

ISSUE DATE:

Oct. 6, 2005

DECISION/ORDER NO:

2666



PL041222

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

Pauline M. Hewitt has appealed to the Ontario Municipal Board under subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Committee of Adjustment of the Municipality of Central Elgin, which dismissed an application numbered A28/04 for variance from the provisions of By-law 1507, as amended, respecting 380 Edith Cavell Blvd
OMB File No. V040627

APPEARANCES:

Parties

Pauline M. Hewitt

Municipality of Central Elgin

Counsel

V. M'Garry

B. Blake

DECISION DELIVERED BY J. CHEE-HING AND ORDER OF THE BOARD

CONTEXT:

Pauline Hewitt (applicant and appellant) is the owner of 380 Edith Cavell Blvd (property) for which an application for variance from the provisions of By-Law 1507 as amended (by-law) to permit an existing chain link fence to continue to be located on the east side of the property was refused by the Committee of Adjustment (Committee) of the Municipality of Central Elgin (municipality). The matter is now before the Board on appeal. The subject property is beachfront property located in the popular beaches of the Village of Port Stanley (Village). The fence in question starts at the applicant's dwelling and continues in a southerly direction (lakeward) right up to the water's edge with an access gate to permit the public to walk along the beach at the water's edge (Exhibit 18). The existence of the fence is a major issue for the residents of the Village, pitting proponents of unrestricted public access to the beach against owners of

beachfront property who argue that their inherent property rights include ownership of the lands up to the water's edge.

The applicant was represented by counsel (Ms. V. M'Garry) and a coastal marine engineer (Mr. M. Sturm). The municipality was represented by counsel (Mr. B. Blake) and planners from the municipality and the Kettle Creek Conservation Authority (Messrs. J. McCoomb and J. Lawrence respectively). In addition seven participants appeared in support of and four participants spoke against the application (refer to Attachment 1).

The property is located in the Residential Zone (R1), Open Space Zone 3 (OS3) and the Dynamic Beach Standard (DBS) as defined in the ZBL and designated as same in the municipality Official plan (OP). The requested permission is to:

1. Permit an existing chain link fence to continue to be located along the easterly interior side lot line of the subject lands whereas, subsection 13.1.3(a) of By-law 1507 requires that no building or structure shall be erected for any purpose within the designated Dynamic Beach Standard (DBS).

The subject fence begins approximately at the applicant's dwelling, which fronts on the south side of Edith Cavell Blvd. continues southward and ends at the water's edge of Lake Erie. The fence is located within two zones i.e. Residential Zone (R1) and the DBS zone. A fence is a permitted structure within the R1 zone. It is that portion of the subject fence, which is located in the DBS zone that is the subject of this appeal. At the onset of the hearing there was some discussion concerning the applicable section of the *Planning Act* that governs this application. This application for permission falls under subsection 45(2)(a)(i) of the *Planning Act*, which deals with the expansion or enlargement of a non-conforming use.

FINDINGS OF THE BOARD:

The central issues to be adjudicated at this hearing were firstly, whether the Board has the jurisdiction to interpret and make a finding on the validity of the province of Upper Canada Crown Patent of 1834, which refers to the subject property. Secondly,

based on the planning evidence, whether all or part of the fence within the DBS zone legally existed on the date of the passing of the By-law 2999 on May 27, 1996, and whether its use was continuous within the meaning of subsection 45 (2) of the *Planning Act*. Thirdly, if only part of the fence legally existed at the date of the passing of the said By-law, whether this application for permission for an extension of the fence represents good planning and is in the public interest.

The Board heard very extensive and credible submissions from the parties and fourteen participants over four days. Having considered all of the evidence and submissions of the parties, the Board makes the following findings:

1. The Board does not have the jurisdiction to interpret the validity of the Crown Patent, which affects the subject property. This is a matter for the courts to adjudicate. However, this does not prevent the Board from making findings on the subject application based on the planning evidence presented at the hearing.
2. The Board finds that a fence did exist along the eastern interior side lot line of the property and which continued up to the southerly edge of the dune formation, within the Dynamic Beach Standard zone prior to the passing of By-law No. 2999 on May 27, 1996. Its use continued up to the date that the application for permission was made to the municipality. As such that portion of the existing fence is a legal non-conforming use.
3. Notwithstanding the finding of legal non-conformity, the Board finds that the extension of the fence within the Dynamic Beach Standard zone occurred some time after the passing of the said by-law. The Board finds that this extension has created an undue adverse impact on the beach; does not represent good planning; and it is not in the public interest.

The reasons for these findings follow.

There was considerable and lengthy argument by both counsels over the interpretation and applicability of the Crown Patent of 1834 given to Charles Duncome by the then province of Upper Canada (Exhibit 23). It was Mr. Blake's submission that the Crown Patent, which applies to the subject property, "reserves free access to the beach for all vessels, boats and persons". It was his proposition that the crown patent

modifies the property rights of the applicant and the existence of the fence is in direct contravention of this clause in the Crown Patent. Ms. M'Garry, counsel for the applicant vigorously argued that the term access does not mean use and that the clause cited above pertains to access from the water by persons disembarking from boats or vessels. It was her proposition that the meaning of that clause must be taken within the context of the times in which it was written when persons from vessels or boats required access to the beach in order to get to dry land. Both counsel cited a wealth of court cases and decisions, which purportedly supported their interpretation of this clause.

The Board finds that the interpretation and applicability of the Crown Patent is beyond its jurisdiction to adjudicate. This particular issue properly belongs in the courts and the parties certainly have that avenue available to them. The Board's primary function is to hear and adjudicate appeals and applications on matters relating to land use planning based on the planning evidence submitted. In that regard, the Board has the *Planning Act* as its primary piece of legislation to administer and at times interpret. Notwithstanding this finding, there is ample planning evidence submitted at this hearing from which the Board can properly adjudicate and render a decision on the appeal at hand.

The Board now turns its mind to the issue of the existence of the fence in relation to the date of the passing of By-law 2999 on May 27, 1996. There was extensive evidence presented, often contradictory, submitted by expert witnesses and residents for both parties over the existence, length, type and use of the fence in relation to the date of the passing of the by-law. It was counsel for the applicant's submission that a fence of some form or another existed as early as the 1960's. The fence over that period of time has been replaced by better fencing material right up to the time of the subject application. The current fence is a chain-link fence. It was her submission that the use of the fence was continuous.

Ms. B. Gore, the previous owner of the property testified that when she resided there in 1980 there was a fence on the same location as the existing fence but that it was a "t-bar" fence. It was her testimony that she extended the fence further towards the beach but could not remember exactly where it ended. Counsel submitted many photographs showing various iterations of the fence (Exhibits 2,3,4,6,9,11). However the dates of when many of these photographs were taken could not be substantiated.

The only photographs, which the Board could rely on, were provided by Mr. Milo Sturm, a marine and coastal engineer who was qualified as an expert witness to give evidence on marine and coastal engineering. Mr. Sturm provided photographs, which were taken in 1995 (the dates were imprinted on the photographs), which clearly showed the existence of a fence on the easterly side of the subject property (Exhibit 2). It was his testimony that the fence continued lakeward until the southerly edge of the dune formation on the subject property.

Counsel for the municipality submitted that even if there was a fence in existence prior to the passing of the by-law that its use was not continuous and that there was no clear evidence submitted as to where the fence ended.

That there was a fence prior to the passing of the by-law on May 27, 1996 is quite evident. It is also evident to the Board that the fence has been rebuilt over time. Many undated photographs were submitted and conflicting evidence submitted on how far the fence extended and whether its use was continuous. The Board finds that the testimony of Mr. Milo Sturm and the date imprinted photographs that he submitted to be reliable. The Board finds that at the time of the passing of the by-law on May 27, 1996 that a fence existed as shown in Exhibit 2. This fence ended at the southerly edge of the dune formation on the subject property. Its use as a fence was continuous up to the date that the application for permission was made to the municipality.

The last matter to be adjudicated is the application for permission for the extension of the fence from the point established by the Board to where it currently ends which is the water's edge. The fence, as it currently exists, now extends right to the water's edge with an access gate to allow the public to walk along the beach (Exhibit 3 a-d). The applicant testified that she extended the fence to the water's edge because her deed clearly indicates that her property extends to the water's edge. Furthermore, because of the litter, parties at late hours of the night and other nuisances from some beach users she was forced to extend the fence in order to protect her property rights. It was her testimony that the access gate allows unrestricted access and egress for the public. Owners of beachfront property to the west testified in support of the applicant citing the same reasons i.e. property rights.

J. McCoomb, planner for the municipality and former planner for the Kettle Creek Conservation Authority (KCCA) provided professional planning evidence for the municipality. It was his testimony that much of the subject property is located in the DBS zone. Pursuant to by-law 2999 which amended the subject ZBL, no building or structure is permitted within the DBS zone. It was his testimony that a fence is considered to be a structure within the meaning of the by-law. Mr. McCoomb further testified that he made a site inspection of the subject property in early 1998 when he was with the KCCA and advised the applicant that the KCCA does not support the construction of a fence within the DBS zone. His recommendation was followed up by a letter to the municipality advising them of KCCA's position on the fence (Exhibit 1, Tab 22). In this letter, Mr. McCoomb recommended that any fencing be limited to no further lakeward than the southerly side of the shallow dune system that runs parallel to the shore. The applicant proceeded to extend the fence within the DBS zone in spite of the KCCA's position. It was the planner's professional planning opinion that the fence is neither an appropriate nor desirable development for the DBS zone, has an adverse impact on beachfront amenity and is in direct contravention of the ZBL and the OP.

Mr. J. Lawrence, planning supervisor of the KCCA provided additional professional planning evidence in support of the municipality's position. Mr. Lawrence was qualified as an expert witness to give evidence related to land use planning as well as shoreline management practices. It was his testimony that the Dynamic Beach is considered a natural hazard within section 3.1 of the Provincial Policy Statement (PPS) and that the subject fence within the DBS zone would inhibit the natural formation of dunes. Furthermore, KCCA was concerned about public health and safety in areas subject to potential flooding and erosion. Section 3.1.3 of the PPS states that within the dynamic beach zone, emergency vehicles and people must have a way of safely entering and exiting the area during times of flooding, erosion and other emergencies (Exhibit 15). It was Mr. Lawrence's professional planning opinion that the portion of the fence within the DBS zone be removed for the aforementioned reasons.

Mr. Miro Sturm, a marine engineer was qualified to give evidence in marine and coastal engineering matters. Mr. Sturm gave evidence in support of the applicant's position. Mr. Sturm was the author of the Port Stanley Beach Management Study, which provided the basis for the beach management policies contained in the municipality's ZBL and OP. It was his opinion that the applicant's chain link fence will not have an

adverse impact on the dune formation within the DBS zone. After considerable debate under cross-examination, Mr. Sturm did agree that a fence could be considered a structure within the DBS zone. He further agreed with the position taken by the KCCA that no structures, which include fences, should be located in the DBS zone. However, it was his opinion that during a storm, the fence would not impede access from the beach, as people would go north away from the beach rather than parallel to the shoreline.

Aside from the testimony of these expert witnesses, participants were divided into two camps. Those advocating unrestricted access to the beach by the public were opposed to any fence that would restrict the public's right to walk freely along the beaches of the Village. Evidence was heard that the beaches of Port Stanley are a major tourist attraction upon which the local economy is heavily dependent. Any attempts to restrict the movement of the public along its beaches would have an adverse impact on tourism. Conversely, evidence was heard from beachfront property owners that their deeds include ownership to the water's edge and that they have a right to the enjoyment of their property. This bundle of rights includes protection from public nuisances and trespassing.

In making its finding on the issue of an application for permission for the extension of the fence, the Board must look at subsection 45(2)(a)(i) of the *Planning Act* and assess whether the extension would result in a similar impact as that portion of the existing fence which has been found to be legal non-conforming. The Board must also assess whether the extension constitutes good planning and is in the public interest.

In its assessment, the Board relied on the evidence provided by the expert witnesses. In this regard, the Board prefers the evidence of the planners for the municipality and the KCCA. In the Board's view, the extension of the fence clearly contravenes By-law 2999, the OP and does not have regard to the PPS with respect to beach management policies within a DBS zone. It will have an adverse impact on the DBS zone by inhibiting natural dune formation. Furthermore, the Board takes very seriously, the issue of public safety during times of emergencies such as flooding. The public and emergency vehicles must have unfettered and unrestricted access from and on the beach during a storm and other emergencies. The existing extension of the fence even with the access gate will impede this type of access. Were it not for the Board's earlier finding of legal non-conformity for that section of the fence that existed prior to

the passing of By-law 2999, the Board would have found the entire section of the fence within the DBS zone to not be good planning nor in the public interest for the same reasons.

As such, the Board finds that the application for permission to allow the extension of the fence beyond the southerly edge of the dune formation to the water's edge will have an adverse impact on the beach within the DBS zone; does not represent good planning; and is not in the public interest. **THE BOARD ORDERS** that the appeal is allowed in part and **ORDERS** that the existing portion of the fence including the access gate from the southern edge of the dune formation to the water's edge be permanently removed. The location of the southern edge of the dune formation within the subject property will be determined by the KCCA. The remaining portion of the fence within the DBS zone, which the Board finds to be legal non-conforming, may remain as chain-link to minimize its impact on dune formation within the DBS zone.

So orders the Board.

J. CHEE-HING
MEMBER

ATTACHMENT 1

List of Participants:

For Appellant:

Mr. T. Campbell, 584 George Street, Port Stanley, N5L 1H4

Ms. B. Gore, 239 Erie St., St. Thomas, ON N5R 2N8

Mr. C. Arnott, 151 Foster Avenue, London N6H 2L2

Robert Taylor, 404 Edith Cavell Blvd., Port Stanley N5L 1E6

Ms. Sharon Pocock, 296 Stills Lane, Oakville L6J 5Y5

C. F. Teetzel, c/o Ruckus Fence, 346 Elm St. St. Thomas, N5R 1J8

Milo Sturm, 298 Belsize Drive, Toronto, ON M4S 1M8

Mr. F. Lenard, 602 George St., Port Stanley, N5L 1J4

For Municipality:

Mr. McCoomb, Planner for Municipality

Mr. J. Lawrence, Planner for Kettle Creek Conservation Authority.

Susan Roy, 172 William St., Port Stanley, N5L 1J4

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