

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



ISSUE DATE: March 19, 2021

CASE NO(S): PL200320

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: | Ken Elphick |
| Applicant: | J. & K. Gammie |
| Subject: | Minor Variance |
| Variance from By-law No.: | 2018-98 |
| Property Address/Description: | 438 Ross Street |
| Municipality: | Township of Huron-Kinloss |
| Municipal File No.: | 2020-013 |
| LPAT Case No.: | PL200320 |
| LPAT File No.: | PL200320 |
| LPAT Case Name: | Elphick v. Huron-Kinloss (Township) |

Heard: March 9, 2021 by Video Hearing

APPEARANCES:

Parties

Counsel*/Representative

Ken Elphick (“Appellant”)

Jon Drennan

Township of Huron-Kinloss
 (“Township”)

Stephen O’Melia*

Jeffrey & Kristi Gammie (“Applicants”)

Self-represented

DECISION DELIVERED BY MARGOT BALLAGH AND ORDER OF THE TRIBUNAL

OVERVIEW

[1] This Decision and Order results from the hearing on the merits of the Appeal pursuant to s. 45(12) of the *Planning Act* (the “Act”) brought by Ken Elphick (“Appellant”) from the decision of the Committee of Adjustment (“COA”) of the Township of Huron-Kinloss (“Township”) to approve the Application for a minor variance of Jeffrey and Kristi Gammie (“Applicants”) for their property, municipally known as 438 Ross Street, Lucknow in the Township (“subject property”).

[2] The Applicants brought an Application for relief from Zoning By-law No. 2018-98 to permit a reduced minimum interior side yard setback of 0.99 metres (“m”) instead of the 1.5 m required by the Zoning By-law in order to permit the construction of a proposed attached garage on the south side of the existing single family detached dwelling.

[3] Following the recommendation of the Township’s planning staff, the COA approved the Application for a reduced interior side yard setback to +/- 0.99 m (+/-3.264 feet), subject to the following conditions:

1. That any future development on the property conforms to the provisions of the Zoning By-law;
2. That the decision applies only to the proposed development as indicated on Schedule ‘A’ attached to and forming part of this decision;
3. That the applicant provides a survey indicating the exact measurements of the garage foundation to the interior lot line to demonstrate conformity with the approved variance to the satisfaction of the Township of Huron-Kinloss; and
4. That the applicant demonstrates no negative drainage impacts to neighbouring properties will result from the garage addition to the satisfaction of the Township.

[4] The Appellant, being the adjacent neighbour to the south of the subject property,

appealed the decision to the Local Planning Appeal Tribunal (the “Tribunal”). The Appellant’s main stated concerns related to the method of measurement of the interior side yard setback and the potential for impacts to his property such as drainage issues as a result of the proposed development.

THE HEARING

[5] At the hearing, the Applicants told the Tribunal that they relied upon the submissions and evidence of the Township, as represented by Township’s Counsel, Mr. O’Melia, given that both parties supported the Application.

[6] The Appellant, who opposed the decision of the COA to authorize the variance, called no witnesses to provide evidence at the hearing.

[7] As a result, the only witness who testified at the hearing was the Township’s Planner, Coreena Smith, who was duly affirmed and qualified without objection to give expert opinion evidence in land use planning.

[8] Mr. O’Melia advised the Tribunal that the Applicants had provided a survey of the subject property as contemplated by condition 4 to the COA’s decision. Mr. O’Melia said that the survey confirmed that the distance between the front portion of the proposed garage structure as measured from the foundation to the interior lot line was 0.823 m (2.7 feet) and a similar measurement from the rear portion of the proposed garage structure was 0.91m (3 feet). Accordingly, he told the Tribunal that the Applicants require a variance to permit a minimum interior side yard setback of 0.823 m (and not the 0.99 m originally requested in the Application) whereas the minimum interior side yard setback required by the Zoning By-law is 1.5 m.

[9] The Tribunal heard evidence from the Township’s Planner, Ms. Smith, that the amendment to the original Application, as discussed above from 0.99 m to 0.823 m, is minor and does not change her planning opinion. Ms. Smith also noted that the COA’s decision intentionally built in some flexibility by approving “+/- 0.99 m” pending the

survey results of the actual setback required.

[10] The Tribunal accepts Ms. Smith's uncontested expert opinion that the amendment to the original application, representing a proposed further reduction of the minimum interior side yard setback of 0.167 m is minor, and as such, finds that notice is not required under section 45(18.1) of the Act.

[11] Mr. Drennan, representative for the Appellant, told the Tribunal that the Appellant agreed that the survey was done and that the measurements were accurate as between the foundation of the proposed garage and the interior lot line; however, he expressed concern as to whether the minimum interior side yard setback should be measured from the eaves of the proposed garage (instead of the foundation) to the interior lot line. Mr. Drennan noted that the drawings for the proposed garage show the roof overhang for the gable ends and the eaves to project an additional two feet (0.61 m) closer to the Appellant's property line than the foundation.

[12] Ms. Smith told the Tribunal that separate provisions in the Zoning By-law speak to the minimum interior side yard setback as distinguished from the treatment for eaves and overhang.

[13] Ms. Smith referred to the definition of "setback" provided in the Zoning By-law as follows:

"Setback" means the horizontal distance from the lot line, measured at right angles, to the nearest part of any building or structure on the lot exclusive of any yard encroachments permitted on the lot. (emphasis added)

[14] According to Ms. Smith, the eaves or overhang represent "yard encroachments" as underlined in the definition of "setback" above. She took the Tribunal to the Encroachments section 4.8 of the Zoning By-law where it provides:

4.8.1 Sills...eaves, gutters...and other architectural features may project into any required yard but not more than 0.45 m.

[15] Ms. Smith gave her expert opinion that the definition of setback read in conjunction with the Zoning By-law provision 4.8.1 means that the measurement for the minimum interior side yard setback is to be taken from the foundation wall and that the eaves are permitted to project into that setback.

[16] In response to further questioning, Ms. Smith acknowledged that the eaves could not project into the side yard by more than 0.45 m according to the By-law and that the drawings of the proposed garage structure shows them projecting more than that, at 0.61 m (2 feet).

[17] This information was relevant to the current Application before the Tribunal for a reduced interior side yard setback to the extent that it relates to the potential drainage issue raised by the Appellant. The Tribunal is satisfied that the potential drainage issue could be addressed by the incorporation of a condition as discussed below.

[18] The Tribunal reviewed with the Parties the test for minor variances as set out in section 45(1) of the Act. An appeal to the Tribunal pursuant to section 45 of the Act is a hearing *de novo* and the onus remains on the Applicant to satisfy the Tribunal for authorization of a variance that the requested variance meets the four tests pursuant to section 45(1) of the Act, namely, that the variance would:

- 1) maintain the general intent and purpose of the Official Plan (“OP”);
- 2) maintain the general intent and purpose of the By-law;
- 3) be desirable for the appropriate development or use of the land, building or structure; and
- 4) be minor in nature.

[19] Given the nature of the requested variance, and the fact no party raised any issue related to sections 2 or 3(5) of the Act, the hearing focused mainly on the four-part

test for minor variances required by section 45(1) of the Act.

[20] Of note, Mr. O'Melia advised the Tribunal that neither the Saugeen Valley Conservation Authority ("SVCA") nor the Maitland Valley Conservation Authority ("MVCA"), the two conservation authorities with jurisdiction over the subject property, expressed concern with the proposed development or Application.

[21] Ms. Smith told the Tribunal that the proposed garage is partly within the floodfringe area but that the MVCA reviewed the proposal prior to the filing of the minor variance application and provided their approval. By Memorandum dated June 4, 2020, the MVCA identified the proposed garage as being within the floodfringe associated with Nine Mile River and its tributary, which traverses the north side of the subject lands. MVCA has no objection to the garage addition given it does not alter access to the subject property and can be developed in such a way that it does not create new flood hazards, aggravate existing flood hazards, or cause adverse environmental impacts. MVCA stated that the application is in conformance with the Natural Hazard policies of the Provincial Policy Statement 2020 ("PPS").

[22] In carrying out its responsibilities under the Act, the Tribunal must have regard to, among other matters, matters of provincial interest. The Tribunal is satisfied that there has been proper regard to the applicable matters of provincial interest for an application of this nature. The Tribunal was also satisfied that there was no issue related to consistency with the PPS or conformity with any applicable Provincial Plan.

The Four Tests for Minor Variances

[23] The requested variances may be authorized only if all four tests as set out in section 45(1) of the Act, and reproduced above, can be met.

Maintain the general intent and purpose of the Official Plan

[24] In addressing the first test, Ms. Smith told the Tribunal that the Bruce County OP designates the subject property Primary Urban Communities. The Township's OP designates the subject property Residential and Parks & Open Space, with Floodfringe and Community Improvement Plan Area Overlays. The proposed garage is sited within the portion of the lot designated Residential under the Township's OP. She advised that the proposed garage addition is accessory to the existing residential use and permitted within the residential designations of both the County and Township OPs.

[25] Ms. Smith gave her opinion that the requested variance would have no adverse environmental impacts and would still allow access for maintenance of the structure and would maintain the general intent and purpose of the County and Township OPs.

[26] The Tribunal accepts the uncontroverted evidence of Ms. Smith, the only witness who testified, and finds that the requested variance, subject to a condition to address the potential drainage issue, would maintain the general intent and purpose of the Region's OP and the Township's OP.

Maintain the general intent and purpose of the By-law

[27] In addressing the second test, Ms. Smith told the Tribunal that the subject lands are zoned Residential One (R1), Residential One – floodfringe R1(f) and Open Space – floodfringe OS(f). The proposed garage addition is within the residential zones. She told the Tribunal that the By-law identifies a minimum interior side yard setback of 1.5 m (4.92 feet) for these lands. She said the Applicants require a 0.823 m (2.7 feet) interior side yard setback from the Appellant's property to the south in order to construct the proposed garage.

[28] Ms. Smith told the Tribunal that side yard setbacks are intended to provide separation between buildings and uses on adjacent properties, space for maintenance and landscaping, and for buffering. She gave her opinion that the proposed 0.823 m

setback will still allow adequate space for maintenance, landscaping and buffering. She noted that access between the front and rear yards can also be achieved by the Applicants via the north side yard.

[29] When asked by Mr. Drennan whether the reduced interior side yard with overhanging eaves would allow sufficient room to clean out the eaves, without requiring encroachment onto the Appellant's property, Ms. Smith gave her opinion that there would be sufficient room for access from the front or the rear or the roof of the proposed garage.

[30] Further Ms. Smith told the Tribunal that she had visited the subject property, and in her view, the requested variance would not impact or interfere with the Appellant's use of his property to the south. She noted that the Applicants' dwelling and the location of the proposed attached garage are set farther back from Ross street than the Appellant's dwelling.

[31] Ms. Smith gave her professional opinion that the requested variance would maintain the general intent and purpose of the By-law.

[32] The Tribunal accepts the uncontroverted opinion evidence of Ms. Smith, who was the only witness, and finds that the requested variance would maintain the general intent and purpose of the Zoning By-law subject to the condition as set out in the Order below.

Be desirable for the appropriate development or use of the land, building or structure

[33] In addressing the third test, Ms. Smith gave her opinion that the variance will permit the Applicants to build an attached garage that meets their needs. The proposed garage has been sited such that it aligns with the existing driveway and avoids the watercourse on the north side of the property. The variance will not impede the function of the lot.

[34] Mr. Drennan expressed the Appellant's concern that there will be runoff onto his property of rainfall and snow, which could cause damage to his fence or property.

[35] Ms. Smith told the Tribunal that the potential impacts related to runoff of rainfall or snow could be satisfactorily addressed by a condition that drainage from the roof of the proposed garage addition will be directed toward the existing drain at the southeast corner of the dwelling so that water will not run onto the Appellant's property.

[36] In Ms. Smith's view, the proposed development is in keeping with the neighbourhood character as many of the neighbouring homes have garages or carports.

[37] Ms. Smith provided her opinion that the requested variance is desirable for the appropriate development or use of the land, building or structure for the reasons given.

[38] The Tribunal accepts the uncontroverted expert opinion evidence of Ms. Smith, who was the only witness, and finds that the requested variance is desirable for the appropriate development or use of the land, building or structure subject to the condition that drainage from the roof of the proposed garage addition will be directed toward the existing drain at the southeast corner of the dwelling so that water will not run onto the Appellant's property.

Be Minor in Nature

[39] In addressing the fourth test as to whether the requested variance is minor, Ms. Smith noted that the impact the proposed development may have on the surrounding neighbourhood must be considered. In her view, the meaning of "minor" is more than a consideration of the numerical difference between the required and the requested set back.

[40] Ms. Smith gave her opinion that the requested variance to reduce the interior side yard setback will not impact the Appellant's use of his property, will still allow for access to the Applicants to the rear of the subject property and will not create a

drainage problem provided authorization of the variance is subject to a condition that drainage from the roof of the proposed garage addition will be directed toward the existing drain at the southeast corner of the dwelling so that water will not run onto the Appellant's property.

[41] Ms. Smith further noted that there will still be a view through the properties along the lot line to the rear yards and there will still be a buffer. She noted that a garage is in keeping with other residences in the neighbourhood.

[42] Ms. Smith gave her professional opinion that the requested variance was minor in nature for the reasons provided.

[43] The Tribunal accepts the uncontroverted evidence of Ms. Smith, who was the only witness, and finds that the requested variance is minor in nature subject to the condition that drainage from the roof of the proposed garage addition will be directed toward the existing drain at the southeast corner of the dwelling so that water will not run onto the Appellant's property.

Conclusion

[44] Based on the whole of the evidence inclusive of the uncontradicted oral testimony of the only witness, Ms. Smith, and the documentary record, the Tribunal finds that the Amended Application, for relief from Zoning By-law No. 2018-98 to permit a reduced minimum interior side yard setback on the south side of the existing dwelling of 0.823 m instead of the 1.5 m required by the Zoning By-law in order to construct a garage, meets the four tests for authorization of the minor variance as set out in section 45(1) of the Act subject to the condition that drainage from the roof of the proposed garage addition will be directed toward the existing drain at the southeast corner of the dwelling so that water will not run onto the Appellant's property.

ORDER

[45] The Tribunal having been asked to consider an application which has been amended from the original application, and the Tribunal having determined as provided for in subsection 45(18.1.1) of the *Planning Act*, that no further notice is required.

[46] The Tribunal orders that the Appeal is allowed in part, and the variance to Zoning By-law No. 2018-98 to permit a reduced minimum interior side yard setback on the south side of the existing dwelling of 0.823 m instead of the 1.5 m required by the Zoning By-law in order to construct a proposed garage is authorized, subject to the condition that drainage from the roof of the proposed garage addition will be directed toward the existing drain at the southeast corner of the dwelling so that water will not run onto the Appellant's property.

"Margot Ballagh"

MARGOT BALLAGH
MEMBER

If there is an attachment referred to in this document,
please visit www.olt.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

A constituent tribunal of Ontario Land Tribunals

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248