

August 8, 2023

Committee of Adjustment
City of Ottawa
101 Centrepointe Drive
Ottawa, ON, K2G 5K7

Committee of Adjustment
Received | Reçu le

Revised | Modifié le : 2023-08-21

City of Ottawa | Ville d'Ottawa
Comité de dérogation

Attention: Michel Bellemare, Secretary - Treasurer

Dear Mr. Bellemare:

Reference: 49 Loch Isle Road
Application for Permission
Our File Number: 123083

Novatech has been retained by the owners of the property municipally known as 49 Loch Isle Road (the "Subject Property") to prepare and file an application for permission to expand the existing legal non-conforming use. The permission application facilitates the construction of a new covered deck in the rear yard in place of the existing legally non-conforming deck.

This letter describes the existing conditions of the site and its surrounding context, the proposed development, and the rationale in support of the application.



Figure 1: Location of Subject Property. (Source: GeoOttawa).

Site and Context

Site

The subject property is located in the Crystal Bay – Lakeview Park neighbourhood within Ward 7 – Bay in the City of Ottawa. The property is a waterfront property that backs onto the Ottawa River. It is an interior lot located on the north side of Loch Isle Road between Sunny Brae Avenue and Rocky Point Road. The subject property has a frontage of approximately 24.73 metres along Loch Isle Road and has a lot area of approximately 1,749.1 square metres. The property is legally known as Lot 2 on Registered Plan 466 and Part of Lot 13 Concession 1 (Ottawa Front), Geographic Township of Nepean, City of Ottawa.



Figure 2: Subject Site. (Source: GeoOttawa).

The subject property is zoned R1E – Residential First Density, Subzone E in the City of Ottawa Zoning By-law 2008-250. A portion of the property is located within the Floodplain Overlay. The property is designated Neighbourhood within the Outer Urban Transect in the City of Ottawa Official Plan.

The site is currently developed with a single-detached dwelling. Parts of the existing home including the rear deck, retaining wall, and stairs to a basement walkout are located within the required 30-metre setback from the normal high-water mark of the Ottawa River (see Figure 3). The deck is legally non-complying with respect to the minimum 30-metre setback requirement from the normal high-water mark.

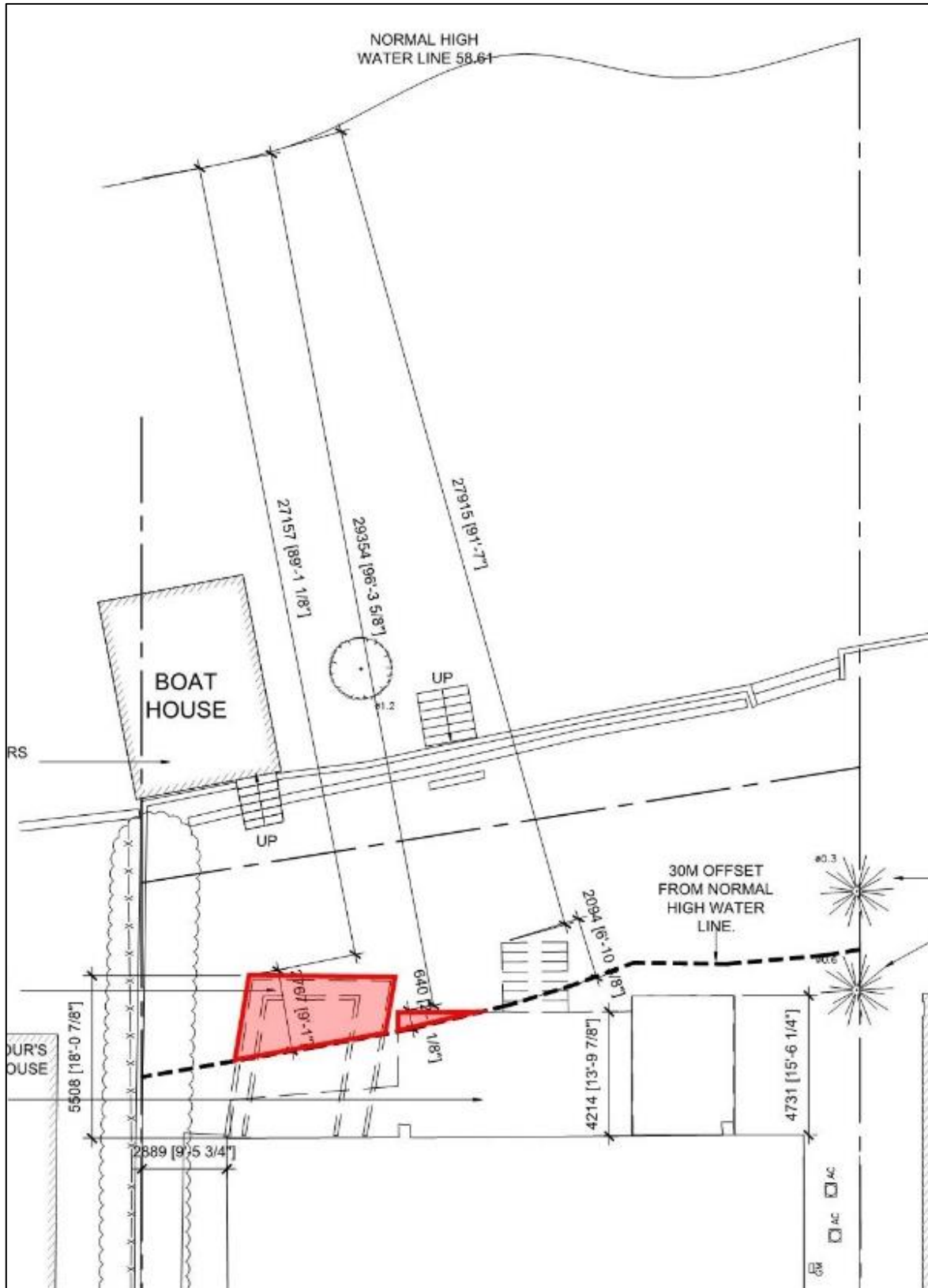


Figure 3: Site Plan excerpt (existing dwelling). (Source: Flynn Architect).

Surrounding Context

The subject property is part of the urban area. It is located within a residential area which includes numerous waterfront lots developed with single-detached dwellings along Loch Isle Road and Carling Avenue. The abutting properties to the west and to the east are both developed with single-detached dwellings. The site is located between Carling Avenue to the south and the Ottawa River to the north within an area characterized exclusively by single-detached dwellings. Commercial uses and higher density residential uses are located south of Carling Avenue. The subject property is similar in size to many of the waterfront lots along Loch Isle Road, which are generally characterized by longer lot depths and larger lot areas.



Figure 4: Context Map. (Source: Google Maps).

Proposed Development

The proposed development is to construct a new covered deck in the rear yard. The new deck will take the place of an existing rear deck, retaining wall, and stairs to a basement walkout that encroach into the required 30-metre setback from the normal high-water mark. The permission application is required to facilitate the enlargement and construction of the covered deck within the required 30-metre setback for the existing legally non-conforming rear deck (see Figure 5). The applicable 30-metre setback is taken from the normal high-water mark of 58.31 metres above sea level identified by the Rideau Valley Conservation Authority (RVCA), which aligns with the high-water mark line identified by the Ontario Land Surveyor (see Appendix A).

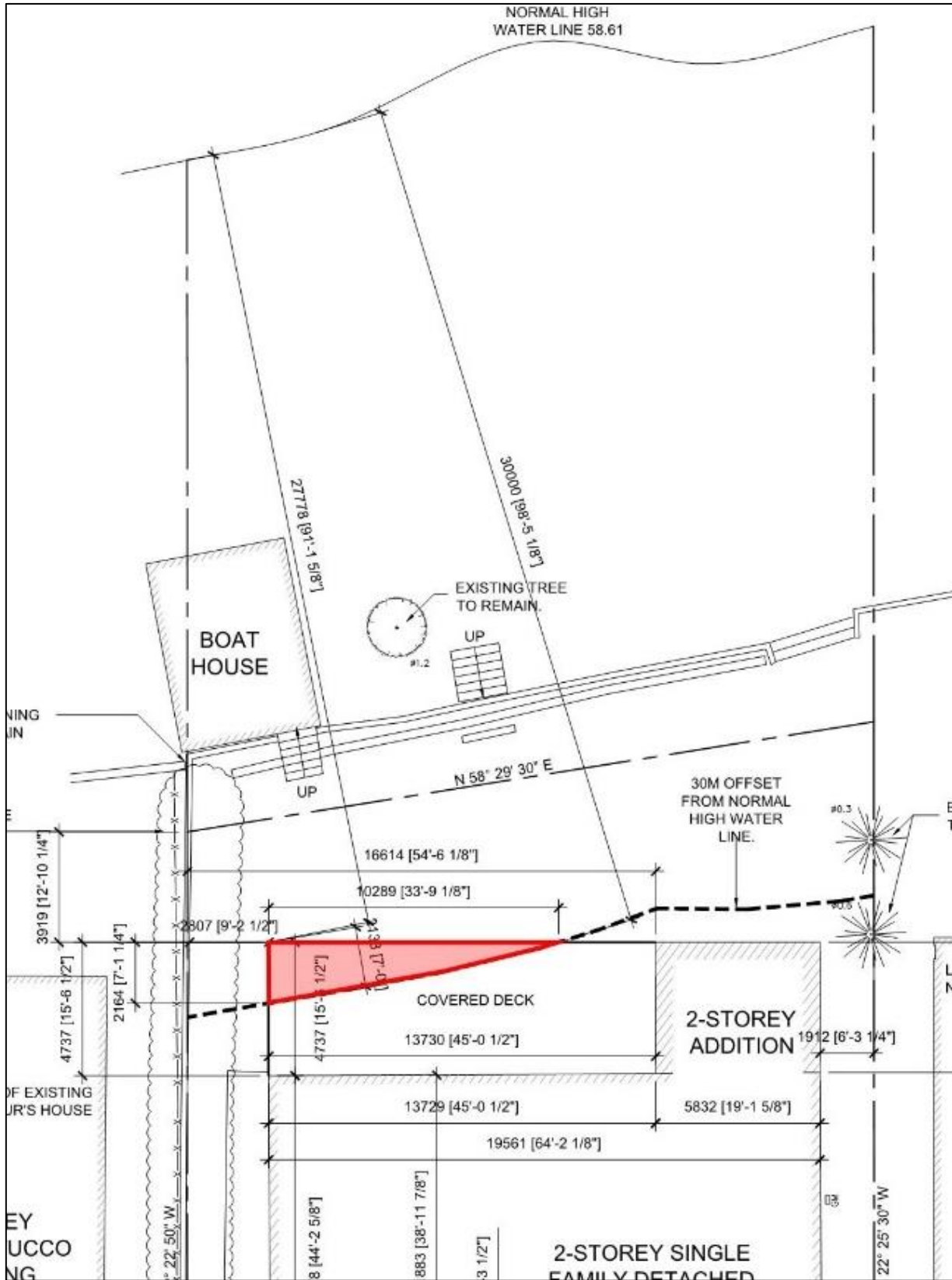


Figure 5: Site Plan excerpt (proposed). (Source: Flynn Architect).

The area of the existing retaining wall and stairs to a basement walkout encroaching into the 30-metre setback is 11.5 square metres. The area of the existing deck encroaching into the 30-metre setback is 1 square metre.

The area of the proposed deck encroaching into the 30-metre setback is approximately 12 square metres. The retaining wall and stairs for the basement walkout are proposed to be removed.

Permission Application

The requested permission for this application is identified below:

- a) To permit the expansion of a legal non-confirming use (deck) to be located 27.7 metres from the normal high-water mark of a watercourse or waterbody, whereas the Zoning By-law states that no building or structure which does not require plan of subdivision or site plan control approval shall be located closer than 30 metres from the normal high-water mark of any watercourse or waterbody. (Section 69(2)(a)).

Note: All requested permissions have been rounded to the nearest tenths decimal place, as instructed by the Committee of Adjustment.

Permission Rationale

The test for permission applications is not provided in Section 45(2) of the *Planning Act*. Section 45(2) of the *Planning Act* states that the Committee of Adjustment may permit the enlargement of a building or structure where it was lawfully used for a purpose prohibited by the by-law on the day the by-law was passed or has continued until the date of the application to the Committee. It states:

(2) In addition to its powers under subsection (1), the committee, upon any such application,

(a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,

(i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or

(ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee; or

(b) where the uses of land, buildings or structures permitted in the by-law are defined in general terms, may permit the use of any land, building or structure for any purpose that, in the opinion of the committee,

conforms with the uses permitted in the by-law. R.S.O. 1990, c. P.13, s. 45 (2).

The test for permission applications is thus derived from case law. The decision for *Sims et al. v. Daschko* (“Sims”) sets out the test for permission applications (see Appendix B). It identifies the test for permissions as being whether the expansion of the legal non-conforming use is desirable for the appropriate development or use of land and the extent of the impact on neighbouring properties. The decision states:

While the Planning Act does in equity make provision for those properties which have been classed as legal non-conforming so that extensions of that use under proper circumstances might be contemplated, there must always be a prior consideration of whether what is intended is indeed desirable for the appropriate development or use of the land, building or structure. The effect of any concession made must always be weighed in the light of the impact it could have upon neighbouring properties enjoying a different land use classification.

Furthermore, the case of *Re. Asgharzadeh* (“Asgharzadeh”) confirms that the reconstruction and enlargement of a legal non-conforming use is appropriately dealt with through a permission application, rather than a minor variance application (see Appendix C). Citing Justice Binnie’s ruling in *Saint-Romauld (City) v. Olivier*, the Asgharzadeh decision confirms that the test to review a permission application for the enlargement of a non-conforming use is to determine the new impacts from the enlargement on the immediate neighbours. The Asgharzadeh decision states:

It is the Board’s view that this is the litmus test for assessing the extension or enlargement of an existing legal non-conforming use. In the matter now before the Board, I am required to assess the impact of the enlargement of the proposed garage structure on the two Objectors whose properties abut the proposed structure.

Based on the Sims and Asgharzadeh decisions, the tests for a permission to expand a legally non-conforming use are that the expansion is desirable and appropriate for the area and that no significant adverse impacts are generated on the neighbouring properties.

The first test for expansion of a legal non-conforming use is that it must be desirable for the appropriate development or use of the land, building, or structure.

The proposed rear deck is considered appropriate development and use of the land. The existing rear deck on the property constitutes a legal non-conforming use with respect to the required 30-metre setback from the normal high-water mark of the Ottawa River. The proposed rear deck will be located 27.7 metres from the normal high-water mark.

The covered deck will replace the existing rear deck currently on the property, allowing the homeowners to benefit from an improvement of an element that already exists on their property. The expansion aligns with the condition of the abutting property to the west, which includes part of the dwelling within the 30-metre setback (see Figure 6). The expansion constitutes a slight increase over the existing rear deck, with the proposed deck being located 1.58 metres closer to the normal high-water mark. The proposed deck encroaches less than the existing retaining wall into the required 30-metre setback, reducing the overall extent of encroachment into the setback from the normal high-water mark.

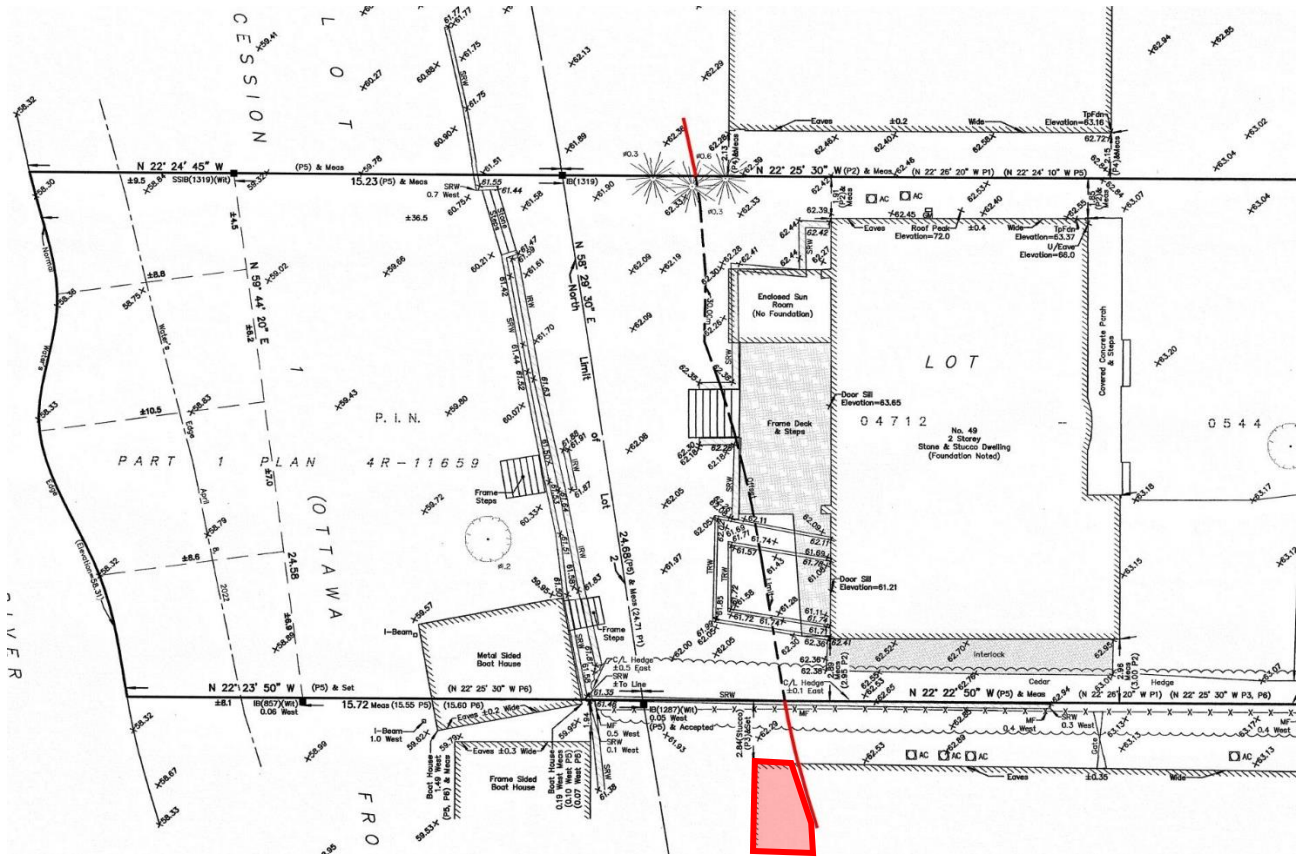


Figure 6: Area of house to the west within 30-metre setback. (Source: Farley, Smith & Denis Surveying).

The legal non-conforming use also does not encroach into the floodplain overlay itself, ensuring that the development does not impact the shoreline or create slope stability concerns.

The expansion of the legal non-conforming use constitutes an appropriate and desirable use of the land.

The second test for expansion of a legal non-conforming use is the impact on neighbouring properties.

The existing detached dwelling with the rear deck is a legal non-conforming use. Detached dwellings are listed as a permitted use in the R1E Zone. The proposed covered deck is generally within the footprint of the existing rear deck. It represents a slight increase of 11 square metres in area over the existing deck but represents a reduction of 0.5 square metres in the overall footprint of elements encroaching into the rear yard, since the non-conforming retaining wall and stairs to a basement walkout will be removed. The expansion of the deck is appropriate for the residential use of the property.

Since it replaces an existing deck projection, the expansion will not impact the neighbouring dwellings any more than the current deck does. The deck expansion essentially matches the building limits of the abutting dwellings to the west and the east, ensuring that no significant difference in encroachment is provided. No overlook impacts or loss of privacy is generated as a result of the expansion, as the covered deck will be accessed from the main level of the home.

The expansion will not result in the removal of trees in the rear yard, as indicated in the Tree Information Report which demonstrates that all six trees affecting the site will be retained. This will ensure that the existing hedge line to the west and the two trees to the east will continue to buffer the legal non-conforming use from the abutting neighbours. The deck expansion will not be visible from the street and will have no streetscape impact. There are no undue adverse impacts on neighbouring properties.

The expansion of the legal non-conforming use will not impact neighbouring properties.

Provincial Policy Statement 2020

The Provincial Policy Statement (PPS) provides direction on land use planning and development matters that are in the provincial interest. Decisions affecting planning matters “shall be consistent with” policy statements issued under Section 3 of the *Planning Act*. A permission application must align with the PPS and any decision by the Committee of Adjustment must be consistent with the directions of the PPS.

Policy 3.1.2 provides restrictions on development and site alteration within natural hazard areas. It states that:

Development and site alteration shall not be permitted within:

- a) the dynamic beach hazard;*
- b) defined portions of the flooding hazard along connecting channels (the St. Marys, St. Clair, Detroit, Niagara and St. Lawrence Rivers);*
- c) areas that would be rendered inaccessible to people and vehicles during times of flooding hazards, erosion hazards and/or dynamic beach hazards, unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard; and*
- d) a floodway regardless of whether the area of inundation contains high points of land not subject to flooding*

The proposed expansion is not located within the floodway as identified by the City of Ottawa Floodplain Overlay. The proposal does not result in development within a natural hazard area and does not pose a potential risk to public health and safety.

The proposed permission application is consistent with the direction of the Provincial Policy Statement.

Conclusion

The proposed expansion of the legal non-conforming rear deck at 49 Loch Isle Road meets Section 45(2) of the *Planning Act*. The development is an appropriate and desirable use of land and does not generate any undue adverse impact on surrounding properties. The development is consistent with the Provincial Policy Statement by contributing to safe and healthy communities and not posing any public health and safety risks. The permission application to expand the legal non-conforming use at 49 Loch Isle Road represents good land use planning.

In support of the applications for permission, please find enclosed:

- Cover Letter (one copy)
- Complete Permission Application Form (one original copy)
- Signed Authorization Form (one original copy)
- Survey Plan (one 8.5x11 copy and one 11x17 copy)

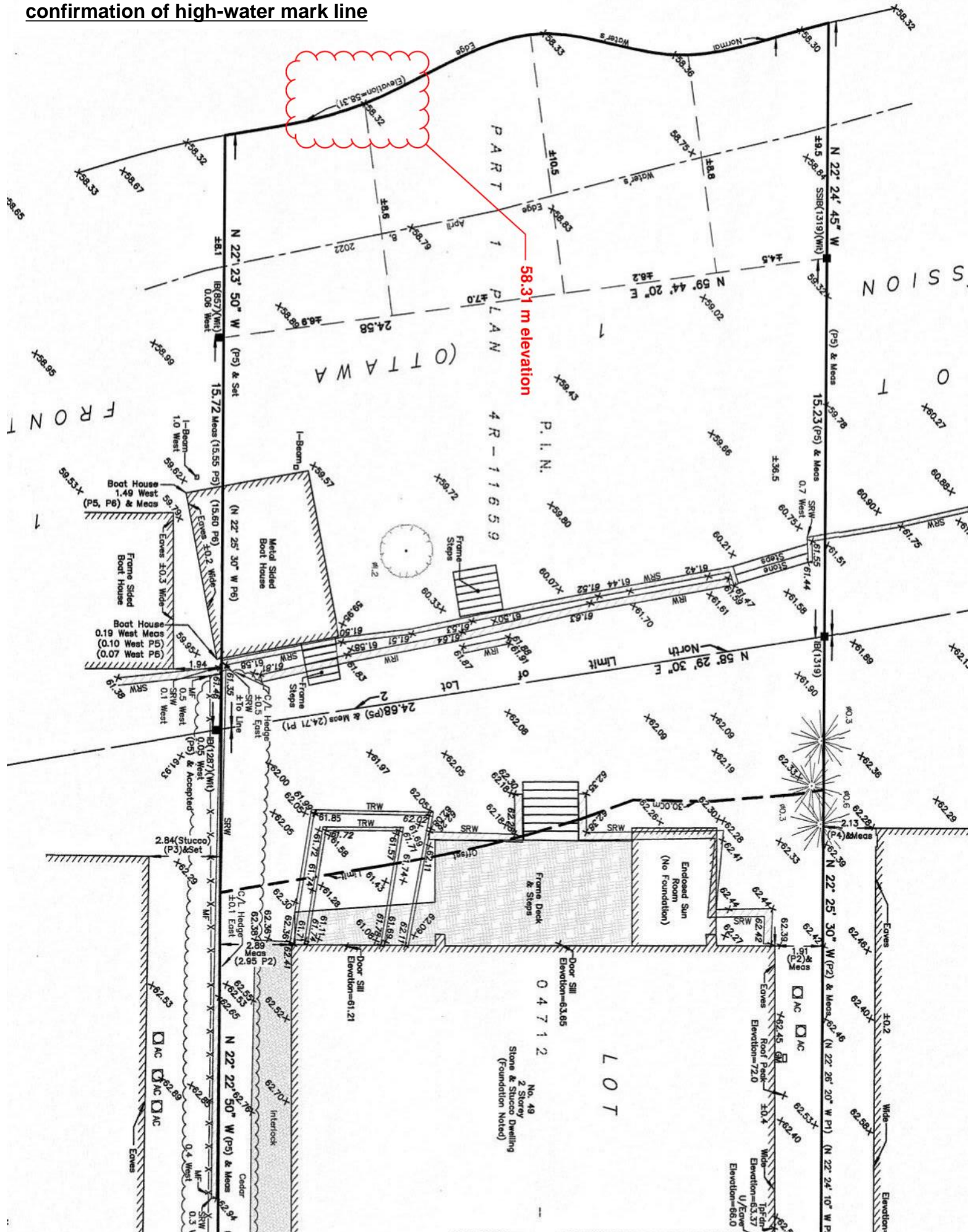
- Site Plan (one 8.5x11 copy and one 11x17 copy)
- Elevation Drawings (one 8.5x11 copy and one 11x17 copy)
- Tree Information Report (one copy)

Should you have any questions regarding this application, please do not hesitate to contact me.

Yours truly,

NOVATECH
Arjan Soor, M.PL
Planner

Appendix A: Survey showing elevation & email confirmation of high-water mark line



Arjan Soor

From: Eric Lalande <eric.lalande@rvca.ca>
Sent: Tuesday, August 1, 2023 12:50 PM
To: Arjan Soor; siobhan.kelly@ottawa.ca; samantha.gatchene@ottawa.ca
Cc: Murray Chown; Hayley, Matthew
Subject: RE: 49 Loch Isle Road Applicable Water Line 123083

Hi Arjan,

We have recently conducted a review and revision to the normal water line/elevation/mark/top of bank for this area, and have updated our accepted contour line for regulatory purposes under the Conservation Authorities Act. As a result the updated elevation aligns with the OLS recommended elevation of 58.31 meters above sea level.

Hopefully, this update will have the added benefit of achieving consistency between the processes both at the CA and the City.

Please let me know if you have any questions.

Thank you,

Eric Lalande, MCIP, RPP
Planner, Rideau Valley Conservation Authority
613-692-3571 x1137

From: Arjan Soor <a.soor@novatech-eng.com>
Sent: Friday, July 28, 2023 12:05 PM
To: siobhan.kelly@ottawa.ca; samantha.gatchene@ottawa.ca; Eric Lalande <eric.lalande@rvca.ca>
Cc: Murray Chown <m.Chown@novatech-eng.com>
Subject: 49 Loch Isle Road Applicable Water Line 123083

Hi Eric, Samantha, and Siobhan

I hope you are well. We are working with Jason Flynn and the property owner on the permission application to expand the legally non-conforming rear deck at 49 Loch Isle Road. We have been provided with two different ways to measure the 30m setback from the water line. One measurement would be from the "normal water line" as identified by the surveyor. The other line would be to measure from the 58.61M contour line identified by the RVCA. We would like to set up a meeting with the RVCA and one of the COA planners to discuss which line the setback applies to for the purposes of the permission application.

Please advise when you'd be available for a quick meeting to discuss this with us next week.

Thanks.

Best regards,
Arjan

Arjan Soor, B.A., M.Pl., Planner
NOVATECH
Engineers, Planners & Landscape Architects

240 Michael Cowpland Drive, Suite 200, Ottawa, ON, K2M 1P6

Tel: 613.254.9643

The information contained in this email message is confidential and is for exclusive use of the addressee.

Appendix B: Sims et al. v. Daschko

1975 CarswellOnt 1185
Ontario Municipal Board

Sims v. Daschko

1975 CarswellOnt 1185, 4 O.M.B.R. 390

Sims et al. v. Daschko

McCrae V-Chair

Judgment: April 3, 1975

Docket: None given.

Counsel: Eugene Fedak, for John Daschko

Headnote

Municipal law

A. L. McCrae, Vice-Chairman:

1 This application comes to the Board by way of an appeal by Anthony Sims, Alex Gould and Clara Zitaruk from a decision of the Committee of Adjustment of the City of Hamilton dated July 2, 1974, whereby the Committee granted an application by John Daschko for a variance from the provisions of By-law 6593 of the City of Hamilton, as amended, to permit the construction of a one-storey and a two-storey addition onto an existing bakery located at the rear of dwelling house premises known municipally as 16 Earl St., notwithstanding that this would be an extension of a non-conforming use and upon the conditions set out in the said decision.

2 In its written reasons, the Committee of Adjustment stated in part as follows:

1. The proposed addition will act as infilling for the existing bakery and would appear to co-ordinate the operations of the bakery and eliminate some of the existing unsightliness as well as the dilapidated structure;
2. The one storey addition replacing the drive shed that appears to be in existence in excess of 20 years would have a minimal effect on the sun light for the abutting properties to the north.

3 Evidence adduced before the Board was that the lands with which the Board is dealing were zoned as "D" by the by-law in force in the municipality, which would permit one and two-family residences. In 1974, an amending By-law 74-60 was passed by the municipal Council and not as yet approved by the Ontario Municipal Board, rezoning the rear portion of the lands of the applicant of the first instance from "D" to "H", which is a commercial classification, but like the "D" use does not permit bakeries. The Committee of Adjustment is of the opinion that the current zoning is that to which consideration should be given in dealing with this matter. It would appear however that there is not too much turning upon this since under both by-laws the use being made of the lands we are dealing with remains legal non-conforming. Extensions of course, of a legal non-conforming use are permitted subject to the requirements of s. 42 [of the *Planning Act*, R.S.O. 1970, c. 349] and providing that what is proposed constitutes a proper planning concept for the area which will not adversely affect the amenities of other properties lying in close proximity.

4 Alexander Gould, one of the appellants, stated that he has lived at 20 Earl St. for over 20 years and is located only two houses to the north of the subject bakery. It is his evidence that he resides in a single-family home upon which he has spent some \$7,000 in home improvements over the years. To the rear of his property he has invested some \$200 in a rose garden requiring a normal amount of sunlight. Exhibit 2 is an old photograph of his home prior to any renovation and showing an additional structure on the front, which has since been torn down. Exhibit 5 is a view of his home as renovated showing its relationship or

proximity to the home of Anthony Sims, another appellant. The witness Gould stated that he was not opposed to the expansion but only to the manner in which it was going to be accomplished. It was his opinion that the proposed extension should be located elsewhere on the property and not in such close proximity to existing residential homes. His main concern is that the extensions proposed will reduce the light to his back yard. He contends that the two-storey addition should be erected on an existing concrete block addition to the east and abutting a 12-foot alley. If this was done, it would be possible to further extend the building to a height of one storey to the west. It would appear, however, on submissions made that such a rearrangement would not be possible due to the bearing qualities of the existing concrete block addition.

5 The other appellant, Anthony Sims, was not present but was represented by his son, Alexander. He stated that his father resides at 18 Earl St. immediately adjacent to the bakery. From the back wall of his father's home to the high board fence at the rear, there is only a distance of 12 ¹/₂ ft. The only kitchen window faces to the east. On the south side of the house there is a distance of seven ft. three in. between it and the Daschko property. This is better seen on ex. 4, which shows the board fence to the rear and the mesh fence to the south delineating the Sims and Daschko lands. The one-storey addition, which will be approximately 10 ft. high and 15 ft. in width contemplated to replace the drive shed, will extend across a very large portion of the 25-foot rear width of the Sims property. This will block off a great deal of the limited exposure his father's property presently has, since he only has seven ft. three in. on the south part of 18 Earl St. suitable for that purpose. The witness stated that there is also a concern being expressed about the possible noise factor which would emanate from any addition to the existing bakery and raises the possibility that it would be possible to install other machinery in the building at a later date. Like the other appellant, he is of the opinion that any addition proposed should be located elsewhere on the Daschko property as it should be farther away from the residential users most affected. At the present time, he states, certain noise does emanate from the existing bakery.

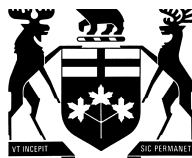
6 Counsel for the applicant of the first instance did not call evidence to support the position of the applicant, but made submissions to the Board that the only concerns that had been expressed by the appellants had to do with a fear of loss of light and of noise. He raised the possibility that the addition proposed could quite possibly have the effect of muffling existing noise and any additional which might be created. He does not agree that there will be any adverse effects upon the adjacent properties through loss of light.

7 Applications such as this with which the Committee of Adjustment and the Board must deal are quite often, as is the case here, of a very complex nature. **While the *Planning Act* does in equity make provision for those properties which have been classed as legal non-conforming so that extensions of that use under proper circumstances might be contemplated, there must always be a prior consideration of whether what is intended is indeed desirable for the appropriate development or use of the land, building or structure. The effect of any concession made must always be weighed in the light of the impact it could have upon neighbouring properties enjoying a different land use classification.** Even the most recent by-law passed by the municipality does not permit bakeries within the land use classification that has been given to the subject property. It is quite clear that the homes on Earl St. were erected at a time before land use planning had been introduced to Ontario. The very minimal spacing between the homes on the street and the limitation upon lot sizes coupled with the mixing of various type of land uses in the area give eloquent testimony to this. In view of the limited residential amenities that presently apply to the lands of the appellants, it is my opinion that far greater thought planning-wise should be given to any proposed development in the immediate area than would appear to have been the case in the application before the Board. There is no planning evidence before me to support what is being sought by the owner of the bakery nor to satisfy me that the extension of the present bakery use will not adversely affect the already limited residential amenities of the neighbouring properties.

8 In all the circumstances, therefore, I am of the opinion that the appeal should succeed and the decision of the Committee of Adjustment is accordingly set aside.

Appendix C: Re. Asgharzadeh

ISSUE DATE:
June 2, 2010



PL091025

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

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Khalil Asgharzadeh

Applicants: Bruce Ellacott, Bozena Clarke, Bradley Sigouin & Mike Nicholson

Subject: Minor Variance

Variance from By-law No.: 2008-250

Property Address/Description: 1-372, 370, 368, 366 Queen Elizabeth Drive

Municipality: City of Ottawa

OMB Case No.: PL091025

OMB File Nos.: PL091026, PL091027, PL091028

Municipal No. D-08-02-09/A -00243, D08-02-09/A-00244, D08-02-09/A-00247, D08-02-09/A-00248

APPEARANCES:

Parties

Bruce Ellacott, Bozen Clarke, Bradley
Sigouin, Mike Nicholson

Khalil Asgharzadeh

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

CONTEXT:

Messrs. Bruce Ellacott, Bozen Clarke, Bradley Sigouin, and Mike Nicholson (the "Applicants") are the individual owners of the homes located at 366, 368, 370 and 372 Queen Elizabeth Drive in the City of Ottawa (the "City"). The Applicants each had a single car garage within a detached 4-car garage (the "structure") located at the rear of

the subject property. This structure was built in 1927 and pre-dated the Zoning By-law ("ZBL"). The Applicants had access to this structure by a right of way registered on title. Due to its dilapidated state, the structure was demolished and each Applicant filed minor variance applications to rebuild a larger structure which would contain four single car garages in the same manner as the original parking structure. The City's Committee of Adjustment (the "COA") considered all four variance applications concurrently and granted the variances with conditions. The COA's decision was appealed to this Board by Mr. Khalil Asgharzadeh (the "Appellant"). The Appellant's property rear yard abuts the location of the proposed structure.

At the hearing, the Parties were self-represented. Mr. B. Sigouin spoke on behalf of the Applicants. There were two Participants (Ms. Lo and Mr. Novotny) who were opposed to the Applications. Ms Lo's rear yard also abuts the location of the proposed structure. The City's Planner was summonsed by the Applicants. The Board consolidated the four minor variance appeals as they related to the same proposed structure.

The Minor Variances:

372 Queen Elizabeth Drive

- a) To permit a reduced westerly side yard and rear yard of 0 metres for the proposed garage, whereas the By-law requires an accessory building to be located a minimum of 0.6 metres from any lot line.
- b) To permit the proposed garage to be located on a different non-abutting lot for which the use was not created, whereas the By-law requires that an accessory structure to be located on the same lot as the principal use to which it is accessory.
- c) To permit an increased lot coverage of 100%, whereas the By-law permits a maximum lot coverage of 50% of the yard in which the accessory structure is located.
- d) To permit a required parking space to be located on a separate lot, whereas the By-law states that a required parking space must be located on the same lot as the principle use to which it is accessory.

370 Queen Elizabeth Drive

To permit the proposed garage be located 0 metres from interior side lot lines, whereas the By-law required an accessory building to be located a minimum of 0.6 metres from any lot line.

368 Queen Elizabeth Drive

To permit the proposed garage be located 0 metres from rear and interior side lot lines whereas the By-law requires an accessory building to be located a minimum of 0.6 metres from any lot line.

366 Queen Elizabeth Drive

- a) To permit a reduced westerly side yard and rear yard of 0 metres for the proposed garage, whereas the By-law requires an accessory building to be located a minimum of 0.6 metres from any lot line.
- b) To permit the proposed garage to be located on a different non-abutting lot for which the use was not created, whereas the By-law requires that an accessory structure to be located on the same lot as the principal use to which it is accessory.
- c) To permit an increased lot coverage to 100%, whereas the By-law permits a maximum lot coverage of 50% of the yard in which the accessory structure is located.
- d) To permit a required parking space to be located on a separate lot, whereas the By-law states that a required parking space must be located on the same lot as the principle use to which it is accessory.

THE EVIDENCE:

Ms O'Connell is the staff planner responsible for the review of the applications and appeared under summons by the Applicants. It was her evidence that since the original structure was built circa 1927, its use as a garage pre-dated the existing ZBL and it continues to be a legal non-conforming use even though the structure was demolished. However, in her opinion the variances are required because the proposed structure is now larger than what was originally built. As such, the proposal is non-complying with some of the performance standards of the ZBL. She considers this as a very unique situation. The Applicants each have individual parking garages within a

detached parking structure located at the rear of the properties whose access is by a right-of-way.

It is her opinion that subsection 34(9) of the *Planning Act* recognizes a homeowner's right to reconstruct a structure where a legal non-conforming use exists. Ms O'Connell made reference to the OMB Decision (*TDL v. The City of Ottawa*, OMB Case No.PL080959 issued on July 28, 2009). That Board Decision held that Section 3 of Ottawa's CZBL in its entirety improperly narrows, amends and restricts the rights of a property owner to a legal non-conforming use contrary to s. 34(9)(a) of the *Act*. That OMB decision was subsequently appealed by the City of Ottawa and the Ontario Superior Court of Justice upheld the Board Decision.

It is Ms O'Connell's planning opinion that the proposed structure will not create any adverse impacts to the neighbours in terms of shadowing. The structure is higher at 14.5 feet but the peak of roof is located away from the appellant's rear yard. A variance is not required for the height. It is her opinion that the proximity of the proposed structure to the rear yard lot line is an urban condition that exists in the City. It is her opinion that appropriate steps have been taken by the Applicants in the design of the structure such that the rear walls will be low maintenance, and water will be diverted away from the rear lot line by the proposed pitched roof design. It was her evidence that the Board should be mindful of the minimum requirement of the City's parking dimensions (5.2m depth). That any setback greater than 6 inches may trigger additional variances with respect to parking depth dimension.

It is her opinion that the variances meet the four statutory tests found in subsection 45(1) of the *Act* in that they maintain the general intent of the OP and the ZBL, that they are desirable for the appropriate development of the lands and that the variances are minor.

The Applicants accepted the planning evidence of Ms O'Connell and requested that the Board authorize the variances subject to the conditions of the COA. However, Mr. Segouin noted in his evidence, that the Applicants have a right to the continuation of the legal non-conforming use after the demolition of the structure as the Applicants had a long-established pattern of usage of the structure as a garage prior to the demolition. It is their intention to rebuild and continue with the same use. It is his contention that

they are not required to obtain a minor variance to re-construct garages on their respective properties, where the use and footprint of the original and new garages remain unchanged. He cited the Board findings in *TDL v. The City of Ottawa*, OMB Case No. PL080959.

The Board heard that the roof is a pitched roof which will be designed to channel the flow of water away from the rear property line. The Applicants also propose to install a one foot ice guard along the northerly edge of the roof line. This would assist in preventing snow on the roof from falling onto the abutting properties. The exterior rear wall of the proposed structure will be constructed with materials requiring low maintenance. The proposed six inches clearance between the rear of the structure and the rear lot line will be sufficient to clear any debris that may collect there (Ex. 1B). The applicants submitted OMB and Court jurisprudence which supported a homeowner's right to rebuild a structure that has enjoyed legal non-conforming status.

The Objectors are not opposed to the parking structure being rebuilt as they recognize its legal non-conforming status. However, they are opposed to the proposed structure so close to the rear property line. They are concerned about the height of the structure which at 14.5ft is nearly 50 percent higher than the original structure at 10 ft. It is their position that if the Applicants want to build at that height then they should respect the minimum setback requirements of the ZBL. The Board heard that over time parts of the original structure were found to be on the abutting property. The Objectors are concerned about the shadow impact, loss of sunlight and view resulting from the proposed height of the structure. Ms Lo is concerned about the debris that will collect between the structure and the fence. It is their opinion that the installation of an ice guard will not prevent snow from falling onto their rear yards or on the fence.

BOARD'S FINDINGS:

That the Applicants can rebuild the existing structure which enjoyed legal non-conforming status is not at issue here. It is clear in the Board's mind that the original structure enjoyed legal non-conforming status and that the Applicants can rebuild and continue the use as a garage and storage which are considered accessory uses under the ZBL. The Board heard evidence that the original structure was in such poor condition and was demolished by the Applicants with the intention of rebuilding a similar

parking structure. The issue here is that the structure now proposed is larger than the original structure and as such it is an enlargement to an existing legal non-conforming use.

It is the Board's view that the City and the COA have incorrectly used subsection 45(1) of the *Planning Act* in their assessment of these Applications. The Applications seek an enlargement to an existing legal non-conforming use. It is subsection 45(2) of the *Act* which applies to the extension or enlargement of a legal non-conforming use.

Court and OMB jurisprudence have upheld a property owner's right to rebuild a structure which has enjoyed legal-non conforming status. In the previously referenced OMB Decision (PL080959 dated July 28, 2009), the Board held that Section 3 of Ottawa's CZBL in its entirety improperly narrows, amends and restricts the rights of a property owner to a legal non-conforming use contrary to s. 34(9)(a) of the *Act*. In that Decision, Vice-Chair Campbell found that the normal evolution of use could encompass demolition and rebuilding of a property within its footprint with the intention to continue the use of the building or structure as it existed prior to the enactment of the by-law. The Ontario Superior Court of Justice ruling upheld that Board Decision and found no error in Vice-Chair Campbell's reasoning in this respect (*Ottawa (City) v. TDL Group Corp.*) The Divisional Court ruled that:

"where a pre-existing use has been modified, expanded or extended but is still within the same use category, the test is to balance the interests of the private property owner with the interests of the community".

That test is found in the Supreme Court of Canada Decision, *Saint-Romauld (City) vs. Olivier [2001]*. In that decision, Justice Binnie held that:

"under the doctrine of acquired rights", the respondents were not only entitled to continue to use the premises as they were when the new by-law was passed, but was given some flexibility in the operation of that use", including the right to "normal evolution" and to "adapt to the demands of the market or the technology that are relevant to it". (*para. 19*),

and,

“..to the extent activities are added, altered or modified within the scope of the original purpose, the Court has to balance the landowner’s interest against the community interest, taking into account the nature of the pre-existing use, the degree of the remoteness and the new or aggravated neighbourhood effects. The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right. This approach does not rob the landowner of an entitlement. By definition, the limitation applies only to added, altered or modified activities” (*para. 39*).

It is the Board’s view that this is the litmus test for assessing the extension or enlargement of an existing legal non-conforming use. In the matter now before the Board, I am required to assess the impact of the enlargement of the proposed garage structure on the two Objectors whose properties abut the proposed structure. The Board notes that the proposed structure is larger only because of the increase in height. The footprint of the proposal is similar to the original structure.

In reviewing all of the evidence, the Board finds that the proposed parking structure will not have an unacceptable adverse impact on the Appellant, and Ms Lo. The Board finds that the proposed height of the structure at 14.5 ft. will not create an unacceptable impact in terms of shadowing, sunlight and view.

It is the Board’s finding that the location of the rear of the proposed garage structure six inches from the rear property line is acceptable and would be sufficient enough for the Applicants to remove any debris along that space. The Board is satisfied that the combination of low maintenance materials, the design of the pitched roof and the installation of an ice guard gutter will minimize any impacts from snow and rain that this garage structure may have on the abutting properties. In this regard, the Board prefers the evidence of the City’s Planner that such conditions are urban conditions that are common in the City.

Therefore, the **BOARD ORDERS** that the appeal is dismissed and pursuant to subsection 45(2) of the *Act*, the reconstruction and enlargement of the parking structure is permitted subject to the following condition(s):

1. The parking structure be built in substantial conformance with the plans found in Exhibit 1B;

2. That a one foot ice guard gutter be installed along the northern edge of the pitched roof facing the rear lot line; and
3. The conditions of the COA (COA decision dated October 16, 2009) found in Exhibit 1B are fulfilled.

So Orders the Board.

“J. Chee-Hing”

J. CHEE-HING
MEMBER