

ISSUE DATE:

**July 15, 2005**

DECISION/ORDER NO:

**1833**



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL050108

Gudrun Kazda has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 01-70 of the Town of Mississippi Mills to rezone lands respecting Part Lot 1, Con. 8 from "EH – Environmental Hazard" to "EH-4 – Environmental Hazard Exception 4" to permit the construction of a single family dwelling  
OMB File No. Z050011

## **APPEARANCES:**

### **Parties**

Gudrun Kazda

Town of Mississippi Mills

### **Counsel**

John Kazda

Bridget Quinn

## **DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD**

The Board dismisses the appeal and will not amend the Zoning By-law as requested.

The subject matter before the Board is an appeal by Gudrun Kazda (the Appellant) to allow construction of a single detached dwelling on her property. Represented by her spouse, John Kazda, the Appellant seeks an amendment to Zoning By-law 01-70 to rezone the subject property from "EH – Environmental Hazard" to "EH-4 – Environmental Hazard Exception 4". The proposed amendment also seeks to add the following subsection:

29.4.6 Notwithstanding their 'EH' zoning designation, lands designated as "EH-4" on Schedule A to Zoning By-law 01-70, may be used in compliance with the "EH" zone provisions contained in this by-law, excepting however, that:

- i) A single detached dwelling may be permitted on the property;
- ii) All development must be flood proofed in accordance with the requirements of the Mississippi Valley Conservation;
- iii) Frontage on an open and maintained road is not required for the single detached residential use of the property.

Town Planner Forbes Symon appeared as a witness for the Town in order to give expert planning evidence. The only uncontradicted expert planning evidence and professional opinion before the Board was that provided by Mr. Symon, who the Board qualified to provide expert planning evidence.

The following contextual information and details of the appeal were provided by Mr. Symon. The property is approximately 2,800m<sup>2</sup> with the vast majority of the property located within a floodplain area. Access to the property is through a private laneway from an unassumed road. The vast majority of the site is bound by a cement retaining wall. Fill has been brought in to bring the elevation to the top of the retaining wall. There is a septic system, a well, footings and foundations, and some sub-floor structure. Permits were originally given under the Mississippi Valley Conservation Authority (MVCA), the Leeds-Grenville-Lanark Health Unit and the Township of Ramsay (now amalgamated into the Town of Mississippi Mills (the "Town")).

The following information is disclosed by the Town of Mississippi Mills' Planning Department Report (Exhibit 5, Tab E) which this panel accepts. The Appellant received building permit #96-77 in August 1996 from the Township of Ramsay. Because of a lack of building progress on the site, the building permit was revoked. The Appellant was advised that MVC and Health Unit permits would be required before a permit could be reissued. The Town of Mississippi Mills passed Zoning By-law 01-70 (Environmental Hazard (EH) Zone) in November 2001. Prior to this date (1992-2001), Zoning By-law 1545 of the Township of Ramsay was in effect.

The Appellant made another building permit application in January 2002. The Appellant was notified of deficiencies in the application and the need for additional information in March of that year, and when a site inspection revealed that work was

proceeding on the Appellant's, a 'stop work' order was issued. In September 2003, by means of a rezoning application to 'special EH', the Appellant again sought to build a residential dwelling in a flood plain. The Board notes that the municipal planner for the Township of Ramsay had recognized the property as 'flood plain' in September 1992, as did the Mississippi Valley Conservation Authority.

The Appellant's Counsel, her husband, said the property is the site of an eventual seasonal home. He said no one has ever mentioned to him about the zoning information, especially the 2001 by-law, and he alleges it was all done without notice. The Appellant and her husband live in Ottawa, a considerable distance away from the Town. He said the Conservation Authority made flood proofing improvements and he considers the building permit originally issued to him by the Township of Ramsay to be valid. He said the Town tried to revoke the permit in February 2000 but they never provided him with sufficient reasons. He said that the building inspector came to the property in the winter without tools so he could not accurately determine the Appellant's new elevations and building foundation.

The Appellant's husband said the building permit was cancelled and a 'stop work' order was issued. He recounted his version of the chronology of experiences he had with having to reapply for a building permit after February 1999 and the fact it has taken longer to build the home than the five years he had originally planned for. The Appellant said his property is not in a flood plain anymore since his land now sits two feet higher. He added that MVCA Engineer John Price says that despite the higher elevation, the property continues to be situated within a flood plain.

The Appellant has three issues as confirmed by her husband in the hearing: 1) cancellation of his building permit; 2) introduction of a new zone change (01-70) coming into effect while he was working on his property, thus eliminating his right to continue to build; and 3) the building permit was renewed twice.

Town Planner Forbes Symon described the history behind the revocation of the Appellant's building permit (which is still in effect) and explained that with ongoing delays in construction activity by January 2000, there were concerns that the footing and foundation had faced several years of exposed freezing and thawing and the foundations were unprotected. As cited above, the Appellant was given until March of

that year to respond to the Town's issues with his property in order for the building permit to be reissued. This never took place and the file on that permit was closed.

As for the Town subsequently passing Zoning By-law 01-70 in November 2001, and Mr. Kazda's allegation that the whole process was 'underhanded' and he was never informed about the zoning change, Mr. Symon provided evidence in Exhibit 5 that public notices were indeed issued in advance and open houses were held, advising of the proposed consolidation of three existing by-laws and the holding of town hall meetings on these matters. The Town circulated the notices via three local newspapers to as wide an area as possible. When the Appellant came to the Town again in January 2002 with another building permit application, Mr. Symon advised that the Town considered it to be a new building permit application and treated it as such. In March 2002, the Town informed the Appellant that a new permit could not be issued because the area had been zoned as "EH". In September 2003, the Appellant brought forward a Zoning Amendment to ZBL 01-70.

Extracts from ZBL 01-70 at Exhibit 5, Tab N, S.29 p.138 designates the subject lands as Environmental Hazard (EH) Zone. "The construction of a residential dwelling is not a permitted use and any permitted building or structure must receive the written approval of the Mississippi Valley Conservation Authority and the Corporation."

Exhibit 6 is supplemental to ZBL 01-70. Specifically, 6.18 Non-Conforming Uses, (a) ii) led Mr. Symon to conclude that the activity that had taken place on the Appellant's property under the previous building permits did not have legal non-conforming status under ZBL 01-70 because the building permit had been revoked.

Section 6.21 of the by-law requires that a residential dwelling must have frontage on a road which is an improved road and is part of the Corporation's approved road system. The road at the entrance to the Appellant's property is not maintained and is not part of the municipal road system as indicated in Exhibit 3. The Township of Ramsay had allowed the Appellant to build a private laneway back in 1994.

Section 6.32 is a general provision regarding watercourse setbacks to protect a private investment from flooding and also to protect natural watercourses. There is a minimum setback of 30m from the high water mark or 15m from the flood line, whichever is the greater and any septic tank or tile field shall be set back a minimum of

30m from the high water mark or 23m from the flood line, whichever is the greater. In this case, the Appellant's property is set in the flood plain, so the setbacks cannot be met.

The Board notes that even before ZBL 01-70 came into effect, the previous ZBL 1545 from the Township of Ramsay also required watercourse setbacks. Exhibit 5, Tab G, p.58 shows that as far back as 1992 the MVCA had determined that the Appellant's proposed construction did not conform to the development setback requirements from a watercourse in ZBL 1545. Despite the Appellant's husband's statement that his property no longer sits in the flood plain because it has been raised two feet, the fact is that the property still physically sits in the flood plain of the Mississippi River. Further, MVC Engineer John Price confirms by way of letter dated 17 May 2005 (Exhibit 8) that the Conservation Authority consider the high water mark of the Mississippi River to be along the wall that has been constructed on the Appellant's property. In this Exhibit, the MVC rejects the Appellant's request to place additional fill on the property to re-locate the high water mark. However, the letter states that the MVC only supports fill placement for flood proofing; the Appellant's request is not for flood proofing or for access to the property. The Board prefers the evidence of the expert witness and the contents of the letter in Exhibit 8 to that of the Appellant's counsel and finds the subject property to sit in the flood plain.

A consulting engineering firm identified four issues with the subject property in 1992: access, zoning, flood proofing and private service and demonstrated to the Board there were concerns with the original application in respect of ZBL 1545. This then would require an amendment to the Appellant's application. Exhibit 5, Tab E is the December 2003 Planning Report regarding the Appellant's application to obtain a ZBL Amendment. The complete chronology is contained therein.

The property is designated as "Flood Plain" in the Ramsay Ward Official Plan and Section 4.14 contains the same 30m watercourse setbacks that the Appellant's property does not meet (Exhibit 5, Tab L, p.4-13). The Town considered the Appellant's application under Section 8, Flood Plain. They noted Section 8.3.1 i) "Generally, no development will be permitted within the flood plain except for flood or erosion control structures....". Other uses are permitted provided that no associated building and structures are located in the flood plain. Clearly, the Appellant's property does not

comply with this section of the Official Plan. The Town rejected the new application under ii): “Development of an existing lot may be considered provided that buildings and structures are flood proofed in accordance with the regulations of Mississippi Valley Conservation and have received the approval of MVC and Council.”

Under the Provincial Policy Statement (Tab O), Section 3.1.2 states that “[D]evelopment and site alteration will not be permitted within...a floodway.” In the case at hand, and as per the definition contained in this document, the floodway is the entire flood plain so development is not permitted. The planner evidenced that the development of the subject property does not conform to the Official Plan and does not have regard for the Provincial Policy Statement. It lacks frontage on an open and maintained road and in Mr. Symon’s opinion, the application does not constitute good planning and he recommends refusal of the application.

The Board does not consider there to be any special circumstances in the case at hand to warrant the variance of setback requirements of the Zoning By-law in force. As outlined above, the Appellant’s proposed development does not meet the requirements in the areas identified. It is clear to the Board that the proposed development does not meet the Official Plan’s requirements for flood plain development as shown in Tab L, Exhibit 5 (p.123-124).

As stated, the Board prefers the uncontradicted expert planning evidence of Forbes Symon to the evidence of the Appellant’s representative. Having considered all of the evidence before it, the Board dismisses the appeal and does not authorize the Zoning By-law Amendment.

So orders the Board.

“R. Rossi”

R. ROSSI  
MEMBER