Case Name:
Motisi v. Bernardi

Between
Motisi et al., and
Bernardi

[1987] O.M.B.D. No. 2

20 O.M.B.R. 129

1987 CLB 11776

Ontario Municipal Board

Panel: A.J.L. Chapman, Q.C.

Decision: May 28, 1987.

(49 paras.)

Appearances:

Gary S. Kay, Q.C., for Giuseppe Motisi, Guiseppina Motisi, Jerry Appleby and Gwen Appleby.

Richard R. Arblaster, for Stella Bernardi.

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1 A.J.L. CHAPMAN, Q.C., MEMBER:-- Stella Bernardi is the registered owner of Lot 910 as shown on Plan 2044 for the City of North York. There is located on Lot 910 a two-storey brick house municipally known as 165 Armour Blvd. in which Mrs. Bernardi lives. Lot 910 has 53 ft. of frontage on Armour Blvd., its easterly boundary, and 51.83 ft. of frontage on Westgate Blvd., its westerly boundary. It is therefore what is known as a "through lot", that is a lot, not being a corner lot, with frontage on two streets. Lot 910 has a southerly boundary measuring 165.68 ft. and a northerly boundary that measures 134.5 ft. The lot contains about 7,550 sq. ft.

2 Mrs. Bernardi, a widow, finds that she is no longer physically or financially able to maintain her property in the way she would wish. She therefore asked the committee of

adjustment of the City of North York for permission to sever her property into two parcels and to convey away the rear or westerly part of Lot 910 to a purchaser who would construct a house on the severed parcel within a prescribed building envelope. Mrs. Bernardi would retain the easterly parcel on which is located her home and garage.

3 In order to do this she needed, and therefore made application for, six variances from the provisions of the city's general zoning By-law 7625 as amended. There were four variances in connection with the easterly or retained parcel, namely, a variance in the frontyard set-back from 24.61 ft. down to 22.01 ft.; a reduction in the southerly sideyard from 5.91 ft. to 1.5 ft.; a reduction in the rear yard from 24.6 ft. down to 14.99 ft.; and a reduction in the minimum lot area from 6,458.56 sq. ft. down to 3,838 sq. ft. The first two variances sought were existing variances from the bylaw, the house having been constructed before the by-law was passed.

4 In connection with the westerly or severed parcel there were two variances asked for, namely, a reduction in the frontyard setback from 24.61 ft. down to 10.06 ft.; and a reduction in the minimum lot area from 6,458.56 sq. ft. down to 3,711.95 sq. ft.

5 The committee of adjustment found all the variances asked for to be permissible departures from the provisions of the zoning bylaw under all the circumstances here and granted the consent to sever the property as requested. The owners of Lot 909, Mr. and Mrs. Appleby, and the owners of the westerly part of Lot 911, Mr. and Mrs. Motisi, appealed that decision to this board. Lot 909 is at the apex of the triangular intersection of Armour and Westgate Blvds. and abuts Lot 910 on the north. Lot 911 abuts Lot 910 on the south and was at some time in the past severed into two lots. The westerly lot, owned by the Motisis, is municipally known as 89 Westgate Blvd., and the easterly part, the owner of which is not known to the board not having taken part in the hearing, is municipally known as 163 Armour Blvd. Lot 911, like 910, was a "through lot" until it was severed into two lots.

6 In matters where a consent to sever and a variance or variances from the general zoning by-law are being sought together, the board considers the variance application first, for if a necessary variance cannot be granted under s. 44(1) of the *Planning Act*, 1983 (Ont.) c. 1, a consent to sever cannot be granted as to do so would be contrary to s. 50(4)(*g*) of the Act.

7 Of the six variances requested the board considers the two existing variances, namely, the set-back of the existing house from Armour Blvd. and its distance from the southerly lot line, to be technical in nature and not worth discussion. The board has considered them and has no quarrel with the committee's decision permitting them in this instance.

8 The remaining four variances have to do with lot areas, the setback of the proposed dwelling from Westgate Blvd., and rear yards, particularly the depth of the rear yards. In thinking about these four variances, two matters of significance must be kept in mind.

9 Firstly, the most significant aspect of this case is that Lot 910 is a "through lot". In the immediate area Westgate Blvd. runs roughly north/northeast and Armour Blvd. runs roughly north/-northwest. The two roads meet and cross each other with the Appleby property being at the confluence of, or at the apex of the triangle created by, the two roads. Because the two roads diverge slightly as they go southerly, the depths of the properties

on the east and west sides of Westgate and Armour Blvds. increase slightly as they proceed southerly from Lot 910 to the southerly boundaries of Lots 936 and 915. As already pointed out Lot 911 was a "through lot" until it was severed several years ago.

10 Mrs. Bernardi's house faces and obviously relates to Armour Blvd. The west side of Armour Blvd. therefore appears complete and fully developed. But the east side of Westgate Blvd. appears to lack one house and that gap in the streetscape is the present backyard of the Bernardi property. The aerial photos found in the appendix to Mr. Dolan's report, ex. 18. illustrates this better than my words can describe. Exhibit 11, prepared by Mr. Sherman, also demonstrates this fact, if one can picture the severed parcel without a building footprint on it. The board accepts the evidence that this is a case of infilling.

11 A most careful examination of the aerial photographs, maps and plans of the area filed in these proceedings reveals that there may be two other "through lots" in the area east of Bathurst St., north of the 401 Highway, and south and east of the Earl Bales Park and Don River Valley, namely, 239 Sandringham Dr. and 30 Tresillian Rd., neither of which can be described as being in the immediate area or area of influence of the subject lands. Hence, the subject "through lot" situation, if not now unique in the general area, is certainly not the norm, and certainly not the cause of any concern from the point of view of establishing some sort of dangerous precedent. The board does not believe dismissing these appeals would create a dangerous or unacceptable precedent in the area.

12 In thinking further about this particular "through lot" -- how it is not a corner lot, but still has frontage on two streets, and more frontage on each street than what the zoning by-law requires or calls for; how it is a unique lot in the immediate area now that Lot 911 has been severed; how, if this proposal is anything at all, it is obviously a case of infilling to complete development on the street and of the immediate area -- the board wonders if it makes planning sense, if it is fair, to compare this particular "through lot" with the norm or average lot in the area that by its shape, dimensions, and location within the several plans of subdivision makes it impossible to even contemplate further subdivision of the average lot. While the board did not hear evidence on this, it is obvious from an examination of the maps and plans filed as exhibits that considerable subdivision of the plans of subdivision has taken place since the plans were first registered. For instance, on Westgate Blvd. from Delhi Ave. to Armour Blvd., the block in which the subject lands are located, there are 21 single-family homes on 17 registered subdivision lots on the west side of Westgate Blyd., and on the east side 19 single-family homes on 16 registered subdivision lots. Immediately north of Edinburgh Dr., about opposite the subject lands, the frontages of 92, 94 and 96 Westgate Blvd. are 50 ft., 40 ft. and 36 ft. From examining the maps and plans of the area, and considering the location of Mrs. Bernardi's house, it is obvious Lot 910 is the only lot left in the area that presents a possibility of being further subdivided. There is therefore considerable justification in looking at this lot as being unique and different from other lots in the area, and that is the first matter of significance that struck the board, and the first matter that, in the board's view, must be kept in mind in considering these applications.

13 The second matter of significance that must be kept in mind when thinking about the variances requested, indeed in thinking about the application for consent as well, is the principal or proposition found in many of the earlier cases dealing with land use, namely, that an owner of land ought to be able to use his land as he wishes, provided, that in doing

so, he is not breaking any law, and not creating some unacceptable adverse impact on his neighbours. This proposition has served as a starting point from which all land use planning has proceeded and is as valid today as when it was first enunciated many years ago. By "law" the board means, in this case, the rights and restrictions affecting the land as found in the applicable official plans, zoning by-laws and, of course, the *Planning Act, 1983* of Ontario.

14 As already noted the four variances now being considered have to do with rear yards, lot areas, and the set-back from Westgate . Blvd. of the proposed house. Are they minor? It is almost trite to say that what is minor and what is not minor cannot be calculated mathematically. What is considered a minor variance in one case could well be considered not minor in another case. It depends upon the established facts of each particular case. The statute is not much help in deciding what is or is not minor. It is left to the discretion of the committee of adjustment or on appeal to this board. Without attempting to limit this discretion, if the variance requested does not produce an unacceptable adverse impact on the neighbours, then it can probably be considered as minor. This appears to be so, under certain circumstances, even if the variance requested amounts to an obliteration of the requirement.

15 With respect to the proposed rear-yard variance, the by-law calls for a 25-foot rear yard and the retained lot will only have a rear yard of 15 ft. The lot to be severed will have a rear yard that complies with the by-law. The combined spatial separation between the existing and proposed house will be 40 ft. instead of 50 ft. This will only affect, if at all, the occupants of the existing and proposed houses. It cannot interfere with the neighbours' enjoyment of their properties. Mrs. Bernardi will have a rear yard of 15 ft. if this proposal proceeds and she does not mind. The future purchasers of Mrs. Bernardi's home and the new dwelling do not have to buy if they do not want small back yards or only 40 ft. between houses. The board is satisfied there are any number of people today who are looking for properties with minimal yard maintenance. Therefore, the board has no difficulty in agreeing with the committee of adjustment and finding the variances requested to be minor.

16 With respect to the lot area variances, the by-law calls for minimal lot areas of 6,458.56 sq. ft. and here the proposed lots have areas of 3,712 sq. ft. and 3,838 sq. ft. They will be in area the smallest lots in the immediate area. But again, the only people really affected by this will be the occupants of the retained and proposed houses and what the board has observed in connection with the rear-yard variances applies here as well. The abutting property owners may be aware that the two lots are smaller than others in the neighbourhood in the same way they may be aware that the rear yards are smaller, but their lack of area cannot interfere with the neighbours' enjoyment of their lots. In North York today there are numerous lots with frontages of approximately 50 ft. and areas of 3,700 sq. ft. In the immediate area the proposed lots are not that much smaller than the two lots in Lot 911 that abut Lot 910 on the south, both of which are below the minimum lot area required by the by-law. In the board's view the two proposed lots make quite respectable building lots for single-family homes. For these reasons the board considers the variances for lot area to be minor.

17 With respect to the frontyard variance the by-law requires a set-back of 25 ft. and what is proposed is a set-back of 10 ft. from Westgate Blvd. This has given the board more

concern than any of the other variances requested because at first blush permitting the variance would appear to permit the proposed house to protrude from the established line of neighbouring houses by about 15 ft. But after examining the photos of Westgate Blvd. that were filed in these proceedings, and examining exs. 2, 5, 11 and 14, the board concludes that locating the proposed house in its proposed envelope will provide an alignment with the houses to the north and south that will produce a homogeneous building line in keeping with the intent of s. 7.8.2 of the zoning by-law. The westerly wall of the Appleby house is about five feet from Westgate Blvd. at its closest point and about 15 ft. from Westgate Blvd. at its furthest point. The proposed house will be 10 ft. 6 in. and 18 ft. from Westgate Blvd. at its closest and furthest points respectively. The Motisi house is 22 ft. and 25 ft. 3 in. from Westgate Blvd. at its closest and furthest points. Westgate Blvd., which gently curves one way as it goes north, begins to curve the other way as it passes in front of the proposed house, but the change is so subtle it will not have any noticeable effect. The board is therefore of the opinion that the committee of adjustment was not wrong and this variance can be considered minor as well.

18 The variances being sought, including the two existing variances, do not in themselves, taken either individually or collectively, produce any unacceptable adverse impacts on the neighbourhood environment, nor can they be held to interfere unduly with the abutting neighbours' enjoyment of their property.

19 Are the variances requested desirable for the appropriate development or use of the land, building or structure? It is clear the proposal is not feasible unless all of the variances are granted. The board, therefore, proposes to consider them collectively under this head. The proposal is to divide the subject lands into two parcels and construct a single-family home on the parcel to be severed. The owner can no longer keep the property as she would like to, but she would like to stay in her home. From the owner's point of view the proposal is certainly desirable and appropriate for the redevelopment of her property. It gives her less land to look after, capital to maintain her smaller property, in short, the means to remain in her home and maintain it in the fashion that she would like to. In the board's view, the owner's wishes should never be lost sight of.

20 The use of the land for a single-family home is an appropriate use as it is in keeping with the surrounding land uses. While the two lots created will be the smallest in the area, the lots are not too small to accommodate either the existing house or the proposed dwelling given the availability of all municipal services. Neither the existing house nor the proposed house will have an adverse effect on the streetscape. In the case of the proposed house, the board is of the view it will have a positive effect in that an obvious hole in the streetscape will be filled in. Furthermore, the house that is proposed for the severed lot (ex. 14) is in keeping with other houses in the neighbourhood, and if it is built within the proposed envelope, it should be possible to integrate it into the residential fabric of the neighbourhood in an acceptable and pleasing way. The board agrees with the committee of adjustment that the proposed variances are desirable for the appropriate development and use of the land.

21 Is the general intent and purpose of the official plan being maintained? The official plan designates the subject lands for residential use and s. B -- General Land Use, s-s. (c), found on p. 19 of ex. 6 in these proceedings, permits further development within areas of

substantial existing development, provided particular regard is given to the character of the existing development so as to avoid development incompatible therewith with respect to density, types of housing and the general standards applicable. In other words, the new development must be compatible with the existing development.

22 In thinking about this test and this case three things should be kept in mind. The *Planning Act, 1983*, in establishing the test, uses the words "in the opinion of the Committee", and on appeal, in the opinion of the municipal board, the "general" intent and purpose of the official plan is maintained. Section B(c) of the official plan is intended to apply to the subject lands "notwithstanding the designated residential density" found elsewhere in the plan. Being compatible with is not the same thing as being the same as. Being compatible with is not even the same thing as being similar to. Being similar to implies having a resemblance to another thing; they are like one another, but not completely identical. Being compatible with implies nothing more than being capable of existing together in harmony.

23 In discussing the first two tests, the board has already set out many of the reasons for finding that these variances, if granted, would still maintain the general intent and purpose of the plan, and I wish to mention only one other at this point, and that has probably been at least hinted at earlier in the decision. Generally speaking, the area has been developed with rectangular lots having frontages on the street in the 40-50 foot range with most lots probably being closer to 50 ft. frontages.That is part of the character of the area and in that respect the two proposed lots are similar.

24 The lot areas vary in size depending on their frontages and depths, but primarily upon their depths as most of the lots have fairly large rear yards, and that too is part of the character of the area. But it is also part of the character of this area that as you move north between Westgate and Armour Blvds. the lots get smaller, the rear yards get smaller, because the two boulevards are converging. The Appleby house faces Armour Blvd., roughly east, and whether you consider the southerly or westerly yards of the Appleby property as its rear yard, neither has a greater depth than about 16.5 ft. The subject land is the last "through lot" in the area. To divide it would create the two smallest lots in the immediate neighbourhood. But that was its ultimate destiny when the street layout was devised, and that too is part of the character of this neighbourhood, and in the board's view not incompatible with it.

25 For all these reasons the board is satisfied the committee was right in their decision and finds the variances, all six of them, to be in keeping with the general intent and purpose of the official plan.

26 The last test set out in s. 44(1) of the *Planning Act, 1983*, is of course whether, in the opinion of the board, the variances maintain the general intent and purpose of the by-law. The intent and purpose of the by-law provisions regarding lot area, side-and rear-yard depths and front-yard set-backs is to estabalish reasonable standards for the neighbourhood. The standards are perfectly reasonable and applicable when applied to the average rectangular lots lying between two streets that are equal distance from each other. The intent and purpose of s. 44(1) of the *Planning Act, 1983* is to supply some relief from those provisions under certain circumstances when you have to apply them to a situation such as we have here when a "through lot" is involved and the streets are not equal distance from each other, but converging.

27 In thinking about this, the board can add nothing to what it has already said while discussing the three previous tests. As Mr. Dolan said at p. 10 of ex. 18:

> The reduced lot area is a function of a reduced back yard, which becomes a private matter of the two individual property owners. The greater public is not impacted, because from a streetscape and pattern of development viewpoint, neighbourhood consistency will be perceived. The proposed development does not strain the by-law standards in relation to established and accepted neighbourhood standards nor does it offend the intent of the by-law provisions.

28 The board agrees and accordingly the board is of the view the committee of adjustment was correct in its decision regarding all six variances and the board finds that all six variances may be permitted.

29 Accordingly, the appeals on the board's files No. V 860500 and No. V 860501 are dismissed; the decisions of the committee of adjustment are confirmed; the applications for the six variances are granted, but subject to the three conditions imposed by the committee of adjustment, namely, that the existing shed at the rear of the dwelling municipally known as 165 Armour Blvd. be removed; that the lot to be severed be developed essentially in accordance with the plans stamped "Received September 5, 1986" which are being held on file by the committee of adjustment; and subject to no drainage problems resulting from the construction of that proposed dwelling house.

30 With regard to the board's file No. C 860471, a consent to sever lands may be granted if the committee of adjustment or in this case the municipal board is satisfied a plan of subdivision of the land is not necessary. Given the shape and size of the land in question the board has no doubt a plan of subdivision is not necessary. But that is not the end of the matter for under s. 52(2) of the *Planning Act, 1983* if the board should decide that a plan of subdivision is not necessary, it is still necessary to consider the matters that are referred to in s. 50(4) of the *Planning Act, 1983* .

31 The board has considered s. 50(4) and is of the opinion the only matters that require some comment in connection with this application for a consent to sever are s. 50(4)(*b*), (*c*), (*d*), (*f*) and (*g*).

32 Clause *(b*) -- the proposed severance is not premature and is in the public interest. The proposal amounts to infilling. Building lots are in demand within the urban area, and it is in the public interest to recognize this fact and encourage new building lots within the urban boundaries, rather than contribute to urban sprawl by permitting development outside those boundaries when good building lots are still available within those boundaries.

33 Clause (*c*) -- the proposal generally conforms to the official plan and adjacent plans of subdivision. In connection with the applications for variances already discussed in this decision, the board has held that the proposal is consistent with the official plan and in particular with s. B(c) of that plan. The board, therefore, has no difficulty with concluding that the application to sever is in general conformity with the Official Plan and adjacent plans of subdivision.

34 Clause (*d*) -- the suitability of the land for the purposes for which it is to be subdivided. It is obvious the proposed lots can accommodate single-family homes. The board has no difficulty with this subsection. There are no problems that cannot be overcome. The lots are suitable for houses.

35 Clause (*f*) -- the dimensions and shape of the lots. A great deal of this decision has been directed to a consideration of that matter and I do not propose to repeat it. The board is satisfied the dimensions and shape of the proposed lots are not out of character with the pattern of development in the area and are in keeping with accepted urban standards.

36 Clause (*g*) -- the restrictions on the land, building and structure. This refers to the by-law, and again, having discussed this at length in connection with the appeals concerning the variances, the board does not propose to say anything further. The variances having been permitted, there is no conflict with the by-law, and accordingly the board has no problem with cl. (*g*).

37 There is left to consider the concerns as expressed by the appellants Appleby and Motisi. Mr. Motisi was concerned the proposed house would create a lot of shade in his backyard and make it difficult for him to back his motor car with safety onto the street. With respect to the first concern the board notes that both houses will be two storeys in height and will face almost due west. The board further notes that the rear of the proposed house is almost directly in line with the Motisi garage. According to a survey of the Motisi property the north-east corner of the attached brick garage is 48 ft. 1 in. from the street line. According to the site plan of the proposed house (ex. 4) the south-east corner of the proposed house is 48 ft. from the street line. The board does not believe the proposed building in its proposed envelope will have any significant effect on decreasing the sunlight to Mr. and Mrs. Motisi's backyard. If it has any, which I doubt, it will be for a very short period late in the day for a very short part of the year.

38 With regard to Mr. Motisi's second concern, while I can appreciate he might worry about it now, I am perfectly certain that when the house is up there will be no problem. He is obviously concerned about site lines to the north, the proposed house being located north of the Motisi driveway. The moving traffic on the east side of Westgate Blvd. will of course be coming from the south and Mr. Motisi has had no difficulty with backing his motor car out onto the street up to now apparently. The south-west corner of the proposed house is 18 ft. from the road allowance. The north-west corner of the house will be 10 ft. 6 in. from the road allowance. A driver leaving the Motisi dwelling should have no difficulty with visibility to the north given those distances.

39 When you consider the added distance of half the travelled part of the road plus the easterly part of the road allowance not forming a part of the travelled portion, there will be no difficulty for any driver using expected driving skills.

40 Mr. Appleby was objecting because after 15 years of being able to look at the backyard of 165 Armour Blvd. and down Westgate Blvd. he was now going to have to look at the north side of a brick house. He was also concerned about a lack of sunlight to his property; he was objecting because the by-law entitled him to be able to look at 50 ft. of open space between houses and now he was only going to have 40 ft.; and finally, he was concerned that his property would be devalued by construction of the proposed house.

41 There is no more in the loss of sunlight suggestion than in the case of Mr. Motisi, perhaps less, because of the existence of tall trees on the property line between the Applebys and Mrs. Bernardi. The board knows of no law, rule or principal of planning that requires Mrs. Bernardi to continue to provide a view of her backyard or down Westgate Blvd. for her neighbour. The Applebys will still be able to look at the rear yards of Lot 910 from their kitchen, they have their own pleasant garden to look at, and there is nothing unusual in a city about being able to see, or having to look at, your neighbour's house from your property. As to there only being 40 ft. between houses rather than 50 ft. as required by the by-law, the board has already decided that this does not amount to an unacceptable impact for the Applebys. The only concern of Mr. Appleby that requires comment from the board is his last concern because of the evidence of an appraiser called on behalf of the appellants.

42 A man who has spent 19 years in the real-estate field and been a qualified real-estate appraiser for the last 9 or 10 years gave evidence on behalf of the appellants. He had seen the site and felt, based on his experience, that if the proposed house was built in its proposed envelope, the Appleby house would suffer a loss of 25% in value, and the Motisi house would suffer a loss of between 15% to 20% in value, because the occupants could no longer have a view of Mrs. Bernardi's back-yard. That was his evidence and he maintained this opinion throughout his cross-examination and no other appraiser gave evidence at this hearing.

43 The board does not find that evidence creditable and I totally reject it. There is no study done, not even a written report, just the witness' feeling, based on his experience, that the houses would lose value because the view of the Bernardi backyard was at risk. It was a judgment call, nothing else.

44 There is not a single window in the north wall of the Motisi house and only a very small window in the north wall of the garage. There is therefore no loss of view of the Bernardi backyard through any window in the north wall. Bearing in mind that the proposed house will not project further to the east than the line of the east wall of the Motisi house, there will be no further loss of view of the Bernardi backyard from inside the Motisi house than exists today. And yet locating a house where the streetscape suggests there ought to be one is supposed to devalue the Motisi house by 15% to 20%. In the absence of any study which would support this judgment call the board is simply not prepared to accept that kind of evidence in a case of this nature.

45 If the witness is wrong about the Motisi house, what about the Appleby house? The witness estimated the value of the Appleby house to be between $350,000 and $400,000. He also estimated that the standard home in the area would have a value of $250,000. If the Appleby house is worth $375,000 the loss according to the appraiser would be $93,750. The Appleby house would be worth only about $30,000 more than the standard home in the neighbourhood simply because 30 ft. of the Bernardi lawn and a view down Westgate Blvd. had been replaced by a view of a house. In the absence of any study to support such a suggestion, the board does not accept it -- the board finds it quite incredible.

46 At one point in his cross-examination the witness gave it as his opinion, based on his experience, that if the new house was 25 ft. back from Westgate Blvd. there would be

no loss of value. The board has already dealt with the building line aspect of this case and only mentions this here because if the loss of value depends upon putting the view from the breakfast area and patio of the Appleby house at risk, it is beyond me how setting the house back 25 ft. from Westgate Blvd. will improve matters.

47 Having observed the witness giving his opinion, and being cross-examined, and after considering all the evidence, the board is not at all satisfied that allowing the applications will result in any loss of value to the appellants' homes.

48 The board agrees with Mr. Dolan, the planner called on behalf of Mrs. Bernardi, that:

> The subject severance and resulting development constitutes a suitable arrangement; is in keeping with the established character and pattern of development of the neighbourhood; does not produce meaningful adverse impacts; and responds positively to considerations contained in Section 50(4) of the Planning Act.

49 It follows therefore that in this particular case, the board prefers the opinion of Mr. Dolan to the planning opinion of Mr. Max Sherman, and accordingly the appeal against the severance is dismissed, the decision of the committee of adjustment in the board's file No. C 860471 is confirmed, and the application to sever is granted subject to the conditions imposed by the committee of adjustment, but being amended to reflect that the time to complete the application as established by the *Planning Act, 1983*, is extended from the date of this decision.