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Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Ambrose Moran and Jack's Lake Cottagers' Association have appealed to the Ontario Municipal Board under subsection 34(19) of the Planning Act, R.S.O. 1990, c. P.13, against By-law 1994-44 of the Townships of Belmont and Methuen

COUNSEL:

W. H. Fox

for Robert Kyle

P. Millard

for Jack's Lake Cottagers' Association

MEMORANDUM OF ORAL DECISION delivered by B. A. HEIDENREICH
on July 6, 1995 and ORDER OF THE BOARD

The Board at the hearing allowed the appeal and ordered that By-law 1994-44 be repealed. There was insufficient time to do justice to the evidence presented and provide detailed reasons. What follows are the Board's reasons for that decision.

The matter before the Board has a long involved history that briefly needs retelling to understand the nature of the application and the appeal by the Jack's Lake Cottagers' Association (J.L.C.A.). Through the evidence of Stephen Kaegi, Clerk-Treasurer for the Townships of Belmont and Methuen and Robert Kyle, the land owner, this is the Board's understanding of the events.

Mr. Kyle in 1989 purchased a property on Jack's Lake which contained a main cottage of 588 square feet with two bedrooms and full facilities and an accessory building on the waterfront of 461 square feet which he calls a second cottage, but has been described by

an abutting long time neighbour as a boathouse. Without obtaining a building permit, Mr. Kyle sided this structure, put on an upper deck, enlarged the porch, put in windows, sliding glass doors and a 6 X 15 foot addition to house a sauna and bathroom. Inside, the wiring was replaced; pine floors and walls were added. Construction was stopped by the Chief Building Inspector who suggested that a minor variance was necessary. The variance application was submitted but there is no indication on the application what is being applied for, although it can be presumed that permission was being sought to complete the structure as planned.

There were strong objections to the variance application by the Ministry of Natural Resources (M.N.R.) and the application was denied by the Committee who considered the construction of a second unit on a single lot "far from a minor variance". The decision was appealed to the Ontario Municipal Board and the appeal dismissed as the application could not be found to conform to the intent of the municipalities' Zoning By-law and Official Plan.

After meeting with the Townships' planner and lawyer, Mr. Kyle applied for a consent to sever the lot so that each unit would be located on a separate lot. Neither the retained nor severed parcel complied with the Zoning By-law in terms of frontage and front yard setback requirements, nor did the dwelling units nor the proposed lot size conform to minimum lot size and gross floor area specified in the Plan. The consent application was granted conditional on rezoning the two parcels to a "special seasonal residential". It is worth noting that the Planning Advisory Committee of the Townships of Belmont and Methuen recommended that the consent application be denied as the water frontage does not meet the Official Plan requirement of 150 feet per lot. It is also worth mentioning that no ratepayers appeared to be aware of the severance application as notification is not required.

By-law 1994-44 which is now before the Board proposes to rezone the lot that contains the converted accessory dwelling to "Special District 27 (S.D.27)" which would permit a minimum lot frontage of 98 feet (30 metres) and a minimum front yard of 10 feet

(3 metres); the main cottage would be rezoned from "Seasonal Residential Zone (SR)" to "Special District 28 Zone (S.D.28)" to permit a minimum lot frontage of 98 feet (30 metres), a front yard of 25 feet (7.6 metres) and a side yard on the east of 8 feet (2.5 metres). By-law 1994-44 was passed by Council and subsequently appealed by Ambrose Moran and the Jack's Lake Cottagers' Association, an incorporated body since 1950.

The case in opposition to the application centred around the planning evidence of Peter Josephs, a qualified consulting planner, and the evidence of Mr. Moran and Neill Lanz, a neighbour abutting to the east, who is also a Director of the Jack's Lake Cottagers' Association.

It was Mr. Lanz's evidence, as a neighbour for forty years to the subject site, that the converted building was always a boathouse with rustic sleeping quarters above. It had no living quarters, furniture or sanitary facilities except an outhouse that was the original outhouse for the main cottage. He described the structure as a typical boathouse for the area used to store boats during the winter. With the conversion of this building into the principal cottage, Mr. Lanz's concerns centre on:

- (a) overdevelopment of the lake, particularly as each unit under the By-law is permitted to erect an accessory building up to 50% of the total floor area of the main building;
- (b) conformity of the proposed By-law to certain policies of the Official Plan;
- (c) the precedent set by the proposal;
- (d) strong opposition to the By-law by the Jack's Lake Cottagers' Association.

On the basis of Mr. Lanz's evidence the Board has to accept that the converted structure is not a legal non-conforming use. While Mr. Kyle may have thought he was purchasing two cottages on one lot in 1989, the structure clearly did not meet the By-law definition of dwelling unit even at that time and his counsel confirmed that he did not have

sufficient evidence to substantiate that it had been a dwelling unit prior to the passing of the By-law and therefore could be considered legal non-conforming. The problem clearly has been created by the current owner by his conversion of an accessory structure into a second dwelling unit.

The appellants' consulting planner had numerous concerns with the amending By-law and the planning merits of the application. It was his opinion that the By-law failed to conform to the policies of the Official Plan; that the amending By-law, as worded, does not reflect the actual ground measurements; that what is proposed is not good planning as a site servicing analysis was not undertaken as is required under Section 3.5.11.4 of the Official Plan prior to a consent being granted and the impact of approving the By-law amendment would be to significantly increase the development potential along the shoreline.

Providing planning evidence for the applicant was Brian Weir, Director of Planning for Peterborough County, who appeared under summons and Karen Ellis, consulting planner for the Townships, who reported to Council on the original rezoning application. Both these planners felt that the amending By-law conformed to the Townships' Official Plan. No By-law can be passed that fails to conform to the general intent of the Official Plan, so this issue will be dealt with first.

The site is within the Official Plan's "Rural" designation and subject to Section 3.5.11, the Plan's "Seasonal Residential" policies. There are two policies that will be quoted in full as it was the interpretation of these policies that created a conflicting planning opinion.

"Section 3.5.11.4 Lot Dimensions

The minimum lot area shall be determined by the results of a site servicing analysis in accordance with the policies contained in Section 5.6 of this Plan, *but in no case shall be less than 0.3 hectares (.74 acres) with a minimum lot frontage of 46 metres (150 feet)* on a public road or a navigable waterway . . . (Board's emphasis)

"Section 3.5.11.5 Floor Area

The minimum gross floor area of living space within the dwelling shall not be less than 74 square metres (796 square feet)."

Both lots have a proposed frontage of 98 feet. One lot is less than .3 ha minimum size area and neither unit meets the Official Plan gross floor area (GFA) minimum of 74 square metres (796 square feet) or the Zoning By-law GFA minimum for a seasonal dwelling of 800 square feet.

It was Mr. Josephs' opinion that the figures as presented in these policies were absolute minimums, not subject to interpretation. Other policies in the Plan referring to lot size allowed a certain degree of flexibility by qualifiers such as "appropriate size". For seasonal residential, however, the wording is extraordinarily specific and in his opinion not subject to interpretation or flexibility. The reasons for such a restrictive policy he felt was to regulate density to maintain the natural aesthetics of the area and protect the water body. Policies in the Plan such as Section 3.5.11.6.5 "Seasonal residential development shall be of a scale that permits it to blend into its natural setting." and Section 3.5.11.6.6 "Seasonal residential development shall be designed to preserve, as much as possible, a site's physical attributes, such as tree coverage, varying topography, scenic views etc., for the benefit of future residents." were used to support this opinion. Mr. Moran confirmed this evidence as he described to the Board the involvement of the Cottagers' Association in the Official Plan process and their efforts to protect the lakes from overdevelopment with extremely restrictive frontage and lot requirements.

Mr. Weir disagreed. He considered Official Plans as principally guiding documents and used Section 9.2 which states "all minimum lot area, lot frontage and floor area criteria herein be considered as approximate and not absolute" as the basis for considering a proposed 98 foot frontage to approximate a 150 foot frontage requirement. It was his

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opinion that one had to look at the existing situation and see what could potentially happen as a result and in this case he saw two existing cottages on a single lot and did not feel that the severance of the lot and the exception By-law would have an impact on the residents.

He did admit that he did not look at the details of the application or do a site inspection prior to his planning report. He also indicated that he was not aware of the Townships' Planning Advisory Committee report and admitted that the County Land Division Committee was not made aware of Section 3.5.11.4 of the Townships' Official Plan and its applicability to these lots. His planning report erroneously states the application is in conformity with the Townships' Official Plan because the lots conform with Section 6.3.2. This particular policy happens to cover "Rural Residential" infilling while the proposal is for a "Seasonal Residential" consent covered by Section 6.5 of the Plan. Section 6.5 clearly states that any seasonal residential consent application is subject to Sections 3.5.11, 6.1 and 6.2 of the Plan. The Board mentions this because it was Mr. Weir's opinion that as a consent had been granted and not appealed, this By-law amendment should be approved because "it implements the Land Division Committee decision". The Committee's decision was not made with the correct facts before it.

The Board, however, on hearing the evidence of Mr. Weir and Ms Ellis is not convinced that appropriate planning rationale has been applied and is somewhat concerned with the rather cavalier approach that has been taken with the Townships' Official Plan. As Mr. Moran and Mr. Millard pointed out under cross-examination:

- The County Land Division Committee in making its decision on the severance application did not have before them the appropriate policies of the Townships' Official Plan, namely Section 5.6.3 which requires that a site servicing report by a qualified engineer be filed with a consent application and Section 3.5.11 which are the seasonal residential policies that have specific lot dimensions and eight specific

development criteria including a referral to Section 5 of the Plan that contain the Townships' general development criteria;

- Mr. Weir was not aware that Section 3.5.11 applied to the application and admitted he had done no assessment of impact. Pressed he considered that Section 3.5.11 and 5.63 "should not be ignored, but should be interpreted broadly."

The Board was not able to accept as creditable the planning evidence of this witness on this particular application.

Mr. Weir is also of the opinion that "Official Plans are not set in stone; they have a built-in flexibility that gives Council and staff of a municipality some freedom of interpretation when making decisions on land use matters." This is not in dispute. The key issue with respect to this application is how much flexibility is there to an Official Plan policy that categorically says "but in no case shall be less than . . .". In the report of Ms Ellis to Council, she neglects to quote the exact wording of this policy. Rather she chooses to describe the section (erroneously referred to as Section 3.5.1.11 of the Plan) as follows:

"This section of the Plan states that single family seasonal residential uses are permitted in the Rural designation on lots that are 0.3 hectares (.74 acres) in size with frontage requirements of 46 metres (150 feet) on a public road or navigable waterway. Although these lot area and frontage requirements generally represent acceptable minimums, Section 9.2 of the Plan indicates that all minimum lot area, lot frontage and floor areas contained in the Plan are considered as approximate not absolute."

Unfortunately, there is no recognition or analysis in this report as to the very absolute wording of Section 3.5.11.4 and the more general wording of other sections of the Plan that deal with lot size but are not applicable to this application. These include Section 3.5.6.2, 3.5.7.3.1, 3.5.8.5.1, 3.5.9.3.1, all of which address lots as being of an "appropriate size".

Only lot dimensions for estate residential uses and seasonal residential uses specify that the appropriate sized lot must depend on the results of a site servicing/hydrogeological analysis and then establish absolute minimums prefaced by "but in no case shall . . .". This is such unusual wording for an Official Plan that it should give all planners a reason to pause and ask the question, "why?". Yet there is no mention of this wording in the planning report to Council. Nor is there any discussion as to whether the "flexibility" of an Official Plan extends to permitting only two thirds of the frontage requirement.

In the end analysis, the Board agrees with Mr. Josephs that the wording of Section 3.5.11.4 is so unusually imperative that it is not intended to be treated as a flexible number to be broadly interpreted. This is a new Official Plan and the evidence as presented by Mr. Moran, who was actively involved in the Official Plan process as a Director of the Jack's Lake Cottagers' Association, confirms that this policy was deliberately specific to protect the integrity of the lakes.

While this is the Board's interpretation based on the planning evidence presented, the Board is also mindful of the Court's interpretation of the word "shall". As counsel for the appellants argued using a Supreme Court of Canada decision Reference re Manitoba Language Rights [1985] 1, S.C.R. 721 and the following passage from St. Peters Estates Ltd., v Prince Edward Island (Land Use Commission) 2 M.P.L.R. (2d) 58 (P.E.I.T.D.), "shall" is presumptively imperative.

"On the highest of judicial opinion, then, it can be said that when a statute ordains that something "shall" be done by this or that person, or by this or that authority, it is mandatory that it be done, that the words of the statute must be obeyed; there is nothing permissive or discretionary about it . . ."

It is on this basis that the Board finds the By-law not in conformity with the intent of the Townships' Official Plan.

There are other issues that need to be addressed. By-law 1994-44, as drafted, would not resolve all of Mr. Moran's problems. The front yard as defined in By-law 1977-25 should be measured from the high water mark to the deck which constitutes a "structure". It is not appropriate to measure to the wall of the unit. This was agreed to by both the appellants' planner and the municipalities' consulting planner and significantly increases the deviation from the By-law standard of the front yard.

The Board must also mention the underlying basis for the J.L.C.A. opposition to the application as expressed by Mr. Moran. The cottagers, through their Official Plan, are attempting to preserve the lake and natural ambience through a policy that effectively limits density. The Townships' Zoning By-law and Official Plan both set a minimum frontage as 150 feet. The proposal, if approved, could set a precedent that has the potential to significantly increase the density in this part of the lake where the lots are all of a similar size. There was no consideration of the planning impacts of this by the County planner or the municipalities' planner.

Counsel for the applicant argued and the Board is fully aware, that all applications must be considered on their individual merit, but the Board does not agree that this is "a special case; a rare situation that does not set a precedent." This is a situation made by the owner, not unwittingly inherited, and it does have, if approved, the ability to set a precedent for this area of the lake. Mr. Weir was fully prepared to show the Board the lots around Jack's Lake that were similar in frontage to the lots proposed. The Board, however, would not admit the evidence because he was unable to differentiate what lots were created prior to the passing of the Townships' Comprehensive By-law and new Official Plan. The Board was also concerned with an attempt to justify after the fact, the planning merits of the application when Mr. Weir agreed in chief that he had not reviewed the application in detail nor undertaken any planning impact studies prior to his report to the Land Division Committee. Lawyers tend to argue that the individual situation is unique and precedent

cannot be established; planners tend to fall back on precedents in establishing the planning merits of an individual situation.

In this case, the desire to resolve an existing problem created by the owner appears to have overwhelmed the planning analysis. It is not for the Board to comment on the other options to the landowner for a situation that clearly cannot be resolved by amendments to the planning documents, but they were all raised at the hearing: relocate the structure (a consolidation of the new building with the main cottage would also resolve its non-compliance with the by-laws minimum GFA), or revert the building back to an accessory building.

These are the detailed reasons for the Board's oral decision on July 6, 1995. The appeal is allowed and the Board orders that By-law 1994-44 be repealed.



B. A. HEIDENREICH
MEMBER