope becoming more significant closer to the lake.

Mr. Dwyer testified that he did not recommend the amended variance (25.9 metre setback) approved by the CoA. It was his opinion that the proposed variances are not consistent with the policies of the Provincial Policy Statement (PPS) and do not meet the criteria established in subsection 45(1) of the *Planning Act*.

Mr. Dwyer submitted that in accordance with the PPS, the property is part of a significant cultural heritage landscape which is to be conserved (subsection 2.6.1). Areas such as this are to be protected for the long term (subsection 2.1.1).

He submitted that lakes are a primary resource for the Township. The OP sets out that Big Rideau Lake is the only cold water lake in the Township; it is managed as a trout lake by the Ministry of Natural Resources and defined as being moderately sensitive (subsection 3.1.1).

The PPS directs planning authorities to protect water quality and promote “efficient and sustainable use of water resources including practises for water conservation and sustaining water quality” (subsection. 2.2.1 f)). To achieve this, it is necessary to implement restrictions on development and site alteration (subsections 2.2.1 d) and 2.2.2) “in or near sensitive water surface features.” The intent of the 30-metre setback is to provide an adequate buffer to protect sensitive surface and groundwater features and to minimize and/or mitigate negative impacts associated with among other things, phosphorous run-off.

Mr. Dwyer submitted that the Township recognizes its water bodies as the most significant natural feature of the municipality. As these resources are of paramount value for recreational and tourism purposes, it is imperative that they be protected from

environmental degradation. Accordingly, the OP seeks to preserve and enhance the Township's water bodies through development and redevelopment which is environmentally sensitive, and maintains water quality and the shoreline environment (subsection 1.3.3.3).

The Waterfront Development policies of the OP stipulates that development or site alteration occur a minimum of 30 metres from the normal high water mark of any water body as a means of protecting the natural and aesthetic qualities of the shoreline environment (subsection 2.2.3.2.1).

Alternatively, the OP is very specific with respect to when a setback of less than the 30 metres can be approved; "Development or site alteration may be permitted less than 30 metres from a water body in situations where existing lots or existing developments preclude the reasonable possibility of achieving the setback" (subsection 2.2.3.2.3). Mr. Dwyer contended that in this instance, there is no constraint which would preclude the reasonable possibility of achieving the 30-metre setback.

The Surface Water Quality and Quantity policies of the OP (subsection 2.23) identify ground water run-off as an issue of concern. Mr. Dwyer submitted that requiring a 30-metre setback allows for a greater area for over-land run-off attenuation. In the case of this particular property, there is a natural drainage depression which leads directly from the proposed siting to the waterfront area beside the boathouse. This area has been cleared of vegetation, resulting in a direct outlet run-off area. Mr. Dwyer opined that this is precisely an example of an area from which development should be setback in accordance with at least the minimum standard. Given the foregoing, it was his professional opinion that the proposed application does not meet the general intent and purpose of the OP.

Mr. Dwyer submitted that the intent and purpose of the RW zoning is to implement the Township's waterfront development and environmentally sensitive development policies of the OP. The zoning is intended to limit and refine the number, intensity and impact of the allowable uses on properties located in proximity to a water body. A 30-metre setback is generally considered to be a minimum setback; greater setbacks may be required given site-specific conditions.

The property has significant depth (313 feet) and there is an area to the rear which is already cleared. While there are a number of exposed rock outcroppings interspersed throughout the property, these are not significant and do not preclude compliant development. Mr. Dwyer submitted that given the nature of the lot, there is a limited opportunity for storm water settling and infiltration. Soils depths are generally shallow, particularly near the shore. The natural drainage pattern in the area proposed for the development would offer limited run-off remediation.

Given the low permeability of the lot and the prevailing drainage pattern, and considering the available depth for an increased setback and existing cleared area beyond the 30-metre setback, the subject application does not meet the intent of the ZBL.

Mr. Dwyer opined that given the Township's emphasis on the importance of lakes as a valuable resource, all proposed development should be completed in a manner which has the least amount of impact on these water bodies. In this regard, one of the most important tools the Township uses to protect these resources is minimum separation distance between the high water mark and the area of development. Accordingly, allowing for a reduced setback where alternate options are available cannot be considered to be desirable for the appropriate development of the lands. Similarly, the effect of the variance is not minor in nature, nor does the proposal represent good land use planning.

Mr. Sheldon Laidman was the Township's Manager, Development Services, and Secretary to the CoA at the time that the subject application was before the committee. As Mr. Bélanger found a certain procedural manoeuvre which took place at the CoA meeting to be somewhat suspect, Mr. Laidman was called as a witness in order to explain what had occurred. While his testimony was helpful in that it may have assisted Mr. Bélanger in understanding the procedural practises of committees of Council, it was not germane to the matter at hand.

Prior to closing submissions, Mr. Fleming suggested that the Board stand down for a period of time to allow for further discussions between Mr. Bélanger and the Township. When the hearing reconvened, Mr. Bélanger thanked Mr. Fleming for the "offer", but stated that he wished to proceed with his appeal as presented.

In his closing submissions, Mr. Bélanger told the Board that developing his property as a heritage site has been a lifelong dream. He implored the Board to look favourably on his application, effectively making it possible for him to realize his dream.

Mr. Fleming argued that reducing the setback is contrary to the policies and specific intent of the OP. The public interest outweighs private interest, and in this case, Mr. Bélanger's interests are counter to the public interests.

Analysis and disposition

The Board accepts and adopts the uncontradicted expert planning opinion of Mr. Dwyer to find that the proposed variances fail to satisfy the criteria established by subsection 45(1) of the *Planning Act*.

The *Planning Act* sets out that if a minor variance fails to satisfy even one of the "four tests", the application fails. In this instance, the Board finds that the proposed variances fail all four tests. The Board finds that the variances do not conform to the general intent of the OP and ZBL, and do not represent good land use planning. Considering the potential adverse impact of locating development within the required 30-metre setback, the proposal cannot be considered to be a desirable development of the property, nor can the variances be considered to be minor in nature.

The Board finds that of particular significance is the failure of the application to meet the general intent and purpose of OP policies. It is evident that the Township has aggressively and consistently taken the position that the 30-metre setback must be maintained except in circumstances where it is virtually impossible to develop a property in a compliant manner. In this regard, the established policy is set out in subsection 2.2.3.2.3, as follows:

Development or site alteration may be permitted less than 30 metres from a water body in instances where existing lots or existing developments preclude the reasonable possibility of achieving the setback. Additionally, there may be isolated cases where site-specific conditions would make it appropriate to reduce the setback in relation to a proposed lot. Any proposal for development or site alteration proposed to occur less than 30 metres from a water body shall be subject to the policies of the Fish Habitat and Adjacent Lands and Environmental Impact Assessments sections of this Plan.

While "need" is not an established criterion for the approval of a minor variance, conformity with the intent and purpose of the OP certainly is. Considering the

importance of water bodies and natural resources to the vitality and prosperity of the municipality, it is both understandable and reasonable for the Township would take a strong stance with respect to the enforcement of the 30-metre setback requirement where such a standard can be met.

The mapping found at Tab 8 of Exhibit 2 reveals that the site is one of the larger properties in the area. It was Mr. Bélanger's evidence that the property was formerly two separate lots which have subsequently merged on title.

The model provided by Mr. Bélanger clearly demonstrated that the subject dwelling can be sited at one of many other compliant locations on the property. In this respect, Mr. Bélanger conceded there are a "dozen" locations on the property where the structure could be located in compliance with the 30-metre setback. Similarly, while the relief requested for the greenhouse is relatively insignificant, the Board can find no justification for granting such. Mr. Bélanger did not present any evidence which could support this variance, and in fact, did not even specifically address this variance.

The guiding principle and policy direction established by the PPS is explicit; "Natural features and areas shall be protected for the long term" (Policy 2.1.1). Local municipalities are required to bring local OP policies into conformity with the guiding principles of the PPS. In my view, the aforementioned OP policies both effectively and successfully achieve this very purpose.

As an aside, the Board commends Mr. Bélanger for his stewardship of the lands; from all accounts he has been extremely conscientious with respect to preserving the natural environment of the property. The Board further appreciates his long standing desire to develop the property as a heritage site. However, regardless of the Board's finding with respect to this application, the dream need not be lost.

While he may view the proposed siting of the subject heritage building to be the optimum location, there are many other options available to him. Although it is true that there are other factors that come into play with respect to his development proposal, such as the prohibition of having two residential dwellings located on a single lot, these prevail outside the realm of the minor variance application. While it is evident that Mr. Bélanger will have to make some choices if he wishes to ultimately recognize his

dream, the Township did not appear to be indicating that the other matters were insurmountable with respect to his plans to develop a heritage property.

THE BOARD ORDERS that the appeal is dismissed and the variances are not to be authorized.

The Board so Orders.

“M. A. Sills”

M. A. SILLS
MEMBER