

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



**ISSUE DATE:** February 11, 2019

**CASE NO(S):** PL170550

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(s):	Jayant & Dorothy Lele and Guy Thorne
Applicant:	Paul Snelgrove
Subject:	Minor Variance
Variance from By-law No.:	2003-75
Property Address/Description:	Concession 11, Part Lot 2, Frye Lane
Municipality:	Township of South Frontenac
Municipal File No.:	MV-38-16-B
OMB Case No.:	PL170550
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OMB Case Name:	Lele v. South Frontenac (Township)

**Heard:** February 1 and 2, 2018 in Sydenham, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

Guy Thorne, Jayant and Dorothy Lele	J. Michael Hickey
Paul Snelgrove	Self-represented
Township of South Frontenac	Tony Fleming

**DECISION DELIVERED BY MICHEL BELLEMARE AND ORDER OF THE  
TRIBUNAL**

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## **A. OVERVIEW**

[1] Guy Thorne, Jayant and Dorothy Lele (“Appellants”) appealed the decision of the Township of South Frontenac’s (“Township”) Committee of Adjustment authorizing minor variances that would allow Paul Snelgrove to build a residential dwelling on Milk Lake.

[2] Based on the evidence and for the reasons that follow, I hold that the appeal is allowed and the variances are not authorized.

## **B. BACKGROUND**

[3] To allow him to build a one “storey and a half 30 [foot-high]” single family residential dwelling on his property, Mr. Snelgrove asked the Committee of Adjustment for relief from Comprehensive Zoning By-law No. 2003-75, which requires a 30-metre setback from the highwater mark, and allow a 13.1-metre (43 feet) setback instead. In its decision, the Committee of Adjustment highlights that the purpose of the application is also to permit construction “within 15m from top of bank”, a reference to the required 15-metre setback from the top of bank of any embankment with a slope greater than 30 percent. While the Committee of Adjustment did not grant the latter relief, it did grant the former, subject to the following conditions:

1. This minor variance is for the construction of a maximum 1080 square foot footprint dwelling, including any decks, to be located a minimum of 43 feet from the high water mark of Milk Lake and a minimum of 100 feet from the high-water mark of the inland wetland area.
2. Minor variance MV-37-16-B is applicable only to South Frontenac Township Comprehensive Zoning By-law 2003-75 and not to any subsequent zoning by-laws.
3. A building permit is required for ALL demolition and construction on the property. There shall be no additional development, or demolition of existing structures, on the property without approval from the Township of South Frontenac.
4. The applicant shall enter into a site plan agreement with the Township to be registered on title, which sets out the Township’s environmental and limited service policies, and which specifies that a permit may be required from the Cataraqui Region Conservation Authority for the proposed

development, and for any shoreline or in-water works in addition to a requirement for the installation of French drains for runoff.

[4] At the hearing, Tony Fleming advised that the application should be amended to reflect a reduced setback of 2.5 metres from the top of bank leading to Milk Lake, and relief from subsection 10.3.1 of the zoning by-law requiring a minimum front yard setback of 30 metres, and allow instead a 13.1-metre setback (identical to the requested setback from a highwater mark or floodline of a body of water).

[5] The Appellants challenged the Committee of Adjustment's decision on the following main grounds:

- The requested relief is not minor, and the Committee of Adjustment did not adequately consider “the topography of the land and its drainage characteristics and the need to protect the water quality of Milk lake and its water sources for human use or for the conservation of natural aquatic life”.
- The Cataraqui Region Conservation Authority (“Conservation Authority”) twice reviewed the application and “on both occasions recommended [its] denial”.
- The subject property “was created by severance... [in] 2006”, based on the Applicant proposing to increase its size and “the identification of a suitable location for a dwelling and septic system, and the Conservation Authority’s support of this proposal”, and subject to a site plan agreement to be registered on title. But “no such site plan agreement was prepared or registered”, the severance “condition remained unfulfilled”, and the Applicant is attempting to build in a location not supported by the Conservation Authority.

[6] With an approximate area of 7.78 hectares (19.2 acres), the subject property is vacant, fronts on Frye Lane (a private road) and has over 180 metres of frontage on northern part of Milk Lake, between Buck Lake and Big Clear Lake.

[7] Designated “Rural” in the Township Official Plan, the subject property is zoned Limited Service Residential Waterfront under the Township Comprehensive Zoning By-law No. 2003-75.

### **C. ANALYSIS AND FINDINGS**

[8] As a preliminary finding, I am satisfied the changes to the original application are minor and, pursuant to subsection 45(18.1.1) of the *Planning Act* (“Act”), no further notice is required.

#### **1. Application Must Satisfy Statutory Fourfold Test for a Minor Variance**

[9] The Tribunal has the power to authorize the requested variances from the provisions of the zoning by-law if, in its opinion, the application meets all four requirements under subsection 45(1) of the Act. The variances must:

- a) maintain the general intent and purpose of the official plan;
- b) maintain the general intent and purpose of the zoning by-law;
- c) be desirable for the appropriate development or use of the land, building or structure; and
- d) be minor.

[10] As subsection 45(18) of the Act provides, the Tribunal “may dismiss the appeal and may make any decision that the committee could have made on the original application”. Therefore, this proceeding is a new hearing on the matter. Also, on any authority or permission it grants, the Tribunal has the power to impose terms and conditions it considers advisable, pursuant to subsection 45(9) of the Act.

## **2. Witnesses**

[11] Testifying in support of the appeal were Mike Keene, a professional planner qualified to provide evidence in land use planning; Christine Woods, an ecological planner with the Conservation Authority (not called as an expert witness); Andrew Schmidt, a development review manager with the Conservation Authority, also not called as an expert witness; Tom Beaubiah, a conservation lands manager and biologist with the Conservation Authority (not called as an expert witness); Rob Snetsinger, qualified to provide evidence in biology and ecology; and Appellant Guy Thorne.

[12] Mr. Snelgrove did not testify or call any witnesses in support of his application. However, in support of Mr. Snelgrove's application, the Township called on the testimony of the following individuals: Reginald Genge, qualified to provide evidence in lake capacity, water quality and environmental impact assessments, and whose testimony was augmented by his witness statement (Exhibit 9); and Lindsay Mills, a professional planner with the Township qualified to provide evidence in land use planning.

[13] Mr. Mills notably authored the April 13, 2017 Township planning report (Exhibit 1, Tab 29) to the Committee of Adjustment recommending approval of the application "with conditions including a revised site plan agreement implementing the recommendations of the report dated October 27, 2016 from OLA". The latter reference is to an October 27, 2016 preliminary Environmental Impact Assessment (Exhibit 1, Tab 20) authored by Mr. Genge, whose firm is called Ontario Lake Assessments & Environmental Education Services.

[14] Mr. Genge's preliminary Environmental Impact Assessment states that a "small area, identified as environmentally sensitive on Schedule 'D' Bedford District of the South Frontenac Township Zoning By-law, lays on the east side of the point of land proposed for the building envelope". He concludes that the environmentally sensitive area "is not significant but does play a role in providing habitat for riparian species and possibly fish habitat and as such should not be filled/excavated or drained or physically

disturbed”. He also concludes that Milk Lake is not a sensitive lake, and that “due to topographic constraints”, the proposed “building envelope location is essentially the best that can be achieved for the lot”. However, the proposed development location “cannot achieve the minimum 30 m setback from the lake on the west side nor the [environmentally sensitive] area on the east side”.

[15] Mr. Schmidt testified that, in his correspondence to the Township and the Committee of Adjustment (Exhibit 1, Tabs 25 and 28), the Conservation Authority recommended that Mr. Snelgrove’s minor variance application be denied, citing persisting concerns relating to the proposed development’s negative impact on natural heritage features and water quality. Mr. Schmidt also highlighted the Conservation Authority’s role in regulating development within 15 metres of a valley land, and that “the valley of Milk Lake is considered to extend inland to the top of the ridge”.

[16] Ontario Regulation 148/06 (“Regulation”) is issued pursuant to the Ontario *Conservation Authorities Act* under the title: *Cataraqui Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses*. Section 3 of the Regulation provides that the Conservation Authority has the power to grant permission for development in areas within its jurisdiction (including the subject property) “if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development”. It was Mr. Schmidt’s evidence that, in this case, “since there are alternative locations for development outside of the water setback, staff do not believe that the [Conservation Authority]’s position will change”.

[17] In her testimony, Ms. Woods referred to her correspondence with the Township concerning Mr. Snelgrove’s 2006 application for consent to create the subject property. It was Ms. Woods’ evidence that the Conservation Authority highlighted that neighbouring Buck Lake—approximately 70 metres from Milk Lake— “has been identified as an at capacity (highly sensitive) Lake Trout lake by the Ontario Ministries of the Environment and Natural Resources”, and that new development is not permitted

within 300 metres of Buck Lake unless it can be demonstrated that runoff will either not drain into that lake, or take at least 300 metres before reaching it.

[18] The application for consent, dated September 7, 2006 (Exhibit 1, Tab 3) describes the area of the proposed new lot as approximately 4.0468 hectares (10 acres), and the remaining lot's area as 34.3983 hectares (85 acres). Ms. Woods testified that, in reviewing the application for consent further to her review of the proposed new lot, she believed that the latter "did not contain a buildable envelope". It was Ms. Wood's evidence that "Mr. Snelgrove suggested that an alternative would be to enlarge the lot to be severed to include lands between the driveway, the north ridge and the north watercourse". Furthermore, a "suitable development envelope was identified on these lands, which would be large enough to accommodate a dwelling and septic system outside of the required setbacks from the top of bank and waterbody, and to provide access to Milk Lake". Ms. Woods testified that this alternate location was north-east of the proposed development.

[19] The subject property, at 7.78 hectares (19.2 acres), is almost twice the size of what the consent application proposed to create as a new lot. It was Mr. Keene's evidence that a 2007 site plan agreement for the subject property (Exhibit 1, Tab 16, Schedule B) demonstrates that the "severance envisioned two developable locations on the site". I find that the subject property's actual size was meant to provide a building envelope acceptable to the Conservation Authority.

[20] On behalf of the Conservation Authority, Mr. Beaubiah reviewed Mr. Genge's preliminary Environmental Impact Assessment of the proposed development. His testimony was augmented by his written comments included in the Conservation Authority's December 1, 2016 correspondence to the Township (Exhibit 1, Tab 25, pages 2-3). It was Mr. Beaubiah's evidence that Mr. Genge's preliminary Environmental Impact Assessment "provides extremely basic information with minimal consideration for fish habitat, but neglects other relevant sections of the PPS [Provincial Policy Statement], Natural Heritage Reference Manual, Significant Wildlife Habitat

Guide, and ESA [*Endangered Species Act*]”. According to Mr. Beaubiah, Mr. Genge’s assessment “does not review typical natural heritage values or assess the impacts of development”, and focuses on “building constraints rather than ecological considerations”. Therefore, the Conservation Authority was “unable to recommend acceptance of the preliminary EIA [Environmental Impact Assessment] as it does not include the relevant considerations and scope”.

[21] Mr. Snetsinger testified that his review of Mr. Genge’s preliminary Environmental Impact Assessment (Exhibit 14) identified several shortcomings. In essence, Mr. Genge’s report failed to cover several important issues and was not sufficiently detailed. For example, it did not “determine the near shore nature of the fish habitat that might be at some threat from nearby development, such as water depths, substrate type, aquatic vegetation, bottom slope, shoreline stability, and evidence of fish nests”. Also, it did not address the proximity of Buck Lake, an “at-capacity lake trout lake” and the fact that a “prescribed 300 m setback may apply”, requiring further investigation and analysis. According to Mr. Snetsinger, the region contains several species at risk and special concern species, and the subject property is “within the regulated area of Gray Rat Snakes”. In addition, there is “a possible watercourse, there is wetland, there is fish habitat, and there may be other natural heritage features of importance [...]”. Mr. Snetsinger testified that all of these issues required further investigation and analysis.

[22] Mr. Genge testified that he stood by his preliminary Environmental Impact Assessment, and that this matter “was all about topography rather than water quality”.

[23] Mr. Thorne owns a cottage on Milk Lake. He testified that Milk Lake is a “very quiet lake” with only three cottages, one of which also has frontage on Buck Lake. He has noticed snakes on the subject property, “once a six-footer”, and “has seen Milk snakes and water snakes” at his cottage, which is “more than 60 metres from the subject property”. He testified that Milk Lake drains into Buck Lake near his property, which is a source of concern regarding the proposed development and its potential impact on water quality.



[24] Mr. Keene's testimony was augmented by his planning opinion letter, dated January 19, 2018 (Exhibit 17). It was Mr. Keene's evidence that the proposed development is inconsistent with the Provincial Policy Statement because it notably fails to demonstrate: that it would not "cause environmental or public health and safety concerns"<sup>1</sup>; that it would maintain the "diversity and connectivity of natural features" and "the long-term ecological function and biodiversity of natural heritage systems"<sup>2</sup>; and that it would "protect, improve or restore the quality and quantity of water"<sup>3</sup>.

[25] Township Official Plan policies for development adjacent to lakes and rivers under subsection 5.2.7(b) include the following:

- (i) All lands within 90 metres (295 ft.) of the highwater mark of all lakes and rivers which are not designated Environmental Protection are included as Environmentally Sensitive Areas. Where development and site alterations are proposed in Environmentally Sensitive Areas, it is the intent of this Official Plan that all buildings, campsites and structures not related to the use of the water and all sewage disposal system leaching beds be well set back from the highwater mark. More specifically, a minimum setback of 30 metres (98.4 ft.) from the highwater mark shall apply but greater setbacks may be required depending on conditions specific to individual sites. [...] These measures are intended to minimize environmental and visual lake impacts by reducing phosphorus inputs, preventing erosion and by maintaining a natural appearance of the shorelines. [...]. (Emphasis added)
- (ii) In implementing subsection (i), it is intended that:
  - 1) On lots created subsequent to the approval of this plan and having steep slopes, minimal woody vegetation cover, thin soils and/or soils with poor phosphorus retention capability, setbacks of 90 metres (295 ft.) may be required. (Emphasis added)
  - 2) On vacant lots existing on the day of adoption of this Plan, a minimum 30 metre (98.4 ft.) setback from the high watermark for all proposed

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<sup>1</sup> *Provincial Policy Statement*, 2014, subsection 1.1.1c)

<sup>2</sup> *Ibid.*, subsection 2.1.2.

<sup>3</sup> *Ibid.*, subsection 2.2.1

structures shall be required. **Consideration may be given to very slight reductions to the minimum 30 metre (98.4 ft.) setback requirement but only if it is not physically possible to meet the setback anywhere on the parcel.** Where it is not physically possible to meet the setback, then the structure shall be constructed as far back as possible from the highwater mark. (Emphasis added)

[26] As Mr. Keene pointed out, the subject property was created subsequent to the adoption of the Official Plan, and may require setbacks of 90 metres. This is also a potential requirement under subsection 5.8.2(a) of Comprehensive Zoning By-law No. 2003-75.

### **3. Variances Do Not Meet the Four Tests Under the Act**

[27] I prefer the land use planning evidence of Mr. Keene and the biology and ecology evidence of Mr. Snetsinger. Based on the evidence, I find that the requested variances, both individually and collectively:

- a) do not maintain the intent and general purpose of the Township's Official Plan because the proposal does not locate development a minimum of 30 metres from the highwater mark; the proposed development may require setbacks up to 90 metres as it is considered within an Environmentally Sensitive Area; the proposal is within 300 metres of a highly sensitive Lake Trout lake (Buck Lake); and there are other locations on the subject property where development could occur while meeting the required setbacks;
- b) do not maintain the intent and general purpose of the zoning by-law because the proposal does not ensure that natural heritage features and hazards from the physical characteristics of the site are identified and impacts are mitigated, and the proposed development may require setbacks up to 90 metres;
- c) are not, from a planning and public interest point of view, desirable for the appropriate use of the land, building or structure on the property, and relative

to the neighbouring lands, because the proposal fails to demonstrate that it would protect the environmental integrity and water quality of the lakes; and

- d) are not minor because the proposal fails to demonstrate that the reduced setbacks would not create an unacceptable adverse impact on water quality or the ecology.

**D. ORDER**

[28] The Tribunal allows the appeal and the variances are not authorized.

*“Michel Bellemare”*

MICHEL BELLEMARE  
MEMBER

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**Local Planning Appeal Tribunal**

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