

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: January 10, 2020

CASE NO(S): PL180151

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Appellants:	Larry and Vicki Roocroft
Applicants:	Larry and Susan Conlin
Subject:	By-law No. ZA-30-17/2018-002
Municipality:	Township of North Kawartha
OMB Case No.:	PL180151
OMB File No.:	PL180151
OMB Case Name:	Larry and Susan Conlin v. North Kawartha (Township)

Heard: October 10, 2018 in Apsley, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Larry and Susan Conlin (“Applicants”) John Ewart*

Larry and Vicki Roocroft (“Appellants”) Wayne Smith

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The Applicants applied to the Township for a Zoning By-law Amendment to permit a new recreational dwelling on an irregularly shaped vacant lot located on Chandos Lake and identified as Part 3 on Plan 45R-5356 (“Subject Property”) in the Township of North Kawartha (“Township”). Planning staff recommended approval. On January 16, 2018, Council for the Township approved the application and passed Zoning By-law No. 2018-002 (the “ZBLA”) amending the Township’s Zoning By-law No. 26-2013.

[2] The Appellants, who own the adjacent property, appealed the ZBLA pursuant to s. 34(19) of the *Planning Act*.

[3] The ZBLA is not complex and provides for only three variances of the zoning standards. First, the ZBLA permits a modest-sized recreational dwelling to be constructed 87 feet from the high water mark instead of the 100 metre (“m”) setback under the zoning requirements. Due to the limited immediate area between the lakeshore and Blue Heron Road, the configuration of the lot, and the setback location of the dwelling, two other variances to setback are required to permit construction of the dwelling. The ZBLA permits a rear yard set-back of 14.7 feet instead of the required 30 feet, and also a side yard setback of 13.1 feet instead of the minimum required zoning setback of 15 feet.

HEARING

[4] The Affidavit of Service was marked as Exhibit 4 to the hearing.

[5] The Appellants requested that Mr. Wayne Smith, who is not a solicitor, represent their interests at the hearing. The evidence presented by the Appellants, through Mr. Smith, was limited to the oral commentary introducing the Presentation Materials filed as Exhibit 3. There were numerous objectors who had provided written and oral submissions before Council, which forms part of the municipal record reviewed by the

Tribunal for the purposes of this Appeal. Other than those persons previously filing objections in support of the Appellants, one Participant, Mr. Gordon Smith, who also resides in the vicinity of the Subject Property at 204 Blue Heron Lane, provided testimony in support of the Appeal. Other than this evidence, the Appellants introduced no other expert, or other, testimony in support of the appeal.

[6] The Applicants presented evidence through three expert witnesses all of whom were qualified by the Tribunal, upon review of their qualification and submission of the Acknowledgement of Experts Duty (Tabs 16 to 21 of Exhibit 1), to provide opinion evidence. Mr. Matt Murray, Junior Planner for the Township, appeared under summons and provided planning evidence. Additional planning evidence was provided by Mr. Darryl Tighe, a qualified professional planner retained by the Applicants for the purposes of the Application and Appeal. Mr. Michael Lord, Manager of Environmental Services at D.M. Wills Associates Limited, the firm that prepared the Environmental Impact Study (“EIS”) for the Applicants (Exhibit 1, Tab 13), provided evidence as an expert qualified to provide opinion evidence relating to environmental assessment impact studies.

[7] Neither the Township nor the County of Peterborough appeared at the hearing, save and except for Mr. Murray who authored the planner report to Council dated November 28, 2017 (Tab 5, Exhibit 1).

[8] The Tribunal has considered all materials that were before Council before passing the ZBLA, all exhibits filed in this hearing, all oral testimony and has considered all of the submissions documents and authorities provided by the Appellants and the Applicants. Upon the Tribunal’s review of all of the evidence, and for the reasons set out herein, the Appeal is dismissed.

ISSUES AND COUNTY OFFICIAL PLAN POLICIES

[9] As the Tribunal considers the Appeal, it must determine whether the ZBLA is consistent with the Provincial Policy Statement, 2014 (“PPS”), conforms to applicable

Provincial Growth Plan for the Greater Golden Horseshoe, 2017 (“Growth Plan”) the County of Peterborough Official Plan (“County OP”) and generally represents good planning in the public interest.

[10] More specifically, upon the Appeal filed, and the evidence presented, the primary issue is whether the ZBLA conforms to the policies in the County OP, including the Environmental Constraint Policies in s. 6.2.15.3, that relate to rural lakeside development on vacant lots of record (which the Subject Property is) inclusive of the shoreline setback which, like most municipalities, requires structures and septic systems to be set back a minimum of 30 m from the high water mark

[11] Of interest in this case, is the portion of the County OP policies under s. 6.2.5.3, relating to Seasonal Residential Policies and vacant lots of record under County OP Amendment No. 3 (p. 64D, Tab 11, Exhibit 1) which set out the requirements for a Zoning By-law Amendment for reduced set back. Those requirements for the ZBLA echo the four tests applicable to a Minor Variance application under s. 45(1) of the *Planning Act*.

[12] The result is that the application for the ZBLA must satisfy requirements similar to a minor variance application, with noted differences i.e. – the ZBLA must “maintain the intent of the Official Plan regarding environmental objectives”. The relevant portion of the policy under s. 6.2.5.3 of the County OP applying to Seasonal Residential Policies reads as follows:

Vacant Lots of Record as of the date Official Plan Amendment No.3 comes into Effect (October 22, 2008)

Vacant lots of record shall attempt to have structures and septic systems set back 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 set back as far as possible from the high water mark. In this regard, a Minor Variance or Zoning bylaw Amendment for a reduced setback for existing vacant 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.

ANALYSIS OF THE EVIDENCE AND FINDINGS

The Nature of the Appellants' Appeal

[13] The Tribunal has reviewed the grounds for the Appeal as set out in Exhibit A to the Appellants' Form, the Presentation Materials submitted in the Appeal and the submissions of Mr. Smith on behalf of the Appellants, as well as the statement provided by Gordon Smith.

[14] The grounds for the appeal, and the extent to which some of these grounds can be considered or determined by the Tribunal, is summarized as follows:

1. The Appellants assert that the ZBLA will somehow adversely affect property values of other nearby properties. Such matters are not valid grounds for appeal to be considered by the Tribunal.
2. The Appellants assert that inappropriate pre-Application and pre-decision activities of the Applicants on the Subject Property represent improper breaches of existing by-laws. The alleged conduct includes such things as removing trees, burning vegetation on the Subject Property, and installing a trailer, an outhouse and electric service with cable running through wetland areas. The Appellants object to the fact that changes were made to the Subject Property before the EIS was completed. The Appellants' closing submission is a rather blunt assertion that the Applicants' "behaviour will be detrimental to the wetlands". The Appellants question the sincerity of the Applicants recognition of the requirement for no-disturbance in the shoreline setback zone. The veracity of such allegations concerning the Applicants' personal conduct (some of which is clearly based upon hearsay and

- subjective opinion) has not been established but more importantly, they are fully irrelevant to the issues before the Tribunal. The enforcement of municipal by-laws and alleged “abuses”, or perceptions of the applicant owners’ personal behaviour, are not matters that are pertinent to the planning issues before the Tribunal.
3. Much of the Appellants’ concerns relate to the procedural conduct of the meeting of Council that gave rise to the passage of the ZBLA, a “rehashing” of events during the meeting (with numerous references to portions of the video recording of the hearing), and objections to the correctness of information presented at that meeting. Although s. 2.1(1) of the *Planning Act* requires the Tribunal to have regard to the decision of council and any information and material that Council considered in making the decision, the hearing of this Appeal is a hearing *de novo*, on the evidence presented, and a determination of the identified issues upon that evidence. A retroactive critiquing of what occurred at the Council meeting by the Appellants is of little or no assistance to the Tribunal in the determination of the issues now before it.
 4. What is left as legitimate focused grounds of Appeal by the Appellants are the assertions that the entire shoreline of the Subject Property is a natural wetland and marsh area, and their concern that with the limited land available between Blue Heron Lane and the boundary of the shoreline setback for development, the development of the Subject Property under the ZBLA will result in significant disruption to an important natural wetland and marsh area and adversely affect “the entire Blue Heron community”.

[15] Insofar as the evidence is concerned, what the Tribunal has before it as the Appellants’ basis for challenging the ZBLA is an assembly of generalized concerns and apprehensions raised by the Appellants as they relate to the wetland, communicated through Mr. Smith, and by Gordon Smith and the written record. Much of what has

been heard in relation to the objections and concerns raised in the Appellants' appeal are unfortunately just that - generalized apprehensions about environmental concerns that are fully unsupported by any hard evidence. Further, in response to cross-examination, despite the criticisms of the EIS no, or limited, inquiries were made to the County, the Ministry of Natural Resources and Forestry ("MNR") or the Crowe Valley Conservation Authority ("CVCA") in respect of much of the background investigation leading to the EIS. Upon the whole of the evidence the Tribunal is unable to give any weight to such apprehensions and criticisms of the manner in which the EIS was completed or how such information was used by Council.

The Expert's Environmental Evidence

[16] Mr. Lord provided a concise and thorough overview of the assessment work that gave rise to the EIS report presented for consideration in support of the Applicants' application for the ZBLA and the request to the CVCA for approval of the reduction in the required shoreline setback. Mr. Lord confirmed that Regulation 159/06 (the Development Interference with Wetlands & Alterations to Shorelines & Watercourses Regulation of the CVCA) and the OP allow for the shoreline setback to be reduced provided that an EIS is completed delineating the wetland, and assessing potential Species At Risk ("SAR") habitat. It must then be determined that there will be no adverse environmental impacts on the wetland or SAR.

[17] Mr. Lord has explained the processes followed in this case to complete the EIS, identified the input and responses received from MNR and CVCA, and the resultant recommended mitigation measures (set out in s. 7.0 of the EIS (Tab 8, Exhibit 1)) required by CVCA as a condition to approval of the construction with the reduced setback.

[18] The Tribunal has considered the Approved Permit Application issued by Ms. Sharlene Richardson on behalf of the CVCA on August 9, 2017, following completion of the EIS, which incorporated all eleven of the conditional mitigation measures set out by Mr. Lord and his co-author of the EIS.

[19] The uncontroverted conclusions and recommendations of Mr. Lord, accepted by CVCA conclude that as long as the recommended conditions in the EIS (incorporated into the CVCA Permit) are followed, the development enabled by the ZBLA can proceed as proposed, such that there will be no intrusion or impact to the nearby unevaluated wetland or Chandos Lake.

[20] Mr. Lord has concluded that the 15 m buffer supported by the EIS, reduced from the required 30 m buffer is appropriate and that any impacts to the physical and biological components of the area will not be permanent or significant such that the function of the existing wetland will be maintained and accordingly no impacts to Chandos Lake are expected. The limited loss of woodland habitat resulting from the cleared area (in an area where woodland habitat is not lacking), and the construction, will, in Mr. Lord's opinion, have a minimal immediate and permanent negative impact from the proposed development permitted under the ZBLA.

[21] The strength of Mr. Lord's uncontroverted expert opinions to the Tribunal, relating to the environmental assessment and issues, were not undermined in cross-examination by Mr. Smith. The Tribunal accepts the uncontroverted evidence of Mr. Lord.

The Experts' Land Use Planning Evidence

[22] The Tribunal has considered the uncontroverted planning evidence provided by both Mr. Murray and Mr. Tighe in support of the ZBLA. The Appellants have provided no planning evidence to challenge their expert opinions.

[23] Both Mr. Murray and Mr. Tighe considered the above noted policy sections of the County OP and the Zoning By-law which mirrors the OP requirements (s. 3.31 Water Setbacks – Tab 12, Exhibit 3). These policies and standards allow for development and sewage treatment elements within the 30 m setback provided that the tests are met. Both experts conclude, based upon the EIS, the responses from MNRF and CVCA, that the construction of the very modest-sized dwelling, with the reduced setbacks, are

minor in nature and maintain the intent of the County OP regarding environmental objectives and is desirable and appropriate for the area. They also opine that the construction, and use of the lands, as it will be permitted under the ZBLA, maintains the intent of the Township's Zoning By-law. Mr. Murray notes the support for the application provided by the CVCA relating to the environmental constraints alleviates any concerns regarding the Environmental Constraint designation for the north eastern portion of the Subject Property.

[24] The Tribunal has considered the responses provided by Mr. Murray to questions raised by the Appellant as to whether the location of the septic system has been sufficiently addressed. Mr. Murray was direct and reasonable in his response that the CVCA's permit, and the conditions imposed, would operate, as would the Applicants' responsibility in securing the necessary permits to install the necessary sewage system, as part of the building permit and construction processes. He candidly confirmed that what would be approved would be determined at the time of construction and otherwise the constraints that existed in respect of the Subject Property had been adequately addressed, particularly considering the relatively small size of the cottage itself.

[25] Mr. Tighe was of the opinion that the proposed development was typical and similar to waterfront development located elsewhere in the Kawarthas and that adjustments in set backs are often ordinarily required, and possible, due to the constraints of some lakeside lots, provided that adequate assessments have been undertaken with respect to environmental matters. In Mr. Tighe's view, those environmental constraints and concerns have, in this case, been thoroughly reviewed and considered by the MNRF, the CVCA and the Township.

[26] Mr. Tighe echoed Mr. Murray's response to the issue raised by the Appellants regarding the septic system, noting for emphasis that the CVCA's Permit expressly acknowledges that a septic tank and bed will be installed to the east of the dwelling. In Mr. Tighe's experience, in the event the area constraints on the property necessitated a consideration of alternate system that would certainly remain to be considered, subject

of course, to the approval and permitting system. These subsequent permit and construction processes, as yet undetermined on a final basis, are not, in his view, sufficient reason to refuse the ZBLA that will allow the development to move forward.

[27] Upon this basis, both Mr. Murray and Mr. Tighe are of the opinion that the ZBLA conforms to the County OP. They are also both of the opinion that the ZBLA is consistent with the policies of the PPS and conforms to the Growth Plan. Mr. Murray confirmed that his recommendations for approval of the ZBLA have not changed and Mr. Tighe opined that upon his review, the ZBLA as drafted should be approved.

[28] The Tribunal has considered the matters raised by Mr. Smith in cross-examination of both Mr. Murray and Mr. Tighe. Despite the apprehensions raised regarding the exact built form dimensions of the cottage, and again, the septic system, the Tribunal finds that the planning opinions of Mr. Murray and Mr. Tighe are not shaken. The Tribunal agrees with the submission that the Applicants will be limited to the size of the building authorized under the CVCA permit. The planners have confirmed that the completion of the work under the ZBLA will be subject to site plan control and are of the opinion that appropriate monitoring of the final form and construction of the project will be adequately addressed by the Township then.

[29] Upon all of the evidence presented, including the uncontroverted environmental and planning opinion evidence supportive of the ZBLA, the Tribunal finds that the ZBLA passed by Council is consistent with the PPS, and conforms to applicable provincial Growth Plan. The Tribunal also finds that the ZBLA meets the version of the “four tests” as set out in the County OP, and the other environmental policies identified by the witnesses and conforms to the County OP.

[30] Accordingly, for all the reasons indicated, the Tribunal finds that the ZBLA generally represents good planning in the public interest and should be approved.

ORDER

[31] The Tribunal orders that the appeal against Zoning By-law No. 2018-002 of the Township of North Kawartha is dismissed.

“David L. Lanthier”

DAVID L. LANTHIER
MEMBER

If there is an attachment referred to in this document,
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Local Planning Appeal Tribunal

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