

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: January 28, 2022

CASE NO(S): OLT-21-001351

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

Applicant and Appellant:	Douglas Murrell
Subject:	Minor Variance
Property Address/Description:	Vacant Land – Nosbonsing Park Road (CON 4) PT LOT 4 RP NR808 PART 112 PT PCL 8589 WF)
Variance from By-law:	1284
Municipality:	Municipality of East Ferris
Municipal File No.:	A-2021-05
OLT Lead Case No.:	OLT-21-001351
OLT Case No.:	OLT-21-001351
OLT Case Name:	Murrell v. East Ferris (Municipality)

Heard: January 10, 2022 by Video Hearing

APPEARANCES:

Parties

Counsel*/Representative

Douglas Murrell

Kevin Thompson*

Lise Currie
Jim Braund

Lise Currie

DECISION DELIVERED BY C. HARDY AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] Douglas Murrell (“Applicant”) owns vacant land located on Nosbonsing Park Road (“Subject Property”). The Applicant applied to the Municipality of East Ferris

(“Municipality”) for variances from Zoning By-law No. 1576, as amended (“ZBL”) to permit the construction of a new seasonal cottage on the Subject Property. Planning staff recommended approval of the variances (“Application”) and the Committee of Adjustment (“COA”) refused the Application. The Applicant appealed the decision of the COA to the Tribunal (“Appeal”).

[2] Prior to the hearing, the Municipality confirmed that it would not participate in the Appeal.

SUBJECT PROPERTY

[3] The Subject Property is currently vacant. Throughout the Appeal, there was considerable debate over the size of the Subject Property. The Applicant maintained that the Subject Property is approximately 0.45 acres as set out in the Application. Those objecting to the Appeal held that the Subject Property is approximately 0.36 acres. The Tribunal must deal with the minor variance before it and what was considered by the COA, including all measurements.

[4] The Subject Property is comparable to the immediate surrounding lots. It was agreed by all Parties that the Subject Property is narrow and does have the least amount of depth of any of the surrounding lots.

[5] The Subject Property is designated as Waterfront in the Municipality’s Official Plan (“OP”), which permits a variety of land uses including low density residential and accessory structures.

[6] The Subject Property is zoned Lakefront Residential Zone (RL), which permits a residential dwelling and accessory structures.

VARIANCES REQUESTED

[7] The Applicant wishes to construct an 800 square foot cottage and a 250 square foot attached screen room with a front yard setback (on the lake side) of 14.6 metres and a rear yard setback (on the road side) of 5 metres (“Proposed Development”). There is no relief from the ZBL required with respect to lot coverage, lot area nor side yard setbacks. The Proposed Development includes a proposed septic system to service the cottage, however, there are no variances required relating to the proposed septic system.

[8] The following are the variances to the ZBL, which have been applied for:

- a. To permit a reduced front yard setback of 14.6 metres, whereas the ZBL requires a minimum front yard setback of 20 metres from the water.
- b. To permit a reduced rear yard setback of 5 metres, whereas the ZBL requires a minimum rear yard setback of 8 metres (“Variances”).

[9] The Application was refused by the COA and an Appeal was filed with this Tribunal.

[10] It is noted that the Municipal Planning Staff provided a detailed report to the COA, in support of the Application, subject to the recommendation that was outlined in the letter from the North Bay-Mattawa Conservation Authority (“NBMCA”) be implemented through the site plan control agreement.

PARTY AND PARTICIPANT STATUS REQUESTS

[11] The Tribunal received a Participant Status Request Form and Statement from Cheryl Archer in advance of the hearing. Ms. Archer owns property to the north of the

Subject Property and appeared at the COA meeting. Counsel for the Applicant did not oppose Ms. Archer's request and Participant status was granted to Ms. Archer.

[12] The Tribunal received two Party Status Request forms in advance of the hearing. The first request was from Lise Currie who lives northwest of the Subject Property and was recorded in the Minutes of the COA meeting. The second request was from Jim Braund who lives across from the Subject Property and was recorded in the Minutes of the COA meeting.

[13] Ms. Currie is a licenced Ontario Land Surveyor, however, was appearing before the Tribunal in her personal capacity as a homeowner. Ms. Currie is opposed to the Appeal and advised the Tribunal that she would not be calling any experts or witnesses at the hearing but was familiar with the hearing process and was prepared to participate fully in the hearing.

[14] Mr. Braund filed a detailed Party Status Request form and statement and is opposed to the Appeal for a number of reasons, many of which are the same or similar to those of Ms. Currie. Mr. Braund advised the Tribunal that he would not be calling any experts or witnesses at the hearing but wanted the opportunity to provide further insight.

[15] The Applicant expressed concern that the issues raised by the two Party requests were indistinguishable and the Tribunal should consider appointing Mr. Braund or Ms. Currie as the representative for both Parties. The Applicant also noted that no expert opinion evidence could be led by Ms. Currie in her submissions to the Tribunal, in the event she was granted Party status.

[16] The Tribunal agreed that both of the formal requests were very similar in nature and could lead to repetition and an inefficient hearing process. The Tribunal discussed the issue of "Common Interest Class" with Ms. Currie and Mr. Braund pursuant to Rule 8.4 of the *Tribunal's Rules of Practice and Procedure*:

- 8.4 **Common Interest Class** Where the Tribunal is of the opinion that more than one party is of common interest with another party or other parties, the Tribunal may, on its own initiative or on the request of any party, appoint a person of that class of parties to represent the class in the proceeding.

[17] Mr. Braund requested that the Tribunal consider appointing Ms. Currie as the representative on behalf of the class and the Applicant did not object to this request. The Tribunal granted Ms. Currie and Mr. Braund Party status and directed that they work together as a “Common Interest Class”. The Tribunal appointed Ms. Currie as the representative.

HEARING

[18] In support of the Appeal, the Applicant primarily relied upon the testimony of Stephen Fahner. Mr. Fahner is a professional land use planner retained by the Applicant who was qualified by the Tribunal to provide expert land use planning evidence and the Tribunal received the benefit of his oral testimony. Mr. Fahner provided an executed Acknowledgement of Experts Duty.

[19] The Applicant also relied upon the testimony of Greg Kirton, Manager of Planning and Economic Development for the Municipality. Mr. Kirton appeared under summons by the Applicant and was qualified by the Tribunal to provide expert land use planning evidence and the Tribunal received the benefit of his oral testimony. Mr. Kirton provided an executed Acknowledgement of Experts Duty.

[20] The evidence in opposition to the Appeal consisted of the factual evidence put forward by Ms. Currie.

[21] The Tribunal received and marked the following documents as Exhibits to the hearing:

- Exhibit 1 – Participant Status Request Form and Statement of Cheryl Archer

- Exhibit 2 – Party Status Request Forms and Statements of Lise Currie and Jim Braund
- Exhibit 3 – Appellant’s Document Book
- Exhibit 4 – Excerpt from Zoning By-Law No. 1284
- Exhibit 5 – Plan NR808
- Exhibit 6 – Annotated Plans of Ms. Currie with calculations
- Exhibit 7 – Photos provided by Ms. Currie

[22] The Tribunal also had the Municipal Record available to it as forwarded by the Municipality, containing all of the information and documentation before the COA when the Application was received, considered and decided.

[23] In the determination of this Appeal, it must be noted that pursuant to s. 45 of the *Planning Act* (“Act”), this is a hearing *de novo* and the onus of establishing that the four tests under s. 45(1) of the Act have been met is on the Applicant.

[24] The Tribunal must evaluate the Variances in the context of the following four tests under s. 45(1) of the Act:

- a. Do they maintain the general intent and purpose of the ZBL?
- b. Do they maintain the general intent and purpose of the OP?
- c. Are they minor?
- d. Are they desirable for the appropriate development or use of the land?

In addition, s. 3(5) of the Act requires that decisions of the Tribunal affecting planning matters be consistent with the Provincial Policy Statement, 2020 (“PPS”). The Tribunal must also have regard to matters of Provincial interest in s. 2 of the Act, as well as regard for the decision of the Municipality and the information it considered in the course of making its decision, in accordance with s. 2.1(1) of the Act.

ANALYSIS AND FINDINGS

[25] For the reasons that follow, and upon various findings set out herein, the Tribunal determines that the four tests under s. 45(1) of the Act have been met and that the Appeal should be allowed, subject to site plan approval.

[26] The Tribunal had the benefit of the uncontroverted and uncontested evidence of Mr. Fahner and Mr. Kirton, neither of whom was seriously challenged under cross-examination.

[27] Ms. Currie did not proffer any cogent evidence upon which the Tribunal could rely to dismiss the Appeal and refuse the Application. The evidence provided by the expert witnesses, who gave evidence in support of the Appeal was convincing and unchallenged in establishing that the four tests referred to above have been met and that the Proposed Development represents good land use planning.

PPS

[28] There was no debate that the requested Variances before the Tribunal are matters of local planning interests.

[29] The Applicant's expert witnesses both acknowledged that the Application is consistent with the PPS.

[30] Mr. Fahner testified that the PPS characterizes land in cottage country as rural and as such, the Subject Property is considered rural under the PPS. Section 1.1.5.4 allows development that is compatible with the rural landscape. Mr. Fahner opined that the Proposed Development is compatible as the dwelling will be smaller in size than those in the area and the Applicant is retaining the shoreline vegetative buffer. Mr. Kirton agreed that the Subject Property is designated rural and residential development is permitted so there are no issues with conformity.

[31] The PPS refers to protecting hazardous lands from development in section 3.1.1. Mr. Fahner testified that the NBMCA has not identified the Subject Property as a floodplain and, as such, the policy does not consider these to be hazardous lands upon which development should not occur. Mr. Kirton agreed that the evidence from NBMCA shows the floodplain along the edge of the shore so there are no conformity issues with the PPS.

[32] There was no evidence before the Tribunal to refute that the Application is consistent with the PPS and the Tribunal finds the same. As such, this case will turn on the satisfaction of the test contained in s. 45(1) of the Act.

Four Tests under s. 45(1) of the Act

Do the Variances maintain the general intent and purpose of the ZBL?

[33] The Subject Property is zoned RL and within this zone lakefront and seasonal dwellings are both permitted uses.

[34] Mr. Kirton testified that the intent of the setbacks in the ZBL are to protect the lake. He opined that the Applicant's request for both front and rear yard setbacks demonstrate that the Application is reasonable. The request for two setbacks is significant. The Applicant could have requested one large rear yard setback thereby meeting the front yard setback requirement. Rather, the Applicant did not want to overload the site and struck a balance, which resulted in seeking relief from both the front and rear yard setbacks.

[35] Mr. Fahner noted that the minimum side yard setback is 3 metres and when the Proposed Development is complete, the side yard setback will be 16.5 metres, far exceeding that required under the ZBL. Mr. Fahner opined that the Proposed Development is optimally situated on the Subject Property, thereby mitigating any privacy or encroachment concerns.

[36] The ZBL requires maximum lot coverage of 10%. As set out in paragraph [3] above, Mr. Fahner acknowledged that those in opposition to the Application have questioned the accuracy of the measurements of the Subject Property. He opined that, if it is accepted that the Subject Property is smaller than what is stated in the Application, lot coverage will still be within 10% as the dwelling being proposed is modest in size.

[37] Mr. Fahner responded to some of the objections raised at the COA and in the Participant and Party statements. He opined that encroachment closer to the lake in this case is reasonable because the Applicant is retaining the shoreline vegetative buffer, which will exceed others in the area. Some opponents noted that the intent of the ZBL was to conserve natural heritage features and Mr. Fahner responded that the NBMCA has not identified the Subject Property as open space, which infers that development was contemplated. Opponents further noted that a new ZBL is forthcoming and demonstrates the intent of the Municipality and Council and that this new ZBL should be given weight. Mr. Fahner testified that the new ZBL does not have any status in this Application as it has not been approved by Council and the Tribunal agrees.

[38] The Tribunal is satisfied that the Variances do meet the general intent and purpose of the ZBL. The Proposed Development is sited in an optimal location on the Subject Property while retaining the shoreline vegetative buffer thereby maintaining the general intent of the ZBL.

Do the Variances maintain the general intent and purpose of the OP?

[39] Messrs. Fahner and Kirton both noted that there is a lack of specific policies in the OP relating to the Application, but that there are general policies contained within the OP that do relate. S. 5.3.8.2(1) of the OP designates that the Subject Property is in a Site Plan Control Area. Any development or redevelopment will be reviewed against the Site Plan Control Guidelines. The Subject Property being within the Site Plan Control Area will ensure that adequate standards are provided for with respect to the Proposed Development.

[40] Mr. Fahner testified that s. 5.3.8.1 of the OP speaks to zoning in areas designated waterfront and this allows the Municipality to zone the area as they determine appropriate through the ZBL. The Subject Property is zoned RL and this establishes the use as residential. Pursuant to this section of the OP, the Municipality could have zoned the Subject Property in an environmental protection zone or an open space zone if the intent was to protect the land from development. The Municipality opted for RL zone and the proposed use of the Subject Property is permitted pursuant to the OP.

[41] Mr. Fahner noted that a natural vegetative buffer is an important consideration with areas along the waterfront. The shape of the Subject Property, in terms of its narrow depth, makes meeting the standard for a 15-metre vegetative buffer as set out in s. 5.3.8.2(4) a challenge. However, Mr. Fahner did opine that the Subject Property will have a reasonable shoreline vegetative buffer when development is complete.

[42] S. 6.2.6 of the OP sets out a policy for buildings being set back a minimum of 30 metres from the water's edge. Mr. Fahner opined that the wording of the policy is not mandatory, it is simply a policy as are all of the other policies contained in the OP. Under cross-examination, Ms. Currie questioned Mr. Fahner regarding his statement that this policy was not mandatory. Mr. Fahner responded that mandatory language in an OP is clear and, in this case, the Municipality stated that this was a policy. He noted that the 30-metre set back from the water's edge is the intent of the OP, but it is not mandatory as one must deal with constraints that are "on the ground" such as terrain or a narrow lot, which is the case in this Application. He opined that the overall intent of the OP is to protect water quality and provide a natural buffer and that intent is met in this case.

[43] Ms. Currie questioned Mr. Kirton as to how the Municipality brings forward s. 6.2.6 when reviewing applications. Mr. Kirton stated that on larger lots and newly created lots, the Municipality would seek to implement a 30-metre setback in most cases. However, there is flexibility in the policy, which is required with existing non-

conforming lots such as the Subject Property. He testified that the intent of the OP is to ensure that residential development is appropriately scaled and has appropriate setbacks from neighbouring properties, roads and lakes. The Subject Property is an existing lot so, in this case, a reduced setback is appropriate provided other policies are met.

[44] Ms. Currie questioned Mr. Fahner on the recommendations contained within the Lake Assessment Study report prepared by Hutchinson Environmental Sciences Ltd. found at Tab 10 of Exhibit 3 ("Hutchinson Report"). The Hutchinson Report recommended a 30-metre buffer along the shoreline for any future development. Ms. Currie asked whether Mr. Fahner would agree that any future development should have a 30-metre buffer. Mr. Fahner noted that this is a recommendation contained within a report, and it is not a regulation. He opined that many lots along the shoreline would not comply if a 30-metre buffer was required. Mr. Fahner stated that this recommendation is not a regulation within the ZBL or the OP and those are the regulations that need to be considered.

[45] The Subject Property is within a regulated area and subject to section 7.2.2 of the OP. The policy dictates that a permit must be obtained from NBMCA prior to the issuance of a building permit. Mr. Fahner opined that site plan control combined with the permit required from NBMCA provides for a system of checks and balances that must be adhered to before the Subject Property can be altered or developed.

[46] Mr. Kirton opined that the intent of the OP policies relating to setbacks from the waterfront are to find an appropriate balance between residential development and resource protection and that this intent is maintained in this Application.

[47] The Tribunal preferred the evidence of the Applicant and finds that the Variances meet the general intent and purpose of the OP. The use is permitted, a natural vegetative buffer will be retained, and the site plan control process combined with the

NBMCA permit provide for a system of checks and balances prior to any development occurring on the Subject Property.

Are the Variances minor?

[48] Much of the opposition to the Application was focused on the Variances not meeting the minor branch of the test, due to the configuration of the Subject Property.

[49] Ms. Currie noted that when considering whether the relief requested is minor, the Tribunal should look at more than just impact. In the present Application, she testified that the relief requested for the front yard setback is not minor due to the lot configuration.

[50] Ms. Currie provided factual evidence relating to the inaccurate measurements on the plans used by the expert witnesses in their review of the Application. She provided the Tribunal with annotated plans and her own calculations, which were entered as Exhibit 6. She noted that the depth of the Subject Property was not known by Mr. Kirton when his planning report was prepared. She argued that he relied on inaccurate measurements and that the depth of the Subject Property is a true concern as there is inadequate space to provide proper drainage. Ms. Currie argued that for these reasons, the Variances do not meet the minor branch of the test.

[51] Mr. Thompson questioned Ms. Currie about the measurements of the Subject Property and lot coverage. Mr. Thompson put to Ms. Currie that irrespective of which number was used for lot coverage, it still meets the minimum lot coverage required under the ZBL. Ms. Currie agreed, but stated that the Subject Property is so small, accurate measurements are needed to make a proper evaluation. She further submitted that Mr. Kirton erred in not requiring a survey in order to obtain accurate measurements. Both experts testified that plans of survey are not required for minor variance applications.

[52] Messrs. Kirton and Fahner both opined that the minor branch of the test is met. In assessing the Application, both experts looked at impact and, in this case, the impact is minimal. Mr. Kirton noted that the Proposed Development is well situated on the Subject Property. The dwelling will have considerable side yard setbacks and will be a comfortable distance from the road and lake with similar setbacks to the adjacent property to the north. Mr. Kirton responded to Ms. Currie's written statement, in her Party request, regarding undesirable impact on surrounding parcels and noted that the character of the area is residential and the Proposed Development will be well below the permitted lot coverage. Mr. Kirton opined that the Proposed Development is a modest dwelling and not out of character with the area.

[53] The Tribunal preferred the evidence of the expert witnesses that the requested Variances are minor. The Tribunal must review the Appeal before it and the Application that was considered by the COA, including all measurements. The Proposed Development is modest and well situated, and any negative impacts are negligible.

Are the Variances desirable for the appropriate development or use of the land?

[54] Mr. Kirton reiterated that, in his opinion, the Proposed Development is situated optimally on the Subject Property. He opined that the Variances are appropriate and allow for the Proposed Development to be in scale with the area and with the lot. He noted that in his experience, it is rare for proposals on small lots to not also request lot coverage variances which demonstrates that the Application is appropriate and desirable in this case.

[55] Mr. Fahner opined that the Proposed Development is consistent with development in the area and on the lake in general. He noted that the Subject Property is small in size but is not out of scale with the area and that the retention of the shoreline buffer is a mitigating factor in this Application.

[56] The Tribunal finds that the requested Variances are desirable for the appropriate development or use of the land.

CONCLUSION

[57] Based on the totality of the evidence, the Tribunal was persuaded that the Variances, subject to site plan control:

- Maintain the general intent and purpose of the ZBL;
- Maintain the general intent and purpose of the OP;
- Are minor in nature; and,
- Are desirable for the appropriate development or use of the land.

[58] The Tribunal had regard for the decision of the COA as well as the information considered by it.

ORDER

[59] **THE TRIBUNAL ORDERS** that the Appeal is allowed and the Variances to By-law No. 1576, as amended are authorized, subject to site plan approval.

“C. Hardy”

C. HARDY
MEMBER

Ontario Land Tribunal

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