

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



ISSUE DATE: November 17, 2020

CASE NO(S):

PL200039

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

Applicant and Appellant:	Andrew Fraser
Subject:	Minor Variance
Variance from By-law No.:	2005-6
Property Address/Description:	Concession 2, Part Lot 29
Municipality:	Township of Rideau Lakes
Municipal File No.:	A-22-2016
LPAT Case No.:	PL200039
LPAT File No.:	PL200039
LPAT Case Name:	Fraser v. Rideau Lakes (Township)

Heard: September 18, 2020 via video hearing

APPEARANCES:

Parties

Andrew Fraser

Township of Rideau Lakes

Counsel

Michael Polowin
Jacob Polowin

Tony Fleming

DECISION DELIVERED BY R.G.M. MAKUCH AND ORDER OF THE TRIBUNAL

BACKGROUND

[1] Andrew Fraser (“Applicant/Appellant”) wishes to demolish an existing 1148 square feet (“sq ft”) one-storey dwelling and construct a 1730 sq ft one and a half-storey dwelling as well as an approximately 247 sq ft unenclosed porch and an unfinished cellar. The new construction is proposed to be 15.1 metres (“m”) from the high water mark. The footprint is also proposed to be expanded from 1203.2 sq ft to 1732 sq ft. The proposed height would be expanded from 15 ft to 22 ft. The Applicant/Appellant also proposes to remove two accessory structures having 8.2 sq ft and 65.3 sq ft. It is proposed to install a new well and septic system.

[2] The property is subject to Site Plan Control under s. 41 of the *Planning Act* (“Act”).

[3] An application was made to the Township of Rideau Lake’s (“Township”) Committee of Adjustment pursuant to s. 45(2) of the Act for permission to change and enlarge a legally non-conforming structure. The application was denied resulting in this appeal. It appears from the evidence that the application was originally evaluated by the Township’s Planning Department under s. 45(1) of the Act. It eventually agreed to process the application under the correct provision but nevertheless recommended against approval and the Committee of Adjustment denied the application resulting in this appeal.

[4] It is noted that a prior unsuccessful application under s. 45(1) of the Act for a similar development was unsuccessfully appealed to the Ontario Municipal Board (“OMB”) in 2011.

[5] The subject property is located on Otter Lake, in the South Elmsley ward and has an area of approximately 1.9 hectares with a depth of approximately 275 ft (83.8 m). It has approximately 625 ft (190.5 m) of frontage on Otter Lake and is zoned Waterfront Residential (RW) under the Township of Rideau Lakes Zoning By-law No. 2005-6 (“ZBL”). The existing dwelling was constructed in 1962, with a floor area of

approximately 1150 sq ft as noted above. Additional buildings on the property bring the total building footprint to approximately 1340 ft.

[6] The Application seeks permission to reconstruct and expand the existing dwelling on approximately the same location. Specifically, the proposal is to demolish the existing dwelling and to reconstruct it approximately 6 to 7 ft further away from the water. The reconstructed dwelling would include a mudroom, an unenclosed wrap-around porch; a second storey and the living room would be enlarged. The Applicant/Appellant also proposes to demolish several smaller buildings on the subject property, and the proposed additions would expand the footprint of the dwelling by approximately 590 sq ft with much of the floor area of the new dwelling to be added on the second floor. The proposed additions would all be oriented away from the water. Furthermore, the proposed construction would involve removing the existing septic system, which is currently located approximately 20 m from the shoreline, and replacing it with a modern system, to be located entirely outside the 30 m setback.

THE EVIDENCE

[7] The evidence in support of the appeal consists of the oral testimony of Murray Chown, land use planning consultant and Mary Alice Snetsinger, environmental consultant.

[8] The evidence in opposition to the appeal consists of Malcolm Norwood, who is a land use planner employed by the Township and Michael Yee, a naturalist/biologist employed by the Rideau Valley Conservation Authority.

[9] All four of these witnesses were qualified by the Tribunal as being able to proffer opinion evidence in their respective fields.

[10] The Tribunal also received written requests and submissions for participant status from the Big Rideau Lake Association and from the Otter lake Landowners' Association, who indicated that they supported the notion that any development along

the shoreline development should respect and conform to Official Plan policies. Participant status is granted to these two associations.

APPLICANT/APPELLANT'S POSITION

[11] Counsel for the Applicant/Appellant maintains that the test to be applied by the Tribunal with respect to an appeal pursuant to s. 45(2), is whether the proposed expansion is appropriate, and whether it will result in undue adverse impacts on the surrounding neighbourhood. This test must be addressed in the context of the law surrounding the protection of acquired rights, which includes nonconforming rights recognized by the decision of the Supreme Court of Canada in *Saint-Romuald (Ville) v. Olivier 2001*, SCC 57, 2001 CarswellQue 2013 ("*Saint-Romuald*"), which provides that nonconforming rights may evolve and expand without losing their protection, and that any evaluation must balance the interest of the landowner with the public interest. The Applicant/Appellant maintains that the Ontario Municipal Board in *Asgharzadeh, Re, 2010 CarswellOnt 4047 (OMB)*("Asgharzadeh"), recognized that *Saint-Romuald* establishes "the litmus test for assessing the extension or enlargement of an existing legal non-conforming use."

[12] The Supreme Court in *Saint-Romuald* confirmed that landowners have a right to the "normal evolution" of nonconforming rights, including the right to exercise that use more intensively, without vitiating the legal protection for those rights. In evaluating an application for evolution or enlargement of nonconforming rights, the Court found that its objective is to maintain a fair balance between the individual landowner's interest and the community's interest. The landowner overreaches itself if (i) the scale or intensity of the activity can be said to bring about a change in the type of use, as mentioned above, or if (ii) the addition of new activities or the modification of old activities, (albeit within the same general land use purpose), is seen by the Court as too remote from the earlier activities to be entitled to protection, or if (iii) the new or modified activities can be shown to create undue additional or aggravated problems for the municipality, the local authorities, or the neighbours, as compared with what went before. These factors are to be balanced against one another.

TOWNSHIP'S POSITION

[13] The Township takes the position that the appeal should be dismissed for the following reasons:

- a) The Application does not conform with numerous sections of the 2020 Provincial Policy Statement ("PPS");
- b) The Application does not represent "good planning" as it is not desirable for the appropriate development of the subject property.
 - i. Specifically, the proposed development does not conform with the Official Plan of the United Counties of Leeds and Grenville;
 - ii. The Township refers to a previous application for authorization of a minor variance under s. 45(1) of the Act in 2010, which sought relief of 15 m from the required 30 m water setback to allow for a demolition and rebuilt enlargement of the dwelling. The relief requested and location of the proposed dwelling is effectively the same in both applications and was denied by the Township, with that decision being upheld by the OMB in July 2011. The OMB at the time determined that building 15 m from Otter Lake does not conform with the Township Official Plan. This finding remains relevant, is subject to *issue estoppel* and should not be relitigated. In this appeal Counsel for the Township argues that the principle of *res judicata* should be applied in this case; and
 - iii. In the alternative, if *issue estoppel* is not applied, the proposed development does not conform with the Township Official Plan. Section 2.2.3.2.3 allows development within the 30 m setback if there is no reasonable possibility of achieving the setback. It was the evidence of Mr. Norwood and Mr. Yee that there is an alternate

location available on the subject property for the proposed development that would comply with the 30 m setback and, as such, the proposed development does not conform with the Township Official Plan in its proposed location;

- c) The proposed development's impact upon surrounding uses is unacceptably adverse. Specifically, the proposed development will have an adverse impact on the water quality and shoreline aesthetic of Otter Lake as building within the required 30 m setback affects all waterfront property owners. Further, setting a precedent of permitting building within the setback despite the requirements of the applicable official plans would result in significant cumulative impacts on the community of waterfront property owners.

[14] Counsel for the Township maintains that the considerations on this appeal are relevant to both the parties in the appeal as well as all waterfront property owners in the Township given the position of the Applicant/Appellant that the Official Plan must be disregarded when determining what constitutes "good planning" and the potential environmental harm that can result if numerous waterfront property owners are permitted to intensify development within the Official Plan's mandated 30 m waterfront setback.

[15] Notwithstanding that the Township's planner Malcolm Norwood initially took the position that s. 45(1) applied in this case; the application represents an increase in building size, volume, and height within the 30m water setback and evaluated the application under s. 45(1), it is now acknowledged by counsel for the Township that the application must be evaluated under s. 45(2).

[16] The legal test for consideration by the Tribunal on this appeal is whether the proposed development constitutes "good planning". On s. 45(2) applications, "good planning" is determined by considering:

- a. Is the proposal desirable for the appropriate development of the subject property?
- b. Is the proposal's impact upon surrounding uses unacceptably adverse?

[17] Counsel argues that the applicable Official Plans are relevant considerations in assessing whether the application constitutes "good planning". Furthermore, s. 3(5) of the Act dictates that all decisions should be consistent with the PPS, the preamble of which confirms that Official Plans are the most important vehicle for implementing the PPS.

[18] All parties agree that the existing structure enjoys legal non-conforming rights. It does not, however, follow that legal non-conforming rights confer any right to expand. That is why permission is required under s. 45(2). The assessment under s. 45(2) is not limited to only the added floor area of the proposed expansion. The test is whether the structure proposed is good land use planning, which must consider the entire structure, especially where specific Official Plan policies apply, as is the case here.

[19] The Applicant/Appellant's interpretation and stated relevance of the *Saint-Romuald* case is incorrect according to counsel for the Township, who maintains that the change in use principle quoted pertains to whether the acquired right is lost as a result of a change in use that alters the use such that it represents a difference in kind, or creates such adverse impacts that it is effectively a different type of use. This relates to what the Applicant/Appellant can modify as of right without an application for expansion under s. 45(2).

[20] The Township does not agree with the proposition advanced by the Applicant/Appellant that when evaluating an application to expand a legally non-conforming use, only the expansion is at issue. The Applicant/Appellant's argument that a municipality is prohibited from imposing any restrictions on the expansion of a legal non-conforming structure is not supported by the jurisprudence according to counsel for the Township. The decision in *Re TDL Group Corp. 2009 CarswellOnt 7336*

(OMB) (“*TDL Group*”) was upheld on appeal to the Divisional Court in *Re TDL Group Corp. 2009 CarswellOnt 7168* (Ontario Divisional Court) and *Asgharzadeh*, which recognize that landowners can rebuild within the same building envelope as of right, but do not go as far as stating that an application under s. 45(2) can only consider the portion of the building that constitutes an expansion. In *TDL Group*, the OMB considered a demolition and rebuilding of a property within the same footprint and held that a zoning by-law cannot extinguish what a landowner is permitted to rebuild as of right. In *Asgharzadeh*, the OMB considered a development that was only larger due to an increase in height, within the same footprint. The OMB only referred in passing to the “impact of the enlargement” but went on to consider the impact of both the location and design of the proposed structure. These cases do not stand for a proposition that the portion of the footprint that is enlarged can somehow be isolated from the rest of the new structure.

[21] Section 45(2) of the *Act* establishes a separate test that governs the expansion of a legal non-conforming structure, and there is no basis in law to argue that the discretion of the Committee of Adjustment, or this Tribunal on appeal, is constrained to only that portion of the structure being expanded.

[22] Counsel for the Township refers to s. 3(5) of the *Act*, which provides that the Application must be consistent with the PPS and relies on Mr. Norwood’s evidence, that the proposed development does not conform with the PPS, particularly sections 1.1.1(c) and (h); 1.6.6.7; s. 2.2; and s. 2.6.1. This evidence was supported by Mr. Yee who stated that the proposal does not improve the ecological functions and biological connectivity of the natural features (primarily Otter Lake) and that it is possible on the subject lot to improve the natural functions as there is ample room to relocate the dwelling.

[23] The Application does not represent “good planning” and is not desirable for the appropriate development of the subject property. What is appropriate or desirable is not measured subjectively through the eyes of the landowner, as there would never be a

circumstance where the landowner would consider their proposal undesirable. The Tribunal instead must consider whether the proposed expansion and the resulting impact on land use and policy is in the public interest.

[24] Due to the lack of conformity with the Township and United Counties of Leeds and Grenville (“County”) Official Plans, the proposal is not desirable for the appropriate development of the subject property and, thus, does not constitute “good planning”.

[25] The public interest is expressed in the Township’s land use planning documents which set out the reasonable expectations for development and redevelopment. The Official Plan also seeks to protect water quality and wildlife habitat associated with the 30 m setback. This is a matter of the public interest that must be considered in waterfront redevelopment applications.

[26] The proposed development does not conform with sections 3.1; 3.3; 4.0; and 4.4.1. of the County Official Plan Sections or sections 2.2.2; 2.2.3.2.1; 2.2.3.2.3; and 2.23.1 of the Township Official Plan according to Mr. Norwood.

[27] Section 2.2.3.2.1 of the Township Official Plan provides that development or site alteration such as filling, grading and excavating shall occur a minimum distance of 30 m from the normal high water mark of any water body. Section 2.2.3.2.3 provides that development or site alteration may be permitted less than 30 m from a water body in situations where existing lots or existing developments preclude the reasonable possibility of achieving the setback.

[28] Both Mr. Norwood and Mr. Yee testified that there is no physical constraint on the lot that precludes the reasonable possibility of achieving the required setback given that alternate locations on the subject property exist where the proposed development could be located that complies with the 30 m setback (or better complies with the setback). Specifically, they maintain that the development could be located in the area that is already proposed to be cleared for the new septic system. Mr. Yee opined that the new

septic system could then be located in the area outside the area designated as Significant Woodland with minimal tree removal required.

[29] Since there is a reasonable possibility of achieving the 30 m setback, the proposed development in the proposed location does not comply with the Official Plan because:

- the impact on the water quality and aesthetic of Otter Lake of building within the required 30 m setback affects all waterfront property owners as they all share an equal interest in the water quality and aesthetic of Otter Lake;
- setting a precedent of permitting building within the 30 m setback despite the requirements of the applicable Official Plans would result in significant impacts on the community of waterfront property owners and the cumulative impact on the ability to achieve the goals of the Official Plan would be eroded if the application is allowed; and
- the evidence of Mr. Yee demonstrates that the reduction in setback from the water is likely to have an adverse impact on water quality and reduces the required 30 m vegetated buffer from the water, which includes important wildlife habitat.

[30] In summary, the Township's argument was that the proposed development will create unacceptable adverse impacts and is not desirable for the appropriate development of the lot. Furthermore, it is not good planning to ignore the important public policy protections established in the Township Official Plan where a reasonable alternative location exists.

FINDINGS

[31] The Tribunal has carefully considered all of the evidence as well as the submissions of counsel and finds that the appeal should be allowed for the reasons that follow.

[32] The Tribunal will deal first with the Township's argument respecting *issue estoppel*. There is no merit to this argument, it is quite clear from the evidence before the Tribunal that the same question has not been decided, and that the Application differs from the previous application that was before the OMB in 2011. Section 45(1) of the Act prescribes an entirely different test than does s. 45(2), involves different considerations, and does not require the type of balancing required by s. 45(2). Accordingly, that argument is rejected.

[33] Section 45(2)(a)(i) of the *Act* reads as follows:

Other powers

(2) In addition to its powers under subsection (1), the committee, upon any such application,

- (a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,
 - (i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or ...

[34] The parties agree that an application under s. 45(2) must be evaluated on the basis of:

- Whether the application is desirable for appropriate development of the subject property; and

- Whether the application will result in undue adverse impacts on the surrounding properties and neighbourhood.

[35] While counsel for the Township takes the position that the errors of its witnesses with respect to the correct evaluation of the Application should have no bearing on the Tribunal's assessment of their credibility, the Tribunal in this case cannot however ignore the consistent misinterpretation of the relevant statutory and planning instruments taken into account when evaluating which witnesses' evidence it should prefer.

[36] Firstly, the Tribunal prefers Mr. Chown's evidence over that of Mr. Norwood and agrees with counsel for the Applicant/Appellant's argument that Mr. Norwood's insistence for some time that the Application should be evaluated under s. 45(1) is incorrect. Furthermore, he provided the Committee of Adjustment with incorrect advice based on this incorrect interpretation of the Act; and took the position on direct examination that the tests prescribed under s. 45(1) may guide an analysis of an application under s. 45(2), but later admitted under cross-examination that there was no statutory basis for this position.

[37] Secondly, the Tribunal also prefers the evidence of Ms. Snetsinger over that of Mr. Yee and agrees with counsel for the Applicant/Appellant's argument that his insistence that the Application should be evaluated under s. 45(1), despite clear language in the Act to the contrary is also incorrect. Furthermore, he took the position on direct examination that the tests prescribed under s. 45(1) still apply to an application under s. 45(2), before admitting under cross-examination that there was no statutory basis for this position. He also based his evaluation of the Application, with a hypothetical alternative development, despite admitting on cross-examination that there is no basis for this position.

[38] The Application proposes to demolish the existing single detached dwelling, and to reconstruct a new dwelling to be used for the same purpose. The new dwelling will have a slightly expanded footprint, with the expansions not to exceed 590 sq ft. The

evidence shows that the total building footprint expansion on the Property will be approximately 400 sq ft when the demolition of existing smaller buildings on the subject property is factored in. In addition, the reconstructed dwelling will be moved approximately 2 m further from the shoreline, reducing the degree of intrusion into the 30 m shoreline setback.

[39] The evidence shows that at the time of construction, there was no minimum shoreline setback mandated for the subject property. The shoreline setback for the existing dwelling ranges from approximately 46 ft (14 m) at the northeast corner to approximately 90 ft (27.4 m) at the southeast corner.

[40] The parties agree that a landowner is entitled to demolish and reconstruct a legally nonconforming structure within the same building envelope as of right. The Township's argument however completely fails to account for the common law protections of landowner's rights to the reasonable evolution of nonconforming rights as outlined in previous decisions of the OMB and this Tribunal including the appropriate analysis to be undertaken under s. 45(2).

[41] Mr. Chown's evidence was that an application to expand a nonconforming use or structure under s. 45(2) is precisely that – an application to expand and when evaluating impact, it is improper to examine anything that does not alter or expand the nonconforming use or structure. A landowner therefore only requires permission under s. 45(2) to expand a legally nonconforming structure and does not require permission to demolish and reconstruct a legally nonconforming structure within the same envelope.

[42] Given that permission is only required with respect to the expansion, the Tribunal agrees that there is no basis to evaluate the impact of portions of a building that are reconstructed as of right. Accordingly, undue adverse impact should be determined only with respect to the proposed additions to the existing nonconforming structure.

[43] The Tribunal agrees with Mr. Chown's opinion that the Official Plan is not a proper consideration when evaluating an application under s. 45(2), since there is no basis in the language of the Act for such consideration.

[44] The Tribunal agrees that the Supreme Court in *Saint-Romuald* plainly states that the reasonable expansion of a nonconforming use or structure is protected, so long as it does not result in undue adverse impacts on the surrounding neighbourhood. The OMB recognized in *Asgharzadeh* that this evaluation represents the litmus test for applications under s. 45(2).

[45] However, to the extent that a planning instrument, including an Official Plan, seeks to impose criteria for expansion of nonconforming uses that are so stringent as to not allow for the type of balancing required by *Saint-Romuald*, those instruments are *ultra vires* and should be given no force and effect.

[46] In this case, the Township's Official Plan purports to preclude all development (including the expansion of a nonconforming structure) within the 30 m setback, unless compliance with the setback is impossible. This does not allow for any of the balancing required by *Saint-Romuald*, and it is the Applicant's submission that these provisions of the Official Plan are *ultra vires*.

[47] Under s. 45(2), expansion of a nonconforming structure should be permitted if the expansion is desirable, and will not result in undue adverse impacts to the surrounding neighbourhood as set out by the Court in *Saint-Romuald*. Adverse impacts are only undue if they are established by objective evidence, and are sufficient to override the acquired rights. The evidence before the Tribunal plainly demonstrates that the Application will not have any undue adverse impacts on the neighbourhood that can be demonstrated by objective evidence.

[48] With respect to the "aesthetic" impacts on Otter Lake, all witnesses agreed that neither the existing dwelling nor the proposed addition are or will be visible from

abutting properties, or from Otter Lake. It is also quite clear that the proposed addition will not have any visual impact on the surrounding neighbourhood.

[49] With respect to environmental impacts, the Township's concerns are not supported by the evidence. The setback from the shoreline will not be reduced but will be maintained.

[50] Furthermore, both Ms. Snetsinger and Mr. Yee agreed that the modernization and relocation of the septic system outside the 30 m setback will represent a significant improvement in terms of environmental impact over the current septic system. They further agreed that the modernization and relocation may actually improve the water quality in Otter Lake. Mr. Yee admitted on cross-examination that he had no evidence of any adverse impacts that would be caused specifically by the proposed additions.

[51] The Township's argument that any proposal that does not comply with the 30 m setbacks set out in the Township and County Official Plans will have adverse impacts on the lake in the absence of any actual objective evidence of adverse impacts is rejected by the Tribunal. The Tribunal requires pertinent objective evidence to make such a finding.

[52] The Tribunal agrees with Mr. Chown's opinion that the proposed development conforms with the criteria for evaluating impacts set out in s. 2.5.1 of the Township's Official Plan.

[53] The Tribunal accepts the uncontested evidence of Ms. Snetsinger, adopted by Mr. Chown, that the proposed development is consistent with policies 2.1.4, 2.1.5 and 2.1.8 of the PPS as it will not result in any adverse impacts to provincially significant wetland, and minimal or no adverse impact on significant woodland.

[54] The existing dwelling occupies approximately 2% of the lot area of the subject property, which is heavily treed. It was the evidence of Mr. Chown and Ms. Snetsinger that the existing dwelling is invisible to adjoining properties, and that it is invisible from

all parts of Otter Lake. The Township's witnesses Messrs. Yee and Norwood agreed with this characterization of the existing dwelling's lack of visibility with Mr. Norwood also agreeing that the proposed replacement dwelling would be equally invisible. The proposed additions will result in a lot coverage of 2.31%, and a floor space index of 2.3%, when the ZBL prescribes maximums of 10% and 15%, respectively.

[55] Under these circumstances, the proposed development cannot reasonably be characterized as a scale of intensification sufficient to bring about a change in use, but rather, a modest intensification of an existing use, which the Supreme Court in *Saint Romuald* has recognized "will rarely be open to objection."

[56] The Township adduced no evidence on the specific impact of the proposed expansion and there is no evidence before the Tribunal that the proposed development will create undue adverse impacts on Otter Lake, the neighbours or the municipality as a whole. The evidence from Mr. Chown, Ms. Snetsinger, Mr. Yee and Mr. Norwood was that the proposed additions will not be visible from the lake or from the neighbouring properties. Mr. Yee admitted on cross-examination that he had no evidence of any adverse impacts that would be caused specifically by the proposed additions.

[57] The Tribunal finds that the evidence before it shows that the proposed development will have positive impacts on the surrounding area and neighbourhood given that the Application proposes to shift the dwelling approximately 2 m further from the shoreline, thereby reducing the degree of nonconformity. Moreover, the proposed development will involve replacement of the existing old septic system (located approximately 20 m from Otter Lake) with a modern system that will be located entirely outside the 30 m setback. Ms. Snetsinger's opinion was that the replacement and relocation of the septic system outside the 30 m setback would result in a significant improvement over the existing situation, and may contribute to water quality in the lake. Mr. Yee agreed with this evidence under cross-examination.

[58] Although the Applicant/Appellant argues that the intent and purpose of the Township's Official Plan is not a relevant consideration in the context of s. 45(2)

application, it is the evidence of Mr. Chown that the proposed development nonetheless conforms with the criteria for evaluating impacts set out in s. 2.5.1 of the Official Plan. The Tribunal prefers his evidence on this issue over that of Mr. Norwood.

[59] The Township's argument that the application could dilute "policy support for maximized water setbacks wherever possible" is not a valid land use planning ground or consideration. In *Foster v. Toronto (City) Committee of Adjustment, 1996 CarswellOnt 5837 (OMB) ("Foster")*, the Board highlighted the limits of precedence as an argument, and reinforced that "decisions of this Board are case-by-case, with each development being assessed on its own merits".

[60] The Township's witnesses appeared to suggest that the entire dwelling and the septic system could be located in the area currently proposed to be cleared for the new septic system outside the 30 m minimum setback. The Tribunal agrees with Mr. Chown and Ms. Snetsinger's evidence that the relocation of the entire dwelling outside the 30 m setback would have a "domino effect," whereby, this would require that a greater amount of significant woodland be cleared than what is currently proposed in order to accommodate the new dwelling, the new septic system, and, require that a greater amount of significant woodland be cleared than what is currently proposed in order to accommodate parking for the new dwelling, and, would result in the entire development, and in particular the septic system, being located closer than what is currently proposed to the Otter Creek-Hutton Creek Wetland Complex, an identified natural heritage feature, and removing intervening natural vegetation cover.

[61] There is no basis in law to justify refusing the Application simply because the possibility of a hypothetical alternative for development may exist. The Tribunal finds based on the evidence of Mr. Chown and Ms. Snetsinger that the alternative proposed by the Township would result in greater adverse impacts than the proposed development.

[62] The Tribunal finds that the proposed expansion is appropriate given that this is a modest expansion of the existing dwelling, which maintains the same use and that after

the additions, lot coverage will be only approximately 23% of what is permitted under the zoning by-law.

[63] Furthermore, both Ms. Snetsinger and Mr. Yee agreed that the modernization and relocation of the septic system outside the 30 m setback will represent a significant improvement in terms of environmental impact over the current septic system. They further agreed that the modernization and relocation may actually improve the water quality in Otter Lake. Mr. Yee admitted on cross-examination that he had no evidence of any adverse impacts that would be caused specifically by the proposed additions.

[64] The Tribunal agrees with counsel for the Applicant/Appellant's argument that this test must be applied in a manner that balances the rights of the landowner to the reasonable evolution of their nonconforming right with the interests of the community: where a pre-existing use has been modified, expanded or extended but is still within the same use category, the test is to balance the interests of the private property owner with the interests of the community.

[65] In light of the fact that the Applicant/Appellant in this case possesses an absolute right to rebuild the existing dwelling within the same building envelope, an assessment of the Application under s. 45(2) must pertain only to the proposed expansion and the Tribunal agrees with Mr. Chown that the intent and purpose of the Official Plan is not a relevant consideration in an evaluation of a s. 45(2) application.

[66] The Tribunal agrees with the reasoning of the Board in the *Foster* case referred to above, where the Board explained that the specific purpose of s. 45(2) is to permit the enlargement of nonconforming rights, which by virtue of a new by-law are no longer permitted. As such, it would be illogical to import a requirement that the enlargement maintain the intent and purpose of planning instruments that were enacted after the use began:

42 In the absence of the sort of direction provided by s. 45(1), board jurisprudence has generally applied good planning principles in deciding whether permission should be granted under s. 45(2)(a)(i). That analysis

has involved consideration of questions similar to those posed by the third and fourth parts of the s. 45(1) test: is the proposal desirable for the appropriate development of the subject property? Is its impact upon surrounding uses unacceptably adverse? ...

43 Counsel for the association argued that the board should also look to the intent and purpose of the by-law when considering an application for permission under s. 45(2)(a)(i). As I said earlier, the proposed development in this case passes that test. However, I find problematic the notion that this is a test which ought to be applied in the context of s. 45(2)(a)(i), particularly in light of the evidence about the purpose of this provision given by the association's planner, with which I found little to disagree. He testified that s. 45(2)(a)(i) is specifically intended to allow for the continuation and expansion of uses which, in virtue of a new by-law, are no longer permitted. For example, it could be invoked by an older industrial use to facilitate an expansion in a neighbourhood later developed, and ultimately zoned, for residential purposes.

44 I am sceptical that such an expansion could be credibly characterized as maintaining the "general intent and purpose" of a zoning by-law which clearly intends the entire area to be residential. I am also inclined to suspect that quite a number of otherwise seaworthy s. 45(2)(a)(i) applications would run aground on the shoals of the intent and purpose of the applicable zoning by-law. It seems to me that s. 45(2)(a)(i) is, at least in part, designed to permit some development that would not pass the second test under s. 45(1). I therefore cannot endorse counsel's suggestion of importing the intent and purpose of the by-law from s. 45(1) into s. 45(2)(a)(i).

[67] The Tribunal agrees with counsel for the Applicant/Appellant that although the Tribunal's analysis in *Foster* focuses on the intent and purpose of the zoning by-law, the same logic applies with respect to the Official Plan. Section 45(2) is intended to permit the expansion of a nonconforming use that long predates the official plan. It is illogical to import a requirement into s. 45(2) that the expansion complies with the intent and purpose of the Official Plan, and there is no basis in the Act for doing so.

[68] In *Stevens v. Hamilton (City)*, 2018 CarswellOnt 9030 at paragraph 22, the Tribunal recently confirmed that the test under s. 45(2) does not include consideration of the OP:

when adjudicating a request for an extension or enlargement of a legal non-conforming use under s. 45(2) of the Act, the Tribunal must determine whether the factors set out in that section are present and whether the proposed relief represents good planning. Section 45(2) appeals are not subject to the four-part test associated with requests for minor variances under s. 45(1).

[69] In conclusion, the Tribunal is satisfied that the application meets the tests under s. 45(2) and should be approved.

ORDER

[70] Accordingly, the appeal is allowed and the application is hereby approved.

“R.G.M. Makuch”

R.G.M. MAKUCH
VICE-CHAIR

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Local Planning Appeal Tribunal

A constituent tribunal of Ontario Land Tribunals

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