

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



ISSUE DATE: April 27, 2020

CASE NO(S): PL190425

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

Appellant:	Susan Jean Lane
Applicant:	Sara Kate Holling
Subject:	Minor Variance
Variance from By-law No.:	2010-100Z
Property Address/Description:	2220 South Bay Road
Municipality:	City of Greater Sudbury
Municipal File No.:	A0092/2019
LPAT Case No.:	PL190425
LPAT File No.:	PL190425
LPAT Case Name:	Lane v. Greater Sudbury (City)

Heard: February 12, 2020 in Sudbury, Ontario

APPEARANCES:

Parties

Representative

Susan Jean Lane	Self-represented
Sara Kate Holling	Self-represented
City of Greater Sudbury	No one appeared

DECISION DELIVERED BY JOHN DOUGLAS AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This was a hearing in the matter of an appeal to the Local Planning Appeal Tribunal (the “Tribunal”) by Susan Jean Lane (the “Appellant”) of a decision by the City of Greater Sudbury (the “City”) Committee of Adjustment (the “CofA”) to approve an application for minor variance made by Sara Kate Holling (the “Applicant”) for lands known municipally as 2220 South Bay Road (the “subject property”, PIN 73593-0135).

[2] The subject property is a long narrow lot with frontage on Ramsay Lake (the “Lake”) along its north property line. The subject property has street frontage on South Bay Road along its south property line. The subject property slopes down from South Bay Road towards the waterfront at a fairly steep grade until it flattens out for about the last 15 to 20 metres (“m”) to the shoreline.

[3] The Tribunal was advised that access to the subject property and the neighbouring waterfront lots was taken from a road that ran along the original shoreline road allowance approximately 60 years ago or more. The road running along the shoreline road allowance was closed and title to the shoreline road allowance transferred to the lot owners. Access to the subject property, and neighbouring properties, is now taken from South Bay Road.

[4] The subject property is currently improved with an existing three-storey dwelling (the “existing dwelling”) at the south end of the property situated in relatively close proximity to South Bay Road. There is also an existing accessory structure, which includes a sauna, pump house and deck (the “accessory structure”) located by the west property line not far from the shoreline of the Lake.

[5] The Tribunal heard from two lay witnesses in this matter: the Appellant provided evidence in opposition to the proposed variances; and, Joshua Watson, partner of the Applicant, provided evidence in support of the proposed variances.

[6] Given that neither the Appellant nor the Applicant were qualified to provide expert opinion evidence in land use planning, the Tribunal filed and entered a Report to the City's CofA dated August 21, 2019 ("Planning Report") as Exhibit 1.

[7] As set out in its decision, the CofA approved the application for minor variance to provide relief from Part 4, Section 4.2.5 and 4.41.3 and Part 5, Section 5.3 of Zoning By-law No. 2010-100Z ("ZBL 2010-100Z"), as amended, for approval of the following:

- 1) construct a two (2) storey addition, with decks on the north elevation of the existing dwelling, providing a minimum 0.6 m side yard setback for the addition and 0.43 m side yard setback for the decks, where a minimum 1.8 m side yard setback is required for the addition and decks may encroach 1.2 m into the required yard, but not closer than 1.2 m to the lot line;
- 2) approval of the location of the existing three (3) storey dwelling on the subject property maintaining a minimum 0.9 m side yard setback, where a minimum 2.4 m side yard setback is required;
- 3) approval of the location of the existing stairs and landing on the west elevation of the dwelling maintaining a minimum 0.03 m side yard setback, where steps and landings can be no closer than 0.6 m to the lot line;
- 4) approval to rebuild the existing accessory structure, being a sauna, pump house and also, construct an attached gazebo, providing a minimum 0.3 m side yard setback where a minimum 3.0 m interior side yard setback located above the high water mark is required;
- 5) permit the eaves to encroach to the lot line, where eaves may encroach 0.6 m into the required yard, but not closer than 0.6 m to the lot line;
- 6) permission for the clearing of a maximum 80.0% of the shoreline buffer area, where clearing a maximum of 25% of the shoreline buffer area is permitted, be granted.

[8] The variances have been requested with respect to two separate structures on the subject property. One set of variances as noted in paragraph [7] as item numbers 1), 2), 3) and 5) deal with the existing dwelling on the subject property. The requested variances are intended to provide relief from the ZBL 2010-100Z to legalize the existing dwelling where it currently does not conform to standards set out in ZBL 2010-100Z, and to permit a proposed addition and modifications to the existing dwelling. The second set of variances as noted in paragraph [7] as item numbers 4), 5), and 6)

address the accessory structure on the subject property. The purpose of these variances is to permit the replacement and expansion of the existing accessory structure and deck with the addition of a gazebo, in relatively close proximity to the shoreline on the subject property.

[9] When considering an appeal of an application for minor variance, the Tribunal must consider the four-part test set out in s. 45(1) of the *Planning Act* (the “PA”): do the variances maintain the general intent and purpose of the Official Plan (“OP”); do the variances maintain the general intent and purpose of the Zoning By-law (“ZBL”); are the variances desirable for the appropriate development or use of the land; and, are the variances minor? The Tribunal must also be satisfied that the proposed variances would result in good planning in the public interest.

[10] The following is a summary of the issues raised by the Appellant:

- a. concerns about past process and decisions of the City with respect to the subject property. The Appellant indicated that at least one previous owner undertook construction on the subject property possibly without a building permit and/or without inspections during construction. She provided a brief history of previous variances granted for the subject property, in 1975, 1988, 1990 and 2014, which in her opinion were not considered in light of the four tests. The Appellant opined that cumulatively the intent and purpose of the ZBL has been ignored repeatedly.
- b. concerns that the neighbour to the east of the subject property has with respect to the proposed variances and potential impacts that might result if the requested variances are granted.
- c. concerns with respect to the septic system for the subject property.

- d. Concerns regarding potential trespass and property damage to the Appellant's property, as well as the property of the neighbour to the west during construction because of the narrow side yards to the east and west of the existing dwelling, which may force the owners to trespass on neighbouring property.
- e. Concerns about potential environmental impacts related to the replacement and expansion of the accessory building and deck, including: potential impacts on water quality resulting from vegetation removal and the steep slopes on the subject property; potential impacts on vegetation on the Appellant's property, in particular, a red pine near the property line in close proximity to the proposed new accessory building and expanded deck. She also noted that the subject property is located in a vulnerable area near a drinking water source.

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

- a. The Appellant's concerns with respect to process and decision made by the CofA for this application or past applications is not relevant to the Tribunal's disposition in this matter. This is a hearing *de novo* in which the Tribunal will make a decision on the requested variances based on the evidence produced at this hearing.
- b. If the neighbour to the east of the subject property has any concerns with the proposed variances, it is that neighbour's responsibility to appear at the hearing, or have an authorized representative appear at the hearing on their behalf, to seek status before the Tribunal to make those concerns known. The Tribunal was provided no documentation authorizing anyone to speak on behalf of the neighbour.

- c. With respect to the concerns raised by the Appellant regarding the septic system, the Tribunal notes that the Planning Report explains that the addition to the existing dwelling is not large enough to require any change to the size of the existing septic system. There is no variance before the Tribunal with respect to the septic system in this matter.
- d. The Appellant's concerns about potential trespass and damage to their property during construction is not a matter before the Tribunal under s. 45(1) of the PA. There are avenues other than this hearing for the Appellant to address trespass and property damage should they occur at any time.
- e. The Appellant's concerns regarding non-conformity with the OP and ZBL 2010-100Z, potential environmental impacts on the Lake and potential impacts on trees on the Appellant's property are legitimate focused grounds of Appeal by the Appellant.

[12] The Tribunal will address the variances with respect to the existing dwelling, and the variances as they relate to the accessory structure separately with respect to the four tests pursuant to s. 45(1) of the PA, and whether they represent good planning in the public interest.

Variances requested with respect to the Existing Dwelling and proposed addition/modifications

[13] Mr. Watson testified that a number of variances are required to address existing infractions of ZBL 2010-100Z based on past construction by previous owners of the subject property. He advised that the variances requested are intended to legalize the existing dwelling as well as permit the proposed addition and modifications to the dwelling.

[14] The Tribunal has reviewed the Planning Report and noted no concerns raised with respect to the variances proposed, with respect to the existing dwelling or the proposed addition and modifications to the dwelling.

[15] In final submissions, the Appellant acknowledged that their primary concern is with the potential impacts of the expansion of the accessory structure.

[16] Based on the evidence provided by the Applicant, the Appellant, as well as the City's Planning Report, the Tribunal is satisfied that the proposed variances 1, 2, 3 and 5 as they relate to the existing dwelling and the proposed addition and modifications to the existing dwelling: maintain the general intent and purpose of the OP; maintain the general intent and purpose of the ZBL 2010-100Z; are minor and desirable for the appropriate development of the subject property.

Variances required for the proposed replacement and expansion of the accessory structure and deck

[17] The Appellant testified that, in her opinion, the proposed variances with respect to replacement of the accessory structure and expansion of the deck do not maintain the general intent and purpose of the City's OP or ZBL 2010-100Z. She noted that the City's OP speaks repeatedly and clearly to "protected natural areas and healthy lakes and rivers" as part of a healthy community. She noted that this is a consistent theme throughout the OP.

[18] The Appellant testified that there is little vegetation in the buffer area near the shoreline on the Applicant's property. She further testified that the Applicant has removed additional vegetation from the subject property. She is concerned that the lack of vegetation combined with the steep slope on the property will decrease water and nutrient retention on the subject property, which will negatively impact water quality in the Lake.

[19] Mr. Watson testified that approximately 80% of the vegetation near the shoreline had been removed before the Applicant purchased the property. He also testified that the removal of vegetation, from the subject property, the Appellant referred to, were weeds and brush located on the slope in the middle of the property and not within the shoreline buffer. After the brush was cleared, the Applicant replanted the area and put down mulch.

[20] Mr. Watson directed the Tribunal to aerial views of the subject property and neighbouring properties, as well as photos he had taken of the shoreline from the Lake. He pointed out that many of the neighbouring properties have removed more than 25 percent of the vegetation within the buffer zone near the shoreline. Mr. Watson also noted that there are other properties with existing accessory structures in relatively close proximity to the shoreline (distances from the shoreline were not provided).

[21] Mr. Watson provided the Tribunal a copy of a letter from the Nickel District Conservation Authority ("NDCA") dated October 16, 2019 regarding an application made under s. 28 of the *Conservation Authorities Act* ("CAA") to replace the roof on the gazebo and extend the deck to the existing retaining wall at the shoreline. In the letter, the NDCA granted permission for the proposed development or interference based upon the information and drawings provided with the application, subject to five conditions to be cleared by the NDCA.

[22] The City's Planning Report states that staff had reviewed aerial photography of the subject property and noted that the cleared lands at the water located within the shoreline buffer area required under section 4.4.1 of the ZBL are legal non-conforming in nature. This supports the Applicant's claim that the removal of vegetation within the shoreline buffer occurred before the Applicant purchased the property.

[23] Comments from the City's Environmental Planning Initiatives (August 16, 2019) state that:

Vegetation clearing or hard surfacing beyond the City's requirement of a maximum length of 25% of the shoreline of the lot (OP policy 8.4.5) should not be approved for the reasons outlined below.

[24] The reasons set out by the City's Engineering Planning Initiatives for maintaining a vegetated shoreline buffer include the importance of water and nutrient retention on site to reduce the impacts on water quality in the Lake due to nutrient loading.

[25] The Appellant expressed concerns with the proposed design for the replacement accessory structure and deck. Currently, the roof of the existing accessory structure slopes from a central peak to the north and south. The roof of the proposed replacement accessory structure slopes to the east and west and the eaves of the replacement structure are proposed to be as close as 0.6 m from the property line. As a result of the proposed east/west slope of the roof, the Appellant is concerned that precipitation will now flow from the roof onto the Appellant's property.

[26] The Appellant was also concerned that the proposed expansion of the accessory structure and deck (with the gazebo), which is proposed to be located as close as 0.3 m from the property line, where a minimum 3.0 m interior side yard setback is required by the By-law, may impact the root systems of trees located on the Appellant's property, which are growing in close proximity to the property line. The Appellant was most concerned about a mature Red Pine, which she had planted with her father. There is no testimony or evidence before the Tribunal, from a qualified arborist (or related profession) addressing whether or not existing trees on the Appellant's property, near the proposed replacement accessory structure and expanded deck, would be impacted by the proposal or whether any potential impacts could be mitigated.

[27] Mr. Watson testified that the City's CofA had considered and decided in favour of the proposal. He noted that the Appellant had raised the same concerns at the CofA hearing and the CofA had still decided in favour of the application. Mr. Watson opined that all the proposed variances meet the four tests pursuant to s. 45(1) of the PA.

Analysis and Findings regarding the variances required for the proposed replacement and expansion of the accessory structure and deck.

[28] Based on the photos provided by both the Applicant and the Appellant, the Tribunal notes that the existing accessory structure and deck on the subject property already occupy a significant percentage of the shoreline buffer. Based on the sketches provided, it appears to the Tribunal that as much as 50% of the shoreline buffer would be covered by the new accessory structure and deck if the variances were approved.

[29] With respect to the NDCA letter, the Tribunal notes that the permission granted by the NDCA is under s. 28 of the CAA not the PA. The tests for a permit issued under s. 28 of the CAA are different than those for a minor variance issued under s. 45(1) of the PA. The NDCA letter states that “this permit does not relieve the applicant from the responsibility of acquiring any other approvals required under federal, provincial or municipal legislation.”

[30] With respect to the removal of vegetation and accessory structures located within the shoreline buffer, one of the key pieces of evidence considered by the Tribunal were the Google images and photos of neighbouring shoreline properties provided by the Applicant. Based on those images, the Tribunal accepts the Applicant’s contestation that more than 25% of the vegetation in the shoreline buffer has been removed from many of the lots in this shoreline community. The Tribunal also observes that, as testified to by the Applicant, there are accessory structures on some of the neighbouring properties that appear to be located within the shoreline buffer. However, it does not appear that the accessory structures on the neighbouring properties occupy anywhere near the nearly 50 percent cover of the shoreline buffer that would result should the variances for the subject property be approved. Further, the Tribunal heard no evidence with respect to whether the accessory structures on neighbouring properties also predated the City’s current OP and ZBL 2010-100Z. Accessory structures that may have been allowed under past OPs and ZBLs, may not be permitted under the updated OP and ZBL 2010-100Z.

[31] Based on the evidence, the Tribunal understands that the purpose of limiting vegetation clearing or hard surfacing beyond the City's requirement of a maximum length of 25% of the shoreline of the lot as per OP policy 8.4.5, is to protect the water quality of the Lake. The reason these shoreline properties are desirable is because of the proximity to the Lake. Based on the City's Planning Report, the Tribunal infers that the purpose of the City's shoreline buffer policies and standards is to maintain the water quality to ensure the Lake remains a suitable drinking water source and the attractive asset that made the shoreline properties desirable in the first place.

[32] The size, shape, slope and narrow lake frontage of the subject property poses inherent limits to the extent of development permitted, based on the policies of the City's OP and ZBL. Simply put, there is limited developable area on the subject property given the City's OP policies and the standards in ZBL 2010-100Z, particularly within the shoreline buffer along its narrow lake frontage.

[33] Based on the evidence, the Tribunal understands that the existing accessory structure and deck are legal non-conforming uses, which the Applicant has the right to maintain in good condition. However, the Applicant did not provide the Tribunal with independent, objective expert testimony that supports an expansion to the existing accessory structure and deck, and addresses the potential impacts on the water quality of the Lake, and potential impact on trees (the mature Red Pine, in particular) on the Appellant's property. While a property owner is permitted to maintain an existing legal non-conforming use or structure, legal non-conforming uses are intended to fade out over time. To approve the proposed expanded replacement accessory structure and deck would entrench a use that is not permitted under the current policies of the OP and zoning regulations.

[34] The onus is on the Applicant to make its case that the proposed variances meet the four tests pursuant to s. 45(1) of the PA, individually and collectively. The Tribunal finds that the Applicant has not produced sufficient evidence to satisfy the Tribunal that the four tests for minor variance have been met with respect to variances set out in

items 4), 5) and 6) of paragraph [7] as they relate to the proposed replacement of the accessory structure and deck with the gazebo. The Applicant did not provide sufficient evidence to the Tribunal to demonstrate that the proposed variances for the accessory structure meet the general intent of the City's OP or ZBL 2010-100Z regarding percentage of vegetative or hard surface cover, or that the proposed replacement structure and expanded deck would not impact the water quality of the Lake, and would not impact trees on the Appellant's property.

[35] Without objective expert evidence in support of the proposal and addressing potential impacts, the Tribunal is challenged to accept that the replacement of the accessory building as proposed and expansion of the deck represents good planning in the public interest.

[36] The Tribunal finds that the requested variances with respect to the proposed accessory structure do not maintain the general intent and purpose of the OP or ZBL 2010-100Z and are not minor nor desirable for the appropriate development of the subject property.

CONCLUSION

[37] The onus is on the Applicant to make its case that the requested variances meet the four tests pursuant to s. 45(1) of the PA.

[38] Based on the whole of the evidence inclusive of the documentary record, regarding the proposal in respect of the dwelling, the Tribunal finds that it has sufficient evidence to determine that the variances requested meet the four tests pursuant to s. 45(1) of the PA and represent good planning in the public interest. For these reasons the Tribunal will allow the appeal in part and authorize the variances with respect to the dwelling on the subject property.

[39] However, based on the whole of the evidence inclusive of the documentary record, the Tribunal finds that the Applicant did not produce sufficient evidence in support of the requested variances regarding the replacement accessory structure and expanded deck (with the gazebo). Based on the evidence provided, the Tribunal is not prepared to entrench a non-conforming use that is not permitted under the current policies of the OP and zoning regulations. The Tribunal finds that the variances requested with respect to the replacement accessory structure and expanded deck do not meet the general intent and purpose of the City's OP and ZBL 2010-100Z, are not minor and desirable for the appropriate development of the subject property, and do not represent good planning in the public interest. For these reasons, the Tribunal will allow the appeal in part and the variances to ZBL 2010-100Z with respect to the replacement accessory structure and expanded deck are not authorized.

ORDER

[40] The Tribunal orders that the appeal is allowed in part and:

- the variances to Zoning By-law No. 2010-100Z, as set out in items 1), 2), 3) and 5) of paragraph [7], as they relate to the existing dwelling, the proposed addition and modifications, are authorized;
- the variances to Zoning By-law No. 2010-100Z, as set out in items 4), 5), and 6) of paragraph [7], as they relate to the proposed replacement of the accessory structure and expansion of the deck (with the gazebo) are not authorized.

"John Douglas"

JOHN DOUGLAS
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.

Local Planning Appeal Tribunal

A constituent tribunal of Tribunals Ontario - Environment and Land Division
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248