

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: July 07, 2017

CASE NO(S): PL161167

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Keith Koehler
Subject:	By-law No. 2016-091
Municipality:	Township of North Kawartha
OMB Case No.:	PL161167
OMB File No.:	PL161167
OMB Case Name:	Koehler v. North Kawartha (Township)

Heard: March 29, 2017 in Apsley, Ontario

APPEARANCES:

Parties

Greg and Dawn Armstrong

Keith Koehler

Counsel

J. Ewart

K. Gravelle

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

[1] This matter involved the appeal of Keith Koehler (the “Appellant”) of the passing by the Council of the Township of North Kawartha (the “Township”) of Zoning By-law No. 2016-091 (the “ZBA”), a by-law to amend comprehensive Zoning By-law No. 26-2013 (the “Township ZBL”).

[2] The purpose and effect of the ZBA is to amend s. 3.31 (Water Setbacks) and s. 3.29 (Street Setbacks) to permit the construction of a seasonal dwelling on the property owned by Greg and Dawn Armstrong (the “Owners/Applicants”), and referred to as 10 Siskin Lane (the “subject property/site”). Siskin Lane is a privately maintained right-of-way.

[3] The subject property is designated Shoreline Area by the County of Peterborough Official Plan (“COP”) - Shoreline Residential by the Local Component, and is zoned Shoreline Residential (RS) Zone by the Township’s ZBL.

Site and Contextual Evidence

[4] Site and contextual evidence was provided by Township Planner, Laura Stone. The subject property is a 0.74 acre legal lot of record with shoreline frontage on Chandos Lake. With the exception of an existing boathouse sited near to the shoreline, the subject property is currently vacant.

[5] The Applicants are proposing to develop the waterfront (northern) portion of the property with a 120 square metre (“sq m”), one-and-a-half storey dwelling, 18.2 metre (“m”) in length. The dwelling is proposed to be sited 6.1 m from the east lot line and 15.24 m from the west property line, and features a 15.6 sq m screened porch on the west side, and open deck space of 19.5 sq m, comprising 13 sq m on the west side and 6.5 sq m on the east side of the dwelling. The total building footprint of the proposed dwelling is approximately 155.3 sq m. The septic system will be located on the non-waterfront portion of the property, south of Siskin Lane.

[6] The property has an irregular shoreline largely influenced by a considerable peninsular feature, and the right-of-way (Siskin Lane) traverses the property at about the midway point. The irregular shoreline in combination with the course of the right-of-way limits the locating of a suitable building envelop on the shoreline portion of the property. Notably, the property extends 52.43 m on the south side of Siskin Lane, but the topography in that area changes to a steep, rocky slope. As well, there were safety

concerns expressed by the Applicants in regard to crossing Siskin Lane if the cottage were to be located on the south side.

[7] The purpose and effect of the proposed ZBA is to allow site specific exceptions to s. 3.29 (Street Setbacks) and s. 3.31 (b) (Water Setbacks) of the Township ZBL, which provide as follows:

s. 3.29 – Street Setbacks

...where a right-of-way runs through a property under private ownership, the applicable setback requirements for the main building shall be reduced to 50% of those required by the zone provisions that would normally apply to the property.

s. 3.31 – Water Setbacks – ss. 3.31 (b) – Vacant Lots of Record

Vacant lots of record as of October 22, 2008 shall attempt to have structures and septic systems setback a minimum of 30 metres from the high water mark.

Where it is not possible to achieve the 30 metre setback, then new buildings and structures shall be setback as far as possible from the high water mark. In this regard, a Minor Variance or Zoning By-law Amendment for a reduced setback for the existing vacant lots may be permitted provided that the relief is minor in nature, maintains the intent of the Official Plan regarding environmental objectives and is desirable and appropriate for the area.

[8] In this case, the open deck space of the structure is 12.2 m from the normal high water mark of Chandos Lake, whereas a setback of 30 m required, and the dwelling is located 3 m from Siskin Lane, whereas a setback of 4.5 m required (as calculated in accordance with s. 3.29). Notably, the setback of the septic system (47.8 m) exceeds the minimum zoning requirement of 30 m from the high water mark. The Peterborough County-City Health Unit has issued a permit for the sewage system.

[9] The application was deferred at the public meeting held on August 2, 2016 to provide an opportunity for members of Township Council to visit the site, accompanied by Township staff.

[10] Ms. Stone indicated that the owners worked closely with Township staff in the determination of an appropriate siting for the cottage. County Planning staff is aware of the application and have provided correspondence confirming that they are not opposed to the placement of the cottage 12.19 m from the high water mark, provided that the septic system is located at a minimum distance of 30 m. A representative from the Crowe Valley Conservation Authority (“CVCA”) visited the site accompanied by Township staff and has provided correspondence indicating that the CVCA has no concerns with respect to the application.

[11] Ms. Stone testified that the proposed residential dwelling is a permitted, desirable and appropriate use of the property. In this case, all zone requirements are met with the exception of the setbacks from the high water mark and the right-of-way, which are not achievable due to the identified constraints of the property.

[12] In consideration of the foregoing, Township staff determined that the proposed siting was the most reasonable location for the dwelling, and recommended that Township Council approve the proposed ZBA.

Planning Evidence - Appellant

[13] Kent Randall provided land use planning evidence and opinion on behalf of the Appellant in opposition to the application. Mr. Randall is a registered professional planner and a Full Member of the Canadian Institute of Planners and the Ontario Provincial Planners Institute.

[14] It is Mr. Randall’s professional opinion that the proposed ZBA is not consistent with the relevant planning policies and the proposal does not represent good planning.

[15] Fundamentally, Mr. Randall takes the position that “the proposed permanent dwelling is not permitted within the Seasonal Residential designation”. The COP serves as a local official plan for several lower-tier municipalities in the County, including the Township.

[16] The application submitted by the Owners indicates that the proposed dwelling will be used as a permanent residence. It was the evidence of Mr. Randall that the Seasonal Residential designation of the property “only permits seasonal cottages” (s. 6.2.5 – COP) – therefore, “the proposed permanent dwelling is not permitted”.

[17] From a planning policy perspective, it is Mr. Randall’s opinion that the proposal is not consistent with the *planning for stormwater management* (s. 1.6.6.7) and *water* (s. 2.2) policies of the Provincial Policy Statement, 2014 (“PPS”), in the following manner:

- Policy 1.6.6.7: The proposed dwelling, including the decks and porch, and the existing boathouse cover 14% of the north (waterfront) area of the property. The introduction of large, impervious surfaces to this area of the property in close proximity to the shoreline has the potential to alter drainage patterns and may impact the quality and quantity of water entering the lake. These implications are particularly enhanced when such a building is placed 12.2 m from the high water mark of the lake. In this respect, the Owners have not demonstrated that the stormwater impact resulting from the development will not negatively impact Chandos Lake, nor has it been indicated how any potential impact on the lake would be mitigated in terms of water balance or contaminant loads resulting from the placement of the proposed dwelling.
- Policy 2.2 – the reduced water setback will greatly reduce the distance within which pollutants are attenuated, particularly if shoreline vegetation is removed and site grading is undertaken. The Owners have not provided any information regarding impacts to the water or shoreline of Chandos Lake, notwithstanding the significant (59%) reduction in the water yard setback, or that the placement of the dwelling at 12.2 m will not impact the lake from a stormwater perspective.

[18] In this same respect, the reduction of the water setback from 30 m to 12.2 m is contrary to the intent of the COP and the Township ZBL. The Seasonal Residential Policies of the COP (s. 6.2.5.3 (h) states:

Vacant lots of record as of the date Official Plan Amendment No. 3 comes into force and effect (October 22, 2008) shall attempt to have structures and septic systems set back a minimum of 30 meters from the high water mark. Where it is not possible to achieve the 30-meter setback, then new buildings and structures shall be setback as far as possible from the high mark. In this regard, a Minor Variance or Zoning By-law Amendment for a reduced setback for existing lots of record may be permitted provided that the relief sought:

- i. maintains the intent of the zoning by-law;
- ii. is minor in nature;
- iii. maintains the intent of the Official Plan regarding environmental objectives; and
- iv. is desirable and appropriate for the area.

[19] This section also stipulates that the 30 m setback is applied to the Shoreline Residential designation in order to preserve the naturally-vegetated shoreline and minimize destruction to the shoreline and wetbeach habitat, minimize visual impact on the waterbody, maintain wildlife habitats and corridors, and improve water quality.

[20] The intent of the 30 m setback is to protect these shoreline areas. It is Mr. Randall's position that any reduction in the setback should only be applied in special circumstances, and only when the application is accompanied by technical justification for the reduction.

[21] The 30 m setback from the high water mark is also intended to reduce the possible impact of flooding and erosion along the shoreline and to maintain the natural shoreline to the extent possible. The Owners have not demonstrated from either a

technical or a planning standpoint that the proposed reduction to the setback will not negatively impact the water quality and wildlife of the lake, or the shoreline.

[22] In addition, the proposed reduction to the setback will create a negative visual impact to the shoreline. The planned dwelling will be highly visible from the lake as there will be little to no large vegetation between the dwelling and the shoreline, which again is contrary to the intent of the 30 m setback.

[23] Correspondingly, the proposed development does not meet the intent of the 30 m setback provision of the ZBL. The reduction in setback is not minor and the proposed development is neither desirable nor appropriate, nor does it represent good planning.

[24] Furthermore, the Owners have not adequately demonstrated that a dwelling cannot possibly meet the 30 m setback, or that, the intended placement of the proposed dwelling is “as far back as possible”. Neither have the Owners demonstrated that the impact from this “major” reduction in setback will not negatively affect the shoreline of Chandos Lake. It is Mr. Randall’s view that allowing such a setback without any technical evaluation, particularly with respect to the impacts to water quality and shoreline integrity, will provide future applicants with an inappropriate standard for justifying encroachment within the 30 m setback.

[25] Mr. Randall also has concerns about the reduced setback from Siskin Lane. It is his position that the proposed reduced setback presents safety issues as vehicles will be passing by the dwelling with only 3 m of separation. Siskin Lane is a private single-lane road, and although speed limits are reduced, the potential for impacts with the dwelling are increased due to the proximity of the road, particularly at times when the road is icy.

[26] It is Mr. Randall’s opinion that any development that is contemplated within the water yard setback should require a high level of scrutiny and should be supported by technical reports and studies that justify a reduced setback. As this particular

development proposal does not appear to be supported by any planning or technical justification, the proposed ZBA cannot be supported from a planning perspective.

[27] Mr. Randall also maintains that the application submitted to the Township and the proposed ZBA do not recognize other deficiencies, which are as follows:

1. The proposed screened porch and the detached open deck do not meet the zoning provisions respecting the maximum permitted area of 10 sq m, pursuant to s. 6.2 (e);
2. The proposal does not satisfy the parking provision requirements of the SR Zone (s. 6.2 (p)); and
3. The proposal does not satisfy the provisions established by s. 3.18 (b) (Existing Undersize Lots) of the ZBL.

[28] In respect of these, it is Mr. Randall's professional opinion that enlargements to the screened porch and deck should not take place within the 30 m setback, unless justification has been provided. The Owners have requested a 95% increase to the maximum size of a detached deck and a 56% increase to the maximum size of a screened porch. These substantial increases in the maximum size of both structures will allow for the introduction of a larger than permitted area of impervious surface in close proximity to the shoreline.

[29] As well, the Owners have not provided or identified any parking spaces associated with the proposed dwelling. Parking areas further increase the development footprint and potentially result in additional impervious surfaces within the setback area. Neither the Owners nor the Township have indicated why this provision has not been met.

[30] Section 3.18 sets out that a building or structure may be erected on an existing undersized lot, provided the building or structure does not contravene any other

provisions of the ZBL. Mr. Randall maintains that as demonstrated by his evidence, the proposed dwelling on the subject property contravenes several provisions of the ZBL. Therefore, the proposed ZBA does not meet the intent of this section of the ZBL.

[31] Mr. Randall emphasized that while it is understood that relief from some provisions may be required on undersized lots, the landowner must provide justification as to why certain provisions cannot be met. In this case the Owners require relief from five different provisions of the ZBL, but have not provided justification as to why these provisions cannot be met.

[32] In conclusion, it is Mr. Randall's professional opinion that the proposed ZBA is not consistent with the PPS, the COP and the Township's ZBL. The proposed dwelling is neither desirable nor appropriate for the area, and the proposal does not represent good planning.

[33] Under cross-examination, Mr. Randall agreed that the subject property is a vacant lot of record. He further confirmed that he had not spoken to either the County or Township planning staff about the application/proposal, nor had he consulted with the CVCA in regard to the environmental concerns raised in his evidence.

[34] Mr. Randall also conceded that a permanent residence is not prohibited in the Seasonal Residential designation. Rather, he acknowledged that s. 6.2.5.2 sets out that "The predominant use of land within the Seasonal Residential designation shall be for seasonal cottages" [emphasis added by Board]. He also acknowledged that the proposed siting of the dwelling on the waterfront portion, rather than being located on the south side of Siskin Lane, would likely result in less trees having to be destroyed. Lastly, he confirmed that the Appellant utilizes his adjacent dwelling as a permanent residence.

Planning Evidence – Applicants

[35] Kevin Duguay provided planning evidence and opinion in support of the application and proposal. Mr. Duguay is a registered professional planner and a Full Member of the Canadian Institute of Planners and the Ontario Professional Planners Institute.

[36] Mr. Duguay clarified that both the GP (s. 2.2.2 1) and the PPS (Policy 1.1.5.2) establish that residential development can be permitted outside of Settlement Areas. Recreational dwellings and accessory uses and structures can be, and typically are, located in Rural Areas having some established resource amenity context, which in this case, is Chandos Lake.

[37] The goal of the COP is to improve and protect waterfront areas as a significant cultural, recreational, economic and natural environment resource, and to enhance land areas adjacent to the shore. The COP also points out that the waterfront is a major recreation resource area that should be made accessible to both public and private users, where appropriate.

[38] The Shoreline Areas are generally associated with leisure, recreation, water supply, support for fisheries and wildlife habitat. Development occurring in these areas should enhance and protect, where possible, those qualities that contribute to the area's character. The proposed residential use is typical of the resource-based recreational development found in this area.

[39] Section 6.2.5.3(h) of the COP establishes specific "Permitted Exceptions" for development of land within the Seasonal Residential designation. This policy states that for vacant lots of record "where it is not possible" to achieve the required 30 m setback, structures and septic systems shall be set back as far as possible from the high water mark (s. 3.31 (b)). These policies stipulate that any reduction in building setback requires the approval of either a minor variance application or a Zoning By-law

Amendment. The Owners have elected to secure the required approval by way of a site-specific ZBA.

[40] Mr. Duguay pointed out that the setback being proposed is consistent with the setback of the Appellant's home from Siskin Lane. He also noted that in order for a building permit to be issued, the Township will have to be satisfied that all requirements/standards are met. As well, the development proposal is subject to site plan approval which includes the requirement for an acceptable plan of drainage and grading.

[41] It is Mr. Duguay's professional opinion that the placement, configuration and design of the proposed residential building within the waterfront portion of the property meets the policy requirements of the GP, the PPS and the COP. By contrast, the siting of the dwelling on the opposite (non-waterfront) side of Siskin Lane is not consistent with the development pattern in this area, and would introduce an unnecessary disturbance to the natural/vegetated state of the property.

[42] There are no identified environmental issues associated with the applications. The CVCA has provided confirmation that it has no concerns with the application, and an Environmental Impact Study was not requested by the Township. In any event, the Owners will have to obtain a permit from the CVCA before the building can be constructed and/or any shoreline alteration is undertaken.

[43] In sum, it is Mr. Duguay's professional opinion that the proposed residential dwelling is an appropriate and desirable use of the property, and is in-keeping with the other development in this area. The relief being sought is minor in nature, and the intent of the COP in regard to environmental objectives is being appropriately maintained.

[44] The ZBA as supported by the Township planner and approved by Township Council is consistent with the policy direction established by the PPS and conforms to

the policy directives of the GP. The proposal is in keeping with the general intent and purpose of the COP and the ZBL, and represents good land use planning.

Analysis and Disposition

[45] In consideration of the evidence and opinions of the expert witnesses and the submissions of counsel, the Board is satisfied the proposed ZBA merits approval. In arriving at this decision, the Board accepts and adopts the evidence and opinions of Ms Stone and Mr. Duguay.

[46] The Board finds that the application conforms to the directives of the GP, is consistent with the policies of the PPS, and maintains the general intent of the COP and Township ZBL as required by s. 6.2.5.3 (h). As such, the Board finds that the ZBA conforms to the COP. The Board is satisfied that all matters of provincial interest have been appropriately considered and the public interests are duly protected.

[47] The Board has been persuaded by the evidence that the proposed dwelling is a permitted use of the property and an appropriate and desirable form of development for the property and the area. The relief being sought is of a minor nature and will not unduly adversely impact the natural environment, the neighbouring property owners, or the area as a whole. Overall, the proposal is consistent with the principles of sensitive land use planning

[48] Principally, the Board has not been provided with technical/scientific or expert evidence in support of the environmental impact concerns (stormwater impact, water quality, shoreline destruction and wetbeach and wildlife habitat) raised in the evidence of Mr. Randall. Mr. Randall does not purport to have expertise in environmental matters; he has not discussed these concerns with the CVCA, nor did he otherwise indicate that he had consulted with any other Provincial agency having responsibility for the protection of the environment, water bodies and/or natural resources.

[49] The evidence before the Board was that the CVCA conducted a site visit and has confirmed that it does not have concerns with the application. The Owners are required to obtain a permit from the CVCA for the construction of the dwelling. Incidentally, under the circumstances I find it entirely reasonable that the Township did not find it necessary to have the Owners obtain a time-intensive and expensive Environmental Impact Study.

[50] The Board does not agree that the lack of a “technical evaluation” in regard to the current application will establish a precedent for future applications. Planning officials and approval authorities, including the Board, are required to assess the merits of each planning application/proposal on an individual basis in accordance with the relevant Provincial and local planning regime.

[51] The COP acknowledges that the natural environmental features and areas within the County make it an attractive and desirable location for shoreline recreational development, and that this type of development is of economic importance to the Township and the County. The COP also contains policies which recognize that there are instances when exceptions to the current zoning provisions can and should be allowed; in particular, insofar as existing vacant lots of record are concerned (s. 3.31).

[52] Mr. Randall contends that it has not been demonstrated that the building cannot possibly meet the 30 m setback. In his calculation, the proposed dwelling could be constructed as-of-right on the south side of Siskin Lane. However, the evidence of Ms Stone was that given the topography and physical constraints of the property, Township staff determined that the proposed siting of the dwelling is the most reasonable location. Ms Stone has attended and systematically inspected the property on several occasions, and she and the owners worked collaboratively to identify an appropriate siting for the dwelling. The proposed siting is consistent with the shoreline development pattern of the other properties along Siskin Lane and the shoreline of Chandos Lake, and County planning staff has indicated they have no concerns about the siting of the dwelling.

[53] Regarding the reduced setback from Siskin Lane, the Board finds Mr. Randall's concern about safety issues to be implausible, particularly in view of the comparable setback of the Appellant's dwelling.

[54] Mr. Randall also has concerns about other zoning deficiencies, including use of the dwelling as a permanent residence, the maximum allowable porch and open deck area, and parking requirements. Notwithstanding, his admissions under cross-examination that a permanent dwelling is not a "prohibited" use in the SR Zone, as Mr. Randall has correctly identified these "deficiencies" are not included in the application and are not provided for in the ZBA. Accordingly, these matters are not before the Board, nor are there any permissions with respect to these provided for by this Order.

[55] In any event, it was the evidence of Mr. Duguay that the parking area(s) will be identified through the site plan process, and otherwise, Township staff will have to be satisfied that all requirements are or will be met before the building permit is issued.

ORDER

[56] The Board orders that the appeal is dismissed.

"M. A. Sills"

M. A. SILLS
MEMBER

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Ontario Municipal Board

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