

The Corporation of the City of Kawartha Lakes
Committee of Adjustment Report – Clifford Tate
Report Number COA2018-070

Public Meeting

Meeting Date: November 8, 2018
Time: 1:00 pm
Location: Victoria Room, City Hall, 26 Francis Street, Lindsay

Ward: 15– geographic Township of Emily

Subject: Permission is sought to recognize the location of two additions to a dwelling within an Environmental Protection (EP) Zone and/or within 15 metres of the EP Zone category boundary whereas Sections 3.13 and 3.18 and Part 5 currently do not permit such expansion. Permission is also sought to construct two decks abutting a dwelling within an EP Zone category and/or within 15 metres of the EP Zone category boundary whereas Sections 3.13 and 3.18 and Part 5 currently do not permit such expansion.

The variances are requested at Part Lot 3 and 4, Concession 2, geographic Township of Emily (File D20-2018-053).

Author: David Harding, Planner II

Signature:

Recommendations:

RESOLVED THAT Report COA2018-070 Clifford Tate, be received;

THAT minor variance/permission application D20-2018-053 be **DENIED**, as the application does not meet the tests set out in Section 45(2) of the Planning Act.

Background: This application was deemed complete August 16, 2018.

Proposal: To recognize two additions to the dwelling. The additions occupy a total footprint of approximately 16.36 square metres (176.1 square feet). To permit the construction of two decks that will occupy approximately 40.14 square metres (432.1 square feet).

Owner: Clifford Tate

Applicant: Doug Carroll, DC Planning Services Inc.

Legal Description: Part Lots 3 and 4, Concession 2, geographic Township of Emily, City of Kawartha Lakes

Official Plan: Environmental Protection and Rural within the City of Kawartha Lakes Official Plan

Zone: Agricultural (A1) Zone, Agricultural Exception Eight (A1-8) Zone, and Environmental Protection (EP) Zone within the Township of Emily Zoning By-law 1996-30.

Site Size: 36.4 hectares (90 acres)

Site Servicing: Private individual well and privy

Existing Uses: Rural, Forest, Wetland, Rural Residential

Adjacent Uses: North: Agricultural, Forest, Wetland, Pigeon River
East: Agricultural, Forest, Wetland
South: Agricultural, Rural, Forest, Rural Residential
West: Rural, Forest, Wetland, Pigeon River

Rationale: Section 45(2)(a)(i) of the Planning Act permits the Committee of Adjustment to consider an expansion to a legal non-conforming use. The tests of 45(1) of the Planning Act are not prescribed for applications considered under 45(2). However, the application must be analysed to determine whether the proposal meets good planning principles.

Section 34(9) of the Planning Act allows for the continuation of the use of any land, building or structure for the purpose it was used on the date of passing of the by-law which prohibited the use provided the use on the date of passing of the by-law was lawful and it continues to be used for that purpose.

Section 45(2)(a) authorizes the Committee of Adjustment to consider an enlargement or extension of a building or structure if its use legally existed on the day the by-law was passed, but that is not permitted by the by-law, or a use permitted under subclause (ii), continued until the date of the application.

In order to apply good planning principles, the legality of the non-conforming use must be established. The applicant has submitted two affidavits in support of the application: one dated August 22, 2016 and the second dated July 24, 2018.

The building used for habitation has been identified as a dwelling within the application, and as a cabin in the affidavits. As the affidavits support the application, the building will be referred to as a cabin for the report.

Factual Information:

The property contains three zone categories within the current Township of Emily Zoning By-law 1996-30, passed October 15, 1996. The cabin is located within the Environmental Protection (EP) Zone. The EP Zone permits conservation uses, bird/wildlife sanctuaries, flood and erosion control works and docks, and forestry. No buildings or structures are permitted within the EP Zone for the permitted uses which are not authorized by the conservation authority, Ministry of Natural Resources and Forestry, or Parks Canada. By-law 1996-30 replaced by-law 1978-, which was the Township of Emily's first comprehensive zoning by-law passed on February 24, 1978. Within by-law 1978-3, the portion of the property where the cabin is located was zoned Open Space (O1) Zone. The O1 Zone permitted golf courses, parks, and agricultural uses but no buildings.

Within the by-law 1978-3, a private cabin is defined as "...a building for sleeping, containing no cooking or sanitary facilities and which is an accessory use to a dwelling." A cabin cannot exceed a floor area of 30 square metres.

Within the current zoning by-law, a private cabin is defined as "...a building for sleeping, containing no cooking or sanitary facilities and which is an accessory use to a dwelling unit." The maximum permitted floor area of a cabin is 30 square metres.

Within the current zoning by-law, a dwelling unit is defined as: "...one or more habitable rooms designed or intended for use by one household exclusively as an independent and separate unit in which separate kitchen and sanitary facilities are provided for the exclusive use of the household with a private entrance from outside the building or from a common hallway or stairway inside the building."

The current zoning by-law requires a dwelling unit that is not within a residential zone category to have a minimum floor area of 93 square metres.

Available Municipal Property Assessment Corporation (MPAC) records record the existence of a cabin built in 1955, measuring an area of 384 square feet (35.7 square metres) with no bathrooms and one bedroom.

The first affidavit notes the existence of a cabin on the property in 1973.

The second affidavit notes the cabin was used as a seasonal or permanent home in 1973.

The second affidavit states that in 1973 the dwelling was an "L" shape of approximately 55.8 square metres. From 1973 to October 25, 2013 its footprint was not expanded; however, it appears to have been expanded between 1955 and 1973 from 35.7 square metres to 55.8 square metres.

The second affidavit states that the cabin was used 4-6 months of the year from spring 2001 until October 25, 2013.

A bathroom shower and sink was installed in 2005.

The Building Division has no record of any permit applications for the property prior to 2017.

Building Division has advised that in addition to the bathroom, a kitchen sink and laundry facilities are present.

Analysis:

When demonstrating the establishment of a legal non-conforming use, evidence must be satisfactorily provided which shows the use was permitted and legally established prior to a change or approval of the zoning by-law, that the use has been continuous since the use became non-conforming, and that the appropriate approvals have been obtained for any subsequent expansions to the non-conforming use.

The affidavits demonstrate the existence of a cabin prior to the approval of the first zoning by-law for the Township of Emily in 1978. However, the second affidavit does not provide evidence to determine whether the cabin was used as a seasonal or permanent residence prior to 1978, nor identify if or how the cabin was used between 1978 and spring 2001. This is a substantial gap of time where information on the nature and continuity of the use of the cabin is not established. It is also unclear whether the cabin was used as a permanent residence for the 4 to 6 months of the year it was occupied from spring 2001 to October 25, 2013. A permanent residential use could not have been legally established within this timeframe as the use was not permitted in the EP Zone under zoning by-law 1996-30. The application identifies the current use of the building as a dwelling. It is unclear on what basis this determination was made.

Prior to 2005 there was no bathroom, and the bathroom was installed without building permits. On-site sanitary disposal was via pit privy and leeching pit to the west of the cabin. While there was no bathroom, there was a kitchen area in existence in 1973, but the second affidavit does not define what is meant by a kitchen area. A kitchen area within a cabin may mean a countertop with a hot plate and no sink. Without further information there is uncertainty as to what actually constituted a kitchen. Therefore, the cabin did not have at least one of the two facilities, being a bathroom and/or kitchen, to be defined as a dwelling unit, nor did it meet the minimum area for a dwelling unit, which would have been applicable to this use in 2005.

There is also a 20.1 square metre (216.4 square foot) discrepancy between the cabin footprint recorded by MPAC and that recorded in the second affidavit. This suggests that the cabin was expanded at some previous point in time. There is some uncertainty as to when this expansion occurred, though it may have occurred between 1955 and 1973. The MPAC information further corroborates that the cabin was constructed without a bathroom.

It is unclear from the affidavits provided what the exact use of the cabin was, but it appears clear based upon the information provided that the residential use and function of the cabin has been expanded beyond that of the original building. The current application suggests that the cabin now carries the characteristics of a dwelling. The basis of 45(2)(a) is that the legally established use has been continuous since the date it became non-conforming. The use of and facilities

within a cabin are fundamentally different from that of a single detached dwelling. If the use has changed to the point where the building no longer functions as a cabin, but as a dwelling, then the basis of 45(2) is no longer upheld as the use has changed.

In the event that further evidence could be supplied to address these questions raised within the analysis to demonstrate a legal non-conforming use, the letter provided from the neighbours raises the important question of whether the use, if it could be considered legal non-conforming, ceased between October 25, 2013 when the current owner acquired title to the property and May 26, 2016 when the owner submitted a pre-screening application to the Planning Division. The letter states that the entire cabin was demolished, and select components incorporated into the construction of a new building. If this is the case, then the building is no longer eligible for consideration under 45(2) of the Planning Act because approvals were not obtained for the construction and the original building containing the use ceased to exist.

Other Alternatives Considered:

A pre-screening application was applied for on or about May 26, 2016. The application proposed to approve an existing seasonal cabin. Due to the breadth of challenges, the application was referred to the pre-consultation process. A pre-consultation meeting took place on July 14, 2016 which outlined that Official Plan and Zoning By-law Amendment applications along with supporting documentation, were required to permit the existing and proposed development. On August 25, 2016, the Planning Division received the first affidavit attached to a letter from the owner. The letter advised the Development Services that rights pertaining to legal non-conforming uses would be exercised.

On September 1, 2016, the Director of Development Services responded with a letter which stated that the cabin was not considered legal non-conforming as the size, area, shape, and location of the building were not clarified within the affidavit. It was also noted that the original size and shape of the building are difficult to determine due to removal of some of the original walls and construction of some additions. Further, no evidence had been provided to determine what the use of the original building was.

Servicing Comments:

The property is serviced by privy and a private individual well.

Consultations:

Notice of this application was circulated in accordance with the requirements of the Planning Act.

Subsequent to the advertisement of the application, the applicant communicated to the Planning Division that they wish to include the recognition of the privy, storage building, and animal coop to the application for the Committee of Adjustment's consideration. The advertisement specified the recognition of two additions to the dwelling and two proposed deck expansions to the dwelling are being sought.

Planning staff is of the opinion that the proposal as advertised does not convey that recognition is being sought for the three additional structures. Should the applicant wish to proceed with the recognition of these three structures, planning staff believe a re-advertisement is necessary to provide agencies and the public the opportunity to comment on these additional structures.

In response to the application as advertised, comments have been received from:

Agency Comments:

Building Division (October 26, 2018): Construction to the cabin has occurred without building permits. An existing animal coop, existing shed, and the two proposed decks will require building permits. See Appendix E for additional information.

Building Division – Part 8 Sewage Systems (October 27, 2018): A sewage system permit has been submitted. The application remains incomplete pending other required approvals and design requirements. The application cannot be endorsed until it can be demonstrated that an on-site sewage disposal system can be accommodated.

Kawartha Region Conservation Authority (KRCA) (October 29, 2018): A violation has been issued under Ontario Regulation 182/06 on January 26, 2017. The violation remains active. In the absence of more detailed information, the existing/proposed development is within a flood hazard. The existing/proposed development appears to be within a provincially significant wetland. The relocation of the existing/proposed development outside of the EP Zone is the preferred option. In the absence of detailed topographical, hydrogeological, and ecological studies to support the application, staff are not in a position to approve the variance application. See Appendix E for additional information.

Engineering and Corporate Assets Department (October 29, 2018): No concerns.

Planning Division: A conclusion is provided in the conclusion section below. The Director of Development Services confirmed that the new affidavit did not change his position on the legality of the building in the letter dated September 1, 2016.

Public Comments:

Benoit and Shelley Dupuis – 1055 Ski Hill Road: Objection to the requested permissions. The existing cabin was in poor condition and was completely demolished. A new cabin was constructed, which used a section of an old wall, and some rotten joists/beams had been attached to the new ones. The dwelling is entirely within environmentally protected wetlands, and approximately 161 tonnes of fill was brought in for the driveway, dwelling, and location of a removed septic bed. The on-site activity could adversely impact the quality of their well water and the water quality of the pond and creek. The increased use of the site has negatively impacted important natural habitat. The increased use of the property has resulted in a loss of privacy. See Appendix F for additional information.

Conclusion:

Based upon the evaluation within the staff report and comments received in response to the application, staff are of the opinion that it is not practical to assess the proposal against the principles of good planning as the evidence and information provided does not lead to the conclusion that the use is legal non-conforming.

As staff are unable to conclude that the use is legal non-conforming, the proposal is unable to meet the tests of the principles of good planning to determine whether an expansion to a legal non-conforming use is appropriate.

Attachments:



Appendices A-F to
COA2018-070.pdf

Appendix "A" – Location Map
Appendix "B" – Aerial Photo
Appendix "C" – Applicant's Sketches
Appendix "D" – Affidavits
Appendix "E" – Department and Agency Comments
Appendix "F" – Public Comments

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