

ISSUE DATE:

**JUNE 15, 2004**

DECISION/ORDER NO:

**1066**



PL031331

**Ontario Municipal Board**  
**Commission des affaires municipales de l'Ontario**

Konrad Lewinski 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 City of Ottawa which dismissed an application numbered A-00423 for variance from the provisions of By-law 1998, as amended, respecting 174 Kehoe Street  
O.M.B. File No. V030653

**APPEARANCES:**

**Parties**

J. Agnew and I. Lewinski

P. Wood and M. Hurley

**Counsel**

A. K. Cohen

J. McIninch

**MEMORANDUM OF ORAL DECISION DELIVERED BY S. D. ROGERS  
ON MAY 28, 2004 WITH REASONS AND ORDER OF THE BOARD**

The Board acknowledges that the matter before this Board has arisen as a result of a fundamental failure of the system. The agencies charged with managing the development approval process have failed both of the parties in front of this Board.

J. Agnew and K. Lewinski own a home at 174 Kehoe Avenue in the Britannia Village area of the City of Ottawa. The property is on the Ottawa River, on the eastern side of Britannia Bay. When they decided to retire in the area, they looked for several years before purchasing the property. Also before purchasing the property, they hired a consultant to investigate the development requirements and constraints applicable in the area. The consultant enquired at the City of Ottawa and the Rideau Valley Conservation Authority. The owners expected that they would be building their retirement home and they carefully investigated what was required.

After purchasing an older cottage at 174 Kehoe Street the couple spent another two years planning the design of their new home. They worked with the City of Ottawa and the Conservation Authority, and insisted on conforming with all of the zoning by-law performance standards.

A building permit was issued. The house underwent construction. When the basement excavation was dug, the Agnew-Lewinskis' neighbours to the north, the Wood-Hurleys, were dismayed to see the location of the house. To their mind the house was located too far toward the river. The Wood-Hurleys enquired at the City and at the Conservation Authority and were told that the new home complied with all requirements of the zoning by-law and of the Conservation Authority.

The home was finished with the exception of a screened-in porch. The house was inspected by officials from the City. It was at that point that the Agnew-Lewinskis were advised that the home did not comply with certain setback requirements applicable to construction in flood plain areas of the City of Ottawa. The Agnew-Lewinskis were required to apply for a minor variance. The minor variance application was refused by the Committee of Adjustment for the City of Ottawa, and the owners appealed to this Board.

At the hearing of this matter, both the owners and their neighbours to the north were represented by counsel. Both parties called four witnesses. In addition, the Board heard from a Mr. Finch, a resident from another part of Ottawa. The Board heard from two planners called by each of the parties, and from each of the owners, as well as from a coastal engineer called on behalf of the owners and a hydrologist called on behalf of the objecting neighbours.

The Board finds that the proposed variances fully and completely satisfy the four tests required to be satisfied under the *Planning Act*, subject to one condition.

### **Variances**

There are three Official Plans relevant to this application: the Official Plan of the Region of Ottawa-Carleton, the Official Plan of the City of Ottawa, and the recently adopted, but not yet approved Official Plan for the amalgamated City of Ottawa. In all of these plans this area is designated Urban Area, but it is noted that the area is in a floodplain or floodway. The site is zoned "Residential – R1G with a flood plain overlay.

This home complies with all of the R1G performance standards. However, it does not comply with certain setbacks related to its proximity to the water.

To understand the variances one has to understand the particularities of the property. The property is located on the northerly end of a series of properties, which are protected from the river by a substantial sea wall. The sea wall is located well into the river, beyond the actual riverside boundary of the properties protected by it. Thus, while the legal ownership of the land stops at an old high water mark, the property in fact extends well past the high water mark, to the seawall, creating an extensive front lawn.

The sea wall is found on two sides of the Agnew-Lewinski property. It is found in the river in front of the property, and along the northerly property boundary, which the Agnew-Lewinskis share with the Wood-Hurleys. The Wood-Hurley property has a sea wall that is well back from the normal high water mark, and as a result has some beach adjacent to the northerly seawall of the Agnew-Lewinski property. In addition, due to a quirk of history, the seawall on the north side of the Agnew-Lewinski property angles inward into the Agnew-Lewinski property just as it meets the part of the seawall, which then runs parallel with the Wood-Hurley seawall.

In any event, it has been interpreted that the home does not meet the zoning by-law requirement of being less than 30 metres from the rivers edge. The rivers edge in this case is identified as being where the high water mark intersects with the north seawall of the Agnew-Lewinski property. As well, because the home is located immediately adjacent to the point of the indented seawall, the house does not meet the 7.5-metre setback from a flood control work.

The variances as requested therefore, which include the as-built home and the yet-to-be-built screened porch, are as follows:

1. A variance to permit the home to be located 8.23 metres from the rivers edge, when a 30 metre setback is required.
2. A variance to permit the home to be located 0 meters from a flood control work, when a 7.5 metre setback is required.

### **Planning Act Tests**

The Board finds that not only do these variances meet the intent of the Official Plans applicable to the site, but that the variances comply in all respects with the Official Plan.

While there are three relevant Official Plans, the provisions of each are similar and reinforce the policies for the site. The Board will therefore refer to the provisions of the City of Ottawa Official Plan which has Ministerial approval and which is, in the strictly legal sense, currently applicable.

The current Official Plans designate this site as part of the “Residential Area” in a “Waterway Corridor”. Residential development is permitted. There are policies, which require new buildings to be constructed in a manner, which is compatible and sensitive to its surroundings and to the massing, height, and urban design of adjacent buildings,

The evidence was unequivocal on this point from all witnesses. The Agnew-Lewinskis put much thought and planning into designing their home. They specifically hired a designer who knew the area and who specialized in creating a house plan, which would reflect the heritage of the area. The area is an eclectic mix of old cottages and newer homes on a diverse mix of lot sizes and shapes. The Agnew-Lewinskis constructed a home commensurate in size with the cottage they demolished. They maintained the peaked roof design of the old cottage. A below-grade garage was installed in order to hide the garage feature and create an aesthetically pleasing front face of the house, with a substantial landscape component. Every witness confirmed that the house was lovely, and the superior design qualities of the home were confirmed by the photographic evidence.

The Agnew-Lewinskis did, however, make one significant change from the old cottage. The old cottage was located very close to the road. The new home was set back from the road in accordance with the 6 metre front yard setback required by the zoning by-law. In addition, in order to achieve the by-law requirement for the slope of the driveway leading to the below-grade garage, the house was set back an additional 3 to 4 metres.

The neighbouring Wood-Hurley home was reconstructed around the original cottage that existed on that property. As a result, the Wood-Hurley home is still located very close to the road.

The result is that the new home is situated further toward the river, than the Wood-Hurley home and the Wood-Hurley home is much closer to the road than the new

Agnew-Lewinski home. However, it is clear that the new home addresses the street in a far more sensitive and compatible way than their neighbours' home.

The Official Plan also speaks to the creation of development setbacks from watercourses in cooperation with appropriate agencies. The actual setbacks are specified in the zoning by-law.

Under Section 6.16 of the Official Plan in the "Flood Plain" policies, the Plan provides in Section 6.16(e) as follows:

- e) City Council shall not permit development in the flood plain...*(in the areas in which this property is located)*...except by site specific zoning by-law amendment which may only be passed if:
  - i) Sufficient information accompanies the application to amend the zoning by-law to show that proposed development and its occupants will be protected from the effects of a 100 year flood.
  - ii) The potential upstream and downstream impacts of the proposal will not significantly affect the hydrology or hydraulics of the flood plain.
  - iii) The designation on Schedule A-Land Use permits the proposed development; and
  - iv) The site is located in the flood fringe.

It was not disputed that the site is designated for residential development and that the site is located in an area considered flood fringe.

With respect to the protection of the house from flooding, the Agnew-Lewinskis consulted closely with the Rideau Valley Conservation Authority (RVCA) when designing their house and carefully incorporated all of the flood-proofing elements required by that Authority. In addition, the home was constructed on a berm to bring it above the 100 year storm level, in accordance with a Flood Damage Reduction Study conducted by a firm called Novatech in 1992.

The Board is more than satisfied that the owners did what the experts and the agency responsible for flood issues advised them to do to protect them from flooding. The RVCA did not advise the owners as to the required setback from flood works. However, the RVCA wrote letters indicating that the owners had addressed all the

issues within the mandate of the RVCA; not once, but twice: once in respect to the issue of the building permit, and once in respect to the issue of the minor variance.

A planner from the RVCA was called by the objecting neighbours. He indicated that the RVCA official who assisted the Agnew-Lewinskis with respect to the construction of their home would have known about the setback requirements. When asked by the Board how the Authority could deal with flood proofing issues and the construction of a flood control berm and not address the issue of the existing flood control works on the property, this witness simply referred to a memo on file which indicated that the RVCA left such matters as siting of the house to the City of Ottawa.

This was not a satisfactory answer from the Conservation Authority in the Board's view, particularly when two letters to the City indicated that the owners had addressed all matters within the mandate of the Authority. It is hard to understand how the relationship between an existing flood control work such as a seawall, to the construction of another flood control work such as a berm, and to the house which the Authority is seeking to flood proof, are not significant considerations in the context of the Authority's mandate.

This situation was exacerbated when the witness for the Conservation Authority gave his professional opinion at the hearing, that the variance respecting a setback from the seawall ought not be granted because there were alternative locations on which to site the already constructed home. The only reason the Board could glean for this opinion was that the proposed setback would make it more difficult – though, after further questioning, not unusually difficult - to maintain and repair the seawall.

The Board also notes, that on cross-examination, this witness admitted that if he had actually reviewed alternatives and the particular circumstances of this case, that he might find that the variance was appropriate.

The flood-proofing berm extended from one side of the property to the other, just at the point where the seawall angles in to the property. Rather than reconstructing the seawall to conform to the property line and filling in the beach area where the seawall angles in, the owners built a bridge of sorts to anchor the berm and span the seawall indentation. This became a subject of study by a coastal engineer and a hydrologist, when the Wood-Hurleys objected to the impact of that bridge on their property.

After hearing considerable evidence, it became clear that the only impact that this bridge modification to the seawall would have on the Wood-Hurley property, would be in a 100 year storm, when the water would top the Wood-Hurley seawall, because it is insufficiently high. In this situation, the water coming over the wall would reflect from the bridge back into the Wood-Hurley property thereby contributing to the water that would already be flooding the Wood-Hurley property. The Board finds that this is a picayune point with no substance. The Board is completely satisfied that such an effect is one of water hydraulics in the most extreme of circumstances, which would have no significant additional erosion impact over that occurring as a result of the flooding of the Wood-Hurley property because of the current deficiencies in their own seawall. In addition, the Board is satisfied that this possible effect can be completely mitigated by either raising the Wood-Hurley seawall as recommended in the Novatech Flood Damage Reduction Study, or by the construction of a parallel structure on their seawall in the corner where it meets the Agnew-Lewinski property.

The Board is satisfied by the evidence of Mr. D. Williamson, the coastal engineer called by the owners, that the bridge, under any weather and water circumstances that have occurred in the past 35 years, will have a beneficial impact in terms of minimizing spray and water volume reaching the Wood Hurley property.

The Board also finds from the evidence that the new home would be protected from the effects of a 100 year storm level and that the changes to the seawall will not significantly affect the hydraulics or hydrology of the flood plain.

The Wood-Hurleys however advanced the proposition that this section of the Official Plan required the passing of a zoning by-law amendment. The planner called by the Wood-Hurleys indicated that in her view, this situation would benefit from a zoning review rather than a minor variance review. After questioning by the Board, the planner indicated that under the zoning review, the setbacks could be reviewed on a wider basis and that matters could be considered in a zoning review that could not be considered in a minor variance review. However, on cross-examination, the planner admitted that the Board had all the information necessary before it to make a decision with respect to the minor variance.

The Board agrees that in some cases a zoning review process seems more appropriate than a minor variance application when the minor variance application calls

into question the very basis for the performance standard. This is not the case here. The Board finds that this is a unique circumstance that has been fully analyzed and assessed by competent experts, and the Board is quite confident that no precedent will be set with respect to the reduction of such setbacks.

Furthermore, the Board accepts the evidence of the planners called by the owners, Mr. Smit, a Manager of Planning and Development Approvals for the City of Ottawa and Mr. Fobert, a planning consultant who had been chair of the Committee of Adjustment for seven years. They advised the Board that a zoning by-law amendment was only required when the use was not permitted, and that minor variances are routinely considered by the Committee of Adjustment for areas in Ottawa located in flood plains. The Board accepts the opinions of these witnesses as to the meaning of this section of the Official Plan. Furthermore, the Board finds that in this situation, it would be a completely unnecessary duplication of work, and serve no useful purpose, to deny this variance and require a zoning amendment review.

The Board was also directed to Section 13.21(b) of the Official Plan dealing with the kinds of considerations a decision maker is to take into account, in deliberating on the four tests for minor variance applications. It directs the decision maker to consider the following:

- i) site constraints and/or restrictions to meeting the requirements of the zoning by-law due to the physical or inherent conditions of the site involved...
- ii) whether or not alternative designs of the building which would be in conformity with the zoning by-law are clearly not feasible or appropriate for the site;
- iii) the concerns of and impact on adjacent owners, residents and community have been addressed;
- iv) an undesirable precedent would not result through the approval of the minor variance.

The Board finds that this is an unusual lot in many ways. It has a seawall, which is located some distance into the river, with a riverside yard extending out to that seawall. It has seawall on two sides of the riverside yard. It has an unusual indentation in the seawall, which brings the seawall into the property. In addition, the home only



touches the seawall at one point in the seawall indentation anomaly. There was no evidence of a threat to the integrity of the seawall as a result of the location of the home.

The Board had diagrams presented to it demonstrating where on the lot a home could be placed, if the 30 metre and 7.5 metre setbacks were observed. These diagrams showed that only a small shed could be constructed on the southeast corner of the property if the setbacks were observed.

It is clear to this Board that the unique circumstances of the site and the setbacks make it impossible for a house to be built in complete conformity with the zoning by-law. Furthermore, the evidence showed that alternative designs were considered, all with a view to properly flood proofing the home, addressing the street, and reflecting the community character, in terms of mass and height and design. The evidence was compelling that the construction of this home will have no impact on the Wood-Hurley property or on the community. Both of the experts called to address the issue of flooding advised the Board that the construction of this home has no adverse impact on the pre-existing flooding problem along the seawall, and that, in fact, it may have improved the situation somewhat. As the Board has noted, the Board does not find that this variance will create an undesirable precedent because of the unique circumstances of the case.

The Board therefore finds that the Official Plan requirements have been complied with in total with this application.

There was no disagreement among the witnesses as to the intent of zoning by-law requirement for the two setbacks, which the owners are seeking to vary. The 30-metre setback from the water's edge is to ensure a measure of protection to the water quality and aquatic flora and fauna. There was no evidence brought or issue raised as to any impact on the quality of water or aquatic life as a result of the location of this home.

The intent of the setback from the flood control works is to preserve the integrity of the flood control works themselves, and to ensure that the development is properly protected. The Board was advised that, with the bridge modification to the sea wall, the home will be properly protected. There was evidence from the witness from the RVCA as to the issues relating to the maintenance of the sea wall. The Board was advised

that generally, the Authority likes to repair and maintain sea walls from the land side and that 6 metres is a preferred maintenance area. However, on being questioned as to the mechanics of repairing the sea wall, the Board received no satisfactory answer as to why the sea wall in the location of the home could not be accessed from the Wood-Hurley beach much more easily than from the Agnew-Lewinski property. The Board was unconvinced that there was any significant impediment to the proper maintenance of the sea wall as a result of the location of this home.

The Board therefore finds that the intent and purpose of the zoning by-laws are maintained with the proposed variances.

The Board also finds that the variances are minor in that there was no evidence of any real adverse impact on the neighbours, or on the community, as a result of the reduction in the setbacks. Some of the witnesses seemed to assume that the variance could not be considered minor given the size of the variance; or because the setback has been eliminated. The Board's jurisprudence is clear in that the size of the variance is not determinative of whether a variance is minor. It is the circumstances under which the variance is being requested, the context of the development and the impact of the variance in terms of its effect on the adjacent properties, on the community and on those living in the development itself, all of which would determine whether a variance is minor. In this case the variance relates to a small corner of a house meeting a corner of the seawall. This circumstance results in no threat to the integrity of the sea wall.

The Board heard from Ms. Hurley. It was clear from her evidence that she felt that the new home was intruding on the space in her riverside yard. She complained of a lack of privacy, and of the impediment of her view across the riverside yard of the Agnew-Lewinski property. The Board finds that these impacts are perceived and not substantive.

There is no absolute right to a view across another's property, particularly a rear yard view. Ms. Hurley maintains her view of the river. It is now only slightly diminished. It is a view that could be diminished without the existence of the Agnew-Lewinski home. The planning policies encourage the vegetation of riverside yards along the Ottawa River to preserve the view of the shore from the river. It is the view from the river that is protected by planning policies. None of the zoning by-law setbacks sought to be varied here, are intended to preserve a neighbour's view.

Nor was there any compelling evidence of an impact on the privacy of the Wood-Hurley home. There is a substantial cedar bush between the two properties, planted by the Wood-Hurleys. This bush would have impacted the view of the river from the old Agnew-Lewinski cottage. Ms. Hurley provided great detail as to the elements incorporated into her porch, and the plantings on the lot, which were completed to ensure the privacy of her deck. As well, it is the intention of the Agnew-Lewinskis to landscape the area of their property bordering the Wood-Hurley property, between the porch, which will extend into the riverside yard and the Wood-Hurley beach, in order to screen the porch from the riverside yard of the Wood-Hurleys. Finally, there is only one window on the building face of the Agnew-Lewinski home facing Ms. Hurley's property. This window is screened by the cedar hedge.

While Ms. Hurley defined her circumstance as equivalent to living in a "fishbowl", the Board was unconvinced that such could be the case when the view from her rear yard is of the Ottawa River. In any event, the zoning by-law R1G performance standards are intended to protect the neighbours feeling of light, air, shadow and privacy. All of the R1G standards have been met. The setback of the new home from the Wood-Hurley home is in accordance with the standards set out in the zoning by-law, designed to address these issues, and therefore the home meets the rightful expectations of the community and the neighbours in that respect.

The Board also notes that while the Agnew-Lewinski home is closer to the river, the Wood-Hurley home is much closer to the road, and towers over the front yard of the Agnew-Lewinski home. The Agnew-Lewinski home conforms with the R1G front yard setback, while the Wood-Hurley home does not. It is the juxtaposition of the two homes, which appears to be creating the discomfort for Ms. Hurley, but there are no de facto impacts and certainly none that are attributable to the variances.

Finally, the Board finds that the variances are desirable for the appropriate development of the property. Great care was put into the design of this home and its presentation to the street and to the water. The house was properly situate in order to meet the zoning by-law standards relating to front yard setback and the slope of the driveway to a below grade garage. The design and effect is universally pleasing and adds to the ambiance and character of the neighbourhood. The Agnew-Lewinskis have

achieved this with no disruption to the environment, the flood protection works, their neighbours property, or to the community.

The Board will therefore allow the appeal and authorize the variances as applied for, subject to the following condition:

1. The variances relate only to the building described in plans on file with the Buildings Department of the City of Ottawa in respect to the building permit issued on June 11, 2002 for 174 Kehoe Avenue, and filed with this hearing as Tab 11, Exhibit 1.

So orders the Board.

"S. D. Rogers"

S. D. ROGERS  
MEMBER