

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: January 10, 2018

CASE NO(S): PL170097

PROCEEDING COMMENCED UNDER subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Township of Minden Hills
Applicant: Kirsteen and Charles Birkett
Subject: Minor Variance
Variance from By-law No.: 06-10
Property Address/Description: Part Of Lot 11, Concession 10 & 11, Geographic Township of Lutterworth
Municipality: Township of Minden Hills
Municipal File No.: PLMV2016071
OMB Case No.: PL170097
OMB File No.: PL170097
OMB Case Name: Township of Minden Hills v. Minden Hills (Township)

Heard: January 3, 2018 in Minden, Ontario

APPEARANCES:

Parties

Counsel

Charles Birkett and Kirsteen Birkett

Self-represented

Township of Minden Hills

Edward B. Veldboom

MEMORANDUM OF ORAL DECISION DELIVERED BY PAULA BOUTIS ON JANUARY 3, 2018 AND ORDER OF THE BOARD

[1] The Township of Minden Hills (“Township”) appealed a decision of the Committee of Adjustment (“Committee”) for the Township, authorizing a reduction in set back from the

high water mark for a property on Gull Lake from the required 30 metres (“m”) to 23 m. The Applicants had initially sought a setback of 15 m.

[2] The property in question is located at Part of Lott 11, Concession 10 & 11, Lackies Lane (“Subject Site”).

[3] The Board was advised that the parties had reached a settlement and proceeded to hear evidence in support of that settlement.

[4] Ian Clendening, a planner with the Township, provided opinion evidence in the area of land use planning in support of the settlement reached by the parties.

[5] After hearing the evidence, the Board orally issued a decision to approve the variance requested with conditions, in accordance with the settlement, as outlined below.

EVIDENCE AND ANALYSIS

[6] Prior to approving minor variances, the Board must be satisfied that the four-part test under s. 45(1) of the *Planning Act* (“Act”) is satisfied. This test is the following:

- a. maintain the general intent and purpose of the official plan;
- b. maintain the general intent and purpose of the zoning by-law;
- c. be desirable for the appropriate development and use of the land; and
- d. be minor

[7] Proposals must also be consistent with the Provincial Policy Statement, 2014 (“PPS”) and must have regard to any applicable provincial matters set out in s. 2 of the Act, which include the protection of ecological systems, including natural areas, features and functions.

[8] The Township's Official Plan ("OP") has general development policies to address lake capacity (3.2.3.1) and water quality (3.2.1.1). Prior to approving any development proposal, Council must be assured that the development will not exceed the capacity of the lake, which capacity is affected by water quality; surface capacity for recreation; and shoreline development capacity.

[9] Gull Lake, on which the Subject Site is located, is identified as moderately sensitive to additional shoreline development and is nearing development capacity in terms of water quality (3.2.3.1.1.6). The OP recognizes that prior to development, detailed studies may be required in relation to this lake and others listed.

[10] Policy 3.2.3.4 establishes policies to protect the shoreline for various environmental goals, including protection of the riparian and littoral zones and associated habitat.

[11] The OP requires the following at Policy 3.2.3.6.3:

In general, development and site alteration should be set back a minimum of 30 m from the high water mark of lakes and rivers, with the following exceptions: The minimum setback is 23 metres for principle buildings and structures and 30 m for tile fields for a vacant lot in existence on the date of approval of this Official Plan.

[12] In accordance with Policy 3.2.3.6.4, a lesser setback may be permitted if:

- It is not physically possible, due to terrain or lot depth features, to meet the required setback;
- In the case of a redevelopment of a property, the imposition of a new setback would result in a more negative impact on the property than allowing reconstruction at the existing setback; and
- A site evaluation report in support of the request to reduce the set back.

[13] In respect of the Subject Site, bullet point two above does not apply.

[14] Regarding the first bullet point above, while the Board understood it was physically possible to site development within the 30 m setback, it would result in the dwelling being very near to or abutting Lackie's Lane, a private road that services several properties. In addition, the terrain where the development was originally contemplated is generally more rocky with a more continuous slope towards the water.

[15] Regarding the third bullet point above, no site evaluation report had been prepared for the purposes of seeking this variance leading up to the Committee hearing.

[16] Zoning By-law No. 06-10 ("ZBL") requires a setback from the high water mark of 30 m for lots created after February 22, 2005. The Subject Site was created by severance after this date further to an application in 2014. For lots created prior to February 22, 2005, the ZBL establishes a 23 m set back.

[17] Policy 3.2.3.6.1 in the OP requires setbacks to establish vegetative buffers for shoreline protection and protection of habitat, wetland or other sensitive natural areas, and to maintain a natural area between buildings, reduce dominance of built form, ensure compatibility, maintain privacy and attenuate noise.

[18] Policy 3.2.3.6.2 indicates that setbacks are used to attenuate phosphorus loadings from storm water and to maintain the natural integrity of shorelines, fish and wildlife habitat. Vegetation within the setback is to be disturbed as little as possible and the soil mantle should not be altered.

[19] At the time of the severance application in 2014 which created the Subject Site, Michalski Nielsen Associates Limited ("Michalski Nielsen") prepared a report ("First Report") to determine if the severances proposed were appropriate from both a biophysical and water quality perspective.

[20] The First Report included a number of recommendations relating to the then proposed lots, which included the incorporation of a 30 m natural shoreline buffer. The severance application was approved, but development was conditional on implementation of the recommendations of the First Report.

[21] Leading up to the Committee's decision for the variance requested, Mr. Clendening prepared a planning report. In it, he indicated that the owners had entered into a Severance Agreement with the Township at the time of the severance application. The owners, as owner and on behalf of all future owners, acknowledged that the First Report had been prepared; they agreed that development and site alteration is to have no negative impact on the natural features and ecological functions of the area; and, in addition, they agreed to implement the recommendations of the First Report.

[22] Mr. Clendening did not make a recommendation to the Committee regarding the variance. However, he requested a condition of approval be added, should the Committee approve the variance, to tie the approval to the drawings/plans that had been submitted with the application.

[23] At the Committee hearing, the Applicants revised their request to vary the setback to 23 m from the standard, rather than 15 m from the standard.

[24] The Committee approved the requested variance of 23 m, with the condition that no deck attached to the dwelling would project into the 23 m setback.

[25] The Township appealed.

[26] Shortly after the appeal was launched, the Applicants retained Michalski Nielsen to update the First Report. Michalski Nielsen prepared a Second Report for the purposes of the variance request, which report is contemplated by the policies of the OP outlined above (Policy 3.2.3.6.4) where a variance from the 30 m setback is sought, but which report had not been prepared.

[27] The Second Report reviewed the matter and concluded that the dwelling itself should be no closer than 25.5 m from the shoreline, with decking, patios and other amenity features to be permitted to extend no closer than 23 m from the shoreline, with a natural vegetated buffer of a minimum in 23 m to be maintained. It was the opinion of Michalski Nielsen that extensive vegetation cover could be maintained and visual impacts would be minimized with the 23 m buffer.

[28] A number of other recommendations were listed, including that the sewage disposal bed be located on relatively flat terrain, a minimum of 50 m from the high water mark, which was a further setback of 20 m from the earlier recommendation in the First Report.

[29] On the strength of the Second Report, the parties agreed to a setback of 25.5 m from the required standard of 30 m for the single detached dwelling, subject to certain conditions:

- a. no porches, balconies, steps and patios, covered or uncovered, shall be erected or established within 23 m of the high water mark of Gull Lake;
- b. the owner of the property shall be required to obtain site plan approval;
and
- c. the site plan, and any required site plan agreement, shall incorporate and implement all of the recommendations found in the Second Report.

[30] Mr. Clendening confirmed that in his opinion, the requested variance would maintain the general intent and purpose of the OP and the ZBL; that the variance was desirable for the appropriate development and use of the land; and the variance was minor, with no anticipated impacts so long as the conditions were implemented. Mr. Clendening also confirmed that the proposal was consistent with the PPS and constituted good planning. The Board is satisfied that matters of provincial interest referenced in s. 2 of the Act have also been sufficiently regarded to.

[31] The Board adopts the uncontradicted opinion evidence of Mr. Clendening.

ORDER

[32] For the foregoing reasons, the Board allows the appeal in part, and authorizes the following variance, with conditions, as outlined in the Minutes of Settlement (filed as Exhibit 3, Tab 1):

1. Section 5.2 of Zoning By-law 06-10 is varied to reduce the required setback from the high water mark from 30 m to 25.5 m for a single detached dwelling subject to the following conditions:
 - a. Notwithstanding subsection 4.1.10(d) of By-law 06-10, as amended, no porches, balconies, steps and patios, covered or uncovered, shall be erected or established within 23 m of the high water mark of Gull Lake;
 - b. The owner of the property shall be required to obtain site plan approval;
 - c. Site plan approval and any required site plan agreement shall incorporate and implement all of the recommendations found in the Michalski Nielsen Report dated July 12, 2017, filed as Exhibit 3, Tab 2.

“Paula Boutis”

PAULA BOUTIS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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