What is or is not a 'Minor' Variance as cast in Ontario Municipal Board Decisions (and Court Decisions reviewing them) 1971 to 2015

The old expression that "there is nothing new under the sun" aptly applies to the criteria applied and thinking of the Ontario Municipal Board in its decisions respecting the interpretation of "minor" when weighing whether the four tests of Section 45 of the Planning Act have been met by a particular application to/appeal from a Committee Of Adjustment. Set out below are nutshell extracts of reasoning/principles which have emerged from Ontario Municipal Board decisions and related court cases dealing with this topic and which are still relevant today. These will be reviewed in this paper.

SUMMATION OF PRINCIPLES

1. Context is everything.
2. Impact is a factor but not the sole factor.
3. A minor variance is not a special privilege.
4. Eliminating a zoning requirement can be authorized by minor variance.
5. If there is impact and an alternative solution there should be no approval.
6. Mathematical calculations of the degree of variance are not helpful.
7. A variance cannot permit a use that is prohibited by the zoning bylaw.
8. A variance may not be minor if it is too large or too important.
9. Numeric deviation is secondary to appropriateness, or a portion, planned and built environ, reasons for the regulation, mitigation conditions, and impact.

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1. 1971 **Perry et al. and Taggart et a1**., [1971] 3 0.R. 666 (High Court of Justice)
   The phrase "minor variation" is a relative expression and must be interpreted with regard to the particular circumstances involved. The reduction in lot frontage by almost 1/3 of the minimum required in a neighbourhood where few of the homes have the minimum required frontage and no adverse effect would be created by the reduction is a minor variance.

2. 1977 **McNamara Corporation Ltd. et al. and Colekin** 15 O.R. (2nd) 718 (Divisional Court)
   Section 42 (now section 45) provides committees of adjustment with the authority to allow "minor

variances". These words are not defined in their exact scope and are likely incapable of being prescribed. No hard and fast criteria can be laid down. The question of whether a variance is minor must in each case be determined in light of the particular facts and circumstances of the case. A committee is not precluded from granting a minor variance which completely releases the owner from a provision of the bylaw.

3. 1987 **Motisi v. Bernardi** 1987 O.M.B.D. No. 2 20 O.M.B.R. 129

   In considering minor variance applications which underlie a consent application the minor variance aspects should be determined first as if they are not to be approved then neither will the consent application. A lot, which is the only lot left in the area, that presents a possibility of being further subdivided is appropriately looked at as being unique and different from the other lots in the area and this aspect must be kept in mind in considering the applications. As a matter of principle the owner of land ought to be able to use that land as the owner wishes, provided that in doing so no law is broken and no unacceptable adverse impact is made on neighbours. The Planning Act is not much help in deciding what is or is not minor and this is left to the discretion of the committee. If the variance requested does not produce an unacceptable adverse impact on the neighbours than it can probably be considered as minor.

4. 1989 **Bos v. Port Colbourne (City) Comm. of Adj't.** 23 O.M.B.R. 75

   A minor variances is one which is a small matter where relief should be given from the conditions or requirements of the zoning bylaw. A sought after variance which is not necessary (in the sense that an alternative solution exists) and which would injure the future expansion or operation of an established industry in the vicinity is not a minor variance.

5. 1989 **Carusetta v. Welland (City) Comm. of Adj't.** 23 O.M.B.R. 89

   If the approval authority is satisfied from the facts that one can completely do away with a zoning requirement because whatever the bylaw was seeking to ensure was not really needed is something that is for the approval authority to determine on the facts and is within its jurisdiction. Whether a variance is either minor or not must be determined on sufficient evidence, failing which the necessary conclusion that it is minor cannot be reached.

6. 1989 **Hepburn v. Toronto (City) Comm. of Adj't**. 23 O.M.B.R. 456

   Whether a variance is minor is a relative judgment and rests on a determination of whether in all the circumstances, an application meets section 44 (now 45) of the Planning Act. Mathematical calculations as to the percentage extent of a variance are simply not helpful. While no one has a right, in law, to a view over another's property, such a loss can and should be considered in circumstances where someone wishes to change the bylaw to restrictions.

7. 1989 **Melling v. North York (City) Comm. of Adj't.** OMB

   The issues as to appropriateness and whether requested variances are minor comes down, in part, to the particular area to be considered. Variances to permit propose lots which fall below the range of lot sizes and frontages prevailing in the area are not minor.

8. 1990 **Wong v. Toronto (City) Comm. of Adj't.** 25 O.M.B.R. 66

   Where the official plan specifies a permitted density of one times coverage, the zoning bylaw permits .6 times coverage, and an application seeks permission for 1.93 times coverage, the application goes beyond the minor variance authority granted to the approving body.

9. 1992 **Thomas v. Toronto (City) Comm. of Adj't.** 27 O.M.B.R. 262

   It is commonly held that the committee of adjustment or the Board on appeal will determine the extent that a bylaw can be varied and still be classed as minor. The determination of whether a variance is minor and reasonable can be measured against the type of use, the physical constraints against meeting bylaw requirements, and the availability of facilities which can substitute for those the bylaw requires.

10. 1993 **Granger v. Toronto (City) Comm. of Adj't.** OMB

    In a case where the zoning bylaw specifically prohibits certain development a variance is not to be granted in the absence of a substituted arrangement which can address the intent of the zoning bylaw.

11. 1994 **Assaraf v. Toronto (City) Comm. of Adj't**. 31 O.M.B.R. 257

    A minor variances a special privilege. It can reduce inflexibility of the zoning bylaw so that undue hardship does not result. There should be a valid reason why the bylaw requirements cannot be met.

It is not sufficient that variance would be convenient to an owner in order to justify its approval.

12. 1994 **London (City) v. London (City) Comm. of Adj't** 30 O.M.B.R. 494

    To determine if a variation of a permitted use is minor or not, the description or definition of the permitted use as contained in the zoning bylaw must first be considered. The extent to which it is sought to be varied must then be measured in the light cast by the description or definition and the relevant portions of the bylaw and official plan, as reflected against the background of the committee's opinion. A variance is not minor when it seeks to permit a use which is not permitted in the zoning area which the property is located. In assessing whether a variance is minor, the relevant categories set out in the zoning bylaw help frame what is the intent of the zoning and official plan, and how the new use strays outside that intent.

13. 1995 **Oshawa Group Ltd. v. Peterborough (City)** Comm of Adj't.

    The usual test for a variance being "minor" is impact. While the board does not usually accept that numerical calculations and analyses really apply to the term "minor" the presence in the official plan of a policy limiting the extent of an expansion cannot be brushed aside.

14. 1995 **Toronto (City) v. Toronto (City) Comm of Adj't.** 32 O.M.B.R. 490

    Section 45 of the Planning Act can be used to vary a permitted use but not to establish a new use and especially where that use is prohibited within the bylaw to be varied. A variance application which seeks to permit a use that is specifically prohibited by the zoning bylaw cannot possibly be consistent with the intent and purpose of that zoning bylaw.

15. 1997 **Fred Doucette Holdings Ltd. and Corporation** 32 O.R. (3rd) 502 (Div. Ct.)

    It is not helpful to determine the question of whether a variance is minor by whether a "new use" is to be authorized; rather, this question is to be determined by whether the use could be described as minor in light of the bylaw and the other factors specified by section 45. No precise definition of a minor variance is possible and it is necessary to maintain a flexible approach always relating the assessment of the significance of the variance to the surrounding circumstances and the terms of the existing bylaw.

16. 2001 **Toronto (City) v. Contact Real Estate lnc.,** (Sup. Ct.)

Whether requested variances would have an adverse impact on surrounding lands is extremely important in deciding whether the variances are in fact minor, although it is not the sole criteria.

17. 2005 **Rosedale Golf v. Degasperis** (Div. Ct.)

It is incumbent on a committee of adjustment, or the board in the event of an appeal, to consider each of the four requirements set out in section 45 and, in its reasons, to set out whatever may be reasonably necessary to demonstrate that this was done and that, before any application for a variance is granted it satisfied all the requirements.

A variance can be more than a minor variance for two reasons, namely that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but such an approach incorrectly overlooks the first factor, size. Impact is an important factor but not the only factor.

A minor variance is not a special privilege that requires the applicant to justify the relief sought on the basis of need or hardship.

18. 2006 **Toronto Standard Condominium Corp #1517** 54 O.M.B.R. 102

The Board has recognized for at least three decades that the Legislature has in section 45 of the Planning Act created a statutory process whereby a relief is made available to avoid the straitjacket or rigid application of the zoning bylaw. This relief stems from the Legislature's recognition that a zoning bylaw, if it is to be applied unfailingly with scant regard for individual circumstances and without due regard to the matters at hand, can result in very odd, undesirable and in some cases wrong situations because the facts in the planning world can be sometimes stranger than fiction. The relief should be granted in some circumstances, not because nonconformity would be less costly, expedient or inconvenient, but because nonconformity can, in fact, be satisfactory and acceptable from a planning standpoint.

Whether a variance is minor or not cannot be regarded as a robotic exercise of the degree of numeric deviation, but must be held in light of the fit of appropriateness, the sense of proportion, a due regard to the built and planned environ, the reasons for which the requirement is instituted, the suggested mitigation conditions to address the possible concerns and last, but not the least, the impact of the deviation. The performance standards of the zoning bylaw are not an end, but a means

to an end, a decision-maker must therefore chase after the question whether the planning objectives would be fulfilled if the variance were to be allowed. The decision-maker must not embark on a tautological and circular exercise of why one cannot abide by the requirements.

19. 2011 **Toronto (City) v. 621 King Developments Ltd.** 72 O.M.B.R. 16 (Div. Ct.)

    In assessing a minor variance application an approving authority must exercise a "careful and detailed analysis" such will tell interested parties how the decision-maker got from "a" to "b". It is not necessary to articulate every landmark along the way.

20. 2015 ***Batson v. Ottawa (City)*** [2015] 0.M.B.D. No. 85 O.M.B.R. 262

    Where digressions from zoning requirements appear arithmetically disproportionate they cannot for that reason alone be identified as not minor variances. Mathematics taken in isolation are not determinative.

EXCERPTS – SECTION 45 OF THE PLANNING ACT

Powers of committee

45. (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by- law and of the official plan, if any, are maintained.

Other powers

(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).

Power of committee to grant minor variances

(3) A council that has constituted a committee of adjustment may by by-law empower the committee of adjustment to grant minor variances from the provisions of any by-law of the municipality that implements an official plan, or from such by-laws of the municipality as are specified and that implement an official plan, and when a committee of adjustment is so empowered subsection (1) applies with necessary modifications. R.S.O. 1990, c. P.13, s. 45 (3).

Re

Perry et al. and Taggart et al.

[1971] 3 O.R. 666

ONTARIO
[HIGH COURT OF JUSTICE]

DONOHUE, J.

11th AUGUST 1971.

Planning legislation -- Zoning by-law -- Variance -- Committee of adjustment permitting building lot with a frontage of 41 ft. when by-law required 60-foot frontage -- Meaning of "minor variance" -- Whether committee exceeded jurisdiction.

The term "minor variance" is a relative expression and, to permit it a good deal of flexibility, must be interpreted with regard to the particular circumstances involved. Accordingly, where the record shows that a committee of adjustment, in permitting a building lot with a frontage of only 41 ft. instead of the required 60 ft., had inspected the neighbourhood and found few homes with a 60-foot frontage, and that no adverse effect was created by the "variance", the committee did not exceed its jurisdiction in approving the variance. Quaere, where a particular use is a minor variance can be satisfactorily reviewed upon an application for certiorari.

[R. v. London Committee of Adjustments, Ex p. Weinstein, [1960] O.R. 225, 23 D.L.R. (2d) 175 sub nom. Re City of London By-law, Western Tire & Auto Supply Ltd. and Weinstein, refd to]

Planning legislation -- Zoning by-law -- Variance -- Property owned jointly by spouses -- Application for variance made by wife alone -- Husband taking advantage of favourable decision by committee by joining in deed severing parcel -- Decision of committee not to be quashed by certiorari simply because husband failed to sign application before it.

MOTION for certiorari to quash a decision of a committee of adjustment.

Charles C. Mark, for applicants.

C.E. Woollcombe, Q.C., for respondent, J. Taggart.

S.P. Webb, Q.C., for respondent, Committee of Adjustment for the Corporation of the Borough of North York.

DONOHUE, J.:-- This is an application for certiorari heard by me in Weekly Court on August 5, 1971.

The applicants seek to quash a decision of the committee of adjustment for the Corporation of the Borough of North York made on October 21, 1970.

The applicants, husband and wife, are the owners of 178 Yong Blvd. and 0live and Alexander Jackson were until January 24, 1971, owners of a parcel of land having a frontage of 94 ft., 9 in., lying immediately to the north of the applicants' land.

The record indicates that the Jacksons resided for 14 years at 180 Yonge Blvd. and always intended to sell the southerly 41 ft. of their holding as a building lot. In 1966 and 1967, the Jacksons attempted to carry out this intention but there being a by-law applicable which required a 60-foot frontage for a building lot, an to the committee of adjustment of the municipality for permission to establish a building lot with a 40-foot frontage, the said committee having the power under s. 32b(1) [enacted 1961-62, c. 104, s. 8] of the Planning Act, R.S.O. 1960, c. 296 [now s. 42(i), R.S.O. 1970, c. 349], to permit minor variations from the prescribed dimensions. This was allowed by the committee.

However, an appeal having been taken to the Ontario Municipal Board that had set aside the decision of the said committee saying that to allow a 40-foot frontage building here when the by-law required 60 feet was not a minor variation as permitted by said s. 32b(1).

In September, 1970, 0live Jackson applied to sever the parcel owned by her and her husband. The purpose of the Jacksons was to obtain permission to so divide their holding as to provide a new building lot with a frontage of 41 ft. on the west side of Yonge Blvd. and an area 7,600 sq. ft. that the lot upon which the Jacksons' home was located be permitted to have a frontage of 53 ft., 9 in.

It appears that two applications were required with respect to the 41-foot lot and one application with respect to the 53-foot, 9-inch lot.

The committee of adjustment allowed all three of the applications. Their reasons, as set out in pp. 23-8 inclusive of the record herein, appear to be that the proposed changes did not alter the character of the existing neighbourhood where few properties had a frontage of 60 ft.; nor would the aesthetic quality of the area be affected by a new home with grounds, trees and the like as specified by the said committee.

The applicants herein, being dissatisfied with these decisions, instructed their solicitor to appeal all three to the Ontario Municipal Board. By inadvertence the said solicitor appealed only the one relating to the 53-foot, 9-inch lot.

After the appeal time of 15 days had run an application was made to the said Ontario Municipal Board for an extension of time for appeal. This was denied.

The applicants now bring this proceeding on two grounds. First, that in permitting a building lot with a frontage of 41 ft. as against the 60 ft. required by the by-law, the committee of adjustments exceeded its jurisdiction which is limited to allowance of minor variations. Secondly, applicants say that Alexander Jackson was not a party to the applications, same having been made in the name of 0live Jackson only, although the applications show that Alexander Jackson was an owner.

The respondent, James Taggart, comes into the picture as follows. He, it appears, had lived for 14 years with the Jacksons until 1971. In his affidavit he describes Mrs. Jackson as his sister and Alexander Jackson as his brother-in-law. This was conceded to be an utter falsehood. Mr. Taggart also deposed that he bought the 41-foot lot from the Jacksons because the Jacksons urgently needed money. He received a deed of this lot on January 8, 1971. He further says that he paid $15,000 for the lot and I was informed that this too was a falsehood following an earlier like perjury in a related land transfer tax affidavit.

On this application for certiorari it is only open to me to consider whether the committee of adjustment exceeded its jurisdiction. Mr. Mark for the applicants directed most of his argument to the proposition that the committee of adjustment had power only to permit minor variations and that to permit a building lot with a frontage of only 41 ft. where the by-law calls for 60 ft. is not a minor variation. At first sight, there would seem to be much in this contention. But on further reflection it becomes clear that the phrase "minor variations" is a relative expression and must be interpreted with regard to the particular circumstance involved. A variation of 19 ft. in the frontage of a building lot might be minor in some instances and major in other instances, so it is necessary to look at the whole picture in any given case in order to determine the meaning of the term. Mr. Woollcombe for the respondent Taggart cites the case of R. v. London Committee of Adjustments, Ex p. Weinstein, [1960] O.R. 225, 23 D.L.R. (2d) 175 sub nom. Re City of London By-law, Western Tire & Auto Supply Ltd. and Weinstein (C.A.), where the City of London committee of adjustment had made a decision on the minor variation provision. In that case, Morden, J.A., expressed the opinion that whether a particular use was a minor variance cannot be satisfactorily reviewed upon an application for certiorari.

Mr. Mark in answer argues that the opinion so expressed by Mr. Justice Morden was not the ratio decidendi of the result in that case. Nevertheless, I think there is a good deal of force in what was said by the learned Justice on appeal.

The record here, I think, supports the view that a good deal of flexibility must be given to this term "minor variation". It appears from the proceedings before the committee of adjustment in 1970 that the said committee had inspected the neighbourhood and found that very few of the homes there had a 60-foot frontage, e.g., the applicants have only 50 ft. The record, p. 24, shows that no adverse effect would be created for adjoining property owners by the proposed variation from 60 ft. to 41 ft.

I have therefore come to the conclusion that on this point, the committee of adjustment did not exceed its jurisdiction. In so finding I have not lost sight of the 1966-67 decision of the Ontario Municipal Board that a variation from 60 to 40 ft. was not a minor variation.

That decision is, of course, not in any sense binding upon me nor does it have any persuasive effect. In any event, the facts appear to be different. I was told by Mr. Webb,

counsel for the committee of adjustment, that in the instant case there were differences in the square footage involved.

Mr. Mark's second ground was that Alexander Jackson did not join with his wife 0live in the application to the committee of adjustment and therefore he was not bound by its decision, and in proceeding without the said Alexander Jackson being a party, the said Committee exceeded its jurisdiction. On p. 66 of the record herein is a copy of the application made on September 22, 1970, to the committee of adjustment in which 0live Jackson is declared to be the applicant and the said 0live Jackson and Alexander Jackson are declared to be the owners. This application also contains a section to be signed by the owner that the application is made with the owner's knowledge and consent. This was signed by 0live Jackson only. The question is: Does this lack of the signature of jurisdiction or was the committee acting in excess of its jurisdiction in proceeding without the application being signed by Alexander Jackson?

I was informed that Mr. Perry, the applicant herein, appeared before the committee of adjustment on its hearing herein and stated his objections to the applications. It would seem that he did not raise the point of lack of the signature of Alexander Jackson. I cannot see how this lack affects the merits of the matter especially in light of the fact that Alexander Jackson subsequently executed the deed to James Taggart, thereby taking the benefit of the committee's decision.

Accordingly, I hold that the application for certiorari fails on both points raised and it is therefore dismissed.

The respondent Taggart therefore succeeds but only because I feel myself compelled by the facts and the law to reach this. conclusion. As mentioned before, he has sworn falsely on two different matters, neither of which has any bearing on the issues involved. Accordingly, I think it sufficient punishment in this matter to deprive him of any costs of his success on this application. Mr. Webb for the committee of adjustment was helpful to the Court but I do not see fit to award costs to his client.

The application is dismissed without costs.

Motion dismissed.

Re

McNamara Corporation Ltd. et al. and Colekin Investments Ltd.

15 O.R. (2d) 718

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

EVANS, C.J.H.C., WEATHERSTON AND ROBINS, JJ.

19TH APRIL 1977.

Planning legislation -- Zoning -- Minor variances -- Meaning of "minor" -- Whether variance amounting to complete elimination of requirement of by-law may be minor -- Planning Act, R.S.O. 1970, c. 349, s. 42.

Pursuant to s. 42 of the Planning Act, R.S.O. 1970, c. 349, a committee of adjustment, and thereafter the Ontario Municipal Board, has power to authorize minor variances from the provisions of any by-law. The term "minor variances" is a relative one and should be flexibly applied. It is not proper for the Committee of Adjustment or the Board to determine that its jurisdiction automatically ends whenever the variance sought amounts to a complete elimination of a requirement of the zoning by-law.

[Re 251555 Projects Ltd. and Morrison (1974), 5 O.R. (2d) 763, 51 D.L.R. (3d) 515; Re Perry et al. and Taggart et al., [1971] 3 O.R. 666, 21 D.L.R. (3d) 402; R. v. London Committee of Adjustment, Ex p. Weinstein, [1960] O.R. 225, 23 D.L.R. (2d) 175 sub nom. Re City of London By-law; Western Tire & Auto Supply Ltd. and Weinstein, refd to]

APPEAL from a decision of the Ontario Municipal Board allowing an appeal from a decision of the Committee of Adjustment permitting a minor variance.

M. J. McQuaid, for appellants.

I. A. Blue, for respondent.

The judgment of the Court was delivered by

ROBINS, J.:-- This appeal raises a question of jurisdiction of the Ontario Municipal Board and committees of adjustment to authorize minor variances under s. 42 of the Planning Act, R.S.O. 1970, c. 349.

The appellants are the owners of a building located at the corner of Yonge St. and Dundas Sq. in downtown Toronto which in 1973 was converted from a theatre to retail stores and office space. In 1975 Classic Bookshops rented 3,490 sq. ft. on the ground and second floors of the building for the retail sale of books and subsequently an additional 5,968 sq. ft. in the basement. No access was available from the ground floor of the store to the basement, and consequently the owners agreed to construct a stairwell connecting the two areas. They duly applied to the Building Department for the building permit necessary to do the renovations. Their application was, however, refused because City of Toronto Zoning By-law 20623 requires that retail stores with a floor area in excess of 6,000 sq. ft. have loading facilities. Here the owners would be required by the by-law to:

> ... provide and maintain at the premises loading facilities, on land that is not part of a highway, comprised of one or more loading spaces, each not less than thirty (30) feet long, twelve (12) feet wide and having a vertical clearance of at least fourteen (14) feet, according to the floor area of the building or structures as follows:
>
> | Number of Loading Spaces | Floor Area |
> |---|---|
> | none | 6,000 square feet or less |
> | 1 loading space. | from and including 6,001 square feet to and including 25,000 square feet |

While no loading space was needed for premises the size of the existing store, the addition of a basement section produced a total floor area of 9,450 sq. ft. bringing into play the by-law calling for one loading space. Because, however, the building occupies the entire parcel of land on which it stands, it is impossible for the owners, short of demolishing a part of it, to comply with the by-law. In an effort to solve the problem they retained an architect to design an alternate system for unloading merchandise. He devised a "loading chute" that is to be located at the rear of the building within easy access from the street

and which, it appears, constitutes a safe, efficient and satisfactory method of unloading, equal or perhaps superior to the method stipulated in the by-law.

The owners then applied to the City of Toronto Committee of Adjustment for relief from the provisions of the zoning by-law. The committee found the application a reasonable one and, acting under the jurisdiction conferred on it by s. 42(1) of the Planning Act, R.S.O. 1970, c. 349, to authorize minor variances, exempted the owners from the by-law requirement on condition that a loading chute be installed instead. This decision was appealed by the respondent, the owner of a nearby building in which a Coles Book Store is located, to the Ontario Municipal Board.

On an appeal to the Municipal Board, the Board, by virtue of s. 42(16) of the Planning Act, may dismiss the appeal and may make any decision that a committee of adjustment could have made on the original application. The power of a committee in the first instance and the Board on appeal to authorize variances is found in s. 42(1):

> 42(1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that implements an official plan or is passed under section 35, or a predecessor of such section, or any person authorized in writing by the owner, may, notwithstanding any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, provided that in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

In this case the Board, after hearing the appeal and considering the requirements of s. 42(1) -- see Re 251555 Projects Ltd. and Morrison (1974), 5 O.R. (2d) 763, 51 D.L.R. (3d) 515 -- concluded: (i) that the variance requested is desirable for the appropriate development or use of the land, building or structure; (ii) that it is in keeping with the general intent and purpose of the zoning by-law; and (iii) that it is in keeping with the general intent and purpose of the official plan. But holding as a matter of jurisdiction that neither it nor the committee is empowered to authorize as a minor variance one which totally eliminates a by-law requirement, the Board allowed the appeal and set aside the committee's decision. Its reasoning was expressed in the following terms:

> ... a variance from one loading space to no loading space, which is what is requested here, cannot be considered minor. The by-law says that between 6,000 square feet and 25,000 square feet, you must provide one loading space. To consider that variance as minor would in my view, amount to completely obliterating the requirement, not just shaving it a little but obliterating it. To put it another way, it is not a variance but an exception. It completely eliminates the requirement and in my view that can only be done by the legislature, in this instance, the City Council of this City by an amendment to its zoning by-law. There is no jurisdiction, in my view, in the Committee of Adjustment or in the Board to find a variance from one to zero which completely eliminates the requirement as minor.

(Emphasis added.)

The Board erred, in my opinion, in its interpretation of the scope of its jurisdiction. By s. 42(1) it is empowered, as is a committee of adjustment, to authorize "such minor variance ... as in its opinion is desirable for the appropriate development or use of the land, building or structure ...". There is nothing to be found in the section which deprives a committee or the Board of jurisdiction in the event a variance eliminates a by-law requirement or fully exempts an owner from it; nor, in my view, can the section be construed so as to preclude the Board or committee from granting as a minor variance one which completely releases an owner from a provision of a by-law.

The Legislature by s. 42(1) confided to committees of adjustment and ultimately to the Municipal Board the authority to allow "minor variances". The statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relative one and should be flexibly applied: Re Perry et al. and Taggart et al., [1971] 3 O.R. 666, 21 D.L.R. (3d) 402 (Ont.H.C.). No hard and fast criteria can be laid down, the question whether a variance is minor must in each case be determined in the light of the particular facts and circumstances of the case. In certain situations total exemption from a by-law will exclude a variance from falling within the category of "minor variances". But not necessarily so. In other situations such a variance may be considered a minor one. It is for the committee and, in the event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as "minor".

Whether the variance proposed is in fact minor, is desirable for the appropriate development or use of the land, building or structure and maintains the general intent and purpose of the by-law and official plan are all matters to be judged by the committee and Board in relation to all the surrounding circumstances of the application. There is no warrant for concluding, as the Board here did, that its jurisdiction and that of a committee of adjustment is automatically cut off whenever a variance amounts to a complete elimination of a requirement of a by-law. It is for the Board and committee to decide whether, to take the case of the by-law in these proceedings, an owner of retail premises having an area more than 6,000 sq. ft. is entitled to a "minor variance" exempting him from the loading space provision; this issue is not removed from their jurisdiction solely because the effect of the variance is total exemption. Similarly, to take another example, in the case of side or rear yard set-back requirements, the fact the exemption sought is the full elimination of the set-back distance does not of necessity mean that the variance is not minor and must be beyond the jurisdiction of the committee and the Board. With the multitude of by-laws covered by s. 42(1) and the number of details they contain, there must be many instances where full exemption can properly be considered no more than a minor variance. It is, as I have said, for the committee and Board to make that determination.

Section 42 was enacted to provide a more expeditious and less cumbersome procedure than that required to effect a by-law amendment: R. v. London Committee of Adjustment, Ex p. Weinstein, [1960] O.R. 225, 23 D.L.R. (2d) 175 sub nom. Re City of London By-law; Western Tire & Auto Supply Ltd. and Weinstein (C.A.). The owners in this case are entitled to have their application determined under the procedure of s. 42 and not required, as suggested, to seek relief from City Council by amendment to the zoning by-law unless the

Board determines if it does on the merits of the matter that the exemption sought is not, as the Committee of Adjustment found, a minor variance.

In sum, the Board erred in law in concluding it was without jurisdiction in respect to the variance in question. As a result it improperly declined to exercise its statutory powers under the Planning Act. The appeal must therefore be allowed and the matter remitted to the Municipal Board for decision. Costs of the appeal and the application for leave to appeal will be paid by the respondent.

Appeal
allowed.

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.

Indexed as:

Bos v. Port Colbourne (City) Committee of Adjustment

IN THE MATTER OF Section 44(12) of the Planning Act, 1983 AND IN THE MATTER OF an appeal by Henry Bos and Betsy Bos from a decision of the Committee of Adjustment of the City of Port Colborne whereby the Committee granted an application numbered A-25/88 by Rene Tessier and Marguerite Tessier for a variance from the provisions of By-law 1150/97/81, as amended, premises known municipally as 8422 Netherby Road, Part Lot 5, Concession 5, Port Colborne

[1989] O.M.B.D. No. 602

23 O.M.B.R. 75

File No. V 880511

Ontario Municipal Board

M.E. Johnson

April 3, 1989

(5 pp.)

COUNSEL:

J.A. Crossingham, for Mr. and Mrs. Bos.

MEMORANDUM OF ORAL DECISION delivered by M.E. JOHNSON:--

Mr. and Mrs. Tessier want to sell a 12.24 acre parcel of land on Koabel Road in the City of Port Colborne to Mr. and Mrs. DeLuca so that Mr. DeLuca can build a family home on that property. Mr. DeLuca wants to position the house at the southeast corner of the property, near the road, and ahead of a drain or small channel which is about 8 feet wide and carries water part of the year. This drain angles across the property, generally about one-third of the way along its depth, and Mr. DeLuca entered an exhibit which showed just

about where that was located. The exhibit comprised an aerial photograph with a delineation of the drain on it.

The Tessier land is designated and zoned, as are most of the lands in the area, as Agricultural (A). Sections 4.19 and 25 of the zoning by-law of the City of Port Colborne, By-law 1150/97/81, contain regulations that affect the development of this parcel with a single detached dwelling. A single detached dwelling is permitted by the zoning by-law on lands that are zoned Agricultural, but only subject to certain regulations being fulfilled. One of those regulations, contained in Section 25(iii)(a), deals with minimum lot frontage. The by-law says that the minimum frontage should be no less than 75 metres.

This property has a frontage on Koabel Road of 66.6 metres. Now, that can't be helped. It lies between the railway track to the north and property owned by other persons to the south. The railway track effectively divides this parcel from another property owned for a number of years by the Tessiers and lying north of the track.

However, another provision of the by-law, Section 4.19, deals with separation distances between new non-farm uses and buildings used for the raising of livestock. The distance factor is to be 300 metres. Mr. DeLuca wants to site his house in a position which would mean, in terms of measurement, that it would be less than 300 metres from the closest existing farm buildings, 260 metres to be exact.

The Committee of Adjustment of the City of Port Colborne granted a request by Mr. Tessier for the variances covering these two matters. Mr. Bos, who owns and lives on a 75 acre parcel of land slightly to the southeast has objected to this decision of the Committee. We had various assessment maps here as exhibits that show where the two properties are and their location in regards to one another. The Bos farm is across Koabel Road and just slightly to the southeast of the Tessier land. Mr. Bos has appealed the Committee's decision to the Ontario Municipal Board.

Now, it's important when you consider applications for minor variances, to be aware of the circumstances under which a Committee of Adjustment can grant a minor variance. There are only limited circumstances where that can happen. There are, in fact, four tests in Section 44 of the Planning Act that have to be met by an applicant who asks for a minor variance, and the Committee of Adjustment has to be satisfied all of those four tests are met and if any one of them is not, the variance fails. When an application is appealed to the Ontario Municipal Board, the Board stands In the position of the Committee of Adjustment and hears the entire application from the beginning and the Board, itself, must review those four tests and be satisfied that all of them are satisfied before the minor variance is granted. That's what I meant this morning when I said that the Board was going to hear this from the beginning and hear all the evidence again.

The four tests, very briefly, are these: the variance must be desirable for the appropriate development or use of the land or the building. It must be a minor variance. In other words, the Committee of Adjustment, or in this case the Board, has to be satisfied it's a small matter where relief should be given from the conditions or requirements of the zoning by-law. And the people applying the test, in this case the Board, have to be satisfied that the general intent and purpose of the zoning by-law is being fulfilled and that the general intent and purpose of the Official Plan is being maintained. Now, those are four very im-

portant matters. And really, what this hearing has been going over is whether or not this variance regarding the Minimum Distance Separation should be granted in the context of the Planning Act.

At the outset of the hearing, Mr. Crossingham stated that the variance regarding the minimum frontage is not in contention by his clients. The Board agrees that is a minor variance and meets the other tests in Section 44. It will be granted in the decision.

The Bos' are, however, appealing the second variance regarding the Minimum Distance Separation. Mr. Bos testified that he is the third generation of the family to farm this property. He hopes to extend the operation, due to the quota arrangements in the province for raising and producing and selling chickens. If he does expand the operation, it may well entail building additional chicken barns and other buildings to take care of the increase. Mr. Bos explained to the Board the logical and scientific approach that he wishes to use in this matter which would indicate that new farm buildings should be placed to the north of the existing farm barns, rather than to the south, where there is also some space. He indicated on Exhibit 10 the general area in which that development would be.

Accordingly, a decrease In the Minimum Distance Separation requested in this application by Mr. Tessier and Mr. DeLuca, for a non-farm building, is not in the best interests of the Bos operation in the future. However, if the Minimum Distance Separation Formula l of 300 metres for non-farm buildings is maintained, then Mr. Bos will have some little flexibility later on, because the application of the Minimum Distance Separation Formula 2 to requirements for the location of farm barns in relation to non-farm uses is a little more flexible and has a number of variables dealing with the type of operation and buildings, etc.

Mr. DeLuca testified that he could, by going to some extra expense, place the house he wishes to build further back on the lot and thus observe the 300 metre Minimum Distance Separation. If he did that, he would have to bridge the drain or put a culvert in, but it can be done.

Mr. Hynde, who is a planner with experience in the Region of Niagara, was called by Mr. Crossingham. He provided the Board with assistance as to the history and intent of the Regional Official Plan in regard to agricultural uses and non-agricultural uses. His evidence is fresh in the mind of everyone here. It Is obvious that the intent of the Council of the Regional Municipality of Niagara is to preserve the agricultural industry and to assist the people who are carrying it out to do so in a business-like manner. The needs of the farm industry and of the people who are involved in it are of paramount importance and the protection of farm land is paramount, although the actual issue of protection or destruction of farm land isn't an issue here. The issue is in relation to the development of further farm operations on the Bos property.

In Mr. Hynde's professional opinion, the Regional Plan does not permit a separation of less than 300 metres in the case of a new non-farm building in relation to existing farm buildings and in that regard I would quote from Section 6.A.15 of the Regional Official Plan, in part:

> "New dwellings shall comply with the Minimum Distance Separation formula of the Agricultural Code of Practice or a separation distance of 300 metres (1,000 feet) whichever is the greater."

There are very similar statements of policy contained in the City of Port Colborne's Official Plan. The Board has given thought to all the evidence that was presented here today. Mr. DeLuca impresses the Board as a person who will be a good neighbour to the Bos family In the future. He very honestly stated to the Board that he could, with some trouble and expense, move the house back on the property.

The Board finds that two of the tests in Section 44(1) regarding this particular variance cannot be met. It is not desirable for the appropriate development of this land. It is not necessary, and certainly not desirable at the expense of injuring the future economic expansion or operation of a farming industry which is already located in the vicinity. Put in that context, it is not a minor variance. And secondly, the requested variance is not within the intent and purpose of the Regional Official Plan as it is set out in Section 6.A.15 of the document.

The Board will grant the appeal of Mr. and Mrs. Bos in part as to the variance regarding the Minimum Distance Separation factor. The requested variance of the Minimum Distance Separation factor from 300 metres to 260 metres is refused. The appeal as to the matter of reducing the minimum frontage requirement from 75 metres to 66.6 metres is refused for the reasons noted earlier in the decision.

M.E. JOHNSON, Member

Indexed as:

Carusetta v. Welland (City) Committee of Adjustment

IN THE MATTER OF Section 44(12) of the Planning Act, 1983 AND IN THE MATTER OF an appeal by Aldo Carusetta from a decision of the Committee of Adjustment of the City of Welland whereby the Committee granted an application numbered A12/88 by Roberto's Half Moon Tavern Ltd., for a variance from the provisions of By-law 2667, as amended, premises known municipally as 326 King Street

[1989] O.M.B.D. No. 224

23 O.M.B.R. 89

File No. V 880326

Ontario Municipal Board

T.F. Baines

February 8, 1989

(7 pp.)

COUNSEL:

G.C.M. Banks, for City of Welland.
D.A. Riou, for Roberto's Half Moon Tavern Ltd.
T.A. Richardson, for Rex Hotel Ltd.

MEMORANDUM OF ORAL DECISION delivered by T.F. BAINES:--

The applicant in this matter, the owner of Roberto's Half Moon Tavern Ltd., seeks a variance of the comprehensive by-law for premises at 326 King Street on the corner of Park Street, to permit the conversion of the second floor thereof from its present residential use to a series of four dining and meeting rooms as an expansion of the other lower level dining and banquet room facilities. All of these uses are permitted within the C3 General

Commercial Zoning to which the property is subject. The sole variance required is as to complete relief from the requirement to provide 15 parking spaces which the by-law calls for, in connection with the amount of square footage that will be occupied by the proposed changed use on the second floor.

The neighbour to the south and east, Rex Hotel Ltd., which owns approximately 80% of the commercially zoned land fronting on the east side of King Street between Park and Lincoln Streets, objects and the objection is based on the fact essentially that such parking would adversely impact their own ability to provide enough parking for their requirements at peak times of use of their premises. They also feel that the Half Moon owners should not be able to take advantage of the substantial area of parking provided by the Rex Hotel. It is provided without any charge or supervision of that parking space.

The Board heard conflicting testimony as to the degree to which the Rex Hotel parking area and the 47 space municipal parking lot which abuts that to the east, is in fact used. The respective owners of the two private properties gave conflicting views of the degree to which it is used and how often it can fairly be said to be used to its maximum. Three witnesses who could be said to be independent, essentially, of the interests of the two main parties, testified that as to two of them, the municipal parking lot is not used to a very great degree and could only fairly be said to be used to its maximum during holiday season around Christmas. At that time the several dining facilities in this area are being used for Christmas parties and the like. One witness, hired for the purposes of making a detailed survey of the use made of the parking lot on three specific days, who is an employee of a security agency, gave what the Board felt was objective evidence and it indicated a very substantial use of the Rex Hotel 80 odd space parking lot by patrons using the Half Moon Tavern as well as people making use of other commercial facilities in the area.

Much was said of whether or not the four tests found in the Planning Act are met. The Board has considerable difficulty in determining whether the general intent and purpose of the Official Plan is met because it is abundantly clear the only really valid Official Plan of this municipality dates from 1952. The only copy filed with the Board is two pages long and totally incapable of any reasonable interpretation as it applies to this problem. There have been some 54 amendments to that Official Plan since 1952 when it was passed, and, when compiled, may be taken to be the governing Official Plan in the municipality. The Board was not given a compiled copy of the Plan as apparently one does not exist. A new Official Plan, passed in the mid-1970s and adopted by Municipal Council but not approved by the Minister was used in part, at least as to certain extracts thereof, for appropriate reference in this hearing. The Board has the usual difficulty in terms of dealing with an unapproved Official Plan and will not rely on it. Reference was made to Official Plan Amendment No. 54 which is a statement of policy and detailed criteria addressing the whole issue of site plan control, as required by the Planning Act, Section 40, in order that the municipality would then have authority to pass a Section 40 site plan control by-law.

In Section 12.5 of that Official Plan Amendment No. 54, one of the objectives is stated to be:

> "To ensure adequate on-site improvements such as lighting, drainage, garbage collection, utilities, landscaping, paving, parking, curbing, etc."

The policies found further on seem more like the logistics of how the basic purpose of the Official Plan Amendment is to be implemented. The Board is informed that there is a Section 40 site plan control by-law which would apply to this property if Council chose to make it apply, but that is clearly discretionary, according to Section 12.10 of the Official Plan Amendment itself.

Given the rather fluid state of the Official Plan and its amendments, the Board finds little comfort in trying to apply the test of Section 44(1) relating to whether or not the intent and purpose of the Official Plan is maintained.

It is argued on behalf of the appellant that since there is a 100% reduction in the parking requirement here, the variance cannot be considered minor. That, of course, is answered by the usual reference to the case of McNamara Construction Corporation Ltd. et al. v. Colekin Investments Ltd., 2 M.P.L.R. p. 61 per Robins J. at p. 65:

> "The statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relevant one and should be flexibly applied."

The learned Justice goes on to give examples as it relates to the case then before him that if the Board is satisfied from the facts that one can completely do away with the requirement, because whatever the by-law was seeking to ensure was not really needed, that is for the Board to determine on the facts and is within its jurisdiction.

Here, the argument of the applicant is that by the provision of 47 spaces in the municipal parking lot, the municipality have specifically provided space to accommodate this type of redevelopment and other commercial and/or residential uses in the neighbourhood that may need parking that they cannot provide on their own premises, without distinction as to what that use might be. Clearly the decision of the Committee and the position of the applicant, herein, is based on the nearby municipal parking being available. The evidence was, as previously stated, conflicting as to whether it is very often full.

The argument of the appellant is that unless the Board is completely convinced that the parking requirement is somewhat pointless because of this municipal parking lot being rarely, if ever, full, then the analogy to the McNamara case cannot be drawn. Frankly, the Board finds the evidence convinces it only that on certain occasions, the combined parking facilities of the Rex Hotel and the municipal parking lot are completely full a number of times during the year but that number of times may be relatively seldom. Given that the provision of parking requirements in the by-law is intended to meet maximum need, it still seems appropriate that parking be a requirement, but the evidence is not sufficient that the Board can determine that the variance is either minor or not in these circumstances.

On the issue of desirability, there is no doubt in the Board's mind that to convert the upper floor to this commercial use would be desirable for the owner of that premises. The owner did a nominal survey of users, as they saw it, of such a facility and was content that, in fact, in the City of Welland there presently is a need for small meeting rooms for meet-

ings that might take place, for instance, between union negotiators and management and things of that nature. This would also be an appropriate facility when related to the dining facility found elsewhere in the premises. That, however, does not address the sometimes broader approach taken by this Board to the words found in Section 44(1) under the criteria, i.e. "desirable for the appropriate development or use of the land". "The land" has been in interpreted both by this panel and others to include surrounding or contiguous lands. Clearly, all of the surrounding land is owned by the Rex Hotel Ltd. and they regard the use of their premises by the Half Moon patrons for a substantial portion of their parking needs, as being undesirable from the point of view of the Rex Hotel Ltd. It does, apparently, sometimes, threaten the ability of the Rex Hotel to satisfy the parking needs of its own patrons. Those parking facilities have been provided at the cost of the Rex Hotel Ltd., stated to be on the order of a quarter of a million dollars, which evidence was not disputed. In addition to that, there's an on-going maintenance cost on the order of $4,000 to $6,000 a year. Thus, it does seem perhaps, questionable as to its desirability in that sense, but frankly, the Board does not wish to rest its decision solely on that point.

The issue that strikes home most strongly to the Board is as to whether or not the general intent and purpose of the zoning by-law is maintained as required as one of the tests found in Section 44(1). That is clearly confirmed as one of the tests that must be satisfied pursuant to the decision of the Supreme Court of Ontario (Div.Ct.) in Re 251555 Projects Ltd. and Morrison, 5 O.R. (2d) p. 764 at p. 766.

Here, the Zoning by-law of the City, No. 2667, as amended, provides at Section 5.27.1 thereof the following:

> "For every building or structure erected or altered so as to increase capacity or enlarge, there shall be provided and maintained off-street parking in conformity with the following schedule, etc...."

Further in that same section in a separate paragraph:

> "In a commercial district, parking space shall be provided within the limits of the commercial district in which the use for which such parking is required, situated upon and/or contiguous to the property in which such use is situated."

Still further, in a further separate paragraph within the subsection:

> "Nothing in this section shall be interpreted as requiring off-street parking for the capacity that exists on the date of this by-law, and the parking requirements shall apply only to the additional capacity provided by erection, alterations or enlargement."

The Board regards that last stated paragraph as giving exemption to the 30 or so spaces which the by-law would otherwise require for the existing two floors of commercial use of these premises, which parking is in fact not provided, but reinforcing the previously stated need for any new or altered section of the building dictating parking needing to be satisfied.

The wording of that by-law is a little more expressive than is generally found in by-laws around the province wherein parking requirements are dealt with, in that it is somewhat more than simply regulatory specifying the required number of spaces for the given type of use. The Board has no difficulty in finding that it expresses an intent and purpose whenever one is going to provide new commercial space or alter existing space so as to provide increased capacity.

The parking requirements generated by that are to be provided within the commercial district. While some argument was made that the public parking lot upon which the applicant relies is located, technically, within the RM or Residential zone abutting, the Board doesn't place much on that as that lot was clearly provided abutting this commercial area to satisfy the needs of it and, perhaps, some residential needs.

However, the fact still remains that the general intent and purpose, as the Board sees it, of this section of the by-law is that if there is any alteration of premises or enlargement thereof which generates the need for more parking, one must provide it.

Now, if the Board had a power at large to deal with variances any way it saw fit, that would be one thing, and perhaps there might be some room to say, well this was simply a dispute between two neighbours about who's entitled to use the parking lot that's there and a dispute as to whether those parking lots are, in fact, used 100% of the time. Clearly, they aren't use 100% of the time. But the Board does not see, in view of the wording of the statute and the clear direction of the Court in the previously quoted case, that it has any room to ignore the requirement that the variance "maintain the general intent and purpose of the by-law". For this Board to do so would, it seems, be to ignore the requirements laid out and would be irresponsible, regardless of the fact that the Board might have some sympathy for the application itself.

As pointed out by counsel for the appellant, the City's own new Official Plan, which it follows even though not formally approved, contemplates:

> "Redevelopment may provide opportunities for alleviating deficiencies in some cases and in others a detailed examination of the development pattern may show possibilities for acquiring new parking areas."

Clearly, no such detailed examination was done here but should the applicant make an application for rezoning, that might very well take place and satisfy the Council as to some relief for this applicant. It is certainly not for this Board to speak to that issue because it's not before it.

In the result, having found that the application does not meet the requirements of one of the four tests of the relevant section, Section 44(1) of the Planning Act, the Board is obliged to allow the appeal and dismiss the application for minor variance.

T.F. BAINES, Member

Indexed as:

Hepburn v. Toronto (City) Committee of Adjustment

IN THE MATTER OF Section 44(12) of the Planning Act, 1983 AND IN THE MATTER OF an appeal by John F. Hepburn from a decision of the Committee of Adjustment of the City of Toronto whereby the Committee granted part and dismissed part of an application numbered A 1755-88 by Robert J. Bridel for a variance from the provisions of By-law 438-86, as amended, premises known municipally as 215 Cortleigh Boulevard

[1989] O.M.B.D. No. 1029

23 O.M.B.R. 456

File No. V 890049

Ontario Municipal Board

P.H. Howden

June 8, 1989

(9 pp.)

COUNSEL:

J.R. Boxma, for Robert J. Bridel.

DECISION OF THE BOARD delivered by P.H. HOWDEN:--

Robert J. Bridel applied for a variance to By-law 438-86 in respect of gross floor area to permit the construction of a 2 storey addition to the rear of his home at 215 Cortleigh Boulevard in the City of Toronto. The Committee of Adjustment granted the application in part, allowing an increase to accommodate the first floor addition only. The neighbour on the west side, John F. Hepburn appealed from the Committee's decision to this Board.

Because appeals to this Board under Section 44 of the Planning Act, 1983 take the form of a new hearing, the proposal before the Board is the 2 storey addition originally applied for by Mr. Bridel. Subsection (18) of Section 44 authorizes the Board to make any decision the Committee could have made on the original application.

During the applicant's evidence, Mr. Bridel confirmed that the building and site plans, filed as Exhibit 21, should be amended slightly. Since he has a swimming pool in the rear yard, he wants more space between it and the rear of the home; therefore, the depth of the addition is to be reduced by 2 feet. The Board will deal with this application on the slightly reduced floor area figures as so amended.

Several facts are not in dispute. The Bridel and Hepburn residences are located on the south side of Cortleigh Boulevard, in the block bounded by Avenue Road to the east and Mona Drive to the west. The subject home was built in the 1920's, well before the City of Toronto enacted the predecessor of the existing zoning by-law in 1953. Several applications for rear additions have been allowed by the Committee and they are in place (Exhibits 4 and 7 to 12), with resulting floor areas ranging between 275 square feet and 1,350 square feet above that permitted by the by-law. To all appearances, it is a stable, attractive and established residential neighbourhood of 2 and 2 1/2 storey homes and, generally, 50-foot lots.

The existing gross floor area of the Bridel home is 2,818 square feet and the lot has an area of 6,700 square feet. The existing floor space index (F.S.I.) is .42 times the lot area. The proposed addition would house a family room on the first floor, and on the second floor, about one-half of the area would be an enclosed sun room located on the west side next to the Hepburn residence. The remainder of the second floor addition would be an open deck. The floor area breakdown is as follows:

Proposed ground floor	498	square feet
Proposed second floor (enclosed)	166.3	square feet
Proposed additional floor area	664.3	square feet

Mr. Brass stated that the deck area was not required by the City's by-law to be included in the floor area calculation. The resulting F.S.I. would be .51 times the lot area. Because the by-law requires a maximum built density of .35, Mr. Bridel requires a variance to carry out his plans.

The persons who gave evidence in support of the application were Mr. Bridel and Allan Brass, a land use planning consultant retained by Mr. Bridel. Mr. Hepburn was the only

person who opposed the application. The issues raised by Mr. Hepburn are solely site specific to the two properties, centering on the impacts to his home and to his family's enjoyment of their property. However, they raise issues relevant to the general intent of the Official Plan, the appropriateness of the proposed development and whether the request is of a minor nature - three of the four tests in Section 44(1) required to be met by any applicant for variance.

The evidence of the witnesses and the photographs (Exhibits 13A to I and 14) indicate that the rear of the Hepburn home extends somewhat further to the south than that of the Bridel home. Most of the rear, first floor windows of the Hepburn home are located towards its west side, where the dining room is located. The Hepburns' kitchen is located on the ground floor in the southeast corner where one south window faces south and a larger window faces east. The latter window is located towards the rear of the easterly wall, where the Hepburn building extends further south than the Bridel home. The line of the Bridels' rear wall, if produced, would meet this window at about its mid-point.

Mr. Hepburn stated that he did not oppose an addition to the rear of the Bridel home if it was limited to 1 storey and located further away from his home. He opposes the 2 storey proposal which would mean an extension southerly past the kitchen and beyond the rear line of his home of the high westerly wall of the Bridel home. He stated that his family uses an area of the kitchen each morning particularly for breakfast, and the present configuration of the homes has always allowed an open view to the southeast and penetration of the morning sunlight into the kitchen. He stated that the 2 storey proposal of Mr. Bridel will severely impact his family's quality of life. On cross-examination, he stated that the dining room is a formal room and it is the breakfast area of the kitchen where the family eats and spends time together most mornings.

Mr. Hepburn referred to mathematical calculations indicating by how much the proposed built density would exceed that permitted. The Board will not repeat that evidence in detail since it is simply not helpful. It has been held for some time, in decisions by the Supreme Court of Ontario and by this Board, that the determination of whether a variance is minor is a relative judgement and rests on a determination of whether, in all the circumstances, an application meets Section 44(1) of the Planning Act: Re Perry and Taggart, (1972) 21 DLR (3d) 402, at p. 404; Re McNamara Corporation et al Ltd and Colekin Investments Ltd., (1977)15 OR (2d) 718, at p. 721. A 50 per cent or a 30 per cent variance in one case could have major repercussions in one situation and little or none in another.

Mr. Brass dealt to a large extent with the general neighbourhood context, and the Board accepts his evidence in that regard, that rear additions have been allowed in the area without effect on the streetscape or the stability of this area. He referred to the following excerpts from the City's Official Plan:

> "2.2 It is the objective of Council that the quality of life shall be improved for each resident."

> "2.8(a) Low Density Residence Areas ... will be regarded

as stable. No changes will be made through zoning or other public action which are out of keeping with the character of such areas."

He stated in regard to Section 2.2, that Mr. Bridel wants to improve the quality of life for his family. As to Section 2.8, he stated that allowance of improvements such as this one will encourage social stability by ensuring a family will remain in the area.

He also referred to Section 2.8(a) of the Official Plan.

"(c) In Low Density Residence Areas, Council may pass by-laws to permit residential buildings having a gross floor area up to 1.0 times the area of the lot, provided that appropriate regard is had for the effect of such buildings upon the stability and general residential amenity and character of the Residence Area and surrounding areas."

The planner's only point in regard to Section 2.8(c) was that this application did not propose a built density close to the maximum allowed by the Official Plan. He did not comment on the potential effects of mass and height on the southeasterly portion of the neighbour's residence in discussing "the general residential amenity" in Section 2.8(c), nor did he comment on them in dealing with the improved "quality of life.... for each resident", referred to in Section 2.2. Such policies are, of course, general in their terms; however, they do require to be addressed somewhat more evenly and pointedly on variance applications where the impacts of each may not extend beyond the next lot but each can have an effect on the objectives of such policies in the more general context.

As to the impacts of the proposed addition on the Hepburn property, Mr. Brass stated that the worst effect which the addition could have is to cause the Hepburns' kitchen window to be in sunlight less than now. At present, because it is on the east side of the home, it receives no sun after noon. He stated that it was always difficult in an urban environment to keep accessibility to sunlight. He concluded that the Hepburns have a window on the south side of the kitchen area where sunlight would not be impeded, and that some sun will still be available on the east side. His basis for this judgement was two photographs, taken at 10:00 a.m. and 10.30 a.m. on April 13, 1989. The 10:00 a.m. photograph shows the upper line of shade on the Hepburns' easterly wall caused by the existing roofline of the Bridel home to cover the first floor windows except the kitchen window. It was fully open to the sun at that time. By 10:30 a.m., the shade line dropped to the bottom of the windows and the previously shaded windows are in sun. He stated that, with the proposed addition, the kitchen window would also be in sun by 10:30 a.m. at that time of year, and in the summer, somewhat sooner. He stated that he had not done shade diagrams so as to allow more precision in respect to sunlight loss. He has an architectural degree in addition to his planning credentials, but he stated that he lacks the skill to do such detailed diagrams.

As to the present view from the Hepburn kitchen, Mr. Brass showed a photograph of trees to the south of the Hepburn property which would still be seen; he conceded that a

blank wall would be opposite the kitchen if this application were approved, although some view would remain to the southeast.

Mr. Brass found the reduction of light to be minor, and the 8-foot separation between homes would, of course, remain. He concluded that the varience was minor in nature with only minor impacts, and that it met the Section 44(1) tests.

Mr. Bridel spoke of the reasons for seeking the permission requested. He lives with his wife and four children (7 to 17 years of age), and they decided not to engage in cottage life. Instead, they want to make the home appeal to their children. Their age range is fairly broad, and the home lacks a family room where they can be supervised and where they can bring their friends. He talked to several contractors and they suggested the upper level over the proposed family room to add to the adult space near the master bedroom. Mr. Bridel understood that the Committee had only approved the 1 storey addition; however, he stated that he "prefers" the whole 2 storey proposal.

On the evidence before it, the Board finds that, since the only time in the spring, summer and fall when sunlight can penetrate the east kitchen window of the Hepburn house during normal waking hours is about 5 to 6 hours in the morning, the 2-storey proposal would cause a loss of natural light for up to 50 per cent of that time, until 9:30 a.m. to 10:30 a.m. The Board accepts Mr. Hepburn's uncontroverted evidence that his home offers a family area in or near the kitchen where sun penetration is an important attribute of this home, enjoyed since it was built. While Mr. Bridel offered three photographs showing the blind closed in this window on those particular occasions, no evidence was presented to impair substantially Mr. Hepburn's point about the importance of maintaining most of the present, limited sunlight availability to an area where the occupants of the home can gather daily. The window to the south is small and not the significant source of light to this area of the house.

The Board further finds that the extension of the Bridel wall past the kitchen will reduce substantially the present limited sense of openness for this area of the Hepburn house. This is an exercise of the increased mass and bulk of the proposal on the side of the home closest to the nearer neighbouring residence. The Board is aware, of course, that no one has a right, in law, to a view over another's property, but loss of view is but one aspect of the increased density sought here and of its location. It can and should be considered in circumstances where someone wishes to change by-law restrictions. However, the Board finds that loss of view per se is not as significant in this case because the window in question, while larger than the southerly one, is not large, like a picture-window or bay type. As Mr. Brass said, the intent of bulk restrictions in by-laws, such as the one in question in this case, is to maintain a certain built character or quality of an area. They control the size of building on a lot and where an extension of such a restriction is being sought, the proposal should address the mass aspect, where warranted, in its design. In this case, the extension is simply a wall-to-wall southerly extension of the entire building, with the greater height and mass closest to the residence where the separation is least. In terms of area character and the apparent departure from part of that character in this application, the Board found noteworthy the one Committee decision referred to it where a photograph of this approved addition was produced. This was the case of 209 Cortleigh Boulevard, immediately south of the subject lot, where the photograph shows a

well-designed, 1 storey rear addition, located near the centre of the home and rounded. The Committee stressed its angled design "to produce as little impact on the abutting property to the east as possible. There is also a substantial distance between the subject dwelling house and abutting properties to allow sufficient light and privacy to these property owners." The Board regrets that the same cannot be said of the plans (Exhibit 2) in this case.

In the decision of the Board in Re Labelle and the Committee of Adjustment of the City of Toronto (unreported, Board's File V 880574), the following statements appear and they are relevant here:

> "The Board is, of course, aware that many large city, residents must accept some reduction in sunlight and in the sense of spaciousness and privacy due to the higher built densities. However, concerns are heightened where increased development beyond that which they accepted when they entered the area may mean a further reduction of space and sunlight - factors important to a continued, decent living environment."

The Board is not satisfied that the application in its present form, meets the general intent of the Official Plan of protecting and improving neighbourhood amenities. The Board also finds that, on the basis of Mr. Bridel's evidence, there is no apparent need for the second storey. It is a preference of his, but he made a point of saying that it was the lack of a family room which was important. The Board finds that the application, as designed, is not desirable nor is it appropriate development in size or shape, and the variance requested is not minor in the circumstances. It appears that Mr. Brass had no input into the plans proposed, but did the best he could with what was presented to him after they were drawn and the application was shaped.

The Board, however, is satisfied that with some imagination and sensitivity, a 1-storey rear addition would meet all of the tests of Section 44(1) if it were of a height so as not to affect the availability of sunlight to the extent of the present design and if its west side was significantly stepped back from the present line of the west wall. It would still interfere to some extent with the Hepburns' view, but since the Board cannot say that that aspect is a particularly significant aspect of their home now, this aspect would not be an impediment to approval. An appropriate reduction in mass and the altered location and height of the structure would, if properly designed, meet the requirements for a minor variance.

The Board has considered the proper disposition in these circumstances and has concluded that the application should not be simply dismissed. This would start the whole process again, needlessly and, no doubt, with added costs. The Board will defer its decision for one month from this date. If, within that time, the applicant or his counsel advises the Board that he wishes to alter the plan as suggested by the Board and continue the application as amended by a corresponding reduction in added gross floor area and according to an altered design, the Board will schedule a continuation of the hearing for one-half day. If this proceeding is to continue, the altered plans should be shown to Mr. Hepburn. If he is satisfied, counsel for the applicant can file the new plan together with a letter outlining how the Board's direction has been complied with, together with a letter of withdrawal from

Mr. Hepburn. If, however, the applicant does not wish to proceed or if he or his counsel do not contact the Board within one month from this date, the appeal will be allowed and the application will be dismissed for the reasons given.

The Board is unable simply to grant the application for reduced gross floor area, as the Committee did, because no finding could be made as to impact and whether the variance is minor without a plan showing exactly how the added area is treated in relation to neighbouring properties, nor could the Board determine the appropriate amount of added floor space without a plan showing its form.

P.H. HOWDEN, Member

Indexed as:

Melling v. North York (City) Committee of Adjustment

**IN THE MATTER OF Section 52(7) of the Planning Act, 1983
AND IN THE MATTER OF an appeal by Julian Melling from a decision of the Committee of Adjustment of the City of North York whereby the Committee dismissed an application numbered B49/88
AND IN THE MATTER OF Section 44(12) of the Planning Act, 1983
AND IN THE MATTER OF two appeals by Julian Melling from two decisions of the Committee of Adjustment of the City of North York whereby the Committee dismissed two applications numbered A 530/88 and A 531/88 for a variance from the provisions of By-law 7625, as amended, premises known municipally as 58 Walder Avenue**

[1989] O.M.B.D. No. 479

File Nos. C 880669, V 880591, V 880593

Ontario Municipal Board

P.H. Howden

March 28, 1989

(8 pp.)

COUNSEL:

M.V. Vaughan, for Julian Melling.

DECISION OF THE BOARD delivered by P.H. HOWDEN:--

The appellant, Julian Melling, purchased 58 Walder Avenue in 1983. Although he has resided there ever since, his intention in purchasing it was to redevelop the lot with either one or two single-family houses, due to the deteriorating condition of portions of the

exterior walls and roof, the small size of the house, and its location in a pleasant, residential area. The lot has a frontage of 50 feet, and is one of the widest lots in this area. Like virtually all of the other lots, it is 100 feet deep.

The house is a bungalow having a floor area of approximately 900 square feet. Mr. Melling has decided to propose a division of the lot in order to build two single-family, detached homes with basement garages. The existing home and free-standing garage in the rear yard would be demolished. For this purpose, he retained a house designer, John Williams, to do the plans, and, following the refusal of his applications for consent to create the new lots and variance to the zoning by-law, he retained a qualified planner, David Butler. Both gave evidence in support of the applications at the hearing before the Board, as did Mr. Melling himself.

The applications for variance, as heard by the Board, have been revised somewhat since the Committee hearing. The application before the Committee involved variance with respect to lot coverage, front yard setbacks, side yards, lot frontage and lot area. After consultation with Mr. Butler and Mr. Williams, Mr. Melling requests that the variance application be amended because the size of the proposed homes has been reduced and their proposed location altered resulting in compliance with the maximum lot coverage of 35 per cent and the front yard setbacks of 24.6 feet. The Board will consider the variance application as so amended because the changes do not alter the substance of the application and they result in a reduction in the number of variances required.

The applications, as amended, request variance to the by-law in the following particulars:

i) the frontage of each lot is proposed to be 24.6 feet, whereas the by-law requires 49.2 feet;
ii) the area of each lot is proposed to be 2,500 square feet, and the by-law requires 5,920 square feet;
iii) the exterior side yards are to be 4 feet, whereas the by-law requires them to be at least 6 feet; and
iv) the distance between the new homes is proposed to be 5 feet whereas the by-law requires 8 feet of separation.

Mr. Williams put before the Board the site plan for the two lots with the proposed homes (Exhibit 2B), and a plan showing the existing home on the lot (Exhibit 2A). He also produced two drawings, one showing the streetscape and scale of homes as they exist today from 50 to 58 Walder Avenue (Exhibit 3) and the other including the two proposed homes (Exhibit 3B). Mr. Williams also introduced a drawing (Exhibit 7) to illustrate a home built on the subject lot in compliance with all of the by-law requirements, except the lot area. All of the lots in this area, referred to in the North York Official Plan as Broadway Neighbourhood, are deficient in lot area and most are deficient in frontage. Mr. Melling stated that if these applications are refused, he will probably propose a home similar to the one depicted in Exhibit 7. Such a proposal would also require a variance or amendment due to the lot area standard.

Mr. Butler pointed out the Broadway Neighbourhood as defined in the relevant Official Plan document (the District 4-5 Plan). He described it as isolated, being a part of the

City of North York bounded on the west and south by the City of Toronto, on the east by the Borough of East York and on the north by Mount Hope Cemetery. The City of Toronto boundary passes through Walder Avenue and five other north-south streets in mid-block, that point on Walder Avenue being four lots south of 58 Walder Avenue. Most of the homes were built over 40 years ago. The only east-west street in the Neighbourhood is Broadway Avenue, and 58 Walder Avenue is located to the rear of three of the lots fronting on Broadway Avenue. He stated that the additional lot proposed here is within the density in the Plan for this neighbourhood.

Mr. Butler stated that the North York zoning by-law was passed in 1952, after most of the homes in this area were built. He termed it a unique area in that no lot complies with the by-law. The zoning of this area is R4 which Mr. Butler sees as reflective of suburban performance standards of the 1950s. For those portions of Walder Avenue and the other area streets which proceed south into the City of Toronto, the zoning standards are less restrictive, allowing a minimum lot frontage of 20 feet and containing no minimum lot area requirement. He found most lots in the neighbourhood to be between 22 feet and 50 feet in frontage, and the range is from 27.5 feet to 50 feet within 200 feet of 58 Walder Avenue. He believes the median lot frontage to be 32 or 33 feet. As to lot area, the range within 200 feet of the subject lot is between 2,750 and 5,400 square feet, with the median being 3,300 square feet. None have the minimum size of lot required by the by-law of 5,920 square feet; however, none within this radius are as small as 2,500 square feet. Mr. Butler stated that because of these factors, one must be cautious in determining the general intent of the zoning by-law, and in considering the area characteristics, regard should be had to the area south to Roehampton Avenue, including the portion within the City of Toronto. He stated that a fair amount of renovation and redevelopment was occurring. He stated that there were only three lots with 50 foot frontages, one of which has been redeveloped, one is the subject lot and the only one left is at 164 Banff Road.

Mr. Butler concluded that the variance applications and the proposed lot division come within the intent of the Official Plan in density and housing type. As to the Plan's criterion relating to general standards, he noted that the by-law functions here as a type of holding by-law which preserves the status quo, subject to changes brought about through Committee of Adjustment application or amendments to the by-law. He is of the opinion that the applications before the Board maintain the general intent of the by-law, and he referred to a decision of this Board on a variance appeal in another area of North York where development was permitted on a 25-foot lot. He viewed the issue as coming down to whether what results is reasonable or not. He looked at the side yard variances as resulting in separations similar to that at 56 Walder Avenue where the home is approximately 1 foot from the lot line and like the proposed homes, treats its second storey as a roof element. He saw the type of home depicted in Exhibit 7 as being more detrimental to neighbours than those now proposed, mainly because of additional shade potential in the summer.

Lastly, Mr. Butler referred to the presently proposed draft housing policy of the Provincial Government. He accepted that it was not yet adopted as government policy. However, he stated that it is an accepted planning principle that intensification of existing residential neighbourhoods can be beneficial to the municipality, and that neighbourhood concerns can be traded off as long as there is no detrimental impact to the area and no

significant change to the neighbourhood. He concluded that the intent of the Official Plan and zoning by-law are generally maintained by the applications before the Board, that they represent desirable development appropriate to this area, and that these variances are minor when compared to the type of development within by-law standards (other than lot area) shown in Exhibit 7. He saw the consent application as having addressed all relevant matters in Section 50(4) of the Planning Act, 1983.

Under cross-examination by Ian Wahn, a retired lawyer representing his son who owns an abutting lot on Brodway Avenue, Mr. Butler clarified the areas considered by him. He stated that for purposes of the Official Plan's density limits, he considered only the Broadway Neighbourhood as defined in the Plan. In arriving at the character of the area, he considered the larger area south to Roehampton Avenue, including part of the City of Toronto.

The Board heard from several persons who oppose these applications. Mr. Wahn (for his son), Dr. Betty Roots, whose lot also abuts the subject lot at the rear, Nadia Gorecki, a resident two lots to the west of Dr. Roots and Karl Tamm and Stanley Skurdelis who reside on Walder Avenue. Joanne Flint and Beverley Salmon, a local Councillor and a member of Metropolitan Toronto Council respectively, each testified as persons knowledgeable of this area, with strong concerns over the reduced lot size and townhouse-like appearance of the proposed homes which could become a precedent in this well-established residential area. Mr. Wahn's son has a rear yard which abuts the more open rear yard of the present house at 58 Walder Avenue, 54 feet in depth. If these applications are granted, the north wall of the northerly proposed house will be wider than the Wahn lot and situate 4 feet away from its rear lot line. Both Mr. Wahn and Dr. Roots referred to concerns over a possible increase in shade on their lots. The other witnesses stressed the smaller size of the proposed lots and fears for increased building density on other lots and further change to the character of this area if these smaller lots are approved.

The Board, in considering these applications, is required by Section 44(1) of the Planning Act to determine whether the variance applications are desirable for the appropriate development of the land, whether the general intent and purpose of the zoning by-law is maintained and whether, in all the circumstances, the variance requests are minor. Mr. Butler filed, as Exhibit 17, a map indicating lot frontages and depths for the area from the cemetery south to Roehampton Avenue and beyond. The Board notes that, apart from a small pocket of lots with frontages of 22 and 26 feet in the northeast corner of the Broadway Neighbourhood, all of the other lots within this neighbourhood in the City of North York, save one, are between 30 and 50 feet in frontage and between 3,000 and slightly over 5,000 square feet in area. On the portion of Cardiff Avenue within North York, the lots have between 33 feet and 44 feet of frontage and range between 100 feet and 137 feet in depth. On Banff Road within North York, the range of frontage is between 32 feet and 50 feet. On Walder Avenue, again within North York, they range between 32 feet and 50 feet. On McBain Avenue, the range is between 32 and 37 feet. On Broadway Avenue, apart from the one pocket mentioned previously, the lots have frontages between 32 feet and 37 feet. With few exceptions, they are 100 feet in depth. There are no lots as small in area as those proposed within the Broadway Neighbourhood in the City of North York, and none as small in frontage except those earlier referred to.

The picture changes as one scans the lots to the south within the City of Toronto, ranging from 30 to 40 foot lots close to the portions of the streets within North York down to 25 foot lots near Roehampton Avenue. This appears to reflect the lesser lot standards found in the City of Toronto Zoning by-law.

The issues as to appropriateness and whether the variances requested are minor, therefore, comes down, in part, to the particular area to be considered. The Board finds no fault with Mr. Butler's consideration of the area as including both North York and City of Toronto segments for purposes of determining general neighbourhood characteristics. However, in considering whether the variances regarding lot size and frontage are minor, the Board is not satisfied in these circumstances, that, given the differing lot patterns prevailing now in that part of the area under the North York by-law and that within the City of Toronto, it should so find. Mr. Butler's reasoning that, because the City of Toronto has allowed development on 21 to 25 foot lots to the south, this should make similar lots a minor matter in respect to the Broadway Neighbourhood in North York on streets where none now exist, seems to be open-ended.

For example, there are some 13 lots in the Broadway Neighbourhood with lot frontages of 38 feet and over. Eleven are between 40 and 50 feet in width. There are some lots to the south in Toronto with lot frontages between 21 and 25 feet. Should this mean that the division of the 13 larger lots in the North York portion of the area is appropriate and minor since the range would be close to the smaller frontages nearby in Toronto? The Board concludes that in these circumstances, the applications should properly be the subject of consideration by North York Council as an amendment to the zoning by-law, either for the Neighbourhood as a whole in order to more properly reflect the development standards desired for existing and new development, or pertaining to this lot only. Full consideration could also be given in this way to the concerns of the objectors with abutting lots on Broadway Avenue regarding the separation from and bulk of building appropriate near their lots and consonant with existing development in the area.

This is not a case where, as in Chung v. North York (unreported, Board File V 870278), the Board was considering a variance from the by-law to allow development of two existing lots and where the range of lot sizes and frontages existing throughout the area included those being proposed. In this case, the proposed lots fall below the range prevailing in this area of North York. The Board is not satisfied that the variances as to lot frontage and size are minor, or that they represent appropriate development for the area subject to the by-law sought to be varied. It should also be stated that there is no evidence that the proposed homes would constitute affordable housing to the majority of the population in Metropolitan Toronto nor were they shown to be so.

Accordingly, the Board will dismiss the variance appeals and will not grant the applications for variance. The Board will dismiss the consent appeal and will refuse the application for consent, as the proposed lots would not comply with the zoning by-law.

The Board wishes to add that Mr. Vaughan put forward a strong case; the evidence raised difficult issues which the Board simply does not find appropriate to be dealt with as a minor variance from the by-law.

P.H. HOWDEN, Member

Indexed as:

Wong v. Toronto (City) Committee of Adjustment

IN THE MATTER OF Section 44(12) of the Planning Act, 1983 AND IN THE MATTER OF an appeal by Simon Wong from a decision of the Committee of Adjustment of the City of Toronto whereby the Committee dismissed an application numbered A316-89 for a variance from the provisions of By-law 438-86, as amended, premises known municipally as 174 Montrose Avenue

[1990] O.M.B.D. No. 1314

25 O.M.B.R. 66

File No. V 890244

Ontario Municipal Board

T.F. Baines, R.B. Eisen

July 23, 1990

COUNSEL:

Adam McIver, for Simon Wong.

MEMORANDUM OF ORAL DECISION delivered by T.F. BAINES and ORDER OF THE BOARD:--

In this application, Mr. Simon Wong, the owner of premises at 174 Montrose Avenue, seeks to regularize the use of the premises as a three unit dwelling having coverage of 1,377.83 square feet whereas the coverage permitted by the zoning is 624.03 square feet. In addition to that, the requirement for parking spaces otherwise set at 3 by the by-law is asked to be done away with as there is no opportunity for parking on the premises. The list of permitted uses in the R2 district where this house is found does not permit three dwelling units.

Mr. Wong purchased the property a year ago at which time he indicated he was quite aware that the property was a three unit dwelling house. His impression was that it had been used that way for quite some time. Shortly following occupancy, a building inspector arrived and indicated that the use of the basement for a dwelling unit was something that would require legalizing and that the way to do it was to make an application to the Committee of Adjustment. Much of the efforts of counsel in the course of this hearing were to satisfy the Board that the property and the way it is used is in effect a legal non-conforming use. Evidence was supplied to the Board which satisfies it that as far back as 1965 the premises were used as a three tenant property. This is from an extract of the assessment for 1965. A further extract of an assessment roll in 1952, however, indicated it was then only a two unit dwelling under the same ownership. When it became a three unit dwelling we have no way of knowing and the Board is thus left less than satisfied that the property is a legal non-conforming use.

Addressing the problem of parking associated with this property, the Board finds now that the owner has on-street parking by permit and one of his tenants has such on-street parking. He also provided us with a letter from the parking authority of Toronto which indicated a 79 space parking facility approximately 5 minutes walk away from these premises with very modest fees for its use. Thus the Board does not see the parking as a very substantial problem although it was drawn to the attention of the Committee in the course of circularization of the various officials at City Hall in the variance application.

The Board is concerned most seriously with the requirement that the variance maintain the general intent and purpose of the Official Plan and zoning by-law. The Board sometimes will go to quite an extent with regard to the general intent and purpose of the by-law if the circumstances so dictate. However, the senior planning policy document of the Official Plan specifies that the permitted density under Section 2.8(c) of the Official Plan is one times coverage. The Zoning By-law R2 Z6 is for a .6 times coverage and the coverage in fact is 1.93 times coverage.

The Board feels that to grant a variance departing that much from the general policy determination of the Official Plan is really going beyond the minor variance authority granted to this Board and others by Section 44(1) of the Planning Act. The situation is one which the Board considers can only properly be addressed by a zoning amendment.

The Board can see little, if any, impact other than the possible parking issue which seems now to have been solved in practice. The Land Use Policy for Housing document issued by the Provincial Government on August 1, 1989 certainly gives support for the idea of regularizing this type of use but the Board repeats that it would not be a proper exercise of the powers given it under Section 44(1) to grant the variances through this process. The applicant did indicate that the rental rates being charged and proposed to be charged are in the $750 a month range and less for the basement apartment, well within the affordable rental range for such premises in Toronto.

In the result the appeal is dismissed and the application is refused.

The Board so orders.

T.F. BAINES, Vice-Chairman

R.B. EISEN, Member

Indexed as:

Thomas v. Toronto (City) Committee of Adjustment

IN THE MATTER OF Section 44(12) of the Planning Act, 1983 AND IN THE MATTER OF an appeal by David Thomas from a decision of the Committee of Adjustment of the City of Toronto whereby the Committee granted an application numbered A 654-91 by Lucy Wright for a variance from the provisions of By-law 438-86, as amended, premises known as 1464 King Street West

[1992] O.M.B.D. No. 618

27 O.M.B.R. 262

File No. V 910387

Ontario Municipal Board

M.F.V. Eger

April 6, 1992

(3 pp.)

COUNSEL:

P.E. Brodey, Q.C., for Mrs. Lucy Wright.

DECISION delivered by M.F.V. EGER and ORDER OF THE BOARD:--

Mrs. Wright has resided at 1464 King Street West since 1978. She has operated the premises as a rest home for this same period, and recently applied for a variance to continue this use without providing on-site parking. Mrs. Wright's request for relief was granted but subsequently appealed by Mr. D. Thomas, who lives on a neighbouring street, causing this hearing before the Board.

The Official Plan designation is residential. The property is zoned R4 Z1.0 by By-law No. 438-86, as amended. This by-law permits rest homes and in this instance requires that a minimum of three on-site parking spaces be provided.

The Board was advised that all other City health, safety and planning requirements have been complied with.

Mrs. Wright indicated that her property has a frontage of 26 feet. The side yards are minimal prohibiting vehicular access to the rear yard for parking. Further, she advised that the rest home provides care for elderly, handicapped or ill persons, generally on social assistance, who do not own or drive cars. In addition, she personally does not own or drive a car. Public transit is readily available on King Street and on-street parking is permitted, except during morning and evening rush hours, to accommodate visitors and health care workers.

On the other hand, Mr. Thomas argues that to eliminate the on-site parking requirements is not a variance but an exclusion. He also feels strongly that Mrs. Wright operates a business and should be required to provide parking on site per by-law requirements. He suggested that this could be achieved through construction of a front yard parking pad.

Answering these points in turn, in Re McNamara Corp. Ltd. et al and Colekin Investments Ltd. (1977), 15 O.R. (2d) 718, 76 D.L.R. (3d) 609, 2 M.P.L.R. 61, the Divisional Court held that the elimination of a requirement of a by-law could constitute a minor variance. In that case, the headnote reads as follows:

> "Pursuant to s.42 of the Planning Act R.S.O. 1980, c. 349, a committee of adjustment, and thereafter the Ontario Municipal Board, has power to authorize minor variances from the provisions of any by-law. The term "minor variances" is a relative one and should be flexibly applied. It is not proper for the committee of adjustment or the Board to determine that its jurisdiction automatically ends whenever the variance sought amounts to a complete elimination of a requirement of the zoning by-law."

This case also indicates that "no hard and fast criteria can be laid down, the question whether a variance is minor must in each case be determined in the light of the particular facts and circumstances of the case". It is commonly held that the Committee of Adjustment or the Board on appeal will determine the extent that a by-law can be varied and still be classed as minor.

The only potential area for on-site parking is the front yard. This would require a separate application and permit from the City. The Board concludes that not all three spaces could be provided for in any case because of the limited frontage of the property and its situation on a hill, and if one or two on-site parking spaces were permitted, it appears that a corresponding amount of street parking would be lost at the front of the subject property.

It became apparent during the hearing that Mr. Thomas plays an active role in commenting on the changes in land use in the South Parkdale area generally. He advises that the area is plagued with parking problems due in part to landlocked properties such as Mrs. Wright's, from the conversion of single detached dwellings to bachelorettes and from parking overflow from events held at the Exhibition. However, there is no evidence before

this panel that would suggest that the granting of this variance would contribute in any significant way to overall parking deficiencies in the area.

The Board finds that the variance is minor and reasonable given the type of use, the physical constraints to on-site parking and the readily available public transportation. The variance conforms to the general intent and purpose of both the Official Plan and zoning by-law and is desirable for the continued provision of residential care on the property.

The appeal is dismissed and the variance granted.

The Board so orders.

M.F.V. EGER, Member

Indexed as:

Granger v. Toronto (City) Committee of Adjustment

IN THE MATTER OF Section 44(12) of the Planning Act, 1983 AND IN THE MATTER OF an appeal by Michael Peter Granger and William Bruce Granger and carried on by Brian Orser from a decision of the Committee of Adjustment of the City of Toronto whereby the Committee granted in part and dismissed in part an application numbered A-1200/91 for a variance from the provisions of By-law 438-86, as amended, premises known municipally as 35 McKenzie Avenue

[1993] O.M.B.D. No. 1816

File No. V 920072

Ontario Municipal Board

M.F.V. Eger

October 14, 1993

(4 pp.)

COUNSEL:

K.M. Kovar, for Brian Orser.

DECISION delivered by M.F.V. EGER and ORDER OF THE BOARD:--

The subject property is located on the south side of McKenzie Avenue in south Rosedale. There is a detached two-storey residence at the front of the lot. A two-storey garage/apartment structure occupies the rear one-third of the lot. This structure is older than the house and is estimated to have been built around the turn of the century. The lot slopes down at the rear and the garage portion of this rear building is at grade with the landscaped rear yard. Steps on the west side of the garage lead down to an entrance to the lower area of the building. The Board heard that this lower level had been improved

over time and has been used both as expanded living space to the main residence and/or as a separate apartment.

The variances are applications related to legalizing the use of the rear building as an apartment and the maintenance of a retaining wall and fence which has a combined height which exceeds the h eight provisions for such structures in the by-law. The Committee of Adjustment granted the variance related to the retaining wall and fence. All other requests were dismissed. Originally, the co-owner of the property, Mr. William Granger appealed the Committee's refusal to this Board causing the hearing. In 1992, Mr. B. Orser purchased the property from the Grangers and he has assumed the appeals.

The Board heard evidence in support of the application from a planning consultant retained by Mr. Orser and from Mr. Granger. The South Rosedale Ratepayers Association and the neighbour immediately to the east at 39 McKenzie Avenue were the major opponents. They submit that the requested variances would have a significant impact on the use and enjoyment of the rear yards of the adjacent properties and the general character of the area by setting a precedent for a house behind a house.

The City's Official Plan encourages the maintenance and enhancement of areas within the City which are of a distinct character. The subject and surrounding lands are designated low density residence area'. Lands so designated are "regarded as stable. No changes will be made though zoning or other public action which are out of keeping with the character of such areas". Although there are a number of "coach houses" on lots in South Rosedale which are used as separate residences they are generally uses that predate the current City by-law. Zoning By-law 438-86, as amended, zones the lands residential' (R1 Z0.6). Relief from numerous by-law provisions is required to enable the garage/apartment to continue to be used as a residence:

1. Each of the existing buildings would not be assigned its own parcel of land, as required.
2. The proposal would create a condition of a residential building located to the rear of another building; the by-law does not permit a residential building to the rear of another building, or the use of any building so as to produce a condition of a residential building in the rear of another building.
3. The garage/apartment is located to the east lot line and approximately 4.45 metres (14 feet 7.5 inches) from the west lot line; as the garage/apartment is located beyond a depth of 17 metres (55.77 feet), the by-law requires a minimum setback of 7.5 metres (24.6 feet) from the east and west lot lines.
4. The garage/apartment is located approximately 0.45 metres (1 foot 6 inches) from the rear lot line, instead of the minimum required setback of 7.5 metres (24.6 feet).
5. One motor vehicle parking space for the detached house would be provided in the garage/apartment, instead of in a private garage as required.

6. The private fence and retaining wall would have a height of approximately 4.88 metres (16 feet) instead of the maximum permitted height of 2 metres (6.56 feet).

Firstly, the topography and landscaping of the site, requires that a retaining wall and safety fence be in place to the west of the garage. The subject application reflects the existing situation. On the basis of the evidence, the Board can easily find that this portion of the application is minor; desirable for the appropriate development or use of the land; and maintains the general intent and purpose of the official plan and zoning by-law. The central issue in this hearing was related to establishing a residential use in building which is located behind another residential building. All remaining portions of the subject application are contingent on the Board's determination of this one issue. Therefore the Board will deal first with the variances related to this particular by-law provision first. If that portion of the subject application fails one of the tests under Section 45(1) of the Planning Act, then there is no merit in proceeding to evaluate in detail the other requested variances.

Section 4 - Regulations Applying to All Use Districts, Subsection (11) outlines the specific policies for a house behind a house. It states:

"b) no person shall erect or use a residential building in the rear of another building"; and

"c) no person shall erect or use a building in front of another building as to produce the condition of a residential building in the rear of another building".

The language of these two sections of the by-law is clearly prohibitive. Taken together, the intent of the by-law is to prohibit one residential building from being located behind another residential building. Therefore, exempting the subject lands from this provision would not maintain the general intent and purpose of the zoning by-law. Having failed one of the required tests under Section 45(1) of the Planning Act, the application cannot be granted. In making this determination the Board differentiates this case from McNamara Corp. Ltd. and Colekin Investments Ltd. (1977), 76 D.L.R. (3d) 609, 15 O.R.(2d) 718, 2 M.P.L.R. 61 where an exemption to a by-law provision was upheld. An exemption to one by-law provision (loading space) was granted, but an alternative (loading ramp) was required. The alternative was able to meet the intent of the by-law provisions to accommodate, in an off-street location, deliveries to a commercial enterprise.

Having determined the matter in this way, there is no necessity to assess the remaining variances which relied on the variance to the by-law provision of one residential use behind another.

This decision is without prejudice to a site specific rezoning application to permit the rear garage/apartment building to continue to be used for residential purposes. The location of this property, backing onto the ravine and the unique design and location of the garage/apartment building are such that specific impacts on neighbouring properties would appear to be minimal.

The appeal is allowed in part to permit the existing private fence and retaining wall to remain in place with a combined height in excess of by-law provisions. The remainder of the appeal is dismissed. The Board so orders.

M.F.V. EGER, Member

Indexed as:

Assaraf v. Toronto (City) Committee of Adjustment

Elise Latner Assaraf has appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act, R.S.O. 1990, c.P. 13, from a decision of the Committee of Adjustment of the City of Toronto which dismissed an application numbered A-1187-92 for a variance from the provisions of By-law 438-86, as amended by By-law 425-93, respecting 93 Mona Drive O.M.B. File No. V 930069

[1994] O.M.B.D. No. 1316

31 O.M.B.R. 257

File No. V 930069

Ontario Municipal Board

T. Yao

October 7, 1994

(9 pp.)

COUNSEL:

John Dawson, for Elise Latner Assaraf.

DECISION delivered by T. YAO AND ORDER OF THE BOARD:--

The Assarafs have a very large house - 5568 sq feet of gross floor area. In 1986, they added a two storey rear addition by an expansion out the centre of the rear wall. It consisted of an enlargement of the kitchen and a new second floor master bedroom. Now they wish to add one small (187 sq ft) and one large (986 sq ft) rear addition which will bring the total gfa to 6733 sq ft. The master bedroom suite already has a walk-in closet, bathroom and dressing room. The smaller addition is for a sitting room, ensuite to the master. This addition will be restricted to the second floor only and will be cantilevered

over the rear yard. The other addition will create a new ground floor family room off the kitchen and be an expansion of one of the bedrooms into a second floor library. It will replace what is now a stone terrace at the southeast corner of the residence. (On page 2, there is a diagram of the attic floor plan. The two additions are in the locations marked "flat roof".)

[Ed. Note: See paper copy for sketch]

The 1986 addition was built within the by-law. Since it was at the centre of the rear wall, there are about 20 feet of clearance to the side lot lines. The new smaller addition will move the north side wall 17 feet north to the Aitkens rear lot line. The new larger addition will move the south side wall 17 feet south to the Olivers. This requires a variance to the length of building regulation and to gross floor area:

permitted floor space index	.35 (4367 sq ft)
existing	.45 (5568 sq ft)
proposed	.54 (6732 sq ft)

The Assaraf lot is a "key lot"; i.e. located on a cross street to the longer blocks of Glencairn and Strathallan Boulevard. It is possibly the largest lot in the area - 12,477 sq feet and located next to one of the smallest - the Olivers who are at 5089 sq ft.

The Assarafs were supported by John Bousfield, one of the Province's preeminent planning consultants. The basic elements of his testimony are:

* there is "negligible" shadowing of the neighbouring property and even this shadowing must be discounted because of the existing vegetation;
* the existing and proposed gross floor areas are artificially inflated by a 1987 zoning change which counted (previously excluded) attic space;
* the planning report accompanying this change states "the paramount planning concern is the compatibility of adjacent buildings and not details of internal space usage within a dwelling";
* this addition is representative of upgrading - "a reflection of the continual investment in this substantial neighbourhood";
* statistics from the Committee of Adjustment suggest that of 84 lots in the neighbourhood; 18 have received gross floor area variances and 6 of these have received variances for an fsi over .6 x lot area.

Dealing with Mr. Bousfield's comments in order, shadowing is a difficult concept to deal with objectively. It is true that there is a generous amount of vegetation but the views are not impenetrable, even in the summer. Exhibit 13-2 shows a square of about 12 x 12 feet of shadow on the Aitkens' property on March 20 at 2:00 pm. On March 20, it will travel across the lot. Throughout the months following March it will decrease to zero by the summer solstice. Is this "major" or "minor"?

To answer this, I looked at a few Board cases dealing with shadowing in Toronto (but by no means an exhaustive search). It is hard to draw general principles from the results.[1]

This is not a case where the Aitkens will be totally in shadow nor is it a case of no shadowing. Is this grounds for rejecting the variance, or to use Mr. Bousfield's test: acceptable adverse impact? To be fair, the jurisprudence suggests that the Board typically uses shadow evidence to confirm what it has already decided; whether the addition is truly minor or not. For example in the Prassas case in footnote 1, the proposal was for the enclosure of a porch and second floor study, together totalling only about 350 sq feet, in an area of Rosedale where densities were typically all over the .6 limit.

Thus to come to a conclusion on the shadowing issue, I have to look at how it fits into the other objections raised by the Assaraf's neighbours.

The next issue concerns the 1987 zoning amendment. By-law 438-86 defines gross floor area as

> "the aggregate of the areas of each floor above ... grade, measured between the exterior faces of the exterior walls of the building, exclusive of ...
>
> (1) in the case of the floor of the first storey below a sloping roof, any unfinished area enclosed by the exterior face of a vertical interior wall that does not exceed 1.37 m in height and the nearest exterior face of the exterior wall or roof at that floor level."

Prior to the amendment there was no height limitation for knee walls. Builders would place high knee walls close together, and then after the inspection, move them farther apart. There is no suggestion that the Assarafs wished to take advantage of any loopholes.

But because the existing house is approximately 1200 sq feet over the .35 fsi limit, and the 1986 addition was built without variances, the inference is that the 1200 sq foot excess was created solely by the amendment. The sketch shows that about a third of the attic is heated and the rest is unused. When the original house was constructed in 1940, the builder chose a Mansard style roof, and the high knee walls created by this design means virtually all the attic (total 1707 sq feet) became included. In his analysis of the 1987 amendment, Mr. Bousfield stated:

> "What really triggered this was the demolition of smaller homes in the Lytton and Castlefield area, where there were small bungalows. And in the normal course, the bungalows were wrecked and there was concern that the new large homes were out of character. The built form of new houses is addressed in the last paragraph on p 14965:
>
> 'The proposal is to encourage the built form of new houses to resemble that of existing houses in terms of bulk and height.'
>
> The idea is to have roofs that are not pitched high enough to have living space."

Reading the entire report, one sees that the main thrust is to close a loophole whereby first floor stories shallowly set below grade may qualify as "basements" and thus

the first floor level becomes entirely exempted. The rationale for inclusion of attics appears to be only in the City Solicitor's report[2] accompanying the amendments:

> "The Commissioner of Buildings and Inspections has advised that because of present difficulties in interpreting what is meant by "dwarf" or "knee" wall, that the reference be to a wall that does not exceed 1.37 m in height."

In other words, the amendment is not a substantive change, but merely clarifies what had always been the intention of the by-law, that is to include attic space, used or unused, where there is sufficient headroom.

I asked Mr. Bousfield whether the intention of this section of the zoning by-law was to encourage the use of this already existing interior space. His reply was:

> "A library on the second floor with a fireplace is much to be preferred over extra space up above. It is much preferable to have the family room next to the kitchen and in terms of having one's druthers, it would be preferable to seal off the attic and go with the addition. [Building in an attic] was a way of getting space in a less costly way. At that stage in the [family's] cycle, it was space that could be made available without any structural elements."

The actual gfa used by the Assarafs, excluding the unheated attic, is 4537 sq feet, which is an fsi of .36. The analogous proposed gfa is 5701 sq feet for an fsi of .46. The problem, as I see it, is a minor variance to .54 fsi today gives the Assarafs or their successors the option to convert all of the unused attic space at some time in the future. So that at the end of the day there could actually be a house with 6733 sq feet of gfa, since that is what is being sought.

The intent of the by-law both before and after the 1987 amendment is to recognize that unused attic spaces do form bulk and massing. It accepts that they should be controlled, whether or not they are heated. Thus the problem is to decide whether the Assarafs are unfairly treated vis à vis houses without Mansard roofs and whether the additions create massing too close to the side lot lines. This massing could be avoided by using less conveniently located space in the attic.

Were this the extent of the evidence, I would find that this appeal fails. However, Mr. Bousfield raised a further very powerful argument. He researched the Committee of Adjustment decisions for the past ten years for the immediate Mona-Strathallan-Glencairn neighbourhood. He found that out of 118 properties, the Committee has granted 19 variances, including six over .6 fsi. One of these, 127 Strathallan Blvd, was appealed to the Board and the appeal was dismissed[3]. These decisions put me in the position where if I dismiss the Assaraf's appeal, I might be out of step with both the Committee and the Board.

I cannot speak for the Committee. As I examine the 127 Strathallan case, the rationale seems to be that the owner hired Mr. Brass, a planner "who has appeared on numerous occasions before this Board" and whose judgment the Board preferred to Mr.

Walker's, who is "a neighbour two houses removed from 127 Strathallan Boulevard". The Board found that there was no direct adverse impact on the appellant Walker. In this case, Mr. Walker also objected, with the same argument as in the 127 Strathallan case. However because this is an appeal from a refusal, it is less easy to focus on the fact that he is a distant neighbour. In fact, all the neighbours whose properties touch the front portion of 93 Mona oppose the variance.

The additions seem to be driven by architectural considerations. The outer perimeter is obviously chosen to fill out the two notches, without any thought given to stopping at the 17 m line, thus avoiding at least one of the variances. The addition facing the Aitkens seems to me to be particularly unfortunate. It ignores the fact that there is a side-lot-to-rear-lot juxtaposition, thus bringing a blank brick wall to within 3 feet of lot line. I agree with Mr. Aitken that the dark space under the addition will be unattractive. This might be an acceptable place to build if there was some trade off to avoid impacting the Olivers on the other side, but the entire notch space next to their rear yard is to be used.

Except for the track record of the Board and the Committee described earlier, I am hard pressed to find that a variance of this magnitude is "within" the intent of the zoning by-law. When faced with the argument that a variance is numerically not minor, counsel for proponents, including Mr. Dawson in this case, cite the landmark case of McNamara Corp v. Colekin Investments Ltd[4] as if that was a complete answer. I wonder if they would be so quick to rely on it if they went back to look at the facts of that case. The minor variance sought was the deletion of the requirement for one loading space. Coles did not have room for the loading space, but was willing to create a loading chute which the court found was "equal or perhaps superior to the method otherwise stipulated in the by-law".

Seen in this light, how is an 1164 sq foot addition to a residence already at the gfa limit, "equal or superior" in terms of the intent of the zoning by-law? There is certainly Board jurisprudence requiring a site specific justification for a minor variance[5]:

> "At this juncture it is worth commenting on the purpose of Section 45 of the Planning Act (1990). A minor variance is a special privilege. It can reduce inflexibility of the zoning by-law so that undue hardship does not result. There should be a valid reason why the by-law requirements cannot be met."

The Assarafs have really presented no valid reason except their own convenience. With or without the change, any addition would require some variance, the inclusion of the attic simply places them in a higher starting position. What is lacking in the proposal is a recognition of the fact that the by-law imposes constraints, and these constraints apply to all.

The variances meet neither the test of being minor nor being within the intent of the zoning by-law. Therefore the appeal is dismissed and the variances not granted.

T. YAO, Member

1 In Conway v. Toronto (City) Committee of Adjustment (1989), unreported OMB File No. V 880724, (D.H. McRobb), "The only major shadow effect will be at 3:00 p.m. on December 21st and, in fact, by moving the garage, some additional sunlight may result." In Gellman v. Toronto (City) Committee of Adjustment (1992), unreported OMB File No. V 910141, (P.G. Wilkes, W.E. King), the Board agreed with the owner's architect that the incremental shadowing of the proposed addition over an as-of-right addition was "insignificant". In Jerudan Development Ltd. v. Toronto (City) Committee of Adjustment (1991), unreported OMB File No. V 900542, (M.A. Rosenberg), dealing with a mixed use building near Yonge and St. Clair, the Board found "there will be a severe impact on the adjoining apartment building relating to sun shadowing and view." In Mackay, Via Italia and Vicinity Residents Association v. Toronto (City) Committee of Adjustment (1993), unreported OMB File No. V 920251, (D.L. Santo), in considering a 2 storey parking garage located in a residential zone at the rear of commercial properties fronting St. Clair, the Board found the structure had less impact than "a traditional two-storey residential structure". In Prassas v. Toronto (City) Committee of Adjustment (1989), unreported OMB File No. V 890159, (N.M. Katary), there is the most extensive description of shadows I have been able to find. The following sentence is typical: [speaking of shadows on March 23, caused by a second floor rear deck enclosure] "At 4:00 p.m. the shadow affects approximately 50 per cent of the width of the [neighbour's] backyard, 50 per cent of that shadow being caused by the existing building." The Board concluded that the shadowing was "not significant".

2 p 14961 of Ex 11

3 Appeal by Wilfred Walker (1991), Unreported OMB File No. V 900626 (D. W. Middleton). Mr. Bousfield did not however supply statistics on Committee or Board decisions where gross floor area variances were refused.

4 McNamara Corp Ltd v Colekin Investments Ltd (1977), 15 O.R. (2d) 718, 76 D.L.R. (3d) 609, 2 M.P.L.R. 261

5 Technakord Chemical Industries Inc. v. Toronto (City) Committee of Adjustment (1993), Unreported OMB File No. V 920546, (B.A. Heidenreich)

Indexed as:

London (City) v. London (City) Committee of Adjustment

The City of London has appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13 from a decision of the Committee of Adjustment of the City of London which granted, upon condition, an application by Ultramar Canada Inc. numbered A. 199/93 for a variance from the provisions of By-law No. Z.-1 respecting 1652 Dundas Street East.

[1994] O.M.B.D. No. 694

30 O.M.B.R. 494

File No. V 930499

Ontario Municipal Board

T. Yao

March 29, 1994

(10 pp.)

COUNSEL:

Patricia Cox, for the City of London.

DECISION delivered by T. YAO AND ORDER OF THE BOARD:--

The main issue is whether the Board can grant a minor variance for a use not permitted in the zoning by-law. This is an application to be permitted to use a gasoline service station lot for sale of cars (up to 25 cars). The site contains a 2 bay garage building. It is boarded up.

Surrounding land uses

The owner Ultramar retained Erin Arrand, a real estate agent, to find a buyer for its property. The site is located at the corner of Dundas and Second/Saskatoon. Second Street is a primary collector. Saskatoon is the continuation of Second south of Dundas. Dundas is the major east-west street in London.

To the east is Noseworthy Brakes and Mufflers. To the north is a PUC utility building. To the west is a lot approximately 50% as large as the subject site, leased from Hydro. Across Second Street is a Mr. Submarine shop. South, across Dundas Street is a Canadian Tire store.

History of the application

In the summer of 1993, Ms Arrand located a buyer for the lot. The purchasers were a consortium of 9 individual investors from Toronto. They included a lawyer, contractor, and persons with experience with the auto repair and minute lube businesses. Ms Arrand said, "They know what they're doing." She looked into the zoning. It is ASA2/ASA5 which permits a service station or repair garage.[1] A repair garage also permits "the sale of automobiles ancillary to the automobile repair garage functions".

On August 15, 1993, Ultramar flew down an executive who met with the local councillors and obtained their support for the project. The councillors, Dawn Erskine and Bud Polhill, wanted the site revitalized. Ultramar applied for the minor variance and was successful on September 7, 1993. By letter dated September 29, 1993, the City appealed. Ms Arrand then lobbied Council to revoke its decision to appeal the Committee of Adjustment. In November, Council voted 10-8 to uphold its earlier decision. The local councillors were still in support of the granting of the minor variance. Ultramar flew down again and was told to seek a rezoning. It applied on November 29, 1993. The City promised to fast track the process.

On January 5, 1994, the Board set January 26, 1994 for the hearing. The City asked that the hearing be adjourned to avoid a possible duplication of hearings and because preparation for the variance hearing would delay the rezoning application. The rezoning was set to go to public meeting in February and a possible Council decision in March. Ms Arrand refused to consent to the adjournment. She wished to have the separate opportunity to obtain the variance. Her purchasers were becoming restless with the appeal. Although their option had run out, she thought they could still be induced to make an offer if there is was a favourable decision at the Board. The Board denied the City's adjournment request.

Zoning of automotive uses

London's Z.-1 by-law has the following zones permitting automotive related uses (the list is not exhaustive):

ASA2 (Associated Shopping Area Commercial)	-auto supply

HS (Highway Service and Commercial)	-service stations, gas bars car washes
ASA5	-auto repair garage, service stations, gas bars and car washes, taxi establishment
ASC5 (Arterial Commercial)	-same as ASA5, except no taxi
GI1 (General Industrial)	-auto repair, body shops
GI2	-same as GI1, plus sales of reconditioned vehicles arising out of the repair or autobody use
RSC1(Restricted Service Commercial)	-ASA5 uses plus auto sales and service (i.e. used car sales), automobile rental
RSC4	-same as ASA5, except no taxi
RSC6	-automobile sales and service, automobile body shop

There are also SS zones (automobile service station) which permit a limited range of automotive related uses for the immediate neighbourhood - from SS (permitting only a gas bar) to SS4 (automotive sales and service limited to six vehicles).

The site is zoned ASA2/ASA5. The description of the ASA zones reads as follows:

"General Purpose of Zone

> This zone provides for and regulates a limited range of service, office and retail uses which are intended to complement the function of designated regional and Community Shopping Areas. Uses permitted in the ASA zone are differentiated through the use of zone variations on the basis of their function, intensity and potential impacts.
>
> Different ranges of uses may be permitted at suitable locations through the use of zone variations. Application of zone variations will be dependent in issues such as necessity for larger site, customer draw and impact on adjacent uses." (Board's emphasis)
>
> London planner Mark Henderson stated:
>
> "ASA2 is retail not catering to automotive. ASA5 is directed to four uses, including automotive repair. A repair use may have ancillary sales. But the main use is auto repair, with six automobiles for sale, and once you exceed this number, you no longer have an auto repair. Sales (as a principle use) are not permitted in ASA2/5 zone."

Thus Z.-1 has a rigid hierarchy for automotive-related uses. Auto sales as a stand-alone use are only permitted in RSC1 and RSC6 zones. RSC1 is the zone for most of the large dealerships along Dundas (e.g. London Jeep Eagle, London Plymouth Chrysler).

Ancillary sales are also strictly controlled by Section 4.31. It limits ancillary sales to an automotive repair to six "stored, kept, or displayed for sale on the site at any one time". As long as the number is below the six car limit, the use of "ancillary sales of autos" is permitted as of right in a broad range of zones - highway commercial, arterial commercial, and industrial. While not permitted in residential per se, the SS zone also permits ancillary sales of land in close proximity to residential zones.

Used car sales

What is actually happening is another story. (This evidence here was introduced in the course of cross examination of Mr. Henderson, and over the objection of Ms Cox, who submitted it had no relevance.) As best as I can determine, the stand-alone auto sales include:

Daves Auto Sales. 1191 Dundas Street. - arterial commercial AC2/AC5 where car sales are not permitted.

Ezee Credit Leasing and Sales. 1365 Dundas St. - ASA5/RSC6 which permits auto sales.

Dundas Auto Sales, 1152 Dundas St. - an operation run out of a trailer parked on the corner of Eastown Shopping Plaza, and located in an 0S4 (conservation and recreation) zone. Automotive sales may be a legal nonconforming use.

Springbank Used Cars, 1500 Dundas St. - a reuse of a GI1 building at the corner of McCormick and Dundas.

Corner of Second and Evangeline, a repair garage with ancillary car sales in an area zoned R2-3.

California Used Car Sales, 1737 Dundas, zoned ASA5/HS4.

None of the lots except Ezee's is in a zone permitting a stand-alone sales Use although most were originally zoned as Heavy Industrial or Local Business which allowed auto sales. Some may be legal nonconforming uses or illegal uses for which no one has asked for a zoning investigation.

The opposing parties' cases

Ultramar states that the area is in an area dominated by automotive-type uses. In addition it claims that the sales of up to 25 cars would be a minor expansion of a permitted use namely, sales of up to six cars. The lot has a capacity for 32 cars, although at that number the turning movements are quite cramped.

The City's position is that the variance is for a change in use. The minor variance process should not and cannot be used to gain a use otherwise prohibited by the by-law.

The law

There are two court cases on this issue. In Re Convenience Services Ltd. and Barrie (1982), 14 O.M.B.R. 12 (H.C.), the minor variance was with respect to a C-5 zone (a generalized commercial zone outside the central core area) where there was a neighbourhood shopping centre. C-5 permitted a local convenience use but not a supermarket[2]. The applicant sought and received a variance to a supermarket use limited to 7,000 square feet. The owner of an existing convenience store (2,200 sq. ft.) in the plaza sought a judicial review of the Committee's decision. The Court said:

> "I cannot think of circumstances where to permit the right to a use which is not permitted under a zoning by-law can be considered a "minor variation" of that zoning by-law... To determine if a variation of a permitted use is minor or not, the description or definition of the permitted use as contained in the zoning by-law must first be considered. The extent to which it is sought to be varied must then be measured in the light cast by description or definition and the relevant portions of the by-law and official plan, as reflected against the background of the committee's opinion ... Here, in effect, the Committee was asked to permit a part of the shopping centre to be used as a "retail store", a use not permitted in the zoning area in which the shopping centre is located. The Committee was not asked to vary, by any degree, a permitted use."

In addition there is the earlier case of R. v. London, ex p. Weinstock, [1960] O.R. 225 (C.A.), in which the area was zoned light industrial and the proposed use was "for the purposes of the Goodwill Rescue Mission." Although the sentence[3] by the Honourable Mr. Justice Morden,

> "Section 18(1) does not give the committee any power to establishing a use - it may authorize or permit a minor variance in respect of the use of land"

seems clear,[4] it should not be forgotten that the actual basis of the decision was that the Committee's decision could be quashed on the single ground that the proposed use was not clearly stated. The Court also stated at 236:

> "The committee is empowered to authorize minor variances. It would be difficult to define the exact ambit of these words. For the purpose of this judgement I am not required to embark upon such a voyage. Numerous and diverse uses are permitted in the light industrial zone by the by-law. It may be that the proposed use by the mission when properly described and defined might fall within the term minor variance." (Board's italics)

The proposition that the Board has no jurisdiction to establish a new use has been followed in Deem Management services Ltd. v. Mississauga (1980), 12 O.M.B.R. 348 (D.D. Diplock), variance refused for administrative office for nursing homes for R3 residential zone. Site is on Hurontario Street one and one half blocks south of the Queen Elizabeth Highway; M.B.S. Developments Inc. v. North York (1984) 16 O.M.B.R. 142 (A.J.L. Chapman), variance refused for pharmacy in a complicated RM5 zone which permitted business, professional and medical offices; Lieb v. City of Toronto (1986), 31 M.P.L.R. 224 (D.M. Rogers), refusal to permit autobody shop from industrial area rezoned to exclude all auto repair; Russell v. Munch & Pun Amuseland (1987), 20 O.M.B.R. 162 (D.W. Middleton), refusing flashing sign where prohibited in all zones; Sheldon Painer and others v. Toronto (1991), unreported V 920073 (J.R. Mills), single persons housing refused for R4 district; Rouse of Homes v. St Catharines (1992), unreported V 900805 (W.R.F. Watty), a pet supply store refused for premises formerly used by the Humane Society but zoned Second Density Residential (R2); Joe Cvenkel v. Township of Medonte (1992) unreported V 910591 (W.E. Ring), home occupation use (preparation of organic salami) refused for an R4 recreational residential zone.

There is a second line of cases where a minor variance for new use was granted because the Board found on all the facts that the new uses was truly minor. Examples are Hodgins v. Bilton (1978), 7 O.M.B.R. 452 (J. Wadds) permitting a part time photography studio in a home zoned residential but on an arterial street in London; Toronto Chinese Baptist Church v. Toronto (1983), 15 O.M.B.R. 471 (P.G. Wilkes) permitting Sunday school use in two R3 dwellings abutting church; Celebrity Inn v. Mississauga (1992), unreported V 910287 (D.L. Santo) permitting a free-standing restaurant in a HC highway commercial zone opposite Pearson Airport. A slight variant of this line of cases is where the new use was arguably not a new use but an "old" or permitted use which did not comply in some way with a regulation. For example, in Redy Management v. Town of Midland (1985) 18 O.M.B.R. 178, the zoning permitted a chiropractor' office as an adjunct to the chiropractor's dwelling unit. The chiropractor wished to move out and live elsewhere; the clinic thus became freestanding. The dwelling unit was in a three storey house which contained 3 units in all and the other two would be unchanged. The Board held that the intent of the by-law was maintained and allowed the variance.

There is a third line of cases which does not frame the question in terms of "new" use or "use not permitted by the by-law". They have their origin in the decision of Mr. Justice Morden in the Weinstein case. In Burlington v. Michael Weinberg (1985), 17 O.M.B.R. 271 (P.H. Howden), the Board said the basic question should be "is the variance minor?" In Weinberg, the variance sought was for a convenience store in a seven unit commercial plaza. The CC6 zoning permitted only three out of 26 retail uses. The plaza owner had found a tenant who wished to operate a smoke shop, with sale of magazines, and limited number of convenience food items. The Board found that the relief asked for - "a convenience variety store" - was not precisely stated. If properly described, the variance might not necessarily offend the intent of the Official Plan and zoning by-law.

> On the issue of a new use, Mr. Howden stated at 277:
>
> "On the facts of this case at least, the Board finds the distinction between establishment of a use and minor variance of a use not to be helpful, as no criteria are laid down to clearly distinguish one from the other."

In the end, the case was adjourned to permit the parties to refine the proposed use to include, among other matters, what items were to be sold and what would be the hours of operation.

Weinberg was followed by the Bargoon Auto Parts v Mississauga (1986) 19 O.M.B.R. 215 (P.M. Brooks) in which the variance was for disassembly, use and distribution of auto Parts in an M2 heavy industrial zone. Mr. Brooks took pains to establish the difference between Bargoon's operation and the ordinary auto wrecking yard; here, the disassembly was carried out inside a "modern and reasonably attractive" building. He stated:

> "(Bargoon) fits within the definition of a . . .wrecking yard only because the by-law does not assist the appellant, or the board, with more detailed definitions. . . . In the context of a zoning category that would permit everything from the very heaviest industrial use to an automobile and truck body repair shop, the board finds the difference .
> to be clearly minor."

In addition, there is also Linda D. McClellan et al v Mississauga (1987), unreported V 860632 (P.M. Brooks) denying a church in a G zone (permitting cemeteries). In McClellan, the church had applied for a rezoning, and upon an unfavourable planning report, initiated the minor variance application. The McClellan decision approves both Weinberg and Weinstein.

In conclusion, a synthesis of the case law seems to suggest that while the proposition that a variance cannot be given for a new use, this is only shorthand for saying that in overall context, the variance is not minor. In assessing whether it is minor, the relevant categories set out in the zoning by-law help frame what is the intent of the zoning and official plan, and how far the new use strays outside that intent. Thus in Convenience, the court recognized that a large supermarket was not a minor variance to a small supermar-

ket, but cast its rationale in terms of "a new use". All of which is to say, we return to the basic tests as set out in Section 45.

Application of tests to this case

In this case we have a use that differs from the permitted one by

1. allowing 25 cars for sale instead of six;
2. allowing a use that is the main use in terms of lot area;
3. the fact "ancillary" seems to denote that the cars are a by-product of the repair garage but the proposal is for cars that may come from anywhere.

In terms of the categories, the increase from six to 25 cars is very similar to permitting stand-alone car sales. This use is permitted in only two RSC zoning categories, whereas ancillary sales are permitted in a broad number of general commercial and industrial categories.

However the categories in the zoning by-law are only one aspect of the case. The policies of the Official Plan deal precisely with Ultramar's proposal:

> "4.5.7 Existing Commercial Strips
>
> iii) Dundas Street East, between Clarke Side Road and Highbury Avenue. . . .permits some of the uses permitted in the Restricted Service Commercial designation including... automotive uses including car and truck dealerships. The Zoning By-law will consider the appropriateness of uses on specific sites or areas based on lot sizes, compatibility and traffic impacts as well as other criteria set out in Section 4.7. - Planning Impact Analysis. (Board's italics)

Thus the City may permit a car sales use at 1652 Dundas St. East, but only by way of rezoning.

When lot sizes etc are considered, the Ultramar proposal measures favourably:

Dundas Auto Sales	145 feet
Dave's Auto Sales	40 feet
Ezee Credit	303 feet
Springbank Auto Sales	391 feet

California Auto Sales	120 feet
Ultramar	approx. 177 feet (with leased lot).

Furthermore, the compatibility and traffic impacts are also favourable as are evident from the site description.

It is unusual to find a location with the special attributes of being on Dundas Street but having the adjacent R2-3 zone not actually occupied by a residential building. (It is a PUC substation.) The nearest residential buildings are across Second Street north of the Submarine Shop or on Saul Street, the next street over from Second. Moreover, the hydro right-of-way that comes down the east side of Second means that there are no residences in the block immediately north of the PUC building.

The leased lot has a capacity for 20 additional cars. No variance is being sought for it but under the ASA2/ASA5 zoning it could also be used for repair garage purposes and could contain the parking for that use, leaving 1652 Dundas to have strictly the car sales use.

Finally there are economic benefits, which are perhaps a dangerous argument but very relevant to the test of "desirability". The very morning of the hearing the building was broken into. An abandoned building on a major thoroughfare is obviously not an attractive sight. Section 4.5.5 states that "improvements to the function and appearance of existing strip commercial function shall be encouraged" and this seems to be the reason the development is supported by the local councillors.

Indeed throughout this case, there was no argument that the 25 cars would have a physical impact; the City's case is in terms of the impact on the legitimacy of the Z.-1 By-law. This is one of those cases where the four tests, considered individually are each met. I respect the City's position that its interpretation of the Official Plan permitted only a resolution by way of rezoning and indeed the City has now rezoned both the site and the leased lot to permit Automotive Sales and Service on March 7, 1994. However the Board is required to interpret the Official Plan broadly and purposefully and once the criteria in 4.5.7 (lot sizes etc) are considered, this case merits a minor variance. After the rezoning, this appeal may be redundant, but in the case there is any appeal from the rezoning, I propose to grant the variance conditional on the property being subject to the site plan review process.

The Board orders appeal is dismissed and the variance granted.

T. YAO, Member

1 "Automotive repair garage" permits most mechanical repairs except autobody but not gasoline sales. "Automobile service station" permits gasoline sales and only minor running repairs.

2 Although it was arguable that a supermarket was a retail store, and therefore permitted by the zoning, the Court notes at 14 O.M.B.R. 15, last sentence, that there was agreement among the parties that the zoning prohibited a supermarket.

3 At 235.

4 It has been followed by the board in Cochi v. Borough of York (1983), 15 O.M.B.R. 209.

Update Week 95-13

Planning

Indexed as:

Oshawa Group Ltd. v. Peterborough (City) Committee of Adjustment

The Oshawa Group Limited, Loblaws Inc., Deiters No-Frills, John Boddy Developments Inc., and BH Parkway Place Ltd. have appealed to the Ontario Municipal Board under subsection 53(7) of the Planning Act, R.S.O. 1990, c. P.13 from a decision of the City of Peterborough Committee of Adjustment which granted an application numbered B 79/93 respecting lands known as 1200 Lansdowne Street West O.M.B. File No. C 930504
The Oshawa Group Limited, Loblaws Inc., Deiters No-Frills, John Boddy Developments Inc., and BH Parkway Place Ltd. have appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13 from a decision of the City of Peterborough Committee of Adjustment which granted applications numbered A 80/93 and A 81/93 for variances from the provisions of By-law 1972-120 (as amended) respecting lands known as 1200 Lansdowne Street West O.M.B. File Nos. V 930573 and V 930574

[1995] O.M.B.D. No. 311

File Nos. C 930504, V 930573, V 930574

Ontario Municipal Board

T.F. Baines

February 10, 1995

(15 pp.)

COUNSEL:

Roslyn Houser, for Summit Plaza Inc.
Gordon E. Petch, for Loblaws Inc., Dieters-No Frills, Bowes & Cocks.
Leo F. Longo, for John Boddy Developments Inc.
Russell D. Cheeseman, for The Oshawa Group Limited.

DECISION delivered by T.F. BAINES and ORDER OF THE BOARD:--

By this application for consent and several minor variances to both the retained and consent parcel, the owner seeks to construct a food supermarket (Sobeys) of 48,800 square feet plus a freestanding restaurant on part of what is presently a designated Major Shopping Centre fronting on Lansdowne Street in the City of Peterborough. The overall site is 16.83 acres. The retained portion would still have a K-Mart Department store of 93,108 square feet, a discount furniture store, The Brick at 29,120 square feet, a free-standing Bank of Nova Scotia at 6,041 square feet, and a small group of existing retail stores at 5,320 square feet totalling in all 134,057 square feet. The retained parcel is to be 10.712 acres. The consent parcel is 6.123 acres. Existing zoning allows the uses presently on the site and those proposed. Without the consent, the combined site presently enjoys a Major Shopping Centre Area designation, and C3 Commercial zoning, so approximately 11,500 square feet of food store or other retail or service uses could be added as of right, for a combined total of 144,000 square feet of building coverage.

With the proposal herein, the consent lot and retained lot would, if the variances are allowed, have a combined building coverage of 185,569 square feet. The question central to this hearing is whether or not the variances could be considered minor by the tests found at Section 45(1) of the Planning Act, R.S.O. 1990, P.13. The planner for the applicant/respondent opined that the two separate parcels under two separate legal ownerships could be, and customarily are, still regarded for planning purposes as one shopping centre.

Owners of other shopping centre commercial lands in Peterborough, both developed and undeveloped, have appealed both decisions of the Committee of Adjustment which allowed the consent and minor variance applications as applied for.

Before this hearing and during the course thereof, it became apparent that first the boundaries of the consent lot needed to be altered slightly; second, the variances needed to be altered, and third, there would be need to add conditions to the allowing of the consent not addressed by the Committee in its decision. This matter was appealed to and arrived at the Board in November of 1993 before recent changes to the Planning Act were proclaimed in force in January of 1994.

Counsel for all appellants challenged the Board's power to apply Section 45(18)(1), the new variance amending power, to a case whereof it became seized prior to the coming into effect of that section. In a decision issued separately it was decided that, given the

procedural rather than substantive nature of the amendment, it was within the Board's powers to apply it retroactively or perhaps retrospectively, if that would serve to expedite the process and avoid repetition of proceedings which would otherwise likely transpire. Several of the variances for both the consent lot and the retained lot, related to adjustments to setbacks and to the width of landscaping strips, given that the City was being given road widening strips on both Lansdowne Street and Clonsilla Avenue, upon which the lands also abut. The other variance, involving large numbers, is the required increase in permitted lot coverage on the retained parcel. That would now go from 20 per cent of lot area as allowed in C3, to 28.66 per cent, following the proposed "red lining" to alter the size and shape of both parcels. That change in configuration would also serve to make the consent lot precisely complying as to its lot coverage requirements whereas it would formerly have had approximately 1 per cent more land than needed.

The applicant introduced evidence through its planner Mr. Warren Sorenson, and Mr. D. Annand, a market analyst. Ms. E. Howson, a planner retained previously by the City in its recent major overhaul of the commercial policies found in its Official Plan, was the City's sole witness. Evidence was led in joint fashion by the appellants through a planner, Mr. D. Butler, Mr. Robin Dee, a market analyst and Mr. W.Scott, a qualified realtor, land economist and consultant in the business and investment end of land use. The hearing lasted 13 days, including argument.

The issues raised and confirmed in the procedural direction arising from the pre-hearing conferences are:

Consent

(1) The decision of the Committee does not provide for the creation of the necessary easements and rights-of-way to accommodate mutual driveways and proper servicing of the site.
(2) The retained and consent parcels are irregularly shaped, too small for the proposed purpose, and do not constitute good planning.
(3) The consent is premature, not in the interest of the public, and does not conform with the Official Plan, especially Sections 4.3.3 and 4.3.4.
(4) Access to the site from Lansdowne Street and the configuration of Lansdowne Street itself, in the vicinity of the site itself, are insufficient.

Minor Variance

(1) The variances are not minor in nature and not desirable for the appropriate development of the land.
(2) The variances are not in keeping with the intent of the Official Plan in that the policies of Sections 4.3.3 and 4.3.4 and, in particular, 4.3.3.7, have not been considered.
(3) The variances are not in keeping with the intent and purpose of the zoning by-law in that the zoning by-law applicable to this site, but not the other Major Commercial Shopping Centres, is outdated and does not implement the above-noted policies of the Official Plan.

Without going into great detail, the Board agrees with the applicant's planner M. Sorenson on almost all of those issues with the result that the Board:

(1) Considers that the lack of specificity about the location and nature of the rights-of-way in the Committee's decision is an oversight, as it is referred to in the preamble to the decision as issued and is remediable.
(2) As it is intended that the two parcels are to be used and enjoyed jointly pursuant to an agreement referred to but not shown to the Board, the irregular shape of the parcels is of little concern once the correct rights-of-way and easements are determined and implemented. The Board was advised several times by Mr. Sorenson that divided ownership of interlocking parcels forming a shopping plaza is relatively common. The Board has experienced that phenomenon elsewhere. Therefore, this is not a matter of concern.
(3) The Board considers the access to Lansdowne Street and to Clonsilla Avenue really only matters of site plan concern and the Board is informed that there are no differences between the City and the owner on that issue. The Board is content that is a matter of detail that can and properly should be worked out pursuant to Section 41 of the Act.

The locations shown on the proposed Site Plan, Exhibit 6, used throughout the hearing, are quite reasonable and workable, in the Board's opinion.

(4) As to whether the variances are, or are not, in keeping with the intent and purpose of the zoning by-law, given that "the Zoning by-law is outdated and does not implement the Policies of the Official Plan", the Board finds somewhat conjectural, given that the allowance or dismissal of an appeal against that by-law is not before the Board. The Commercial Policies part of the Official Plan have been recently modified and updated by O.P.A. 57, approved by the O.M.B in a decision released January 5, 1993, and the proper drafting of a by-law (amendment) to implement that O.P.A. might take many forms.

Central Issue

Issue no. 3, under each of the consent and minor variance applications and no. 2 in the variance matter, became in large part the focus of the proceedings. In essence, it was divided in three parts.

(1) The minor variance application was challenged as the inappropriate approach to so major a change, in practical effect, based on the allegation that the O.P.A. and rezoning approach, otherwise required under Sections 4.3.3.7.2, 4.3.3.7.3, 4.3.3.7.4 and 4.3.3.7.5, should have been the approach here and the Board should dismiss the applications on that ground.
(2) The intent and purpose of the new Commercial Policy sections of the O.P., which now applied since O.P.A. 57 came into effect, were policies which these applications, if approved, would not maintain.
(3) The market impact upon two commercially designated centres, one of which is also zoned to permit a quite substantial shopping centre, would impact ad-

versely upon the future planned function of those centres and would thereby not be "minor" by the Board's usual criterion.

First, the Board is content that it has the power by way of minor variance to allow those variances requested, even as further amended after the Committee of Adjustment proceedings and decision. That said, however, the Board is somewhat concerned by the wording used by the City in the new Section 4.3.3.7.1. It reads as follows:

> "Existing centres shall only be permitted to expand to the limit of the zoning existing on September 1, 1988, subject to the authority of the Committee of Adjustment to grant variances to those regulations." (Board emphasis)

The Board does not interpret those words as some form of attempt by the City to amend or confine the powers and "authority" as they so describe it, as granted under the Planning Act. The Board does, however, given the other provisions found immediately after that section, regard it as expressing, to some degree, the City's anticipation in general terms, of the extent to which it might expect the Committee reasonably to go. In other words, the Board does not see that section as a carte blanche to indicate the City's agreement with whatever the Committee might allow under its own interpretation of the limits of its jurisdiction.

Given that Section 4.3.3.7.1 clearly allows existing Major Shopping Centres, of which this K-Mart plaza is agreed to be one, together with the right to expand to the limits of their 1988 zoning, that would permit approximately 11,000 feet of expansion here to approximately 144,500 square feet. Would the further expansion to 185,500 square feet approximately be what the City had envisioned as simply a minor variance? That would properly lie within the Committee's powers as supported by the Divisional Court in McNamara v. Colekin, 2 M.P.L.R. 61, the well-known case in this field. There are clearly arguments for and against. The fact that the City is here supporting the applications represented by its legal counsel and the retained planning consultant it used in the process of developing its Commercial Policy review resulting in O.P.A. 57, suggests its support does go that far.

Given, however, the interpretation of the entire O.P.A. 57 Commercial Policy section of the O.P., the Board feels that to read subsection 4.3.3.7.1 consistently with the rest, it should not be read as going that far. The Board does not rest its decision in these matters solely on that determination.

The Board does not propose to engage in a detailed word for word analysis of the various sections and subsections of the Commercial Area chapter of the Official Plan as fairly recently modified by O.P.A. 57 and approved by the Board. It will suffice to refer to section numbers and summarize their intent.

Clearly, there is no provision in the Plan which contemplates permitting any commercial development outside of the C.B.D. which could be construed as threatening its primacy as the Regional Centre. (Section 4.3.3.).

The subject is designated a Major Shopping Centre Area which permits development as a shopping centre with many retail and/or service commercial uses among others not relevant here. Such Centre may expand to be large enough to accommodate population

and market growth within the regional area that does not prejudice the C.B.D. or the role of existing M.S.C.A.'s and, if possible, the designated Future M.S.C.A. (FMSCA). Further, it must not exceed 150,000 square feet without a satisfactory market impact study or, if it already exceeds 150,000 square feet, it may expand as permitted in Section 4.3.3.7. (See Sections 4.3.3.1, 4.3.3.2, 4.3.3.3, 4.3.3.5.1, 4.3.3.5.2).

Mr. Sorenson's report at page 11 states as follows:

> "The K-Mart plaza would exceed this size range only with the addition of the development proposed in the subject applications (to a total of) 185,000 square feet. This is a situation not expressly addressed by the Plan. However, there is no justification for assuming that the Plan here intends to require a market impact study in this particular circumstance thereby treating this expansion more restrictively than it would the expansion of a larger centre which already exceeds the size range."

Mr. Sorenson does not address the qualification, if any, that might be expected from the words "limited expansion" that are found in two places in the preceding parts of this major section on M.S.C.A.'s. Those two places are in the "Purpose" and "Objective" parts of this major section. According to counsel in argument, Mr. Sorenson acknowledged in cross-examination that Section 4.3.3.7.1 and the powers exercised therein by the Committee and of course this Board, are fundamental to the success of the application.

M.S.C.A.'s may expand as in Section 4.3.3.7.1 above or, if larger than so permitted, only after an amendment to the O.P. and "regardless" not until August 31, 1995. Such expansions must pass several conditions such as the C.B.D. not being prejudiced, or other M.S.C.A.'s and, if possible, the F.M.S.C.A. The expansion by way of use or retail operation shall not be a second such facility within the same Centre. Importantly, no new M.S.C.A. may be established before the F.M.S.C.A. located at Lansdowne and Ashburnham.

All of the foregoing is dependent upon obtaining an O.P.A. and providing a market impact study with various details. (Subsections 4.3.3.7.2, 4.3.3.7.3, 4.3.3.7.4., 4.3.3.7.5, 4.3.3.7.6).

Details as to the development of the F.M.S.C.A described as the John Boddy site, establish its size at a maximum of 150,000 square feet if a market demand study shows the need and the usual prohibition against prejudicing the other Centres or the C.B.D. In any event, it may proceed on a phased basis, with the first phase effectively being 70,000 square feet. It now has zoning for that and may now proceed as of right to that level of development.
(Section 4.3.4.)

Another site referred to frequently (Bowes & Cocks),is located at Sherbrooke and Woodglade and is designated Neighbourhood Commercial, which ranges in size from 8,000 to 80,000 square feet. It is designated but not yet zoned. It was represented that the owners of both the Boddy and Bowes & Cocks sites have received interested enquiries about leasing their premises if built to suit, from Sobeys and other supermarket retailers at sizes which would be the maximum available now on those sites. Their interest was expressed to be dependent on the results of this hearing.

The Boddy and Bowes & Cocks sites are both near the respective outer limits of development at the southeast and northwest corners of the City respectively. This is quite relevant to the City's apparent plan to encourage commercial development to be relatively spread out to better serve the public, rather than become overly concentrated, as is presently submitted, would be the case here. This concentration is along a portion of Lansdowne Street west of the geographic centre of the City. (George Street).

Presently three of the City's four M.S.C.A.'s are located on a relatively short stretch of Lansdowne west of that point.

It is suggested that by the addition of 48,800 more square feet to this immediate area, it will develop into a very intense group of retail and other commercial uses acting in a synergistic way with the possible effect of even challenging the C.B.D.

> O.P. Section 4.3.1.2 states in part:
>
> "The basic undertaking is to pursue a program of distributing future retail commercial facilities development in the City to provide for the maintenance and strengthening of the retail component of the C.B.D."
>
> Subsection 4.3.3.6.3 states:
>
> "No new M.S.C.A.'s, Neighbourhood Commercial Areas or General Commercial Areas shall be located in that portion of Lansdowne Street west of George Street, nor along Clonsilla Avenue."

The proposal is on that part of Lansdowne and also accesses Clonsilla Avenue.

Subsection 4.3.3.7.5 states:

> "There shall be no new major shopping centres established, other than on the site designated F.M.S.C.A. on Schedule "I" without an amendment to the Official Plan and regardless, no new major shopping centres including the site designated F.M.S.C.A. - (until certain conditions are satisfied). However, once these conditions have been satisfied first priority for the establishment of such a centre will be given to the site on the north side of Lansdowne Street at Ashburnham, subject to the policies of Section 4.3.4."

It is argued that it is self evident from the Plan that the Boddy site has preference to be the next M.S.C.A. to develop, even if only in phases as permitted in Section 4.3.4.7.4. These references do not specifically address the expansion of an existing M.S.C.A. as in this case. Expansions of M.S.C.A.'s are covered under Section 4.3.3.7 and it is clear the success of the applicant's case depends upon subsection 4.3.3.7.1 being interpreted very literately according to the words used.

Reference to Section 4.3.5.2 limits M.S.C.A.'s to 14,000 square metres (150,000 square feet) without a market impact study to show that the C.B.D. is not prejudiced nor the other major centres. Thus, it is argued, this development should not be able to subvert

the clear intent of that and other sections that clearly contemplate Market Impact studies, before such size may exceed that limit. No such study was done for the Committee hearing but was prepared by both sides for this hearing. Needless to say, the two studies while agreeing on the fundamental issue of this proposal not affecting any other planned commercial site by causing the closing of any existing stores, they disagree on whether it may delay the opening of the Boddy site referred to above or, if so, by how much. That in turn raises the question of whether the proposal threatens the "planned function" of another commercial facility within the City.

A further Objective expressed for M.S.C.A.'s is found at Section 4.3.3.2 as follows:

> "To recognize existing major shopping centres and provide for limited expansion of such centres, while ensuring that such centres individually and collectively complement the regional centre role which will continue to be served by the retail commercial component of the Regional Centre/C.B.D. Area."

No definition of the term "limited expansion" is found in the Plan but it clearly gives an added sense of limitation in a planning sense to the exercise of the Committee's powers in Section 4.3.3.7.1. In setting forth the Objective of allowing "limited expansion" the more generalized Purpose precedes it in part as follows at Section 4.3.3.1.

> "---The designation recognizes existing major shopping centres and provides for limited expansion of such centres until specific conditions with respect to the Regional Centre/C.B.D. Area have been satisfied.---"

Clearly, in its policies, the City is applying a sense of reasonableness to its process so that it is not necessary for every change in an M.S.C.A. to follow the route of a mandatory market impact study and a zoning change.

The crucial and difficult question is at what point of expansion of use or building area is the more comprehensive process to be required?

Interestingly, when being cross-examined on the possibility that a second major food store not be allowed on the retained parcel by way of variance condition to comply with the sense in Section 4.3.3.7.4:

> "Expansions---shall not include---a major food store where the centre already had one such similar facility---."

Mr. Sorenson agreed that the application by Sobeys is for a "Major Food Store". That, in the Board's mind, is not only obviously correct, it colours to some degree the interpretation to be made of the term "limited expansion" found in Sections 4.3.3.1 and 4.3.3.2.

Before proceeding to deal with the Board's reasoning and conclusions, it is appropriate to say that careful attention to the testimony of the witnesses who presented market impact evidence failed to reveal any relevance to the real issue in this case and for that reason their testimony is not dealt with. The same must be said of the evidence presented by Mr. W. Scott. This is not intended in any way to be critical of their evidence or the manner in which it was presented.

The Board reasons that without some changes to the applicable C3 zoning regulations, the development proposed cannot go forward. Two routes are open. Consent and zoning amendment with its attendant requirement for a market impact analysis or, consent and minor variance(s) as contemplated simply by the Planning Act or, as reinforced by Section 4.3.3.7.1. The applicant chose the second route.

Needless to say, the four tests found in Section 45(1) must be complied with and the Board finds no difficulty saying that the tests concerning Desirability, and Maintenance of the general intent and purpose of the by-law are satisfactorily complied with.

As to being "minor" the usual test is impact and the Board does not accept the suggestions of the appellants that a delay of only an estimated duration on the opening of an already approved F.M.S.C.A. (Boddy site), whose date of opening cannot be accurately predicted as of the date of the hearing, constitutes impact on "the planned function" of an existing facility. While that should lead to the conclusion that the variances are minor, in the context of this particular case and relevant parts of the O.P, the Board will not so find. Found in the same part of the document as the reference in Section 4.3.3.7.1 to being "permitted to expand-- -subject to the authority of the Committee of Adjustment to grant variances to those regulations" which, by itself, opens a very wide possible spectrum given the court's ruling in McNamara v. Colekin above, are the two sections outlining the "Purpose" and the "Objective" of the O.P. in the Commercial sector for Major Shopping Centre Areas. If Sections 4.3.3.1 and 4.3.3.2 with their reference to "limited expansion" did not exist, the Board, based on the above, would have no difficulty accepting that the effect of the variances would be minor keeping in mind the finding of the court in the Coles Book Store case cited above.

Clearly, as a matter of law, a municipality cannot limit the power of a Committee of Adjustment which, though appointed by Council, receive their power in the exercise of their duties from a statute passed and amendable only by the Legislature. That said, however, in allowing variances, one test or criterion is that the variance or the result thereof, must "maintain the general intent and purpose of the O.P."

Quaere, therefore, does the allowing of one or more variances to the application of the existing zoning by-law, whereby expansion on the subject site (two combined would be allowed to a total of almost 185,000 square feet from its present 133,500 square feet approximately, constitute "limited expansion"? That is an increase of approximately 38 per cent. The Board does not usually accept that numerical calculations and analyses really properly apply to the term "minor" as found in Section 45(1) but the presence in the O.P. of the words "limited expansion" cannot be brushed aside.

In interpreting the meaning to be given a word, subsection or whole section, in legislation or policy, the Board is guided by the courts in Re Bele Himmel Invest. Ltd. v. Mississauga, (1982) 13 O.M.B.R. 17 which holds, inter alia, that an Official Plan is a policy document to be interpreted broadly according to its general intent. Thus, in determining the meaning of "subject to the authority of the Committee of Adjustment", the Board is obliged to look at the entire Commercial Policy part of the Plan as recently updated in O.P.A. 57.

Here the Board reads the combination of allowing "limited expansion" on such M.S.C.A.'s together with the reference to the Committee of Adjustment as the enabling

means within the limits of their powers, as just that. The "Purpose" is spelled out in so many words in Section 4.3.3.1 of the Plan, complemented by the "Objective" at Section 4.3.3.2 and enabled by Section 4.3.3.7.1. While the municipality cannot limit the powers of the Committee under the Act, the Board suggests the municipality has clearly indicated that while it wishes the more streamlined and expeditious process to apply, it intends that it do so only as a "limited expansion". That then becomes the "intent and purpose" under the Act to be applied under Section 45(1).

That combination, in the Board's mind, prevents using Section 4.3.3.7.1 in its literal meaning without substantially reducing the degree of variance granted. It is not the Board's function to fill in an appropriate number within which the Committee could operate without concern for exceeding the O.P.'s implied limits. Had the increase over zoned limits been only 10 per cent, the Board estimates there would have been little difficulty.

The Board is also persuaded the intent and purpose of the plan are not being followed in respect of its policy at Section 4.3.1.2:

> "The basic undertaking is to pursue a program of distributing future retail commercial facilities development in the City---."

This policy serves to protect the primacy of the C.B.D., the City's major commercial policy theme and to distribute shopping opportunities relatively equitably around the City with the intent in mind of better serving the shopping public. The proposal would have served to further concentrate the main shopping facilities outside of the C.B.D. on the strip of Lansdowne Street West, west of George Street, proscribed by Section 4.3.3.6.3. Admittedly, that is found in the section dealing with "new" M.S.C.A.'s but it provides a further flavour to the Plan's "Intent and Purpose".

The Board accepts that one of the intents and purposes of the Plan is the above-noted distribution of "future retail commercial facilities development". This application would not maintain that intent and purpose, rather, it conflicts with it.

In several places the figure of 150,000 square feet is cited almost as a tide line beyond which you could not develop without following the more elaborate and "thorough" processes already mentioned. Clearly, here the end result of approximately 185,000 square feet substantially exceeds that.

Submissions that the wrong process had been used to arrive at the result and which should be fatal to the application, the Board does not accept. The Board considers that now all the information necessary has come out in these proceedings. The Board is not too impressed with arguments that depend solely on process for their validity. The Board does not see that the rezoning and market impact study process would have achieved a different result, at least with this panel.

Submissions were made that to allow the consent and variances herein, even with conditions deemed relevant, a precedent would be set, upon which the other major players in the supermarket business in Peterborough would immediately seize, leading to a series of inappropriate changes. The Board is content each such application would be considered on its own merits.

The Board is content that for the reasons set forth above, the intent and purpose of the Official Plan would not be maintained by the allowance of this consent and its attendant variances. They are interdependent and must succeed or fail together. In accordance with the findings of the court in Re 25155 Projects Ltd. v. Morrison, (1975) 5 O.R. (2d) 763, it is sufficient that only one of the required four tests not be achieved to result in a refusal of the variance application.

The appeals against the consent and variances granted are allowed and the applications for consent and minor variances, both as originally made and as subsequently suggested to be changed, are not allowed. The Board so orders.

T.F. BAINES, Vice-Chairman

d/sdd

Update Week 95-40

Planning

Indexed as:

Toronto (City) v. Toronto (City) Committee of Adjustment

The Corporation of the City of Toronto has appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13 from a decision of the Committee of Adjustment of the City of Toronto which granted an application by Truprop Limited/Trucena Properties Limited numbered A-590-94 for a variance from the provisions of By- laws 438-86, as amended and 425-93, respecting 394 King Street West

[1995] O.M.B.D. No. 1616

32 O.M.B.R. 490

File No. V 940411

Ontario Municipal Board

J.R. Mills

Decision: August 23, 1995
Filed: September 18, 1995

(4 pp.)

COUNSEL:

G. Townend, for City of Toronto.
D. Golden, for Truprop Limited.

MEMORANDUM OF ORAL DECISION delivered by J.R. MILLS AND ORDER OF THE BOARD:--

At the commencement of the hearing counsel for the City brought a motion to the effect that the Committee of Adjustment and in turn this Board had no jurisdiction to deal with the subject minor variance application as the use applied for (commercial parking lot) was explicitly prohibited in the City's Zoning By-law 438-86.

The by-law reads as follows:

SECTION 12 EXCEPTIONS APPLYING TO SPECIFIC USE DISTRICTS OR SPECIFIC LANDS

204.(A) No person shall within King-Spadina, use any land for the purpose of a commercial parking lot.

A commercial parking lot is defined in the by-law under Section 2 and counsel for the applicant confirmed that's what it was applying for.

Counsel for the City relied on the following Court and Board decisions to support his motion:

1.Regina v. London Committee of Adjustment Ex Parte Weinstein (1960), O.R. 225 (Ont. Court of Appeal)

2.Re Convenience Services Ltd. and Barrie Committee of Adjustments et al. (1982) 14 O.M.B.R. 12

3.M.B.S. Developments Inc. v. City of North York Committee of Adjustment (1984) 16 O.M.B.R. 142

4.Lieb et al v. Corporation of the City of Toronto (1986) 31 M.P.L.R. 224

5.Russel v. Munch & Fun Amuseland (1987) 20 O.M.B.R. 162

6.Rally Holdings Ltd. et al v. Town of Midland (1975) 5 O.M.B.R. 255

7.Bargoon Auto Parts Inc. v. City of Mississauga (1986) 19 O.M.B.R. 215

8.City of Burlington v. Michael Weinberg & Associates Ltd. (1985) 17 O.M.B.R. 271

9.City of London v. City of London Committee of Adjustment (1994) 30 O.M.B.R. 494

It was the City's position that the subject variance application was not varying a permitted use within the by-law but rather establishing a new use and in fact one that was specifically prohibited within it. It was also his position that one could not satisfy one of the tests of Section 45(1) of the Planning Act as the application could hardly be considered to

be within the intent and purpose of the zoning by-law when the by-law specifically prohibits the use.

Counsel for the applicant requested that the Board not make a decision on the City's motion until it had heard his whole case which would demonstrate that what was applied for was indeed minor or could be allowed as a temporary use or could be considered as an extension to a legal non-conforming use next door. He relied on the following cases to oppose the City's motion and to support the evidence that he would call:

1. Rebelo v. Toronto (City) Committee of Adjustment (1991), 25 O.M.B.R. 477
2. City of Toronto v. 606314 Ontario Ltd. (1987), 21 O.M.B.R. 501
3. Moked v. North York (City) Committee of Adjustment (1993), 28 O.M.B.R. 271
4. Goodwood Club v. Uxbridge (Township) (1990), 24 O.M.B.R. 199
5. City of London v. City of London Committee of Adjustment (1994) 30 O.M.B.R. 494
6. Re City of London By-law (1960), 23 D.L.R. (2d) 175 (Ont. C.A.)
7. Re McNamara Corp. and Colekin Investments (1977), 15 O.R. (2d) 718 (H.C.J. Div.Ct.)
8. Action Sandy Hill v. Catholic Health Assn of Canada (1987), 20 O.M.B.R. 476
9. Re Roman and Andersen (1979), 23 O.R. (2d) 442 (H.C.J. Div. Ct)
10. Sudbury Reg. Municipality v. Sudbury Committee of Adjustment (1993), 30 O.M.B.R. 224
11. Kiss et al v. Phil Dennis Enterprises Ltd. (1974), 3 O.R. (2d) 576 (H.C.J.)
12. Dziuryn v. Halton United Church Extension Council (1984), 16 O.M.B.R. 364
13. Murphy v. Mississauga Committee of Adjustment (1988), 22 O.M.B.R. 209
14. Herridge v. Gulf Oil Canada Ltd. (1983), 15 O.M.B.R. 314

The Board agrees with counsel for the City that it indeed lacks jurisdiction as did the Committee of Adjustment to deal with the subject application. Section 45(1) of the Planning Act can be used to vary a permitted use but not to establish a new use and especially where that use is prohibited within the by-law to be varied.

Even if it was found that the Board did have jurisdiction, any minor variance application must pass the four tests of Section 45(1) and if it fails one of the tests the application fails. How can the variance applied for possibly be consistent with the intent and purpose of By-law 438-86 when that by-law specifically prohibits commercial parking lots in this area of the City? It can't. And therefore failing that test the application fails.

How can the variance applied for be an extension of a legal non-conforming use when the subject land is in fact a separate lot and was not used as a commercial parking lot when By-law 438-86 came into force? It can't. The Board agrees with counsel for the City that performance standards within zoning by-laws can be varied but new uses cannot be created. Finally, even if the Board or in turn the Committee of Adjustment approved the

minor variance on a "temporary" basis such approval could not overcome the foregoing failures.

There are other avenues open to the applicant to achieve what it is after either through a rezoning application or a temporary use by-law application under section 39 of the Planning Act to the City. If the applicant decides to follow one of these avenues and it ultimately ends up with another appeal to this Board, the Board will try to expedite the hearing of that appeal. This is not a guarantee nor should this member be seized of any future hearing on this matter. The City's motion is allowed, the variance applied for is denied and the Board so orders.

The foregoing oral decision was made at the conclusion of the argument on the City's motion. The Board ruled that there would be no benefit in hearing the evidence to be called by the applicant's counsel in arriving at a decision on the motion.

J.R. MILLS, Member

Re

Fred Doucette Holdings Ltd. and Corporation of the City of Waterloo et al. [Indexed as: Fred Doucette Holdings Ltd. v. Waterloo (City)]

32 O.R. (3d) 502

[1997] O.J. No. 6292

Ontario Court (General Division),
Divisional Court,

Southey, Keenan and Sharpe JJ.

March 14, 1997

Planning -- Zoning -- Minor variance -- Applicant's site zoned industrial -- Zoning by-law for industrial zone permitting the retailing of food products produced on the site as an ancillary use -- Applicant applying for a minor variance to permit retailing of food products not produced on site -- Application granted -- Minor variance a flexible concept -- Minor variance may authorize a use not permitted by the existing by-law -- Planning Act, R.S.O. 1990, c. P.13, s. 45(1).

MG processed certain food products at a site located in an area zoned industrial in the City of Waterloo. This use was permitted under the zoning by-law, which included within its industrial uses "food and beverage products manufacturing which shall be limited to 'meat and poultry products', 'bakery products', and 'beverages' as well as 'product assembly, product processing and wholesaling (no retail)'". The zoning by-law also permitted as an ancillary use "up to 50% of the floor space of an industrially zoned building to be used for the display and retailing of products produced, assembled or repaired on the site". Pursuant to s. 45 of the Planning Act, MG applied to the City's Committee of Adjustment for a minor variance to the zoning to permit it to retail food products that were not processed at the site.

F Ltd., which operated a competing business in the City, did not receive notice of MG's application because its own site was at some distance from MG's. The Committee granted the minor variance as it was unopposed and it was the Committee's opinion that the relief requested was in keeping with the general intent and purpose of the by-law and official plan and was desirable for the appropriate development and use of the property. F Ltd. sought judicial review of the Committee's decision on the ground that the variance was not

minor and therefore was beyond the lawful authority of the Committee. F Ltd. submitted that the Committee did not have the power to establish a use not contemplated by the by-law.

Held, the application for judicial review should be dismissed.

Per Sharpe J. (Southey J. concurring): Section 45 of the Planning Act contemplates "a variance from the provisions of the by-law, in respect of the . . . use" of the land. Any decision of a committee of adjustment permitting a variation in the use of the land authorizes a use not permitted by the existing by-law. It was not helpful to determine the question of whether a variance was minor by whether a "new use" had been authorized; rather, this question was to be determined by whether the use could be described as minor in light of the by-law and the other factors specified by s. 45(1). No precise definition of a minor variance was possible and it was necessary to maintain a flexible approach always relating the assessment of the significance of the variance to the surrounding circumstances and to the terms of the existing by-law. In this case, it could not be said that the Committee exceeded its jurisdiction. It duly considered the factors specified by s. 45. The variance did not significantly alter the use of the land. The result might have been different if the industrial zoning prohibited retailing, but this was not the case since the by-law contemplated retailing as well as several non-industrial commercial uses involving the provision of products and services to the public. To the extent that the nature of the retailing was significant, the terms of the variance did not depart significantly from what the by-law already permitted.

Per Keenan J. (dissenting): The application for judicial review should be allowed because the Committee erred in interpreting s. 45 of the Planning Act; in concluding that the variance was in keeping with the general intent and purposes of the zoning by-law and the Official Plan; and in concluding from this and the absence of opposition that the variance was minor. The Committee exceeded its jurisdiction by granting a variance which permitted a use that was clearly and specifically not permitted by the by-law. The Official Plan by specific reference to the retailing of products produced on site must be taken to have considered and excluded as part of the permitted use the retailing of products produced elsewhere. A use which has been considered and excluded is not simply a not permitted use, it is more akin to a prohibited use. Both the Official Plan and the by-law showed a general intent and purpose to preserve the industrial zoning and not to permit retail uses except within a very narrow and specific range of products produced on site. Recognizing that the by-law permits only the retailing of products that are processed on site, it was inconsistent and unreasonable for the Committee to grant the variance. Further, the absence of opposition did not relieve the Committee of the responsibility of making a determination that the variance sought was in fact minor in nature, and the Committee could not conclude from the absence of opposition that the variance was minor.

Cases referred to

Bargoon Auto Parts Inc. v. Mississauga (City) (1986), 19 O.M.B.R. 215; Burlington (City) v. Michael Weinberg & Associates Ltd. (1985), 17 O.M.B.R. 271; Convenience Services Ltd. v. Barrie (City) Committee of Adjustments (1982), 14 O.M.B.R. 12, 139 D.L.R. (3d) 496 (H.C.J.); Lieb v. Toronto (City) (1986), 31 M.P.L.R. 224 (O.M.B.); London (City) v. London

(City) Committee of Adjustment (1994), 30 O.M.B.R. 494; McNamara Corp. v. Colekin Investments Ltd. (1977), 15 O.R. (2d) 718, 76 D.L.R. (3d) 609 (Div. Ct.); Perry v. Taggart, [1971] 3 O.R. 666, 21 D.L.R. (3d) 402 (H.C.J.); Polgrain v. Ivanhoe Corp. (1976), 13 O.R. (2d) 463, 71 D.L.R. (3d) 348, 1 M.P.L.R. 7 (Div. Ct.); R. v. London (City) Committee of Adjustment, ex parte Weinstein, [1960] O.R. 225, 23 D.L.R. (2d) 175 (C.A.)

Statutes referred to

Planning Act, R.S.O. 1990, c. P.13, s. 45(1), (12)

APPLICATION for judicial review of a decision of a Committee of Adjustment granting a minor variance.

Christopher J. Tzekas, for applicant.
Simon J. Adler, for respondent, 1084118 Ontario Inc. (Meats Galore).
M.S. Grossman, for respondent, 813504 Ontario Ltd.
Darrell N. Hawreliak, for respondent, Corporation of the City of Waterloo.

SHARPE J. (SOUTHEY J. concurring): -- This is an application for judicial review of a decision of the Committee of Adjustment of the City of Waterloo granting an application for a "minor variance" to a zoning by-law. The site in question is located in an area zoned industrial. The respondent Meats Galore asserts that at the site it assembles and processes certain food products, a permitted use under the by-law. The by-law permits up to 50 per cent of the building floor area to be used for the display and retailing of products produced, assembled or repaired on the site. Meats Galore also carries on a retail operation in 50 per cent of its building area. The effect of the Committee of Adjustment's decision under review is to allow the respondent Meats Galore to retail food products that are not processed at the site. The applicant operates a competing business in the City of Waterloo and challenges the authority of the Committee of Adjustment to grant this variance. The applicant takes the position that the variance is not "minor" and therefore beyond the lawful authority of the Committee of Adjustment.

Issues

The application raises the following issues:

(1) Did the Committee of Adjustment exceed its jurisdiction in granting the application for the minor variance?
(2) Was the minor variance authorized by the Committee of Adjustment so imprecise and incapable of application or administration that its decision should, in any event, be quashed?

Background

The respondent 1084118 Ontario Limited, operating as "Meats Galore", leased from the respondent 813504 Ontario Limited two units of an industrial strip mall in the City of Waterloo. The two units have a floor area of some 5,000 square feet. There is an issue between the parties as to precisely what activities Meats Galore carries on at the site. That issue is the subject of another pending action. This application for judicial review was presented on the assumption that the business of Meats Galore complies with the zoning by-law as varied by the impugned decision and consists of processing, wholesaling and retailing various food products including meat, poultry, dairy and dry products.

The applicant, Fred Doucette Holdings Ltd., is a franchisee of M & M Meat Shops Ltd. and operates a M & M Store in the City of Waterloo. The applicant's store is located in a commercial plaza in the city some 2.3 kilometres from the premises operated by Meats Galore.

The respondent City of Waterloo maintained a watching brief at the hearing of this application, but pursuant to an agreement with the applicant whereby the applicant undertook not to seek costs against it, the City took no part in the proceedings except to make certain submissions as to costs as between it and the respondents.

The relevant Official Plan and zoning by-law provisions of the City of Waterloo are as follows. Under the Official Plan, the "industrial" designation is defined as follows:

> . . . a category in which the predominant use of land is industrial and permits manufacturing, assembly of goods, processing of raw materials, warehousing, storage of bulk goods, repair and servicing operations, transportation terminals and municipal works yards. A limited amount of space may be permitted for the retail sale and display of products manufactured on the premises subject to the provisions of the zoning by-law.

(Emphasis added)

The Official Plan contemplates "complementary uses" within the industrial designation which include "commercial uses which directly serve the industries or employees, public or commercial recreation facilities". Complementary uses may be permitted under the plan "provided their function will not conflict or interfere with the satisfactory operation and development of areas for industrial purposes". "Complementary service commercial uses" such as coffee shops, banks and offices are also encouraged in industrial areas.

The definition of permitted "industrial uses" in the zoning by-law governing the site in question includes "food and beverage products manufacturing which shall be limited to 'meat and poultry products', 'bakery products' and 'beverages' as well as 'product assembly, product processing and wholesaling (no retail)'".

The provision of the zoning by-law of particular relevance to the present case deals with "ancillary uses". It permits in premises such as those occupied by Meats Galore the use of "up to fifty (50%) percent of the building floor area . . . for the display and retailing of products produced, assembled or repaired on the site". The zoning by-law also defines certain "complementary commercial uses" which include matters such as service stations, offices and parking facilities. Permitted "additional uses" include matters such as banks, coffee shops and the "display and retail sales of hardware and home improvement materials and

accessories". Finally, the by-law specifies certain prohibited uses. It is common ground that no activity carried on by Meats Galore is caught by any of these explicitly prohibited uses.

The principals of Meats Galore first made inquiries about the possibility of leasing the property in question in May 1994. They had certain discussions with the City of Waterloo officials. There is some dispute as to precisely what information was conveyed during these discussions, but that dispute is not relevant to the issues presented on this application. Meats Galore decided to lease the premises and it opened for business on September 15, 1994.

The City Building Inspector visited the premises in October 1994 and found that Meats Galore was displaying and retailing products that had not been produced or assembled on the site. Following a number of meetings involving the city staff, solicitors and the owners of Meats Galore, the city officials recommended to Meats Galore that it proceed with an application for a minor variance to the zoning by-law. As 813504 Ontario Limited is the owner of the premises, the application was presented in its name. Notice of this application was provided in accordance with all regulatory requirements. The applicant did not receive the notice because of the distance between its premises and the Meats Galore site.

The City of Waterloo's Committee of Adjustment heard the application on November 23, 1994 and issued the following decision:

November 23, 1994

File No. 479 Submission No. A-94/94

The following is the Decision of the City of Waterloo Committee of Adjustment respecting the application of 813504 Ontario Limited regarding 105 Lexington Road, Waterloo, Ontario.

"That the application of 813504 for permission to allow 50% of the permitted retail floor area to be used for the retail of food products that are not processed on site whereas the by-law only permits the retail of products that are process on site be approved. This approval shall be subject to the following condition:

1. That the retail items be limited to food products only."

Carried Un.

The subject property is composed of Part Block 2, R.P. 1531 and is municipally known as 105 Lexington Road, Waterloo, Ontario.

The reasons for the above Decision are as follows:

1. In the opinion of the Committee the relief requested is in keeping with the general intent and purpose of the Zoning By-Law and Official Plan and is desirable for the appropriate development and use of the property.
2. No objections were expressed by neighbouring property owners to the application.
3. In view of the above, the Committee is of the opinion that the relief requested can be considered to be minor in nature.

The Planning Act, R.S.O. 1990, c. P.13, s. 45(12) provides for an appeal on the merits of such a decision to the Ontario Municipal Board. No appeal was taken from the Committee of Adjustment's decision in this case.

Analysis

(1) Did the Committee of Adjustment exceed its jurisdiction in granting the application for the minor variance?

The powers of a Committee of Adjustment to authorize variances from the provisions of by-laws is found in the Planning Act, s. 45(1):

> 45(1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

The applicant submits that the Committee of Adjustment exceeded its jurisdiction in that the use it authorized cannot be described as a "minor variance" from the use contemplated by the by-law. No issue was taken by the respondents with the applicant's contention that the interpretation of "minor variance" is a legal question which goes to the Committee's jurisdiction and that the appropriate standard of review is whether the Committee interpreted this statutory provision correctly. As that is how the case was presented to us, and as it is my view that the result in this case would not be different if another standard of review were applied, I proceed on that basis, simply noting that no argument was presented on the issue.

The applicant placed particular reliance on the decision of the Ontario Court of Appeal in R. v. London (City) Committee of Adjustment, ex parte Weinstein, [1960] O.R. 225, 23

D.L.R. (2d) 175 (C.A.). That case involved an attack on a committee of adjustment decision approving the application of a hostel for derelict persons to operate in an area zoned as "light industrial". In its decision, the Committee of Adjustment stated that it found it appropriate "to establish a use, under zoning by-law C.P.-98-133, on the premises . . . which are located in a light industrial zone; for the purpose of the Goodwill Rescue Mission". Morden J.A. observed (at p. 235) that the Planning Act "does not give the committee any power to establish a use , it may authorize or permit a minor variance in respect of the use of the land". He went on to hold that the committee had really failed to deal with the question posed by the statute in that its decision did not specify the permitted use. The decision referred only to "the purpose of the Goodwill Rescue Mission", leaving the use wholly unspecified and subject to whatever the Goodwill Rescue Mission chose to do from time to time.

Morden J.A. made it clear that he was not attempting to define the ambit of "minor variance" (at p. 236): "It would be difficult to define the exact ambit of those words. For the purpose of this judgment I am not required to embark upon such a voyage." While holding that the committee's decision should be quashed, he expressly noted that (at p. 236): "It may be that the proposed use by the Mission when properly described and defined might fall within the term minor variance."

The applicant submits that in approving the variance at issue in the present case, the Committee of Adjustment "established a use" not contemplated by the by-law, contrary to the admonishment of the Court of Appeal in the Weinstein case. It is submitted that the variation permits the use of retailing products not assembled or processed at the site, that such a use is not authorized by the by-law, and that accordingly, the decision established a new use rather than vary an existing use.

In my view, the applicant's submission reads too narrowly the scope of the powers conferred upon the Committee of Adjustment. In light of the unusual circumstances of the Weinstein case and Morden J.A.'s explicit statement that he did not purport to define the term "minor variance", the passage relied on by the applicant should not be given undue weight. The central point of the Court of Appeal's decision was the finding that the committee fell into error because it purported to authorize an unspecified use that bore no relation to the terms of the by-law. It is clear, on the other hand, that the court thought it perfectly possible that a use not precisely authorized by the by-law could be permitted as a minor variance as its decision left open the possibility that the hostel might be allowed under a properly framed order. Indeed, one need go no further than the terms of the statute to reach the conclusion that a minor variance may result in altering the permitted use. Section 45 expressly contemplates a "variance from the provisions of the by-law, in respect of the . . . use" of the land. Any decision of a committee of adjustment permitting a variation in the use of the land authorizes a use not permitted by the existing by-law. The question, in my view, is not helpfully described as whether a "new use" has been authorized, but rather whether the use permitted by the decision can be described as a "minor variance" in light of the by-law and other factors specified by s. 45.

The scope of the power of Committees of Adjustment pursuant to s. 45(1) has been judicially considered on a number of subsequent occasions. It is fair to say that these cases echo Morden J.A.'s view in Weinstein that no precise definition of "minor variance" is pos-

sible. Indeed, in my view, the predominant theme from what emerges is the need to maintain a flexible approach, always relating the assessment of the significance of the variance to the surrounding circumstances and to the terms of the existing by-law.

The decision of Robins J. in the Divisional Court in McNamara Corp. v. Colekin Investments Ltd. (1977), 15 O.R. (2d) 718 at pp. 721-22, 76 D.L.R. (3d) 609, suggests that the powers of the committee of adjustment must be read flexibly:

> Whether the variance proposed is in fact minor, is desirable for the appropriate development or use of the land, building or structure and maintains the general intent and purpose of the by-law and official plan are all matters to be judged by the committee and Board in relation to all the surrounding circumstances of the application. There is no warrant for concluding, as the Board here did, that its jurisdiction and that of a committee of adjustment is automatically cut off whenever a variance amounts to a complete elimination of a requirement of a by-law. It is for the Board and committee to decide whether, to take the case of the by-law in these proceedings, an owner of retail premises having an area more than 6,000 sq. ft. is entitled to a "minor variance" exempting him from the loading space provision, this issue is not removed from their jurisdiction solely because the effect of the variance is total exemption.

Similarly, in Perry v. Taggart, [1971] 3 O.R. 666 at p. 668, 21 D.L.R. (3d) 402 (H.C.J.), it was said that "the phrase 'minor variations' is a relative expression and must be interpreted with regard to the particular circumstance involved". I would also refer to the helpful decision of P.H. Howden, Q.C. (now Howden J. of this court), in Burlington (City) v. Michael Weinberg & Associates Ltd. (1985), 17 O.M.B.R. 271 at pp. 276-77:

> . . . it is for the board to determine, on appeal from the committee, whether the application is a minor variance in the circumstances of the particular case. Because of the inexact terminology used in the Act, it should only be in the clearest of cases where such matters should fall on the issue of jurisdiction. Even in the Weinstein decision, where the committee used the term "establish a use", the court held that it was the lack of precision and clarity in the description of the use that was fatal. On the facts of this case at least, the board finds the distinction between establishment of a use and a minor variance of a use not to be helpful, as no criteria is laid down to clearly distinguish one from the other. On the basis of the decisions reviewed, the question in each case should be, is the particular variance requested one which is minor within the meaning of s. [45 (1)] of the Act?

We were also referred to the decision of Carruthers J. in Convenience Services Ltd. v. Barrie (City) Committee of Adjustments (1982), 14 O.M.B.R. 12, 139 D.L.R. (3d) 496 (H.C.J.). There, a committee of adjustment allowed as a minor variance to a by-law permitting a "local convenience retail store" the use of "supermarket". Carruthers J. found that this could not be sustained as a minor variance (at p. 20):

> I cannot think of circumstances where to permit the right to a use which is not permitted under a zoning by-law can be considered a "minor variation" of that zoning by-law. That is the effect of the Committee's decision here. The Committee was not asked to vary a use which may be made of the land and premises, the subject of the application, by such a degree, either as an extension or otherwise, that can be considered "minor".

In my view, the Barrie case does not call for a narrower reading of the powers of committees of adjustment than the authorities to which I have just referred. Although actual terms of the by-law are not entirely clear from the report of the case, it is apparent from the quoted passage that Carruthers J. was of the view that the variation had the effect of permitting a fundamentally different use, if not a use forbidden by the by-law. I would, in any event, distinguish the Barrie decision from the case at bar on a number of grounds. First, it is clear that the decision to quash the decision of the Committee of Adjustment in that case was also motivated by other factors, in particular, inadequate notice and conduct bordering on fraud on the part of the party seeking the adjustment. Second, Carruthers J. expressly referred to evidence from the city planner to the effect that the application was for a "major variance" that would require a zoning change, that the city council was unlikely to approve such a change and that the Committee adopted the planner's approach (at p. 21) "to do indirectly what it could not do directly". Third, it is my view that there is a considerably greater difference between a "local convenience retail store" and a "supermarket" than there is between a retail arm of an industrial building that sells food products processed on site and one that is in all respects identical except that it also sells food products processed off-site.

In light of these authorities, in my view, it cannot be said in the case at bar that the Committee of Adjustment exceeded its jurisdiction in finding that what was proposed was a "minor variance" to the existing by-law. The decision of the Committee indicates that the factors specified by s. 45 were duly considered. The only change effected by the Committee's order relates to the source of some of the products being retailed. The Committee's order permits the respondent to retail food products not assembled or processed on site. One can appreciate why the source of products being retailed by the respondent is of concern to its competitor, the applicant. It is by no means clear, however, from the perspective of its statutory mandate, why this matter should be of equal concern to the Committee of Adjustment.

The variance did not, in my opinion, significantly alter the use of the land. The case might well be different if the industrial zoning prohibited retailing. That is plainly not the case: the existing by-law contemplates retailing as well as a number of other non-industrial commercial uses involving the provision of products and services to the public. With respect to a particular industrial site, the area permitted for retail purposes is relatively large , up to 50 per cent of the site. From a land use perspective, the nature of the activity of retailing is surely of considerably greater significance than what is being retailed. To the extent that the nature of what is being retailed is significant, the terms of the impugned variance cannot be said to depart significantly from the nature of what the by-law permits the respondents to retail. The by-law restricts them to retailing products assembled or processed at the site. The variation restricts the respondent to retailing the same type of products as that assembled at the site, namely, food products. Finally, the variance in no

way permits the respondents to depart from the requirement of the by-law that any retailing will take place in conjunction with the activity of food processing in the other half of the building not used for retailing. In this regard, it is my view that the use permitted under the variance remains an "accessory" to the industrial use.

I note finally that we were referred to a number of decisions of the Ontario Municipal Board dealing with the issue of "minor variance". In my view, the decision at issue in this application is very much in line with matters found to be "minor variances" by that tribunal when entertaining appeals from committees of adjustment: see, e.g., Burlington (City) v. Michael Weinberg & Associates, supra (by-law permitting "tobacconists", variation permitting sale of convenience items); Bargoon Auto Parts Inc. v. Mississauga (City) (1986), 19 O.M.B.R. 215 (by-law permitting "automobile and truck repair garages", variation permitting "disassembly, storage and distribution of new and used auto parts"); London (City) v. London (City) Committee of Adjustment (1994), 30 O.M.B.R. 494 (by-law permitting sale of six cars; variance to permit sale of 25 cars).

I conclude that in light of the terms of the official plan, the zoning by-law and the terms of the statutory power conferred upon the Committee, it cannot be said that the Committee exceeded its jurisdiction in finding this to be a "minor variance" within the meaning of the Planning Act.

(2) Was the minor variance authorized by the Committee of Adjustment so imprecise and incapable of application or administration that its decision should, in any event, be quashed?

The argument that the variance ordered by the Committee of Adjustment is so imprecise and incapable of administration that it should be quashed is presented in the factum of the applicant, but was not pressed in oral argument. The only authority cited in support of this argument is the Weinstein case, supra. As already noted, that case dealt with a decision found to be deficient because it failed to specify any use. The variance authorized here appears to me to be as precise as the by-law itself. I conclude that the minor variance is not lacking in precision and that this argument is without substance.

Conclusion

For these reasons, I would dismiss the application for judicial review. The respondent Meats Galore is entitled to its costs which I would fix at $4,500. The respondent 813504 Ontario Limited is also entitled to costs, but in view of its more limited participation, I would fix those costs at $2,000. In view of the agreement between the applicant and the City, there shall be no order of costs in favour of the City.

KEENAN J. (dissenting): -- I am unable to agree with the reasons for judgment of Sharpe J. In my judgment, the appeal should be allowed and the order of the Committee of Adjustment set aside for the reasons hereinafter set forth.

The applicant is the franchise operator of an M&M meat shop in a commercial-zoned area of Waterloo ("M&M").

The respondent 1084118 Ontario Inc. operates a business known as Meats Galore with an outlet in an "Industrial One Zone" in Waterloo ("Meats Galore").

M&M competes with Meats Galore. However, because of its location in an industrial strip mall, Meats Galore pays lower taxes and a lower rental rate and thereby has a competitive and financial advantage over M&M.

The Meats Galore outlet is located in an industrial zone. The applicable part of the City of Waterloo's Official Plan provides:

3.3 INDUSTRIAL

3.3.1 The Industrial designation shown on Schedule 'A' is a category in which the predominant use of land is industrial and permits manufacturing, assembly of goods, processing of raw materials, warehousing, storage of bulk goods, repair and servicing operations, transportation terminals and municipal works yards. A limited amount of space may be permitted for the retail sale and display of products manufactured on the premises subject to the provisions of the zoning By-law.

(Emphasis added)

The City of Waterloo Zoning By-law 1418 applies and it provides:

23A INDUSTRIAL ONE ZONE

23A.1 No person shall erect, alter, enlarge or use any building or structure in whole or in part or use any land in whole or in part within the Industrial One "I1" zone for any purpose other than one or more of the following uses:

23A.1.1 Industrial Uses

communication facilities including studios
contractors
custom service shops
dry cleaning and laundry plants
food and beverage products manufacturing which shall be limited to "meat and poultry products", "bakery products" and "beverages"
industrial or construction equipment suppliers
laboratories
manufacturing
printing or publishing
product assembly
product processing

> service and repair establishments
> transportation service
> warehousing and storage (no retail)
> wholesaling (no retail)
>
> 23A.1.2 Ancillary Uses
>
> 23A.1.2.2 for any use listed in section 23A.1.1 except warehousing and storage and wholesaling where said use is in an Industrial Mall where there are three and one half parking spaces or more for every one hundred square metres of building floor area, up to fifty (50%) percent of the building floor area occupied by said use may be permitted to be used for the display and retailing of products produced, assembled or repaired on the site.

(Emphasis added)

A separate action is pending in which the central issue is whether the activity carried on by Meats Galore falls within any of the uses listed in 23A.1.1. For the purposes of this application we assume that it does.

Meats Galore opened for business on the site in September 1994. The product offered for sale in the retail facility included significant amounts of products produced elsewhere than on the site. This problem was noted by the City of Waterloo building and zoning inspector. Subsequent discussions gave rise to an application to the Committee of Adjustment for a variance to permit Meats Galore to display and sell food products which were not processed on the site. City of Waterloo officials assisted in the preparation and presentation of the application at no cost to the applicant. This is not the City's normal practice.

The City of Waterloo's Committee of Adjustment heard the application for variance on November 23, 1994. It decided:

> That the application of 813504 for permission to allow 50% of the permitted retail floor area to be used for the retail of food products that are not processed on site whereas the By-law only permits the retail of products that are process [sic] on site be approved. This approval shall be subject to the following condition:
>
> 1. That the retail items be limited to food products only.
>
> The Committee gave the following reasons for its decision.
>
> 1) In the opinion of the Committee, the relief requested is in keeping with the general intent and purpose of the Zoning By-law and Official Plan and is desirable for the appropriate development and use of the property.
> 2) No objections were expressed by neighbouring property owners to the application.

3) In view of the above, the Committee is of the opinion that the relief requested can be considered to be minor in nature.

As was pointed out by Sharpe J., no issue was taken by the respondents with the applicant's contention that the interpretation of "minor variance" is a legal question which goes to the Committee's jurisdiction and that the appropriate standard of review is whether the Committee interpreted this provision correctly.

In my opinion, the Committee of Adjustment made the following errors:

(1) the Committee erred in its interpretation and application of s. 45 of the Planning Act, R.S.O. 1990, c. P.13;
(2) the Committee erred in concluding that the variance is in keeping with the general intent and purposes of the Zoning by-law and the Official Plan;
(3) the Committee erred in concluding that the variance "can be considered to be minor in nature" based on (2) above and the absence of opposition.

Section 45 of the Planning Act provides:

> 45(1) The committee of adjustment . . . may . . . authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

It was held by this court in Polgrain v. Ivanhoe Corp. (1976), 13 O.R. (2d) 463 at p. 465, 71 D.L.R. (3d) 348, that there are four essential factors that the Committee of Adjustment must consider and find:

(1) that the variance is a minor variance;
(2) that the variance be desirable for the appropriate development or use of the land;
(3) that the general intent and purpose of the By-law be maintained; and
(4) that the general intent and purpose of the Official Plan be maintained.

In my opinion the Committee exceeded its jurisdiction by granting a variance which permitted a use which was clearly and specifically not permitted by the by-law. Having recognized that "the By-law only permits the retail of products that are process(ed) on site", it was inconsistent and patently unreasonable to grant the variance.

The Committee read s. 45 of the Planning Act backwards and formed an opinion that the variance was a minor one because of the absence of objection and its opinion that the use requested is in keeping with the general intent and purpose of the by-law and the Official Plan. The correct approach is to test the proposed variance against the four essential factors. If the proposed variance passes the test, it may be granted. If it does not pass the test, there is no jurisdiction to grant the variance.

The Committee's assertion that the variance is consistent with the zoning by-law and the official plan is an unreasonable finding in view of the clear intention of both the official plan and the by-law to exclude the use permitted by the order. While s. 45 refers to the opinion of the Committee and not the opinion of a court, the Committee's opinion must be a reasonable one. If it is not reasonable, it must be set aside.

The Committee took into account the absence of opposition from those persons who had been served with notice of the application for variance in determining whether the variance sought was indeed a minor variance. The absence of opposition does not relieve the Committee of the responsibility of making a determination that the variance sought was in fact minor in nature. Nor does the absence of opposition relieve the Committee of the obligation to consider whether the proposed variance is consistent with the provisions of the Official Plan and the zoning by-law. It was unreasonable to conclude that the variance could be considered a minor one because of lack of opposition. In this case the variance was not minor in nature and it was unreasonable to conclude that it was.

The variance permits a use which had been specifically addressed and excluded as a permitted use by both the Official Plan and the zoning by-law. Paragraph 3.3.1 of the Official Plan makes a specific exception to permit limited retail sale of products produced on site. It must be taken to have considered retail sales of products produced elsewhere and have specifically excluded that use. Similarly, the by-law in 23A.1.2 makes a specific provision for an ancillary use permitting limited retail sale of products produced on site. The by-law tracks the Official Plan and must be taken to have considered and excluded retail sale of goods produced elsewhere. A use which has been considered and excluded is not simply a "not permitted" use. It is more akin to a "prohibited" use.

A similar circumstance was found in the case of Lieb v. Toronto (City) (1986), 31 M.P.L.R. 224 (O.M.B.). The Ontario Municipal Board reversed a decision of the Committee of Adjustment of the City of Toronto granting a variance. At issue was the use as a motor vehicle repair shop, a use not permitted under the existing by-law although it had been a use permitted under the previous by-law. The Board stated at p. 227:

> It is agreed that there is nothing specifically excluding these uses, but the fact that they were permitted before and are not permitted after would, to this Board, seem an indication that they had been considered . . . and excluded, which in the mind of this Board is the same as indicating that there is a prohibition suggested in this by-law.

And further at p. 228:

> The application here is not to vary a use of a part of their property as an auto repair shop, but is rather to allow a Class B motor vehicle repair shop in an area where such use is not only not permitted but an area from which such a use was excluded intentionally after discussion. This is an additional use, not a variance of a use and we find that irrespective of the Board's opinion, as above stated, that it would not have jurisdiction to grant the variance as requested.

In this case, the proposed variance falls into that same category of a non-permitted use which is the same as a prohibited use. Even if it is not a prohibited use, it is clearly a use which is not permitted under the by-law and cannot be considered a "minor variation" of that by-law. See Convenience Services Ltd. v. Barrie (City) Committee of Adjustments (1982), 14 O.M.B.R. 12 at p. 20, 139 D.L.R. (3d) 496 (H.C.J.).

Both the Official Plan and the by-law recognize that the predominant use in an industrial zone is industrial. Both the Official Plan and the by-law recognize an exception to permit a limited amount of space for retail sale and display of products manufactured on the premises. That exception is granted in the by-law as an "ancillary use" which is clearly limited to retailing and display of products produced on the site. The exception is narrowly limited to allow the traditional "factory outlet store". Both the Official Plan and the by-law show a general intent and purpose to preserve the industrial zoning and not to permit retail uses except within that very narrow and specific range of sale of products produced on site.

Neither the Official Plan nor the by-law contemplate that the limited exception may be used as a lever to expand the exception to change the "factory outlet store" into a retail store for food products generally. In effect, the decision of the Committee of Adjustment introduces a commercial use in place of the narrowly limited exception ancillary to the industrial use of the premises. It has grafted on to the ancillary use another retail use which has been considered and excluded.

The problem of adding a variance to an ancillary use was recognized by the Ontario Municipal Board in London (City) v. London (City) Committee of Adjustment (1994), 30 O.M.B.R. 494. At issue was an application for a variance to expand the uses of an automotive repair site. The existing zoning permitted as an ancillary use the retail sale of up to six cars repaired on the site. The requested variance sought to allow retail sales of 25 cars, not limited to cars repaired on site. The lot had a capacity for 32 cars.

The Board considered at p. 502:

. . . we have a use that differs from the permitted one by

(1) allowing 25 cars for sale instead of six;
(2) allowing a use that is the main use in terms of lot area;
(3) the fact "ancillary" seems to denote that the cars are a by-product of the repair garage but the proposal is for cars that may come from anywhere.

The Board went on to observe that the categories in a zoning by-law were only one aspect of the case. Also taken into consideration were the "appropriateness of uses on specific sites or areas based on lot sizes, comparability and traffic impacts as well as other criteria set out in Section 4.7 , Planning Impact Analysis". The Board considered lot sizes of other permitted car sales uses in the area and found that the applicants compared favourably. The Board noted that a hydro right-of-way separates the site from the nearest residential area, that the adjacent leased lot fell into "garage repair" zoning and could be used to make the subject lot available for car sales only.

The Board noted the economic benefits of permitting the proposed use of what had become a derelict building. Finally, the Board noted that the City had rezoned the site and the leased lot to permit the use sought which may have made the appeal redundant. The

Board concluded that the variance was a proper one given all the criteria in the applicable section of the official plan.

The London case is clearly distinguishable from the instant case. None of the elements which permitted the proposed use to be considered a minor variance in that case are present in this case. There are no planning criteria, area characteristics, zoning amendments or economic considerations which would permit a finding that the general intent and purpose of para. 3.3.1 of the Official Plan or 23A.1.2 of the by-law are maintained. Rather, it is clear that the intended grafting of another non-permitted use onto the permitted ancillary use is a violation of the general intent and purpose of both the Official Plan and the by-law.

Provision in the Official Plan and the by-law for "complementary" uses does not in any way change or modify the general intent and purpose to restrict the zoning to industrial uses. A complementary use is a commercial use which is allowed in an industrial zone for the convenience of the industrial users and their employees. The Official Plan refers to "complementary service commercial uses such as coffee shops, banks and offices". The fact that such uses are permitted in the area does not help to make a variance to permit another commercial use a minor variance.

I conclude that the proposed variance was not a minor variance and it could not reasonably be considered to be in keeping with the general intent and purpose of the Official Plan and the by-law. The order of the Committee of Adjustment should be set aside.

Application dismissed.

Indexed as:

Toronto (City) v. Contact Real Estate Inc.

IN THE MATTER OF an appeal under subsection 96(1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28, as amended from the Decision No. 0077 of the Ontario Municipal Board delivered by N.M. Katary and N.A. Crawford dated January 16, 2001
Context Realty Inc. appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from the Decision of the Committee of Adjustment of the City of Toronto which dismissed its application numbered A460/00 for variances from the provisions of City of Toronto Zoning By-Law 438-86, as amended, respecting 1947-1997 Bloor Street West.
OMB File No. V000322
Between
City of Toronto and David MacAlpine, applicants/moving parties, and
Context Real Estate Inc., respondent

[2001] O.J. No. 3047

Court File Nos. 67/2001 and 69/2001

Ontario Superior Court of Justice
Divisional Court

O'Leary J.

Heard: May 2, 2001.
Judgment: May 4, 2001.

(13 paras.)

Land regulation -- Land use control, zoning bylaws -- Appeals to appeal board -- Jurisdiction, approval of variance or non- compliance -- Reversible error -- Land use control, appeals to the courts -- Leave to appeal, on question of law.

Motion by the City for leave to appeal a decision of the Ontario Municipal Board that allowed an appeal and granted minor variances in connection with Contact's proposed development. The City argued that the Board erred in law by improperly deciding that a minor variance was to be allowed as long as the requested variance did not cause an unacceptable adverse impact upon surrounding land.

HELD: Motion dismissed. The Board was correct in concluding that the variances were minor because they would not have had an adverse impact on surrounding land over and above the adverse impact caused by a building built within the dictates of the zoning by-law. It dealt with the question of whether the requested variances were desirable for the appropriate development or use of the land, and whether the proposed building would maintain the general intent and purpose of the zoning bylaw and the official plan. There was no error of law for the court to consider. Therefore, leave to appeal was not granted.

Statutes, Regulations and Rules Cited:

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 96(1). Ontario Rules of Civil Procedure, Rule 61.

Planning Act, R.S.O. 1990, c. P.13, s. 45, 45(1).

Counsel:

Naomi Brown, for the moving party, City of Toronto.
Robert A. Maxwell and Audrey A. Shecter, for the moving party, David MacAlpine.
Richard Storrey and Mark Noskiewicz, for the respondent.

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1 **O'LEARY J.**:-- This is a motion for leave to appeal to the Divisional Court pursuant to the provisions of s. 96(1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 and Rule 61 of the Rules of Civil Procedure. Leave is sought with respect to a decision of the Ontario Municipal Board (the "Board") dated January 16, 2001, made pursuant to section 45 of the Planning Act, R.S.O. 1990, c. P.13 as amended which allowed an appeal from the Committee of Adjustment and granted six minor variances to the Respondent Context Real Estate Inc. ("Context") in connection with a proposed development at the property municipally known as 1947-1997 Bloor Street West in the City of Toronto.

2 The applicants contend that the Board erred in law by improperly deciding that a request for a minor variance is to be allowed as long as the requested variance does not cause an unacceptable adverse impact upon surrounding land whether built on or natural. It is said that by so doing the Board ignored the requirements of ss. 45(1) of the Planning Act which allows a variance to the zoning by-law only when the variance is: 1.) minor; 2.) desirable for the appropriate development or use of the land; and 3.) maintains the general intent and purpose of the zoning by-law; and 4.) maintains the general intent and purpose of the official plan.

3 I do not agree that the Board granted the requested minor variances solely because they would not have an unacceptable impact on surrounding land. It must be said however that whether the variances requested would have an adverse impact on surrounding lands is extremely important in deciding whether the variances are in fact minor. For example the planner for the City testified that in his opinion the six variances requested resulted in greater mass and height of the building, compared with that allowed by the zoning by-law and so would have a greater adverse impact on surrounding lands and were therefore not minor in nature. There is in my view much merit in the words of Board member A.J.L. Chapman, Q.C., in Motisi et al. v. Bernardi (1987), 20 O.M.B.R. 129 (O.M.B.) at 133:

> 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.

4 The Board then in concluding that the variances requested were minor was quite right in emphasizing that the six variances requested would not have an adverse impact on surrounding land, over and above that caused by a building built within the dictates of the zoning by-law.

5 In dealing with an application of this kind it is prudent to keep in mind the words of Robins J. for this Court in Re McNamara Corporation Ltd. et al. and Colekin Investments Ltd. (1977), 15 O.R. (2d) 718 (Ont. Div. Ct.) at 721-722:

> The Legislature by s. 42(1) confided to committees of adjustment and ultimately to the Municipal Board the authority to allow "minor variances". The statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relative one and should be flexibly applied: Re Perry et al. and Taggart et al., [1971] 3 O.R. 666, 21 D.L.R. (3d) 402 (Ont. H.C.). No hard and fast criteria can be laid down, the question whether a variance is minor must in each case be determined in light of the particular facts and circumstances of the case. In certain situations total exemption from a by-law will exclude a variance from falling within the category of "minor variances". But not necessarily so. In other situations such a variance may be considered a minor one. It is for the committee and, in the event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as "minor".
>
> Whether the variance proposed is in fact minor, is desirable for the appropriate development or use of the land, building or structure and maintains the general intent and purpose of the by-law and official plan are all

> matters to be judged by the committee and Board in relation to all the surrounding circumstances of the application.
>
> ...
>
> With the multitude of by-laws covered by s. 42(1) and the number of details they contain, there must be many instances where full exemption can properly be considered no more than a minor variance. It is, as I have said, for the committee and Board to make that determination.
>
> ...
>
> The owners in this case are entitled to have their application determined under the procedure of s. 42 and not required, as suggested, to seek relief from City Council by amendment to the zoning by-law unless the Board determines if it does on the merits of the matter that the exemption sought is not, as the Committee of Adjustment found, a minor variance.

6 The Board specifically dealt with the question of whether the requested variances were desirable for the appropriate development or use of the land. It reviewed at pages 7-12 of its reasons, the evidence tendered on this point.

7 In the result the Board accepted and acted on the evidence of the architect for Context. He pointed out that to change the proposed structure so as to comply with the zoning by-law:

> First, the ceiling heights would be reduced from 9 feet to 8 feet, for both retail and residential uses, thereby making the space less attractive for both uses in the niche market aimed for in the development. Second, the reduction in height would diminish "the potential of the building creating a sense of enclosure on Bloor Street and enhancing the Main Street experience." Third, the concrete wall associated with the parking structure would "face the single family residences which is less aesthetically pleasing than residences facing residences." Fourth, the reduction in the number of dwellings "reduces the opportunity for intensification. If you do not intensify on Main Street, sprawl will continue, and where else can you intensify without redevelopment of existing built form?" Finally, "the difference in impacts associated with building mass, lighting, shadow, etc., whether five storeys without variances or six storeys with the variances, is so negligible that you have to ask yourself, what is gained and lost by sticking to a general zoning standard applied to this unique site?" He concluded his testimony on the 2.5 option with the candid statement, "as an architect I look at all the design parameters including planning requirements, but I also have to look at the economic feasibility of a project because there is no satisfaction in designing something that cannot be built to address market factors".

8 It should be noted that the Manager of Community Planning with the City testified that if the zoning by-law be strictly adhered to, a three-storey concrete wall facing the existing houses would not lead to a desirable outcome. He felt the proposed variances responded creatively to the situation.

9 As to the desirability of the proposed building for the appropriate development of the land the Board stated:

> ... the proposal was the preference by the applicant/appellant and the planning staff of the City. ...
>
> The architect for the applicant recommended this option not only because it was the best feasible response to the challenge of the unique site but also because it met the dual demands of the official plan for intensification and sensitivity to an established neighbourhood.
>
> ...
>
> The proposal consists of a mixed use building with one level of ground floor retail facing Bloor Street and fifty residential dwelling units. The building is six storeys high facing Bloor Street and includes four storeys of dwellings below grade, with Bloor Street constituting the grade as per the by-law. Looking up north from the base of the building, "it is a ten storey building which is animated and not a concrete wall". The building contains two levels of below grade parking and storage space which do not enter into the FSI calculations. Dwellings are one and two storeys in height and the ceiling height is 9 ft. All dwellings in the building face south with the first level of dwellings on the south face, below grade, having a private landscaped open space at the "ground level", while all other dwellings have a terraced outdoor balcony. The south face of the building is staggered, and complies fully with the requirements of the angular plane in the by-law.
>
> ...
>
> Based upon an analysis of the pertinent evidence, the Board finds that the proposal is a singularly creative response to the multiple challenges posed by the planning instruments and the environmental character of the site and its vicinity.
>
> The relevant question, therefore is, whether or not the proposal, no matter how creative, meets the four tests set out in the Planning A Ct.
>
> ...
>
> This is a battle between a set of general standards in an Official Plan and a zoning by-law and a set of site specific requirements.

> All witnesses, without exception, repeatedly stated that the site was singular in its character traits, admittedly for differing reasons, that ought to be conserved and enhanced,
>
> ...
>
> Based upon an analysis of all of the evidence, the Board finds that the variances requested meet the four tests set out in Section 45(l) of the Planning Act.

10 I am satisfied from the reasons of the Board that it considered not only whether the requested variances were minor and desirable for the appropriate development of the land, but also whether the proposed building would maintain the general intent and purpose of the zoning by-law and the official plan. For example the Board recognized that the density restrictions in the zoning by-law are meant amongst other things to control the length of shadows created by high buildings and avoid traffic congestion. The Board concluded that the proposed structure would not cause an unacceptable adverse impact upon existing development on Bloor Street or existing traffic conditions. Once again lack of adverse impact is relevant but that does not mean the intent and purpose of the zoning by-law was not considered.

11 If it be the argument of the applicants that the Board can only show it has paid heed to the general intent and purpose of the official plan and zoning by-law, by not allowing any variance that exceeds the limits set in the plan and by-law then I find that proposition to be without merit. Subsection 45(1) of the Planning Act gives specific authority to the committee of adjustments, and so the Board on appeal, to authorize minor variances from the provisions of the zoning bylaw if desirable for the appropriate development of the land and if the general intent and purpose of the zoning by-law and official plan are maintained.

12 Since I do not accept the proposition that the Board decided requests for minor variances are to be allowed simply because they do not cause an adverse impact upon surrounding land, I conclude there is no error in law for the Divisional Court to consider.

13 Leave to appeal is refused, the application is therefore dismissed.

O'LEARY J.

cp/s/qlfwb

COURT FILE NO.: Toronto 775/03 & 777/03
DATE: 20050708

*The Rosedale Golf Association Limited et al***.** v *Ontario Municipal Board* et. al (Ontario Divisional Court, dated July 8, 2005)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JUSTICES MATLOW, JARVIS, MOLLOY

B E T W E E N:	)	
	)	
KITSON VINCENT	)	N. Jane Pepino, for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
FREDDY and WENDY DEGASPERIS	)	A. Brown and L. Richetti, for the
	)	Respondents
Respondents	)	
	)	
AND BETWEEN:	)	
	)	
THE ROSEDALE GOLF ASSOCIATION LIMITED	)	Chris Paliare, for the Appellant
	)	
Appellant	)	
- and -	)))))))))))))))	
FREDDY DEGASPERIS JR. and WENDY DEGASPERIS		A. Brown and L. Richetti, for the Respondents
Respondents		
- and -		
ONTARIO MUNICIPAL BOARD		M. Michaels, for the Intervenor, Ontario
Intervenor		Municipal Board
- and -		
CITY OF TORONTO		Andrew Weretelnyk, for the Intervenor,
Intervenor		City of Toronto
	)	
	)	**HEARD:** February 21, 2005

MATLOW J.

REASONS FOR JUDGMENT

[1] Both of these appeals are allowed. The order of the Ontario Municipal Board is set aside and the appeal by the DeGasperis' before the Board is remitted to the Board to be heard by a different panel in accordance with these reasons. If the parties cannot agree on the disposition of costs, written submissions regarding costs may be exchanged and submitted by counsel in triplicate. The submissions by parties claiming costs are to be submitted within one month and all submissions in response are to be delivered within two weeks thereafter.

[2] The appeals are brought pursuant to section 96 (1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 ("the OMB Act") which provides for an appeal from an order of the Board to this Court, with leave, on a question of law. Leave was granted by Cunningham, A.C.J.S.C. whose reasons are reported at [2004] O.J. No. 1153. Both appeals were heard together on the consent of all of the parties and the intervenors.

[3] The order in appeal was an order made by the Board allowing, in part, an appeal by the "DeGasperis'", from a decision of the Committee of Adjustment of the City of Toronto which had dismissed their application for certain minor variances from the zoning by-law applicable to their property at 35 Green Valley Road.

[4] The DeGasperis' initial application is described at the outset of the Board's reasons as follows;

> Green Valley Road is located in the City of Toronto (formerly the City of North York) along which are large lots with substantial homes. The property at No. 35 is one such lot and dwelling. The area is a mature enclave of prestige structures. The applicants, (Mr. F. and Mrs. W. DeGasperis, Jr.) propose to demolish the existing structure and to replace it with a larger, modern, home. Minor variances to the Zoning By-law provisions were sought from the Committee of Adjustment as follows:
>
> 1. north side yard setback of 1.22 metres to the proposed dwelling whereas 1.8 metres is required;
>
> 2. length of dwelling to the rear (living space portion) of 21.3 metres, and length of dwelling to the rear of the proposed covered patio and open terrace above of 26.9 metres whereas 16.8 metres is permitted;
>
> 3. dwelling height of 10.63 metres whereas 8.0 metres for a flat roof is permitted; and
>
> 4. front balcony area of 23.5 square metres and rear balcony area of 81.47 square metres (revised from 110.6 on appeal – the Board accepts the amendment to the application is minor and no further notice is required, invoking Section 45 (18.1) and 45 (18.1.1) of the Planning Act) whereas 3.8 square metres is permitted for each balcony.

[5] By its order, the Board upheld the Committee of Adjustment's decision with respect to the first of these variances sought. However, with respect to the remaining three, the appeal was allowed and the variances sought were granted.

[6] Various issues arise in this appeal regarding the interpretation and application of section 45 (1) of the *Planning Act*, R.S.O. 1990, c. P.13 ("the Act") which confers jurisdiction on committees of adjustment to grant minor variances. It reads as follows:

> 45 (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

[7] The issues raised by the appellants on which leave to appeal was granted are set out in the reasons of the Associate Chief Justice as follows:

> The moving parties raise four issues which they say demonstrate how the OMB erred in law. These issues are as follows:
>
> 1. That the OMB erred in law by subsuming three of the four tests under ss. 45(1) of the Planning Act to the sole question of impact, thereby failing to properly address three of the four tests under that section.
>
> 2. That the Board erred in law in rejecting previous decisions of the OMB that a minor variance is a "special privilege" and that applicants must be able to demonstrate why they could not adhere to the by-law. By taking the position it did, the moving parties say the OMB erred in law by holding that the respondents herein were not required to demonstrate any need for the minor variance in order to satisfy one or more of the prescribed tests.
>
> 3. That the Board manifestly misapprehended the evidence and thereby erred in law by holding that the length of the "habitable" portion of the proposed new dwelling was within the requirements of the by-law. Further, that the OMB erred in law by holding that the height limit set out in the by-law was merely a "technical" requirement such that a variance ought to be granted.
>
> 4. That the OMB erred in law by taking into account and relying upon an irrelevant consideration when it concluded that no impact would result from an illegal and unenforceable condition as related to the rear balcony.

[8] To the extent that I am persuaded that these issues raise questions of law, I will now address them in roughly the same order, commencing with my analysis of the four tests established by section 45 (1) of the *Act*. I will first deal with the applicable law and then review the proceeding before the Board.

[9] An application for a minor variance must meet what is often referred to as the four part test mandated by the *Act*. To satisfy the requirements of the test a variance must:

1. be a minor variance;

2. be desirable, in the opinion of the committee, for the appropriate development or use of the land, building or structure;

3. maintain, in the opinion of the committee, the general intent and purpose of the zoning by-law; and

4. maintain, in the opinion of the committee, the general intent and purpose of the official plan.

[10] These tests can, and therefore must, be interpreted in accordance with the adequately clear and ambiguous language used in section 45 (1) of the *Act*.

[11] It is incumbent on a committee of adjustment, or the Board in the event of an appeal, to consider each of these requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before any application for a variance is granted, it satisfied all of the requirements.

[12] A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties.

[13] Accordingly, in my view the Board was required, at the outset, to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.

[14] The second test requires the committee to consider and reach an opinion on the desirability of the variance sought for the appropriate development or use of the land, building or structure. This includes a consideration of the many factors that can affect the broad public interest as it relates to the development or use.

[15] Accordingly, in my view the Board was required to consider each variance sought and reach an opinion as to whether or not it, either alone or together with the other variances sought, was desirable for the appropriate use of the subject property. The issue was not whether the variance was desirable from the perspective of the DeGasperis' plans for their home but, rather, whether it was desirable from a planning and public interest point of view.

[16] The third test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the zoning by-law.

[17] Accordingly, in my view the Board was required to engage in an analysis of the zoning by-law to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.

[18] The fourth test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the official plan.

[19] Accordingly, in my view the Board was required to engage in an analysis of the official plan to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.

[20] I pause here to observe that the proper performance of this prescribed four-step exercise will rarely be simple. It requires, without exception, a careful and detailed analysis of each application to the extent necessary to determine if each variance sought satisfies the requirements of each of the four tests.

[21] I turn now to the reasons given by the Board and my analysis of how the Board interpreted and applied the four statutory tests.

[22] In its reasons the Board expressed its view that obtaining a minor variance is not a "special privilege", a view contrary to a number of earlier decisions of the Board. In those decisions such as *Assaraf v. City of Toronto Committee of Adjustment* (1994), 31 O.M.B.R. 257, the Board had held that a minor variance is a "special privilege" and will not be granted in the absence of need or hardship. The Board in this case rejected that view, stating at page 3 as follows:

> A minor variance is not a "special privilege" that requires the applicant to justify the relief sought on the basis of need or hardship. The Planning Act authorizes variances to the Zoning By-law if four "tests" are met. Section 45 (1) does not create yet a fifth test of need or a sixth test of hardship. Provided the applicant can satisfy Section 45 (1), the application ought to be authorized if proper planning for the site will result, always mindful of what is in the public interest. It can be said an application is "needed" in every case involving a variance – otherwise the application would be redundant if the proposal adhered to the zoning by-law performance standards. To require proof of hardship is to import words and a test which do not exist upon a reasonable interpretation of Section 45 (1). One can think of a multitude of situations where no hardship is evident but where the application has merit and meets Section 45 (1). Are those applications to be arbitrarily denied? Provided the statutory criteria are applied and the application withstands the scrutiny of acceptable planning practice, then additional, unsanctioned, hurdles will not be imposed by the Board to evaluate minor variance requests.

[23] I agree with the Board's analysis and interpretation of the law as to whether the obtaining a minor variance is a special privilege. However, in addition to what the Board stated I would add that the inclusion of the word "may" in section 45 (1) indicates that the jurisdiction given to a committee of adjustment to grant minor variances is permissive and confers on it a residual discretion as to whether or not grant them even when the four tests are satisfied. In exercising its discretion, a committee is entitled to take into account anything that reasonably bears on whether or not an application should be granted and, in my view,

need and hardship are factors that, in appropriate cases, can properly be taken into account. However, even when these factors are taken into account and an application for a minor variance is granted, that does not transform the granting of the minor variance into a special privilege.

[24] I turn next to how the Board applied the four tests to the minor variances sought. With respect to variances #2, 3 and 4, there is nothing in the Board's reasons that indicates that the Board considered whether those variances were patently too large to qualify as minor. The only factor addressed in the Board's reasons appears to be the likely impact of the variances. It follows, therefore, that the Board's consideration of this test was inadequate.

[25] The Board's application of the remaining three tests can be dealt together. In brief, I am persuaded that the Board's reasons, taken in their entirety, reveal that the Board failed to interpret and apply these tests correctly. In some instances, the Board erred in its interpretation of the tests; in others it failed to consider matters that were essential to their correct application. Throughout the Board's reasons, there are references to the evidence of witnesses whose evidence the Board accepted but those references do not state what the evidence was and why it was preferred over other evidence. Throughout the Board's reasons the focus is on the likely impact of the variances sought with no or little regard for anything else. Of equal importance is the omission of any analysis by the Board of the general intent and purpose of the by-law and the official plan and how the granting of the minor variances sought would maintain those intents and purposes.

[26] Examples of some of the inadequacies of the Board's interpretation and application of these tests can be seen in the following excerpts.

> Page 5
>
> > Collectively and individually, the other variances [My note: this refers to the variances other than variance #1] meet the general intent and purpose of the Official Plan. The site is designated Residential Density One (RD-1). The new development will be compatible with the existing area in terms of scale, function and physical character. The evidence presented by the applicants' planner pertaining to the Official Plan, and the opinion regarding intent and purpose, are preferred and accepted by the Board.
> >
> > The Board accepts the evidence of the applicants' planner that the general purpose and intent of the Zoning By-law will be maintained for the length and height variances.

There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive. The second test requires consideration of "desirability" and not "compatibility". There is no analysis of either the zoning by-law or the official plan or how their respective intents and purposes are maintained. The evidence of the planner pertaining to the official plan is not specified and, because no transcript of the hearing is available, there is no way of determining what that evidence was. Nor are there any details given of the apparently contrary evidence given and why the Board preferred that of the applicants' planner.

> Page 6

> The Board prefers the evidence of the applicants' planner that the four tests in Section 45 (1) are met for the height and length relief.

This repeats the same error described above.

> The remaining request for relief deals with the balconies, both at the front and the rear of the dwelling. There is no issue in the Board's view, the intent of the Official Plan is maintained – balconies are integral to residential structures. The real issue is the size of the balconies and the intent of the Zoning by-law. Balconies, be they functional or decorative, are limited to 3.8 square metres in area. The proposed balconies exceed the limit. But the Board must consider the impact. The front balcony is located on the south side of the dwelling, away from the Ginsler property and adjacent to the service area of the Golf Club. No one is adversely impacted by the front balcony. It will not create a precedent for the area given the location and context. The Board accepts the applicant's planning evidence the four tests are met for the front balcony.

This repeats many of the same errors described above. The focus is on impact. There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive.

> The rear balcony is large but it is intended only for the personal use of the occupants of the dwelling. The spectre of party revelers using the balcony to disrupt the neighbouring property uses was tempered by the offer of the applicants, through their counsel, to physically screen and eliminate access to the majority of the balcony and to turn most of it into a decorative feature of the home. About 32 square metres would be allocated to use by the applicants. Counsel for the objectors question the enforceability of such a restriction or condition. However, the Board is satisfied if the rear balcony is restricted physically as proposed by the applicants, enforceability should not be a problem. Any issue of overview to the neighbouring properties will also be eliminated. No adverse impacts will result. The four tests in Section 45 (1) will be met if the useable area of the rear balcony is confined.

This too repeats many of the same errors described above. The focus is on impact. There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive. Despite section 45 (9) of the Act, the restriction imposed requiring screening of the balcony and use of only "about 32 square metres" is beyond the scope of the Board's authority. The use that can be made of a balcony does not change the fact that the balcony still remains a balcony. As well, the notion that the restricted use of the balcony could or would be effectively enforced is unreasonable.

> In conclusion, the Board accepts and prefers the evidence of the applicants' planner that the variances for length, height and balconies meet the general purpose and intent of the Official Plan, meet the general intent and purpose of the Zoning By-law, that they are desirable for the appropriate development of

> the land and that they are minor, subject to the condition noted and subject to filing revised plans.

This too repeats many of the same errors described above. There is nothing here which satisfies the requirements set out above in paragraph 11. It is not sufficient for the Board to use template catchwords that refer to the four tests in order to show that it properly considered and applied those tests.

[27] Accordingly, on my reading of the entirety of the Board's reasons, I am persuaded that the Board committed numerous errors in its interpretation and application of the four tests. The consequence of those errors must, however, be determined only after consideration of the proper standard of review that is applicable, namely, correctness or reasonableness.

[28] Counsel did not refer us to any cases in which the standard of review was addressed in appeals from decisions of the Board involving applications for minor variances, nor could I find any. Nevertheless, I am satisfied that there is now sufficient guidance from the Court of Appeal and, as well, from this Court to require us to hold that the standard to be applied is that of reasonableness.

[29] The most recent guidance from the Court of Appeal can be found in *Mississauga (City) v. Erin Mills Corp*., 71 O.R. (3d) 397 [2004] O.J. No. 2690. The relevant portion of the judgment in which the related but different issue before the Court is described and the issue of standard of review is addressed is found in the following excerpt from the reasons for judgment of Goudge, J.A.:

> [33] The Board's fundamental task in each case was to determine the test to be used to decide if there was "a conflict" between the various subdivision agreements and the relevant development charge by-law. In other words, what meaning should be given to that term in s. 17(2)? Having settled on a definition of conflict, the Board's task was to go on to apply it to each instance where the developer alleged that a conflict existed.
>
> [34] In my view, the Board's interpretation of "conflict" in s. 17(2) is properly reviewed using a standard of correctness. The considerations relevant to the pragmatic and functional approach to determining the proper standard of review all point in this direction. Those considerations are well known: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration*), 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193.
>
> [35] There is no privative clause protecting the Board's decisions when they come before the Divisional Court on appeal with leave pursuant to s. 96(1) of the Ontario Municipal Board Act. This suggests a less differential standard of review.
>
> [36] The appeal to the Divisional Court can only be on a question of law. Thus, what is reviewed by the court is a finding of law, not one of fact. In this case the legal question is the interpretation to be given to the term "conflict" in a regulation to the 1997 DCA. This is not the Board's home statute nor is there any other reason to presume that the Board has unique experience in interpreting it. Neither is it apparent that the Board's general expertise in matters of planning and land use is engaged in defining this term. The Board would seem to have no greater expertise than the court

> in giving meaning to the concept of "conflict" between a contract and a by-law. This points to closer scrutiny of the Board's decision.

[30] In the case at bar, however, the *Act* is the Board's home statute and there is good reason to presume that the Board does have "unique experience in interpreting it" in relation to the provisions dealing with minor variances. In *London (City of) v. Ayerswood Development Corp.*,

[2002] O.J. No. 4859 (C.A.), the Court of Appeal held that a reasonableness standard should be applied to decisions in which the OMB is interpreting its own statute. A similar analysis was made and the same conclusion reached by this Court in *Eastpine Kennedy-Steeles Ltd. v. Markham (Town*) O.J. No. 644, a case involving another provision of the *Act*. Accordingly, I conclude that reasonableness is the standard of review that must be applied here.

[31] In the circumstances of this case, I am persuaded that the Board's Reasons cannot withstand the somewhat probing examination involved in the reasonableness test. The errors of the Board are so serious and extensive that they fail to meet the standard of reasonableness.

_____

Matlow J.

_____

Jarvis J.

_____

Molloy J.

Released: July 8, 2005

Update Week 2006-27

Planning

Case Name:

Toronto Standard Condominium Corp. #1517 v. Toronto (City) Committee of Adjustment

Toronto Standard Condominium Corporation #1517 has appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from a decision of the Committee of Adjustment of the City of Toronto (Toronto and East York Panel) which granted an application by Concord Adex Developments Corp. numbered A0680/05TEY for variance from the provisions of By-law 438-86, as amended, respecting 361-397 Front Street West and 12-16 Blue Jays Way OMB File No. V050599

[2006] O.M.B.D. No. 707

54 O.M.B.R. 102

35 M.P.L.R. (4th) 152

2006 CarswellOnt 3996

File Nos. PL051279, V050599

Ontario Municipal Board

S.W. Lee (Executive Vice-Chair)

June 21, 2006.

(20 paras.)

COUNSEL:

K.M. Kovar, for Concord Adex Developments Corp.

W.H.O. Mueller, for Toronto Standard Condominium Corporation #1517.

T. Wall, for City of Toronto.

DECISION DELIVERED BY S.W. LEE AND ORDER OF THE BOARD:--

1 These proceedings relate to a driveway constructed to the underground parking facilities of two existing condominium towers at the address set out in the title of proceedings in the City of Toronto. A portion of the driveway has a width of 5.0 metre whereas the applicable zoning by-law requires a 5.5 metre. The driveway is currently used for a two-way traffic operation.

2 To correct this deficiency, Concord Adex, the developer applied to the Committee of Adjustment for a minor variance. It was successful. The decision was appealed to this Board by the condominium corporations. The Board may add, parenthetically, that the condominium corporations have launched legal actions against the developer and the City with respect to this non-conformity and all parties agree that the Board's decision should precede the legal actions.

3 The Board heard an array of evidence of conflicting expert evidence in these proceedings, which include land use planners and traffic engineers. The Board also heard evidence in relation to a civil engineer adduced by the appellant as to the feasibility of conformity and the relative costs of correction if the driveway is to be widened either to the north or to the south. In addition, non-expert evidence was also adduced, including the residents.

4 The driveway leading to the underground parking facilities is a two-way traffic ramp, having a total length of 36 metre from grade to the garage entrance. The driveway is also located at the south portion of the site. There is a grade difference between the subject site and the property to the south owned by the railway authorities CN Rail, not only because of the sloping nature of the ramp, but because of the nature of the site as well. It is a gentle ramp and relatively straight in the sense that there is little curvature. At the bottom, the ramp turns at an angle to the garage door, but remaining at level.

5 The agreed statement of facts indicates that there was delay experienced by Concord during the building permit process in securing the necessary agreement of the railway authorities to permit Concord to encroach, solely for construction purposes, over railway owned lands in order to enable the driveway to be constructed as intended, to conform to the zoning by-law driveway width of 5.5 metre. Accordingly, in order to avoid the encroachment, revised building permit plans were prepared and submitted to the Chief Building Official of the City whereby the width of the driveway was reduced by 0.5 metre. These building permit plans bear the stamps of the City of Toronto on their face.

6 It is trite to state that a relief under Section 45(1) of the Planning Act requires the satisfaction of the requisite tests, traditionally known as the four tests. There has been a

wealth of jurisprudence enunciated pertaining to these provisions over the years, from both the Courts and the Board. In light of the most recent decision rendered by the Divisional Court in Vincent v. DeGasperis [2005] O.J. No. 2890, some doubts have been cast on the state of the law that may pertain to the application of this relief addressing the questions of performance standards. In the course of our analysis, the Board would make the requisite enunciations in the rightful place.

7 It is necessary to re-iterate the long-standing affirmation recognized by the Board for at least three decades that the legislature has in s. 45(1) of the Planning Act created a statutory process whereby a relief is made available to avoid the strait-jacket or rigid applications of the zoning by-law. The relief in question has been designed so that an independent tribunal, whether it is a Committee of Adjustment or the Board, can review and determine whether it can be granted on an individual case using the statutory tests set out. This relief stems from the Legislature's recognition that a zoning by-law, if it is to be applied unfailingly with scant regard for individual circumstances and without due regard to the matters at hand, can result in very odd, undesirable and in some cases wrong situations because the facts in the planning world can be sometimes stranger than fiction. The relief is not to be regarded as an extraordinary remedy. In fact, the relief should be granted in some circumstances, not because non-conformity would be less costly, expedient or convenient, but because nonconformity can, in fact, be satisfactory and acceptable from a planning standpoint.

8 The first question to be answered is whether it is "minor" or not. Neither of the land use planners in these proceedings, Mr. Stagl for the applicant nor Mr. Rendl, for the appellant has made the assertion that it is a matter of the degree of numerical deviation. This is important as both planners have rightfully rejected the mistaken interpretation of certain enunciations of the judgement of DeGasperis. Neither accepted that the question of the size of deviation is determinative to the question whether it is " minor" or not. In this case, a deficiency of 0.5 metre appears, on the surface, to be quite innocuous, but both planners agree that that in itself is insufficient, incomplete or unnecessary to answer this question.

9 The leading case ReNamara Corporation Ltd. and Colekin Investments Ltd. (1977), 15 O.R. (2d) 718 has this to say in terms of variance on a performance standard:

> The Legislature by s. 42(1) confided to committees of adjustment and ultimately to the Municipal Board the authority to allow "minor variances". The statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relative one and should be flexibly applied: Re Perry et al. and Taggart et al., [1971] 3 O.R. 666, 21 D.L.R. (3d) 402 (Ont. H.C.). No hard and fast criteria can be laid down, the question whether a variance is minor must in each case be determined in the light of the particular facts and circumstances of the case. In certain situations total exemption from a by-law will exclude a variance from falling within the category of "minor variances". But not necessarily so. In other situations such a variance may be considered a minor one. It is for the committee and, in the event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as "minor".

10 The recent case of DeGasperis has this to say on the question of being minor:

> A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties.

11 The dicta of Re: Namara have not been overruled or overturned by the most recent DeGasperis case. This is not surprising as the ratio decidendi of Re: Namara has stood the test of time because the judgment recognizes and pays homage to two very important underlying principles. Firstly, whether it is "minor" or not cannot be regarded as a robotic exercise of the degree of numeric deviation, but must be held in light of the fit of appropriateness, the sense of proportion, a due regard to the built and planned environ, the reasons for which the requirement is instituted, the suggested mitigation conditions to address the possible concerns and last, but not the least, the impact of the deviation. Secondly, Re: Namara recognizes that the performance standards of the zoning-law are not an end, but a means to an end. The decision maker must therefore chase after the question whether the planning objectives would be fulfilled if the variance were to be allowed. She must not embark on a tautological and circular exercise of why one cannot abide by the requirements. Neither should she use a yardstick of means, median or any singular numeric approach as a measurement for an appropriate minor variance. Furthermore, a long line of Board cases has held that the assessment of whether it is minor or not cannot be fathomed on an a priori basis. It has been our consistent practice that the question of minor is best to be assessed on an empirical, a concrete and fact-specific basis. In other words, a seemingly "small" deviation may not qualify as "minor". On the other hand, a seemingly "large" deviation or an obliteration of the numeric requirement may be quite appropriate. In short, the numbers themselves are devoid of meaning unless the context is known and rationale for those numbers are known.

12 The Board finds that the driveway width in this nature should not be confused with what is the driveway linking to the public roadway. In fact, the evidence of Mr. Mark, the traffic engineer for the appellant, in giving his evidence has made that confusion in the course of his analysis. Nor should the width of this driveway be confused with the requisite width of the travelled width of a road allowing a two-way traffic even though the former does allow the operation of both inbound and outbound traffic.

13 Unlike a roadway, the speed limit, the use and convention of the ramp such as this would ensure that this is quite different from a highway or a public travelled transportation facility. The Board agrees with Mr. Stagl's analysis that such a driveway is to allow adequate and unobstructed access to parking facilities and from that standpoint, there is evidence to support that the deficiency satisfies the test amply. This does not mean drivers can avoid due caution and care. On the contrary, it is imperative that drivers should exercise such caution. In fact, as our analysis would bear, the proposed conditions would ensure and strengthen the cautionary behaviour of drivers. Exhibit 8 sets out a number of examples whereby the City has approved a number of projects allowing driveway or ramp provisions less than 5.5 metre. These include apartment buildings and residential towers. These comparables obviously are not determinative but illustrative that they have been done in other instances and that the City has not been unduly punctilious or strict in applying the requirement of 5.5 metres and the deficiency of that nature can be regarded as small in degree and minor in amplitude.

14 Two of the other four tests require applications of and probing into the planning instruments that have been enacted by the municipality and completed its review and appeal process. They require the decision-maker to inquire whether the general intent and purposes of the Official Plan and zoning by-law can be met. Both of the planners agree tacitly that the more pertinent consideration is the zoning by-law rather than the Official Plan as there is no issue that both the Part 1 and Part 2 Plans do allow and encourage a high intensity development of this nature. The Board has noted, as pointed out by Mr. Stagl, that in section 16.18 of the Official Plan, the minimum width of a public lane serving residential and park lands are 5.0 metre.

15 The relevant portion of the by-law, Zoning By-law 438-86 sets out the 5.5 metre requirement. Mr. Stagl, in his analysis, has traced from the parent provision of the by-law that this numeric requirement has either replaced or amplified the requirement of adequate and unobstructed driveways or passageway. These indeed are the principal intent and purposes underlying the requisite provisions. They are not to be confused with the design objectives of a transportation facility whereby speed, turning manoeuvre, traffic volume and other safety factors resulting from speeds are the principal concerns.

16 It is also important to note that this ramp is to be designed for the residents' vehicles, not for loading or servicing, as there are facilities for the latter. Although there is disagreement at the hearing whether this ramp should allow bicycles traffic, the Board is satisfied from the design of the underground parking floor plans that this ramp is not designed for bicycles traffic. The Lea Consulting Report dated November 7, 2005, indicates that with due caution from drivers, this ramp operates efficiently as designed. The Board agrees. On the other hand, the Board has not been presented with any cogent or persuasive evidence that a 0.5 metre of additional width would act as an important marginal feature for the improvement of operational efficiency, conveniences, or safety. The Board is well-satisfied that the general intent and purposes of the Official Plan and by-law are met by this variance and that the adequacy and the passageway for the purposes of a ramp of residents' motor vehicles are met.

17 As for whether this would meet the test of the desirable for appropriate development or use of the land, building or structure, the Board finds that the test is met. There is

no evidence that the variance would have any effect on usage, passageway, queuing, on any on or off site inconveniences. The slope or curvature are not substandard. This ramp is only for residential vehicles and there is no pick-ups, drop-offs or service vehicles uses. All the technical evidence shows that this ramp with its 5.0 metre width is workable and efficient. Furthermore, there has not been any demonstrable evidence to show that an extra 0.5 metres can add decisively to the benefits or address decisively to those concerns raised.

18 The questions of safety is debated at length in these proceedings. There is no doubt that there have been incidents scratches and marks on the walls and two incidents, one involving a $2,400 and another $3,400 claim. Mr. Mark, in his report to the Board, maintains that 6.0 metre is what should be required. When crossed-examined, he conceded that the TAC Geometric Design Guide on which he based his opinions represent guidelines but not standards. This is critical as the introduction of TAC specifically delineates that this Guide does not attempt to establish standards and indeed does not use the term. He also admitted he has had little project experience in the City of Toronto, especially for such multi-unit, high intensity projects and he is not aware of 5 metre requirement for the public lane set out in the Official Plan. The Board prefers on the whole the evidence proffered by Mr. Leingruener. In the a.m. peak, as expected, the traffic flow is predominately outbound; in the p.m. peak, the traffic flow is predominately inbound and there are more potential conflict between inbound and outbound traffic at the p.m. peak; however, the duration for such opposing traffic is not high. Nonetheless, to eliminate those instances where there may be conflict, the proposed conditions set out in Exhibit 6 will go a long way to enhance cautions. For example, if flashing red or amber signals are provided at certain locations, drivers would be more aware of on-coming traffic. If the central dividing line is painted and repainted at regular intervals, alertness can be heightened. The two additional conditions suggested should also be included: one indicating no right-turn on red at the base, two, the north wall redesigned to eliminate encroachment at the levels of winged mirrors.

19 In conclusion, the Board finds that the variance should be authorized as the four tests are fully addressed. Mr. Mueller urged the Board to find that these proceedings are designed for the collateral purposes to minimize the damages of the legal actions and to frustrate or stay the legal proceeding launched on behalf of his client. The Board is not persuaded that these proceedings represent any bad faith in the legal or moral sense. It is unfortunate that the original plan to conform is not adhered to; but one must not lose sight of the fact as well that a construction job of this size is a major undertaking and a remission such as this, regrettable as it may be, does happen. It is fortunate that it is caught at last. The Board has not heard any evidence that the respondent had done this intentionally or attempted to hide the errors and our decision is not made to avoid the further expenses that may accrue for corrections. It is our finding that the proposed conditions will go a long way to ensure driver's cautions.

20 Accordingly, the Board orders that the appeal be dismissed and the variance is authorized subject to the conditions set out in Exhibit 6 as amended by the two additional conditions. Exhibit 6 (Attachment "1") is attached hereto to this decision.

S.W. LEE, Executive Vice-Chair

* * * * *

ATTACHMENT "1"

Reqested Variance
361-397 Front Street
City of Toronto

s.s. Variance from the following Section of Zoning By-law 1994-0806 (as amended)

1. Section 4(5)(h), for a driveway width of 5.0 metres for a two-way operation leading to parking facilities, whereas By-law 1994-0806 requires a minimum driveway width of 5.5 metres for a two-way operation.

subject to the following conditions:

1. A white stop bar painted at the bottom of the ramp for incoming vehicles. The stop bar will be located in a position that will provide the driver with clear access to the garage door sensor and will situate the vehicle away from the potential zone of conflict between turning vehicles.
2. A white stop bar be painted at the stop sign at the top of the ramp.
3. The yellow centre line be repainted with a highly visible and reflective paint. All pavement markings should be maintained regularly.
4. The garage door opening mechanisms/detectors are connected to a signal system that can differentiate and manage the respective inbound and outbound calls.
5. Flashing red or amber signals be provided at specific locations to inform drivers of potential on-coming traffic.
6. The signals would be grouped in respect to inbound and outbound traffic.
7. When an inbound call is made through the garage door opener sensor, the signals located inside the garage and on the parapet wall (for outbound traffic) are activated. These would be flashing amber signals to indicate that drivers should proceed with caution.
8. When an outbound call is detected by the garage sensor, the signals located at the bottom (mounted on the wall beyond the garage) and the top of the ramp will be activated. The signal at the bottom of the ramp will flash red to inform drivers that they must yield the right of way to oncoming traffic. The signal at the top of the ramp would be a flashing amber signal to inform drivers that they should proceed with caution.
9. An intelligent controller device will be required to manage this operation.
10. The right-of-way is provided to outbound traffic since there is insufficient room for vehicle queues in the garage. The ramp, as indicated by the survey undertaken will have sufficient capacity to queue up to five inbound vehicles. The probability of five vehicles queuing in one instance is anticipated to be minimal at this time based on the surveys undertaken.
11. The gates located on the ramp west of the garage access should be relocated further west and be closed. The extra space will allow vehicles to

make a three point turn if access to the garage is not granted. Additional caution is required for this occasional manoeuvre.

12. The metal cover above the garage door sensor and intercom should be enlarged to increase the sensor's line of sight. This will reduce the number of vehicles stopping in the outbound lane to open the garage door. An alternate technology may also be considered.
13. Painting the walls of the ramp white to increase reflectivity and visibility.

NOTE: Residents will need to be informed of the system's purpose and operation once designed and installed.

Case Name:

Toronto (City) v. 621 King Developments Ltd.

Between
City of Toronto, Appellant, and
621 King Developments Ltd., Respondent

[2011] O.J. No. 5789

2011 ONSC 7047

289 O.A.C. 217

93 M.P.L.R. (4th) 69

72 O.M.B.R. 16

2011 CarswellOnt 15370

Divisional Court File No. 107/11

Ontario Superior Court of Justice
Divisional Court

J.D. Cunningham A.C.J.S.C.J., G.I. Pardu and
G.M. Mulligan JJ.

Heard: October 27, 2011.
Judgment: December 7, 2011.

(44 paras.)

Municipal law -- Planning and development -- Variances -- Appeals -- Appeal by the City of Toronto from the Ontario Municipal Board's decision permitting nine minor variances for a development on vacant land dismissed -- The variances allowed the respondent developer to construct two mixed commercial and residential towers -- The Board's decision provided more than adequate detail and transparency and the Board did not attribute undue weight to the developer's history of revitalizing the area -- Finally, the Court was not satisfied that the Board had reversed the onus of proof as alleged by the City.

Statutes, Regulations and Rules Cited:

Ontario Municipal Board Act R.S.O. 1990, c. O.28, s. 96(1)

Planning Act R.S.O. 1990, c. P.13, s. 45

Counsel:

B. O'Callaghan and J. Braun, for the Appellant.

C.G. Paliare and R. Stephenson, for the Respondent.

REASONS FOR DECISION

The judgment of the Court was delivered by

1 G.M. MULLIGAN J.:-- The City of Toronto ("the City") appeals from the decision of the Ontario Municipal Board ("the Board") dated February 16, 2011 ("the decision") permitting nine minor variances for a development on vacant land at 621 King Street East, Toronto owned by 621 King Developments Ltd. ("621 King").

2 For the reasons that follow, I would dismiss the appeal.

3 The Board approved nine minor variances to enable 621 King to construct a two tower eleven storey development with the first two floors for commercial use and the balance for residential units. The Board's decision reversed an earlier decision of the City's Committee of Adjustment denying the minor variance applications. The site in question, now vacant, was previously occupied by a motor hotel.

4 The appeal is brought pursuant to section 96(1) of the Ontario Municipal Board Act R.S.O. 1990, c. O.28 ("the OMB Act") which provides for an appeal from an order of the Board to this court with leave on a question of law. Leave was granted by J. Wilson, J. whose reasons are reported at 2011 ONSC 3007. Leave was granted on the following questions concerning the Board's interpretation and application of section 45 of the Planning Act R.S.O. 1990 c. P.13 ("the Planning Act"):

i. Did the Board err in law by failing to conduct an independent analysis of each of the four tests of section 45(1) of the Planning Act for all of the contested minor variances under appeal?
ii. Did the Board err in law by relying on irrelevant factors that do not form part of the minor variance test?
iii. Did the Board err in law by reversing the onus in a minor variance appeal by placing the evidentiary burden on the party opposing the variances rather than on the party supporting the variances?

BACKGROUND FACTS

5 The background facts are summarized in considerable detail in paragraphs 9 to 22 of the decision of J. Wilson, J. By way of brief summary the site is governed by a number

of planning documents including the City's Official Plan, its secondary plan known as the King - Spadina Secondary Plan and a City of Toronto Zoning By-law. The site is also governed by the King - Spadina Urban Design Guidelines which has its goal preserving heritage buildings in this area. In connection with its proposal, 621 King sought nine minor variances from the City of Toronto's Committee of Adjustment. In its decision of October 6, 2010 the Committee of Adjustment refused to grant the minor variances.

6 The Board conducted a hearing de novo over a two-day period and heard evidence from expert witnesses for both sides. At that hearing the City did not oppose three of the nine requested minor variances.

7 The City's by-law in force at the time did not include density restrictions but did include height and set-back requirements in addition to angular plane limitations on buildings on the south side of King Street. The King - Spadina Urban Design Guidelines previously mentioned allowed increased building height if the proposal was part of a conservation, restoration, and maintenance of a heritage building. No heritage building was part of this development proposal as the site was vacant at the time of the application.

8 It is not disputed that this is an area undergoing significant revitalization. This revitalization has been encouraged by policies in the Zoning By-law designating this area as a "reinvestment area" and the City's Official Plan which designates this area as a "regeneration area".

STANDARD OF REVIEW

9 Both parties acknowledge that the appropriate standard of review to be applied to the Board decision is reasonableness. The definition of reasonableness in Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 bears repeating. As the Court stated at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals cannot lend themselves to one specific, particular result. Instead, they give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

10 Before reviewing the position of the parties with respect to the three key issues identified in the leave to appeal decision it is useful to review judicial authorities with respect to the level of deference that ought to be accorded to a specialized tribunal interpreting and applying its home statutes. The authorities provide context for this court's interpretation of whether or not the decision of the Board is reasonable within the context of its analysis of the applicable principles and its articulation of that analysis in its reasons.

11 With respect to the issue of deference toward a specialized tribunal the Supreme Court of Canada provided the following guidance in Dunsmuir (supra) at para 48:

> [D]eference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers". We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision". [citations omitted]

12 With respect to the Board's expertise in interpreting its home statutes Matlow J. noted in Vincent v. DeGasperis, [2005] O.J. No. 2890 (Div.Ct.) at para. 30:

> In the case at bar, however, the [Planning] Act is the Board's home statute and there is good reason to presume that the Board does have "unique experience interpreting it" in relation to the provisions dealing with minor variances.

13 As Sachs J. noted in Dorsay Investments Ltd. v. Toronto (City) 2010 ONSC 3212 at para. 18:

> I am conscious that the question engages the policy expertise of the Board and involves the equivalent of their "home" statutes. As such, the Divisional Court owes deference to the Board's decision and the decision would likely attract a standard of reasonableness on the appeal itself.

14 The importance of reasons that are transparent was reviewed in Clifford v. Ontario (Attorney General) 2009 ONCA 670. As Gouge J.A. stated at para. 29:

> The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. To paraphrase for the administrative law context what the court says in M.(R.E.) at para 24, the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.

15 It is clear that if the Board fails to give adequate reasons for the conclusions reached its decision may be struck down. As Swinton J. noted in Toronto (City) v. Romlek Enterprises, [2009] O.J. No. 2232 (Div.Ct.) at para. 47:

> In the present case, the Board failed to give reasons explaining why the variances granted were properly considered minor.

16 The Planning Act sets out a four part test as to whether or not a variance can be considered minor. As Matlow J. stated in Vincent v. DeGasperis [2005] O.J. No. 2890 (Div.Ct.) at para. 9:

> An application for a minor variance must meet what is often referred to as the four part test mandated by the Act. To satisfy the requirements of the test a variance must:
>
> 1. be a minor variance;
> 2. be desirable, in the opinion of the Committee, for the appropriate development or use of the land, building or structure;
> 3. maintain, in the opinion of the Committee, the general intent and purpose of the zoning by-law; and
> 4. maintain, in the opinion of the Committee, the general intent and purpose of the official plan.

17 In DeGasperis Matlow J. went on to say at para. 13:

> Accordingly, in my view, the Board was required, at the outset to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.

18 But in the words of Gouge J.A. in Clifford: "It is not necessary that the tribunal describe every landmark along the way".

19 As Harvison Young J. set out in Simon v. Bowie 2010 ONSC 5989 (Div.Ct.) at para. 15:

> I do not agree that De Gasperis, (supra), requires that each test be applied entirely separately and formalistically as asserted by Mr. Wood. It is sufficient if the reasons make it clear that the Board applied the correct test substantively, taking the appropriate factors into consideration, and that it considered the evidence properly. In my view, the Board's reasons meet these requirements.

20 In North Barrie Plaza Ltd v. 1729981 Ontario Ltd. 2011 ONSC 3825 McIsaac J., in an application for leave to appeal a minor variance decision, made reference to the same quotation of Gouge J.A. in Clifford. On the facts before him, McIsaac J. concluded at para 18:

> I am satisfied that these reasons [of the Board] conform with the need for "careful and detailed analysis". They tell the applicant and the respondent and, indeed any reader how the Board member got from "a" to "b". It was not necessary to articulate every "landmark along the way".

21 It is clear that the definition of a minor variance has not been precisely defined. As Robins J. stated in McNamara Corp. v. Colekin Investments Ltd. (1977), 15 O.R. (2d) 718 (Div.Ct.) at para. 8:

> The legislature by section 42(1) confided to committees of adjustment and ultimately to the Municipal Board the authority to allow "minor variances". This statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relative one and should be flexibly applied ... It is for the committee and, in event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as "minor".

22 In Supportive Housing Coalition of Metropolitan Toronto Re, 1993 CarswellOnt 5200 (Div.Ct.) Montgomery J. provided the following guidance:

> It is not good enough to pick out pieces of the decision of a tribunal or court and hold them up to a magnifying glass and contend that, within a sentence or two or a paragraph, it is crystal clear that there has been an error. The court must read the totality of a decision and weigh it according to the appropriate test.

THE BOARD'S DECISION

23 After a two day hearing involving expert evidence from both 621 King and the City the Board reserved its decision and issued written reasons. In its conclusions the Board stated at page 16:

> [T]he Board accepts as persuasive that the proposed variances meet all four tests for minor variance and should be approved. The general intent and purpose of the City's Official Plan and Zoning By-law are maintained, the proposal is desirable for the appropriate development of the subject site by balancing a diverse range of planning considerations and issues in a dense, intensifying and revitalizing urban context and represents good planning. Finally, the variances are minor and do not create unacceptable impacts on the surrounding properties or on King Street.

24 In its decision the Board acknowledged the heritage character of the area as well as the significant revitalizing and regenerating pattern of recent developments in the area. To give context to its decision the Board stated at para. 13:

> The area is not simply home to examples of old-style buildings and heritage buildings. It is also replete with examples of city-approved condominium developments that exceed the zoning standards of the area and these two cannot be simply set aside for in the Board's view, they form an integral part of the character of this area.

25 In its written decision the Board informed itself of the nine minor variances being proposed and provided a description of the site and the proposed development.

26 The Board reviewed the planning instruments including the Official Plan and the King - Spadina Secondary Plan and the evidence of the expert witnesses. The Board also noted its own experience and stated at page 4:

> Like the City's Committee of Adjustment, the Board has considerable experience with the planning context of the area and in assessing the merits of numerous development applications for this area in the context of the relevant planning documents.

27 The Board continued at page 5:

> Given the Board's historical familiarity with the area and its expertise interpreting the planning documents in accordance with the requirements of the Planning Act, the Board reviewed the planning evidence of both Parties and determines that there is nothing in the details of the proposed development or in the variances sought that depart in any meaningful way from the planning context of the existing build form, the neighbourhood or its character.

28 The Board noted that there were nearly 30 examples of approvals for similar developments in the area where minor variances had been granted by the Committee of Adjustment or the Board.

29 The Board also noted that the applicant before it, Freed Developments [the owner of 521 King], was a significant player in the revitalization of the King - Spadina area. The Board noted: "the Freed projects co-exist without causing undue impacts on surrounding properties and streets". However, the Board cautioned itself at page 7:

> The Board does not suggest that the developer's previous successes in revitalizing the King - Spadina neighbourhood should serve as a precedent for some automatic approval of this development.

30 At page 7 the Board acknowledged the context of this development and noted that the City had approved "new, tall and taller buildings" in the surrounding area. The Board indicated that its approval of the minor variances was based on several factors. After commenting on similar designs already approved for the area, the Board continued at page 7:

> And, the Board's in-depth reading of the planning documents, consideration of the expert witnesses' testimony and its assessment of the test for these minor variances lead the Board to determine that there has been a consistent pattern of approvals for revitalizing and regenerating this quadrant of the City in the very manner and build form that the applicant proposes through this design.

31 With respect to the four tests to be considered with respect to minor variances the Board began its discussion by stating:

> In considering the four tests for a minor variance as set out in section 45(1) of the Planning Act, the Board considers the planners' and urban designer's opinions in the context of the Official Plan, policies and Zoning By-law standards.

32 I now turn to a consideration of the three questions under appeal.

i. Did the Board fail to conduct an independent analysis of each of the four tests of section 45(1) of the Planning Act for each of the contested minor variances under appeal?

33 With respect to this question the City's position is succinctly stated at para. 30 of its factum:

> The Board erred in law by failing to conduct an independent analysis of each of the four tests of section 45(1) of the Planning Act for all of the contested minor variances under appeal in three ways:
>
> (a) the Board failed to consider the relevant Official Plan policies and accordingly erred in its understanding of how other developments in the area should influence the Decision;
> (b) the Board erred in rendering a decision which lacks sufficient detail and transparency;
> (c) the Board erred in relying on the Developer's witnesses' interpretation of the relevant planning instruments rather than conducting its own independent analysis.

34 In my view no error of law was committed by the Board. There were nine minor variances before it. However, the parties defined very narrowly the single issue before the Board. As the Board stated in its reasons at page 4: "[T]he applicant agreed with the City's opening statement that this hearing is 'all about built form and compatibility with the historic character of the area'. Given the narrow issue presented by the parties, the Board was not obliged to expand at length upon other issues. It was not required to meticulously and formalistically set out each of the four tests for each of the nine minor variances. In the context of this large development, the expert evidence the Board heard from both sides, and its own expertise and experience in this area, the Board set out what was reasonably necessary to provide a pathway to its conclusion. The Board is a specialized tribunal empowered by the legislature to conduct a hearing de novo on appeals of minor variance applications. In its decision the Board noted both its historical familiarity with the area and its expertise in interpreting the planning documents. The Board was obliged to weigh the expert evidence presented to it. It gave logical reasons for preferring the evidence of one expert over the other, and it did not err in so doing. In my view the decision provides more than adequate detail and transparency, especially when measured against the standard of reasonableness.

ii. The Board in erred in law by relying on irrelevant factors that do not form part of the minor variance test in three ways.

35 The City's objection is captured in para. 53 of its factum:

> The Board relied on the following irrelevant factors in rendering its decision which the City submits is contrary to the statutory test and is clearly unreasonable.

(a) the Board erred in confusing the actions of the Committee of Adjustment with the actions of City Council in respect of the approval of other developments in the area and then placing weight on those alleged actions;
(b) the Board erred in penalizing the City in the conduct of its case by placing little weight on the evidence of the City's two witnesses because of the Board's mistaken belief that City Council had approved other developments in the area; and
(c) the Board erred in placing undue or any reliance upon the identity of the developer in its development history.

36 Paragraph (a) refers to the suggestion that City Council somehow approved other developments. The Board's decision makes it clear that there were close to 30 other developments approved in the area. The vast majority of these approvals for minor variances were as a result of decisions of the City's Committee of Adjustment. A few were based on decisions of the Board on appeal from the Committee of Adjustment. Committees of Adjustment are independent bodies established by municipalities. They have an independent function with respect to minor variances. Their approval does not denote approval by the municipality. A municipality is free to appeal the decision of its own Committee of Adjustment, in fact that is what happened here. When a municipality chooses not to appeal the decision of its own Committee of Adjustment it foregoes its right to challenge the decision before the Board. Logically then, a municipality gives tacit approval to a decision of the Committee of Adjustment by not appealing. By inference the Committee's decision is seen as one that has the approval of council. Given the specialized power of the Board, its experience in this area, and its clear understanding of its "home" statutes, I have no hesitation in finding that there was no confusion by the Board with respect to this issue.

37 With respect to paragraph (b), based on the same analysis, the Board made no mistake as to the approval of City Council and therefore the Board did not penalize the City.

38 The Board noted the developer's role in regenerating and revitalizing this area and its successes with respect to other developments. However, the Board specifically cautioned itself by stating:

> The Board does not suggest that the developer's previous successes in revitalizing the King - Spadina neighbourhood should serve as a precedent for some automatic approval of this development. Far from it, and the Board has evaluated this proposal in the context of the specific urban design details and planning evidence before it.

39 I am satisfied that the Board looked to the developer's history of the revitalization of this area in context. It did not attribute undue weight to this factor.

iii. The Board erred in law by reversing the onus in a minor variance appeal and placing it on the party opposing the variances rather than the party making the application for the variances.

40 The City's submission with respect to this issue is captured at paragraphs 68 and 69 of its factum:

> The law regarding the onus of proof in a section 45(1) appeal to the Ontario Municipal Board is clear and well-established. The onus is on the applicant in the development proposal to satisfy the Board that the four tests are met. In this instance, the Board appears to have ignored the well-established onus on the developer and suggests instead that it is up to the City to demonstrate why the proposed development would not fit into the King - Spadina neighbourhood.

41 Reading the decision as a whole, and in the context of the two-day hearing involving expert witnesses from both the developer and the City, I am not satisfied that the Board reversed the onus of proof. The submission of the respondent in its factum at para. 63 is instructive:

> Finally, the Board did not reverse the legal onus. It may be that, once 621 King had adduced evidence that the Minor Variances should be approved, the evidentiary or persuasive burden shifted to the City. But this is not the same as the Board shifting the legal onus to the City. The Board did not make its decision on the basis that the City had a legal onus to discharge and failed to do it. The Board's decision was based upon its review of the evidence as a whole, and its conclusion that the evidence revealed that the proposed variances were minor.

42 The Board is a specialized tribunal given legislative power to conduct hearings de novo with respect to minor variance appeals from Committees of Adjustment. Minor variance hearings are the daily fare of the Board. In my view the Board has not reversed the legal onus.

43 The City's appeal is dismissed.

COSTS

44 The parties agree that costs should be fixed at $17,500 for the successful party. Costs are payable in the amount of $17,500 by the applicant to the respondent forthwith.

J.D. CUNNINGHAM A.C.J.S.C.J.
G.I. PARDU J.
G.M. MULLIGAN J.

Case Name:

Batson v. Ottawa (City)

PROCEEDING COMMENCED UNDER subsection 53(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended
Appellant: Paula Batson
Applicant: Allen and Salvina Nacarrato
Subject: Consent
Property Address/Description: 933, 935 and 937 Falaise Road
Municipality: City of Ottawa
PROCEEDING COMMENCED UNDER subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended
Appellant: Paula Batson
Applicant: Allen and Salvina Nacarrato
Subject: Minor Variance
Variance from By-law No.: 2008-250
Property Address/Description: 933, 935 and 937 Falaise Road
Municipality: City of Ottawa

[2015] O.M.B.D. No. 766

85 O.M.B.R. 262

2015 CarswellOnt 12980

OMB Case No.: PL141480

OMB File Nos.: PL141480, PL141481, PL141482,

PL141483, PL141484, PL141485

Municipal File Nos.: D08-01-14/B-00388, D08-01-14/B-00390,

D08-01-14/B-00391, D08-02-14/A-00369,

D08-02-14/A-00370, D08-02-14/A-00371

Ontario Municipal Board

Ottawa, Ontario

Panel: M.C. Denhez, Member

Heard: July 14, 2015.
Decision: August 18, 2015.

(39 paras.)

Appearances:

Allen and Salvina Nacarrato: E. Blanchard, counsel.

Paula Batson: Self-represented.

DECISION DELIVERED BY M.C. DENHEZ AND ORDER OF THE BOARD

INTRODUCTION

1 This was a dispute over severances on an urban property, with variances.

2 In the City of Ottawa ("the City"), Allen and Salvina Nacarrato ("the applicants") proposed to split a lot with some 39 metres ("m") of frontage (128 feet) into three almost equal parts, with frontage measuring slightly over 40 feet each. The intention was to replace the existing house, of about 1200 square feet, with three new dwellings.

3 This original project, on Falaise Road in the Carleton Heights area, would require consent for the severances, plus variances on three subjects:

(a) **for frontage:** the longstanding zoning called for a minimum frontage of 18 m (59 feet);

(b) **for lot area:** the zoning called for a minimum lot area of 665 square metres ("m[superscript 2]"), whereas these lots would measure between 430.3 m[superscript 2] and 485.6 m[superscript 2];

(c) **for sideyard setbacks** for the proposed new houses.

4 The existing zoning would accommodate two houses (albeit large ones), not three. The applicants applied to the Committee of Adjustment ("COA") accordingly. City planning staff initially had no objection, but later questioned whether those lot sizes were in character with the neighbourhood.

5 However, in a relatively detailed decision, the COA found that the proposed three dwellings would be preferable to a pair of dwellings, if built to the full extent permitted by

the existing zoning. The COA granted the consents and authorized the three variances. It attached the seven standard conditions.

6 Paula Batson ("the appellant") is an area resident who lives some 600 m away. She said she had concerns because "this is a planning issue... This isn't a minor variance." She said that modifications of this scale, to the By-law's requirements for frontage and lot area, should be by way of rezoning, not variances. She appealed the COA decision to the Ontario Municipal Board ("the Board").

7 In the lead-up to the Board hearing, the applicants dropped the part of the variance application for sideyard setbacks. That left the question of lot frontage and lot area, and consents would still be necessary to divide the lot.

8 At the hearing, the applicants were represented by counsel, with the assistance of expert planner Katherine Grechuta. The appellant was self-represented and called no witnesses and other than herself. The City did not attend.

9 The Board has carefully considered all the evidence, as well as the able submissions of both sides. On consent of the parties, the Board also conducted an unaccompanied site visit. The Board finds that normally, there is nothing inherently cramped or substandard about a single-detached lot over 40 feet wide. The Board also agrees, however, that even a lot of those dimensions could potentially appear incongruous, if it was visibly different from the surrounding streetscape to which it was juxtaposed.

10 That would arguably be the case along many of the streets in Carleton Heights, including right around the corner from the subject property, and further down Falaise Road. A residential project which did not "fit" its surroundings (and what is sometimes called "the rhythm of the street") would normally contravene the City's Official Plan ("OP"). A previous Board decision, some blocks west on Falaise Road, in *Cameron v. Ottawa (City) Committee of Adjustment* [2003] O.M.B.D. No. 301 ("*Cameron*") reached a similar conclusion.

11 But the streetscape here is different. As one enters Falaise Road approaching the subject property, only two other houses are in immediate sight. Aside from a school property across the street, and some houses clustered off in the distance (including the vicinity of the Cameron), all one sees are those three houses -- and green.

12 That, the Board finds, is the visible streetscape here.

13 The Board also finds that, although the proposed lot measurements might digress from the streetscape pattern elsewhere in the neighbourhood, it does not visibly do so here, to any significant extent. There is no streetscape of symmetrically wider lots even visible here. The proposal does not digress from the OP, and meets the other relevant tests.

14 Given the Board's finding concerning the character of the streetscape, the Board is prepared to introduce a supplementary condition concerning greenery. To that limited extent, the appeal is allowed in part; the appeal is otherwise dismissed. The details and reasons are set out below.

BACKGROUND AND CONTEXT

15 The subject property, on the north side of Falaise Road, is three doors west of Prince of Wales Drive, a major arterial road. The house at the corner of Prince of Wales Drive has a similar size to most houses in the area; but both the subject property and the one next door have houses that are conspicuously undersized.

16 As mentioned, a school property is across the street to the south. Beyond the school, to the west, is a community centre. Falaise Road dog-legs slightly southward at that point. The upper parts of houses are perceptible beyond that point, but at some distance. North of Falaise Road, two north-south cross streets, Senio Avenue and Claymor Avenue, have "T" intersections with Falaise Road west of the subject property. There are houses on the corner lots, but those houses face the cross streets, with substantially vegetated sideyards along Falaise, giving it that "green" appearance.

17 The subject property has greenery of its own, notably two prominent street trees on City property. The applicant Mr. Nacarrato insisted that it was the applicants' intention to retain as much greenery as possible, including those two trees, though the Board was told of no certainty about how this would be done.

18 On the cross streets and in the surrounding neighbourhood, the character is less green. Lawns are prominent, but houses tend to be wide: although the lot width is considerable, separation distances between houses tend to be modest. The applicants' planner described that layout as "tight knit."

19 There was no dispute that backyards in the neighbourhood tended to be very substantial. There was, however, a dispute over whether that was perceptible from the street. The appellant argued that a passerby could sense the large overall lot areas; the applicants' planner was skeptical, and called overall lot area "indiscernible."

20 The R1 zoning in the area calls for relatively wide lots of almost 60 feet (though the subject property had over twice that), and comparatively large lot area. Some owners in Carleton Heights have used such properties to build grand houses with threecar garages etc. The applicants' proposed houses are substantial (about 2900 square feet), but not what were called the "massive homes" built in some other parts of Carleton Heights.

21 The applicants applied to the COA for variances. City planning staff were guarded in their report to the COA, suggesting that the rationale had yet to be fully elaborated:

> Granted, the lot is located on the periphery of the R1 zone, however, the Department does feel that the neighbourhood context may be better represented by the creation of two lots instead of three. Additional rationale is needed to reinforce the compatibility argument.

22 The COA took a different view:

> The creation of the three proposed lots will not result in an adverse impact on the existing streetscape nor on adjacent properties. The Committee finds that the proposal for three modest detached dwellings will be more compatible with the existing homes in the neighbourhood and will contribute to the residential intensification objectives... in a more positive manner than what could be built as-of-right under the zoning by-law in the

form of two larger detached dwellings. Furthermore, the Committee also notes that the Carleton Heights secondary plan establishes a range of target densities for this area which would result in smaller lot areas than what the zoning by-law presently allows.

CRITERIA

23 The applicable criteria for approving consents for severances are outlined in separate sections of the Act. The relevant provision for consents, s. 53(12), refers to the criteria in s. 51(24):

> ...Regard shall be had, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the municipality and to,
>
> (a) The effect of development... on matters of provincial interest...;
>
> (b) Whether the (proposal) is premature or in the public interest;
>
> (c) Whether the plan conforms to the Official Plan...;
>
> (d) The suitability of the land for the purposes...;
>
> (e) (Highways)
>
> (f) The dimensions and shapes of the proposed lots;
>
> (g) The restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on the adjoining land...
>
> (h)-(l) (Natural resources, floods, services, schools, land dedications, energy)

24 The Act also deals with whether the transaction should proceed instead by way of subdivision; but that suggestion was not made at the hearing. In the absence of new roads or other public facilities which might normally require the subdivision process, the Board finds no need to proceed by way of subdivision.

25 For variances, the criteria (often called "the four tests") are set out at s. 45(1) of the Act, namely that a variance from the applicable By-law may be authorized if it is minor, desirable for the appropriate development or use of the property, and maintains the general intent and purpose of both the Zoning By-law and of the Official Plan ("OP").

26 There was particular discussion of "fit." That is because the OP refers to the concept repeatedly. Policy 2.5.1, on "compatibility", refers to a project which

> enhances an established community and coexists with existing development without causing undue adverse impact on surrounding properties. It

"fits well" with its physical context and "works well" among those functions that surround it.

27 OP Policy 4.11 and the OP Annexes go on to describe those compatibility factors in detail.

ANALYSIS

28 The appellant compiled an impressive amount of mathematical data about lot sizes in the neighbourhood.

29 She also emphasized the "sense of space and greenery". She objected not only to the scale of the mathematical digression from the zoning standards, but also to the fact that there would be "three in a row." Finally, she objected to the notion that such a digression could be sought by way of a variance, instead of rezoning. "What bothers me is that this is an abuse of the planning process."

30 The Board is reminded of the familiar argument, that where digressions from Bylaw requirements appear arithmetically disproportionate, they could not possibly be treated as "minor" variances. That argument was considered at length in court cases like:

* *Vincent v. DeGasperis*, [2005], O.J. No. 2890; 256 D.L.R. (4th) 566; 2000. A.C. 392; 12 M.P.LR. (4th) 1, where the Divisional Court suggested that in some cases, a variance may be too large to be considered minor; and

* *McNamara Corp. Ltd. v. Colekin Inv. Ltd*. [1977] O.J. No. 2222; 15 O.R. (2d) 718, ("*McNamara*") where the Divisional Court said the Board could indeed authorize a variance reducing a substantial zoning standard to zero.

31 Here, the Board is fully aware of the mathematics involved. The Board is also guided by *Assaraf v. Toronto (City) Committee of Adjustment*, [1994] O.M.B.D. No. 1316, 31 O.M.B.R. 257, where it was observed that in *McNamara*, when the standard was reduced to zero, it was because the outcome would be "equal to or perhaps superior to the method otherwise stipulated in the by-law." The Board finds that this was essentially the same rationale invoked by the COA in its decision, with the apparent inference that this was therefore a case where *McNamara* would apply. On consideration, the Board agrees that in this case, the mathematics taken in isolation are not determinative.

32 Turning to the substantive merits, the applicants' expert testified that the three-way split of the lot, and the project generally, complied with all the relevant criteria of the Act. She added that Board approval would not set an ominous precedent for the surrounding area.

33 The Board agrees, for the elementary reason that the surrounding area is different. The subject property is located in a distinctive streetscape, visually isolated from the surrounding streets. The sight lines did not extend around the corners into the cross streets. Whereas the surrounding streets are characterized by a pattern of typically wide houses on wide lots, the subject property is not visibly part of any such pattern.

34 Indeed, no such visible pattern is even within sight.

35 Instead, the streetscape here is comprised of a total of three houses (two of which are undersized), one school, and an expanse of green. Despite the eloquence of the appellant, the Board was not persuaded that the proposal would fail to "fit" that context, either in terms of lot width or lot area.

36 The Board has carefully considered all the evidence. The Board concludes, as the expert opinion confirmed, that the consents and the revised variances, along with the conditions, now meet the statutory criteria. The Board finds no digression from s. 51(24) or the four tests.

37 The corollary to the Board's finding, however, is that at this location, greenery is an important element of the "fit." Mr. Nacarrato emphasized that this was part of the applicants' intent -- but there was also some uncertainty as to how this would be done.

38 The Board concludes that it would be in the interest of the applicants -- and, more importantly, the public interest and consistency with the OP -- that the subject of the greenery be considered professionally. The Board introduces a condition to that effect.

ORDER

39 The Board therefore Orders as follows:

1. The Board dismisses the appeal against the decision of the Committee of Adjustment, as it pertains to variance provisions for lot width. Those provisions, as described by the COA, are authorized.

2. The Board dismisses the appeal against the decision of the COA, as it pertains to variance provisions for lot area. Those provisions, as described by the COA, are authorized.

3. The Board notes that the proposed variance provisions for sideyard setbacks have been withdrawn from the applicants' application, and are hence not authorized.

4. The Board dismisses the appeal against the decision of the COA, as it pertains to the provisional consents for severances. Those provisional consents are granted.

5. The Board confirms the seven conditions which the COA attached to the above.

6. In addition to the above conditions, the Board adds the following two conditions:

    a) The applicants shall engage a qualified professional, whether an arborist or a landscape architect, to prepare, in conjunction with the owners' designer, a plan showing the existing trees

and significant bushes that can be retained outside the proposed building area, including street trees. The plan shall also address the replacement of trees that cannot be so retained, and to provide further green buffers to such extent as is reasonable according to their professional opinion. The said plan must be submitted to the satisfaction of the City, as a condition precedent to the approval of a building permit.

b) Subject to the above, the development shall be essentially in accordance with the plans filed with the Board, at Exhibit 3, Tab 19.

M.C. DENHEZ
MEMBER