

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: June 11, 2014

CASE NO(S): PL130928

Applicant(s) and Appellant(s): Art Fraser
Applicant(s) and Appellant(s): Robert and Deborah Pillar
Subject: By-law No. 2013-29
Legislative Authority: Subsection 34(19) of the *Planning Act*, R.S.O.
1990, c. P.13, as amended
Municipality(ies): Township of Tay
OMB Case No.(s): PL130928
OMB File No.(s): PL130928

APPEARANCES:

Parties

Counsel

Art Fraser

Robert and Deborah Pillar

Township of Tay

P. Petersen

HEARING EVENT INFORMATION:

Hearing: Held in Tay, Ontario on March 13, 2014

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

[1] This matter involved the separate appeals of Art Fraser (“Appellant”) and Robert and Deborah Pillar (“Appellants”) of the passing of Zoning By-law Amendment No. 2013-29 (“ZBA”) by the Council of the Township of Tay (“Township”), for the properties fronting onto Crescent Drive.

CONTEXT

[2] The Appellant parties both own vacant lots fronting onto Crescent Drive which they propose to develop with a dwelling at some point. Crescent Drive is a private road which is not constructed or maintained to municipal standards. Moreover, in August 2012, the Township became aware that they do not own Crescent Drive.

[3] These lots are currently located within the Shoreline Residential ("SR") designation. The SR designation does not permit development on lots that do not have frontage on an improved public street.

[4] The Township's comprehensive zoning by-law ("ZBL") formerly contained a provision which was intended to apply to vacant lots for well-established cottage locations within the designated Limited Services Residential ("LSR") Zone that do not front onto an improved public street.

[5] In effect, this provision permitted the development of vacant lots, provided the owner enter into an acknowledgement that the Township does not maintain the road in any way; that the Township will not maintain or assume the private road or street unless it has been built according to municipal standards; and, that the owner agrees not to request the Township to assume the private road or road allowance.

[6] However, the ZBL had a loop hole which allowed for this same provision to be applied to any lot, regardless of zoning. Upon the advice of its solicitor, the Township amended this section via way of a "housekeeping item" in 2010.

[7] The properties which are the subject of the current appeals front onto Crescent Drive and are entirely within a Plan of Subdivision (1202) registered in 1955. At that time, the Township was not the approval authority for subdivisions, and the plan did not dedicate Crescent Drive as a municipal road; updated land title records indicate that this road remains under the ownership of family members of the original owner of the subdivided lands.

[8] There are 18 lots which front onto Crescent Drive. Of these, six are developed with detached dwellings. Five of these were constructed in the 1970s with the remaining dwelling believed to have been built in 1987. Albeit some of the existing homes have been enlarged, updated and/or converted to full time residences, no building permits have been issued for new dwellings in this area since 1987. Municipal water and sewer servicing is not available in this area.

[9] More recently, Mr. Fraser sought to obtain a building permit to construct a dwelling on one of his three vacant lots. Several years prior, and before purchasing these lots, he had consulted with Township staff who reportedly confirmed that he would be able to obtain a building permit with a road acknowledgement/agreement. However, that changed with the amendments to the comprehensive ZBL in 2010.

[10] In response to the request by the Mr. Fraser for a building permit, the Township enacted the proposed ZBA. In effect, the rezoning is required in order to allow development to occur on vacant lots on Crescent Drive.

[11] The purpose and effect of the proposed ZBA is to rezone the developed lots on Crescent Drive from Shoreline Residential "SR" Zone to Limited Service Residential Exception Seven "LSR-7" Zone, and to Limited Service Residential Exception 7 Holding (H) Zone "LSR-7(H)" for the vacant lots. The (H) symbol relates to requirements for road improvements and servicing.

[12] Specifically, the issues in dispute arise as a result of the provision of the proposed ZBA which stipulates that a holding (H) symbol to be applied to the development of these lots, shall not be removed until such time as the property owner has completed the following at his/her expense:

- a) the private street on which the subject property fronts, must have a driveable width of 6 metres ("m") and a minimum weight rating of 11,340 kilogram ("kg") from Bass Bay Drive to and including the full frontage of the property to the Township's satisfaction;

- b) the recommendations of an engineer's drainage study for the development of the subject property, including downstream improvements, have been implemented to the Township's satisfaction;
- c) the recommendations of a hydrogeologist's study for the development for the subject property addressing both well and septic servicing has been implemented to the Township's satisfaction;
- d) the subject property be serviced with a tertiary treatment sewage system meeting the requirements of the Ontario Building Code; and,
- e) a development agreement between the Owner of the subject property and the Township shall be required to implement mandatory road maintenance by the Owner regarding the private Street from Bass Bay Drive to and including full frontage on the property and to implement any and all of the above requirements.

[13] The proposed ZBA further stipulates that for those lands zoned LSR-7, in the absence of a municipal sanitary sewage system, a dwelling unit shall be serviced by a tertiary treatment sewage system meeting the requirements of the Ontario Building Code.

SUBMISSIONS BY THE APPELLANTS

[14] Robert Pillar told the Board that they are long time seasonal visitors to the Township, having camped in the area for over 30 years. In 2004, they purchased a lot on Crescent Drive with the intention of developing it as their retirement residence at some point in the future.

[15] Principally, Mr. Pillar's concern was that the ZBA was "open-ended and ambiguous". Specifically, he objects to the requirement that the necessary work/studies be completed "to the Township's satisfaction". In his view, this requirement has the potential of exposing them to an "unacceptable amount of financial risk".

[16] In this respect, he contends that even if the work/studies were to be carried out, there is no guarantee that a building permit would be issued. He requested that the Board amend the proposed ZBA by removing the words “to the Township’s satisfaction”.

[17] Mr. Fraser provided details of the background and circumstances which has led to their appeal. In this regard, he asserted that they had consulted with Township planning staff prior to purchasing three lots on Crescent Drive in 2002.

[18] Mr. Fraser maintains that at that time, Township staff was made aware of his intentions to develop the lot(s) at some point in the future, and he were assured that a building permit could be obtained provided he entered into a Private Road Agreement with the Township.

[19] Based on this assurance, he purchased the property and has been working to improve and prepare these lots for development. He now wishes to proceed to construct a 1,400 square feet (“sq. ft.”) bungalow as their retirement residence.

[20] Mr. Fraser said that he again met with Township officials in 2007 to discuss developing the property and at no time did anyone suggest that he would not be able to get a building permit.

[21] In fact, he claims that the first time they heard of this was in January 2013 when a local realtor told them that the Township will no long issue building permits for Crescent Drive. Mr. Fraser told the Board that they “could not believe this to be true; they never imagined that they would not be able to build on these lots”.

[22] However, after making several inquiries of Councillors and/or Township staff, the Frasers were advised that as a result of “housekeeping amendments” to the ZBL in 2010, building permits were no longer available for vacant lots on Crescent Drive. Among other things, the ZBL requires that a property within the SR designation front onto an improved public street in order to obtain a building permit for a vacant lot.

[23] Mr. Fraser reported that he has tracked down the current owners of Crescent

Drive, and they have “agreed in principle to transfer ownership of the road to whoever Tay Township wants”. Moreover, in a letter dated February 14, 2014, the current owners provided authorization for the Frasers to utilize and/or undertake maintenance to this road.

[24] Mr. Fraser told the Board that he agrees with the Fire Chief that Crescent Drive must be maintained in a manner which allows for emergency vehicle access and provide safe passage for the local residents and their guests. However, he challenges certain of the road specifications and/or standards (example - turnaround for fire trucks). He too objects to the stipulation that any work must be completed “to the Township’s satisfaction”.

[25] Mr. Fraser told the Board that in July 2013, he met with engineers from the Skelton Brummell firm (Jay Clark and Bryan Draper) to explore the possible costs of complying with the ZBA. In this regard, Mr. Fraser submitted that the costs of doing so could be prohibitive, leaving him with no choice but to walk away from his long-time investment and retirement plans.

[26] In conclusion, Mr. Fraser takes the position that the conditions imposed by the proposed ZBA are unreasonable and unnecessary. He further contends that these provisions have not been applied in a consistent manner throughout the Township, and as such, he believes they are being unfairly targeted. In his view, the proposed ZBA is not consistent with the Official Plan (“OP”) and contains “numerous restrictions that are unjust” and will cause him to suffer considerable “financial harm”.

SUBMISSIONS BY THE TOWNSHIP

[27] Bryan Ritchie, the Township’s Manager of Roads and Fleet, provided information about the condition of Crescent Drive. This area is flat and prone to flooding due to a high water table and lack of surface water drains. Given the current condition and lack of maintenance of this road, there is a cause for concern about emergency vehicle access.

[28] Mara Burton, the Township's Director of Planning and Development, provided contextual and expert opinion evidence in support of the ZBA. She is a registered professional planner and a member of the Ontario Professional Planners Institute.

[29] Ms. Burton told the Board that the Township has no interest in assuming ownership and maintenance of Crescent Drive, and there are no plans to extend municipal servicing to this area. Neither is there any justification for doing so.

[30] In this regard, the Township takes the position that if new development is to be accommodated, servicing must be undertaken in a manner that protects the public health and safety, and the natural environment. This planning direction is consistent with the policies of the Provincial Policy Statement, 2005 ("PPS") respecting the provision of water and sewer services (1.6.4.1 and 1.6.4.4).

[31] Moreover, the OP establishes that new development within the waterfront area and the SR designation "shall not be permitted where it would contribute to the demand for public services which are uneconomic to provide, improve or maintain" (s. 4.1.2.1.4).

[32] Ms. Burton submitted that this objective is also consistent with PPS policies pertaining to Rural Areas. In particular, she referred the Board to the policy which sets out that "development shall be appropriate to the infrastructure which is planned or available, and avoid the need for unjustified and/or uneconomical expansion of this infrastructure" (1.1.4.1 b).

[33] In this respect, Ms. Burton contended that it is important for the Township to limit and control development in areas such as Crescent Drive. This road is not maintained to municipal standards and presents risks with respect to emergency vehicle access. This area is poorly drained, resulting in issues with surface water and mud. In turn, these conditions, in combination with a substandard winter control and road maintenance program, poses difficulties for larger vehicles attempting to navigate Crescent Drive.

[34] Likewise, there is no lot grading and drainage plan for Crescent Drive, and even with the few homes that are currently built, the Township has been called out on numerous occasions regarding drainage issues. This type of condition gives rise to concerns by Township officials about the potential for contamination of area wells and harm to the natural environment.

[35] Ground water located close to the surface has meant that septic systems in this area have had to be constructed with raised beds in order to achieve drainage above the water table. Given the wetness of the ground, the Public Works Director has recommended that the owners be required to provide proof that the septic system intended to be utilized will work properly in the area.

[36] In summary, it was Ms. Burton's opinion that the proposed ZBA is consistent with the policy directives of the PPS and conforms to the OP. Given the policy direction limiting the availability of municipal services, and considering the potential difficulties respecting the provision of private water and sewer services on Crescent Drive, the provisions of the ZBA are appropriate and justified.

[37] Moreover, the provision of the (H) symbol is an appropriate and necessary mechanism by which to ensure that the public health and safety is safeguarded and the environment is protected.

DISPOSITION AND ORDER

[38] The Board, in having considered the concerns of the Appellant parties and the planning evidence of Ms. Burton, finds that the proposed ZBA is consistent with policy directives of the PPS and serves to effectively implement the policies of the OP. In this regard, the provisions of the proposed ZBA reflect the principles of good land use planning.

[39] More importantly, the provisions of the ZBA which are the subject of these appeals, including the provision of an (H) symbol are appropriate and necessary in

order to safeguard the public health and safety, and to protect the environment.

[40] That being said, the Board can appreciate that the Frasers feel that they have been somewhat betrayed and/or aggrieved by the current situation.

[41] Mr. Fraser testified that they did check in advance of purchasing the property, and were assured by Township officials that they would be able to build on the lands subject to entering into a Private Road Agreement. The Board does not doubt the veracity of Mr. Fraser's testimony in this regard.

[42] However, that information was provided several years ago and well before appropriate zoning controls were in place and/or it was recognized that the public health and safety and the protection of the environmental were vital planning policy considerations. Planning legislation and policy is constantly evolving and often results in necessary changes to zoning and building standards.

[43] As is the case in this instance, a property owner cannot expect to rely on information provided many years ago, nor can they expect that change will not occur. Case in point, it was not until 2012 that the Township became aware of the nature of the ownership of Crescent Drive; up to that point, the Township believed that the road was municipally owned.

[44] Notably, the Board finds the Pillars' situation to be somewhat different because the zoning in place at the time they purchased their lot prevented them from developing the property.

[45] Provincial planning legislation (such as the Growth Plan for the Greater Golden Horseshoe and the PPS) has brought about significant changes in direction with respect to planning policy and the principles of good land use planning. The municipal planning regime must adopt and adhere to these new directives; local OP's must be consistent with and/or conform to the relevant legislated policy directives. ZBL's must implement the purpose and intent of the OP.

[46] In this instance, the proposed ZBA provides the potential for Crescent Drive land owners to develop their properties provided that certain requirements can be met; an opportunity which is not available under the current zoning.

[47] However, in doing so, municipal officials must be vigilant in the assessment and scrutiny of matters of public health and safety and the protection of the environment. While it is unfortunate that the Frasers (and possibly the Pillars) feel that they are being unfairly targeted, the Board cannot agree. The very types of requirements being requested in this instance are established in the OP and have been imposed by the Township with respect to other development proposals.

[48] Township staff and elected officials, as well as the Board, are obliged to consider the greater public good when dealing with development applications and/or planning matters. In doing so, the interests of a few property owners cannot be permitted to trump public health and safety concerns, environmental issues, and/or the financial interests of the Township and the residents of the community at-large.

[49] In the current case, it is apparent to the Board that the Township is attempting to accommodate requests by the Appellant parties to develop their properties, while at the same time ensure that the interests of other local residents and the natural environment are being sufficiently protected. In my view, the proposed ZBA achieves those very purposes.

[50] Mr. Pillar has requested that the Board amend the ZBA by removing the reference to “to the Township’s satisfaction”. Notwithstanding that this is a requirement which is typically secured in these types of executions, if not “to the satisfaction of the Township”, how and who is to determine the appropriate standards and measures to be applied. That aside, having determined that the ZBA is appropriate and necessary, the Board is not prepared to accede to this request.

[51] The *Planning Act* requires that the Board give regard to any decision made by a Council or local planning authority with respect to a planning matter, and any supporting

information and material considered in making that decision (s. 2.1).

[52] In arriving at their decision with respect to the proposed ZBA, Township Council has relied on advice from their solicitor and the evidence, opinions and recommendations of the Township's Fire Chief, Manager of Roads and Fleet, and Director of Planning and Development. In contrast, the Board has not been provided with any expert and/or technical evidence in support of the appeals. Accordingly, the Board finds there is no justification for intervening in the decision made by Township Council.

ORDER

[53] The Board orders that the appeals against Zoning By-law No. 2013-29 of the Township of Tay are dismissed.

"M.A. Sills"

M.A. SILLS
MEMBER

Ontario Municipal Board

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