

Property Rights

Democracy

Common Law

Vol. 13, No. 1

June/July 2018

The Landowner

\$6.95

Rural Families

Rural Politics

Rural Business

Urban Landowner Fights
Ottawa's zoning Bylaw

Restrictions on
Keeping Birds

Clean Yard Bylaw?
Follow the Money

Hockey
Memories



TO SUBSCRIBE
613-831-9061

Urban landowner rights versus zoning bylaw practice in Old Ottawa East

by Denis Rancourt

I'm a volunteer researcher for the Ontario Civil Liberties Association (ocla.ca) and I have seen many non-stop government violations of individual rights in several arenas but recently I got a front-row seat at the violations of my own landowner rights. I fought them and won. This is how I did it.

Landowner rights are two-sided: You have a right to use your property. And you have a right not to be subjected to undue nuisance from other landowner's uses of their property. The latter is the so-called *nuisance tort of common law*.

In an urban or community environment, the municipality or city in addition is given statutory rights intended to optimize service provision and to minimize conflicting ambitions. The resulting creatures are called zoning bylaws, which are enforced by police powers.

Virtually all the problems arise at the boundaries between lots and between differently zoned areas, where owners on either side of the boundaries have different designs.

Badly zoned residential areas allow multiple and changing problem boundaries between lots, where constant impositions are forced on established residents by changing uses of lots. This can in-effect amount to forced expropriation out of one's residential neighbourhood that historically had a definite character and lifestyle culture.

My own neighbourhood of Old Ottawa East (formerly Archville, which was incorporated as the village of Ottawa East in 1888 and in 1907 was amalgamated with the growing community of Ottawa) is particularly bad in this regard. The bylaw zoning allows both single-family dwellings to co-exist with rental multi-unit four-floor-level buildings. And it allows single-family dwellings to be demolished and replaced with such multi-unit buildings.

This is what that looks like for my

neighbour at 39 Chestnut Avenue (the small white house): My neighbour is in a wheelchair and her house was adapted for her at great expense. She is now suddenly surrounded by noisy air-conditioning units, shade-casting buildings, privacy-vitiating high windows, and many near-proximity noisy neighbours. She opposed the out-of-character developments but the Committee of Adjustment ("Committee") and the Ontario Municipal Board ("Board"), in their infinite wisdom, decided that the developments were "minor variances" and were "desirable for

variances" in Ontario. I was to learn that the minor variance provision (s. 45(1)) of the Planning Act is unconstitutional, and that both the Committee and the Board most-often do not have jurisdiction to approve variances.

I also learned that Ontario is the only province in Canada whose bylaw-variance provision in its planning act sets a jurisdictional threshold as "minor variance", without defining "minor" and without providing the established criteria of undue harm from compliance with the bylaw and absence of injury to



the appropriate development".

In my own recent case, my wonderful, immediate neighbour died of cancer and her husband moved to a managed home. They owned two lots because the second was a large vegetable garden and a utility building. They supplied their extended family and many neighbours with tons of vegetables. The developer who bought the two lots made applications to sever the lots into three and so-called "minor variance" applications to build a large two-unit three-story building and a large single-unit home. Full-lot-footprint affairs.

This would have had deleterious effects on my family's enjoyment of our property. It was the beginning of my crash course in the corrupt practice of "minor

neighbouring properties.

I talked to many people and decided, with my wife's permission and support, to make full legal arguments against the applications. I'm not a lawyer but I have made constitutional arguments before in the courts.

The staff of the Committee and of the Board were professional, competent and helpful, a nice change compared to Ontario courts! I was shocked by the Committee at its hearing of my challenge because it did things that no administrative tribunal in Canada is supposed to do:

1. It expressly stated that it would not hear or receive any constitutional arguments whatsoever.
2. It expressly stated that it would

COUNTY CHAT

not hear or receive any challenge to its jurisdiction to decide the minor variance applications.

These statements by the Chair of the Committee, Helena Prockiw, are equivalent to deciding that the constitution and the Charter do not apply in a committee of adjustment hearing and that, unlike with the mere Supreme Court of Canada, the jurisdiction of the Committee cannot be challenged.

I expressed my dismay to no avail. Only one out of five Committee members opposed the variance applications, even though a strict interim control bylaw was in force that was grossly violated, in addition to the general bylaw.

I then filed a notice of appeal to the Board. The developer hired two lawyers from a large law firm and lined up an expert witness. The partner at the firm in an email to me said: "We are of the preliminary view that your constitutional argument is not properly brought to the OMB, but should be the subject matter of a court Application. You may wish to research this before filing your notices."

That is plain wrong and is echoed by City lawyers. So you have to be careful.

Then I filed my Notice of Constitutional Question, in view of the scheduled Board hearing, to the Attorney Generals (Ontario and Canada). When the Attorney General of Ontario's counsel responded to me, there was no mention that "your constitutional argument is not properly brought to the OMB", to the contrary.

My Notice of Constitutional Question

prompted the City to request standing to intervene at the Board on the constitutional question. The Board in-effect granted this and I advised that I did not object.

Next I served and filed my full legal argument, with much of my evidence and a description of what my main expert witness would say. I also sent it to the Attorney Generals and to the City's lawyer. The 53-page document is posted on the OCLA web site here:

<http://ocla.ca/wp-content/uploads/2018/05/PUB-OMB-PL180027-Appellant-Rancourt-submissions-of-2018-05-08.pdf>

It tells the full story in evidence and lays out the legal arguments.

Here are all my legal arguments, in notice of appeal format:

Unconstitutionality and Violation of Charter rights

1. Section 45(1) of the Planning Act (henceforth, the Act) is unconstitutional because in-effect it infringes or denies the complainant's s. 15(1) Charter right of equal protection and equal benefit of the law without discrimination:

(a) The applicant's common law property rights are kept intact, whereas the common law property rights (nuisance tort) of the complainant are prejudicially negated, disregarded and violated.

(b) The residents living near the applicant's land are denied the full protection and benefit of the zoning bylaw whereas other residents are not.

2. In the alternative, the complainant is discriminated against as an ordinary

resident of a dwelling, acting in personal interest to protect his living environment, compared to a non-resident developer acting with a business interest.

3. The said discrimination is established in the body of the decisions made by the Committee to grant the requested relief from the bylaws. It is quantitative and palpable, and is thus not saved by a s. 1 Oakes analysis. It is not prescribed by law nor demonstrably justified in a free and democratic society.

4. The Committee refused to hear or consider the appellant's constitutional argument. On the contrary, the Supreme Court has been clear that constitutional challenges should be heard by the administrative tribunal (hence the Committee, and now the Board): *Cooper v. Canada*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854.

Constitutional vagueness of the Planning Act

5. Section 45(1) of the Act is unconstitutionally vague, in that it does not establish transparent boundaries for the domain of jurisdiction of the Committee to authorize variances from the provisions of the by-laws in effect (in this case the Interim Control Bylaw 2017-245 and the Zoning Bylaw 2008-250).

6. The doctrine against vagueness in the laws is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion, e.g.: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 1992 CanLII 72 (SCC).

7. The doctrine against vagueness applies to all law, from the criminal code to regulatory enactments. Any provision of law, which does not satisfy both rationales of the doctrine against vagueness, is invalid and without force or effect.

Jurisdictional argument

8. Section 45(1) of the Act provides conditional jurisdiction to the Committee and to the Board to authorize variance from provisions of bylaws enacted pursuant to the Act. The jurisdiction to authorize variance from bylaw provisions is limited to "minor" variances, which is a true jurisdictional question.

Lanark Landowners Association Fight the Mississippi Mills "Poop Tax"!



Donate to www.gofundme.com/5nwjbw

9. The historical jurisprudence of allowing minor variances is to admit the difficulty of imposing codified bylaw conditions on the complexities of real land-use circumstances.

10. Any jurisdictional question must be answered both objectively and correctly; it is not a matter of discretion; however the Act does not provide a definition of or a test for the jurisdictional threshold expressed as "minor". Therefore s. 45(1) of the Act is unconstitutionally vague. In the alternative, if the impugned provision is not constitutionally vague (which is denied), then the meaning of "minor" must be taken from the common-law jurisprudence, not solely from Ontario case law that has developed in a statutory context in which a test for "minor" is not specified.

11. On this basis, the Committee did not have the jurisdiction to substantially override the prohibitions of the Interim Control Bylaw 2017-245 passed by the elected Council, nor did it have the jurisdiction to override the general bylaw. The Board also does not have the jurisdiction to do so.

The variances are not desirable for appropriate development

12. In the alternative, if s. 45(1) of the Planning Act is constitutional (which is denied) and if the Tribunal has jurisdiction (which is denied), then the applications should be denied because the applied-for variances are not desirable for the appropriate development of the lots:

1. There are unacceptable and easily avoidable deleterious effects for the neighbours in this established community.

2. There are unanswered and proven concerns of soil toxicity and public health, without a city plan to prevent health risk.

The following are some particulars in this regard. [And so on...]

Within hours, the applicant (developer) had abandoned all his applications and suggested that the hearing was not necessary. He implemented a plan B and is now building two single-unit homes on the two original lots. He has been respectful, responsible and responsive to the community in the on-going building process.

I responded that I was willing to proceed with the constitutional questions, which I argued were not moot.

Within days, the Board released its formal order that the applications are denied for the reason that the applicant advised he would not make submissions. The matter of the appeal is closed. However, the minor variance provision of the Planning Act remains unconstitutional and continues to be misused. It is unlawfully a planning instrument that gives the tribunals virtually unlimited discretion. Also, the general bylaw must be changed.

I'm helping neighbours and the community association to continue the battle, and some have adopted my legal arguments.

Recently, zoning law procedures have been overhauled in Ontario. The Board has been replaced by a "Local Planning Appeal Tribunal". But, unfortunately, the "minor variance" statute provision and the legal culture in Ontario have not changed. Appeals of minor variance decisions are run essentially the same way as before. I will witness the procedural differences soon. I hope that things have not been made worst for ordinary landowners and residents. **

I can be reached at: denis.rancourt@gmail.com

Pattison Legal Services now offers Unbundled legal assistance.

What is Unbundling?

'Unbundling' provides for an economical alternative for those who cannot afford full legal services yet do not qualify for legal aid. Unbundling is an agreement between you and your legal representative to provide a limited scope of work.

For example: To answer a Provincial Offences charge, a legal representative will initially attend court on the client's behalf to ask for the prosecution's disclosure. A proper disclosure package should contain all evidence to support the charge and that the evidence has been legally obtained by the charging officer. The legal representative examines the disclosure package to craft a defence. Unbundling, for instance, may include an agreement where the client attends the preliminary hearing to obtain the disclosure package themselves. This saves the cost of the legal representative's personal court appearance.

Legal representation costs money.

The same is true for a civil action: From drafting the Demand Letter to filing the Claim to preparing for Settlement Conference and Trial, these tasks can often be completed by the client to save legal costs and to gain a deeper understanding of the action to which they are a party.

Unbundling allows the client to choose those legal services that they will and will not undertake themselves—but only by way of an agreement clearly defining the legal representative's scope of work.

Contact **Pattison Legal Services** Pattison Legal Services to learn more about how unbundling can benefit you.

Pattison Legal Services
Box 16,
Grand Bend, ON. N0M 1T0
O: 519-238-6233
C: 780-799-3008

The Landowner

Vol. 13, No. 1
June/July 2018

NEWS

Publisher
Tom Black

EDITORS

Roger Graves,
Marlene Black, Shirley Dolan,

LAYOUT & DESIGN

Marlene Black,
Stacey Neitzel, Tom Lilly

PHOTOGRAPHY

<https://commons.wikimedia.org/w/index.php?curid=54786754> Wikimedia Commons,
Gerry Jette, Judith Cox, Barney Moorhouse
<https://commons.wikimedia.org/w/index.php?curid=35068481> By Tim1965 - Own work, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=16542558>
By Michael hunter - Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=41174478> By Michael hunter - Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=41174478>

ADVERTISING and SUBSCRIPTIONS

1-613-831-9061

6 issues \$33.90/yr (\$56.50/2 yrs)

Subscribe Online

www.LandownerMagazine.com

VISA/MC accepted

Email Contact:

thelandowner@bellnet.ca

The opinions expressed in this magazine
are those of the writers and are not
necessarily the views of the Publishers

Return undeliverable Canadian addresses to:

THE LANDOWNER
6610 Fallowfield Rd
Stittsville, ON, K2S 1B8



**Signs of
Spring,
Summer
and All
Things
Beautiful**

What's Inside...

Regular Features

- 4 Rural Reflections - *Tom Black*
- 5 Landowner Groups contact
- 6 County Chat - *Denis Rancourt*
- 9 Your letters
- 12 Your Health - *Brenda Kearns*
- 17 Combat Gardening - *Judith Cox*

Articles and Stories

- 18 Reminiscing - *Barney Moorhouse*
- 26 Restrictions on Keeping Birds- *Paul Stevens*
- 30 It Matters How You Stand - *Tom DeWeese*
- 36 Clean Yard Bylaw - *Jeff Bogaerts, paralegal*
- 38 Time to go Fishing - *Lyle Dillabough*
- 39 Municipal Planning and Bitcoin - *Steve Clarke*

Columnists - Editorials

- | | |
|-----------------------|--------------------------|
| 10 Randy Vancourt | 29 Ian Cumming |
| 11 Mark Tijssen | 33 Nick Vandergragt |
| 13 The Contrarian | 34 Roger Graves |
| 14 Tim Ball | 40 Jim Merriam |
| 20 Mark Tijssen | 42 Marlene Black |
| 21 Michael Coren | 44 The Old Jackass |
| 22 John Robson | 45 Doug Bell - crossword |
| 24 The Geezers Corner | 46 The Old Rooster |
| 28 Diana Fisher | |