

MAY 24 1991

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V 900168

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF Section 44(12) of
the Planning Act, 1983

AND IN THE MATTER OF an appeal by
Gordon R. Demetrick and
Luanne Demetrick from a decision of
the Committee of Adjustment of the
Municipality of Dysart et al.,
whereby the Committee dismissed an
application numbered A-39/89 for a
variance from the provisions of
By-law 77-32, as amended, lands
being composed of Lot 58, Plan 483,
in the Township of Guilford

C O U N S E L :

Richard R. Arblaster	- for	Gordon and Luanne Demetrick
A.R. Black	- for	The United Townships of Dysart et al.

DECISION delivered by J.R. TOMLINSON AND ORDER OF THE BOARD

Two years ago, Gordon Demetrick became fed up with sleeping on the side of the bed that was jammed against the wall at his cottage near Haliburton. Since his bedroom was too small to move the bed, he made the bedroom bigger.

Unfortunately, he did not obtain a building permit for this extension of the master bedroom and the Township subsequently told him that it contravenes the 7.5 metre (24.6 feet) front yard setback provision of the Township Zoning By-law, as well as the By-law's provision requiring a 20 metre setback from the water's edge.

The Demetricks applied for the necessary minor variance from these provisions, but were refused. They have appealed that decision of the United Townships' Committee of Adjustment to this Board.

At the hearing, counsel for the Demetricks called two witnesses Mr. Demetrick himself and Klaus Lehman, a land use planner. Counsel for the Township called one witness, James Dymont, the planning consultant for the United Townships.

Counsel for the Demetricks conceded that the Board should decide this application as if the extension had not yet been constructed and were merely being proposed. The Board has proceeded on this basis.

The Demetricks cottage is located on the north shore of Moose Lake, some 42 feet back (north) from the high water mark, according to the sketch filed as Exhibit 6 by the appellants

Before they added the ten foot square extension at the front of their cottage, a deck ten feet deep extended along the whole front of the cottage. According to Exhibit 6, the front (south) edge of the floor of the deck was situated some 3 feet, 4 inches above grade level, 32 feet back from the high water mark and 15 feet, 6 inches back from the front lot line. (A 66 foot wide, unopened, original road allowance abuts the front of this property and the high water mark encroaches on to the road allowance by anywhere from 35 feet to 49 feet, 6 inches depending on the location.)

At the present time, the easterly 10 feet of the deck is taken up by the extension. The westerly side of the extension has a door for easy access from the bedroom to the deck and there is a window at the front of the extension facing the lake.

The position of the United Townships is that these setback provisions are based, in part, on express Official Plan policies which seek to preserve the natural environment as far as possible, and, in particular, to keep the appearance of the shoreline as natural and undeveloped as possible. Counsel argued that because of this policy and because of the pressures which are constantly being

exerted by cottagers to build closer and closer to the water, variance from the setback requirements under these circumstances should be regarded as not being minor.

He said as well, that the application was not desirable for appropriate development or use of the property because there were other ways of expanding the cottage which would not contravene these setback provisions.

Finally, he said that although the Zoning By-law was a "forgiving" one in that it permitted certain additional building in cases of legal non-conforming uses, it was intentionally not so forgiving as to permit the variances requested, and the application would not conform with the general intent of the Zoning By-law or the Official Plan

The Board appreciates the desirability of maintaining this shoreline in as natural looking a state as possible, and difficulties faced by the United Townships in attempting to contain the relentless push towards the water by one cottager after another. Based on the evidence presented at this hearing, the Board must, however, grant this application.

The evidence of both planners was that from a distance of 100 feet or more out in the lake, no visual change would be noticed as a result of the addition and that from within that 100 distance, no change of significance would be noted

Given this evidence, the Board is hard-pressed to see how the application fails to conform with the intent of the Official Plan policies previously referred to, or the setback provisions of the By-law which are largely based on those policies. In this regard, it is significant as well that the addition is simply being constructed on top of a deck which already existed and which itself

created some visual effect by virtue of being located some three feet, four inches above grade and having a railing resting upon a solid board wall around the deck of some one foot, eight inches in height. No clearing of trees or extension of the facade of the cottage was involved.

As to the desirability of the addition, there was little question that from Mr. Demetrick's point of view, extending the master bedroom towards the south was the best alternative because it allowed a slightly closer view of the water, provided a direct access to and from the front deck and allowed him to get out of his side of the bed in the morning.

As well, he emphasized that a more "liveable" sized bedroom would provide him and his wife with a suitable place of refuge, when necessary, from the strenuous indoor activities of their grandchildren.

Counsel for the United Townships said that the proposed addition was not desirable for the appropriate development or use of the property because the cottage could be expanded to the east or west or north to provide the necessary extra space, without requiring an encroachment or further encroachment into the front yard and water line setback areas.

The evidence of the appellants, however, was that none of these alternatives was more desirable than the one actually chosen.

Mr. Demetrick pointed out that there is a steep incline coming down from the road at the rear of his property which leaves very little area to build on at the back of his cottage. He said it would be necessary to remove several substantial trees at the rear of his building to construct an addition this size and that it would be impossible for cars to turn around in the rear yard if the addition

were built to the rear. An extension to the east or west would extend the face of the cottage that would be visible from the lake and would, according to Mr. Demetrick, require the removal of numerous substantial trees if the extension were constructed on the side.

The Board accepts this evidence and finds that the alternative chosen was the most desirable, given it has no detrimental effect on the view from the water towards the shore and, as was agreed upon by planners as well, has no adverse impact on the neighbouring properties.

There was considerable discussion at the hearing about the effect upon this application of By-law 90-34, an amending by-law passed July 9, 1990, and about the proper interpretation of the two setback provisions of the By-law. The planner for the United Townships took the position that even if the deck at the front of the cottage were considered to be four feet in height, which would allow the addition to comply with the front yard setback provision, that addition would still not comply with the provision requiring a 20 metre setback from the water, since it treats the deck as a separate structure.

Given the circumstances of this case and the evidence presented by the planners, the Board has been able to reach its conclusion without having to decide these questions.

Counsel for the United Townships drew the Board's attention to an earlier Board decision in the matter of Wood v Township of Lake of Bays, 24 O.M.B.R. 123, in which the Board refused to authorize a variance to allow a deck to be constructed which would have extended into the required set back area from the high water mark.

That case is not of much assistance however because no evidence was brought by the applicant to establish the general intent of the Official Plan or Zoning By-law, while the Township's planner testified as to the intent of both and told the Board that the variance applied for did not conform with it.

Based on all the evidence, the Board is satisfied that even if the deck is not considered to be four feet in height, and even if the 20 metre setback provision is to be interpreted in the way suggested by the planner for the United Townships, the variances applied for are minor, desirable for the appropriate development or use of the property and maintain the general intent of the Official Plan and Zoning By-law.

The Board will therefore allow this appeal and authorize the variances requested, but only to the extent necessary to legitimize the present ten foot by ten foot addition. The Board so orders.

DATED at TORONTO this 23rd of May, 1991.

"J.R. Tomlinson"

J.R. TOMLINSON
MEMBER