



December 15, 2011

Councillor Peter Milczyn
Chair, Planning and Growth Management Committee
Toronto City Hall
100 Queen Street West, Suite C51
Toronto, ON M5H 2N2

RE: Committee of Adjustment Proposed Study

Dear Councillor Milczyn:

We are writing to provide you with a FoNTRA proposal for a study on the Committee of Adjustment (CofA) process for the City of Toronto (please see attached).

Specifically, the study would determine how well the various CofA are working across the City of Toronto; the impacts and costs to the City of Toronto of appeals to the Ontario Municipal Board; and recommendations on the CofA process.

FoNTRA is concerned that the approval process by which homeowners get so-called minor variances to the Zoning By-law is ineffective, time consuming, and expensive. As well, requests for larger and larger variances are by no means "minor" in nature and are regularly approved by the CofA. We would like to have a detailed, statistically valid study to confirm our concerns - or not.

We look forward to discussing this proposed study with you at your earliest convenience.

Yours truly,

Geoff Kettel
Co-Chair, FoNTRA
129 Hanna Road
Toronto, Ontario
M4G 3N6
gkettel@gmail.com

Peter Baker
Co-Chair, FoNTRA
124 Sherwood Avenue
Toronto, Ontario
M4P2A7
peterwbaker@rogers.com

Cc: FoNTRA Representatives & Other Interested Individuals
City of Toronto Councillors

The Federation of North Toronto Residents' Associations (FoNTRA) is a non-profit, volunteer organization comprised of 27 member organizations. Its members, all residents' associations, include at least 170,000 Toronto residents within their boundaries. The 27 residents' associations that make up FoNTRA believe that Ontario and Toronto can and should achieve better development. Its central issue is not *whether* Toronto will grow, but *how*. FoNTRA believes that sustainable urban regions are characterized by environmental balance, fiscal viability, infrastructure investment and social renewal.

FEDERATION OF NORTH TORONTO RESIDENTS' ASSOCIATIONS (FoNTRA)

Committee of Adjustment Effectiveness Study Framework for the City of Toronto –November 2011

Introduction

The City of Toronto's framework for local land-use planning decisions is governed by its Official Plan (OP), Zoning By-laws (ZB), and the City appointed Committees of Adjustment (CofA) which hears applications for **minor** variances from the Zoning By-laws. A new city-wide and harmonized ZB was approved by City Council in September, 2010 and then repealed on May 18, 2011. As a result, the ZBs of the former municipalities (as amended) continue in force.

While appeals of the CofA decisions may be made to the Ontario Municipal Board (OMB), the City has the power through the City of Toronto Act to establish its own Local Appeal Body (LAB), which at this point has not been implemented.

FoNTRA's concern relates not only to the number CofA decisions appealed to the OMB but also, perhaps even more importantly, to the quality, transparency, and consistency of the CofA's decisions and their adherence to provisions of the *Planning Act*. Specifically, the costs for OMB appeals are high, and in addition, an overruling by the OMB of a City's decision sets a new standard for land-use planning.

FoNTRA, and its 27 member area residents' associations, have long been concerned that the process by which homeowners get so-called minor variances to the Zoning By-law approved, is being seriously abused by requests for larger and larger variances that are by no means "minor" in nature and which are regularly approved by the CofA. As one councilor recently put it, "we no longer have a Zoning By-law but a Zoning guideline".

In February 2011, FoNTRA prepared a report with recommendations for improving the CofA process (see Appendix A). This paper identifies four main problems with the CofA process:

1. Too many applications with very large variances approved;
2. The City should defend the Zoning By-laws;
3. The current process is time consuming and costly to all the parties involved; and
4. Appointments to the Committees of Adjustment.

Our February 2011 paper proposed solutions to make the process more effective, less time consuming, as well as less expensive. FoNTRA then met with the Chair of the Planning and Growth Management Committee along with another city councillor to discuss this report.

While we have a great deal of anecdotal evidence about weaknesses of the CofA system, we would like to have a detailed, statistically valid study to confirm our concerns - or not.

Purpose of Study

FoNTRA proposes that a study be conducted on the Committee of Adjustment processes for the City of Toronto. Specifically, the purpose of the study is:

1. To determine how well the various CofA are working across the City of Toronto;
2. To determine the impacts and costs to the City of Toronto of appeals to the OMB; and
3. To recommend changes to the CofA process to make it more effective.

Scope of Study

There are four CofAs in Toronto:

- Toronto/East York
- North York
- Etobicoke/York
- Scarborough

The study should cover each of these areas over a period of 10 years. This would involve an enormous amount of data if every minor variance application for each of these 10 years were to be scrutinized. It is suggested that some form of statistically sound sampling is likely necessary to reduce the data set to a manageable size.

Data Collection

Each of the area CofA is mandated to respond to a request for data (including individual applications and results) for a fee of \$125. For example, Moore Park Residents' Association made such an application and was able to obtain five years of data for Moore Park in hard copy in about two weeks.

Results Expected by CofA Study

- Percentage of applications approved/rejected by year.
- For key parameters (e.g. GFA, lot coverage, height & setbacks), percentage increase allowed over the Zoning By-law.
- What percentage of requests was minor in nature and which were not minor*?
- What percentage of Applications was opposed by City Planning Department?
- Are there any trends apparent over the ten-year period?
- Are there significant differences between the four CofA?

*** According to the *Planning Act*, there are four distinct tests, each of which must be satisfied in order to permit (but not require) approval of a minor variance application:**

- 1) it is minor in size, nature, importance and impact;
- 2) it is desirable for the appropriate development or use of the land, building or structure in relation to the broad public and planning interest;
- 3) upon analysis, the general intent and purpose of the Zoning By-law are found to be maintained; and
- 4) the variance conforms with the Official Plan in effect on the date of the application.

For greater certainty, where the four tests are met, the Committee of Adjustment retains residual discretion as to whether or not to approve the variance.

APPENDIX A

FEDERATION OF NORTH TORONTO RESIDENTS' ASSOCIATIONS

CITY OF TORONTO, COMMITTEE OF ADJUSTMENT RECOMMENDATIONS FOR IMPROVEMENT

Introduction

The City of Toronto's framework for local land use planning decisions is governed by its Official Plan (OP) and Zoning By-laws (ZB) and the City appointed Committee of Adjustment (CofA) which hears applications for **minor** variances from the Zoning By-laws. A new city-wide and harmonized ZB was approved by City Council in September, 2010, but many appeals have been registered against it at the Ontario Municipal Board (OMB). Until the OMB hears the appeals of the new ZB, the provisions of both the old and new by-laws are in effect. While appeals of the CofA decisions may be made to the OMB, the City has the power through the City of Toronto Act to establish its own Local Appeal Board (LAB), which at this point has not been implemented.

In its 2005 decision¹ the Divisional Court clarified the minor variance process quite extensively with respect to the "four tests" for minor variance (Section 45(1) of the *Planning Act* ²). While most minor variance applications involve more than one variance, each variance needs to satisfy each of the following four tests:

- The variance must be minor in nature. The Court concluded that the *Planning Act* must be interpreted to mean that *a variance can be more than minor for two reasons, namely that it is too large to be considered minor or that it is too important to be considered minor.*
- The variance is desirable for the appropriate development or use of the land.
- The variance maintains the general intent and purpose of the Zoning By-law.
- The variance maintains the general intent and purpose of the Official Plan.

These four tests are the law and the CofA is required to adhere to the law, as interpreted by the Divisional Court. The Divisional Court clearly stated that it is incumbent on the CofA to consider each of the four requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so. Further, the CofA is required:

- To examine each variance sought to determine whether or not, with respect to both size and importance, which includes impact, it is minor. Minor in size as variance to the ZB specifications, not variance to existing conditions.
- 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 – including a consideration of the many factors that can affect the broad public interest as it relates to the development or use – and not what is desirable by applicants.

It is our contention that the CofA process as currently implemented by the City of Toronto does not adhere to the law, that the four tests are not supported, and that the process is regularly abused by minor variance applicants. The result is an expensive, time consuming process with many applications being approved, frequently with variances that under any definition cannot be considered "minor" in nature.

¹ Vincent v. Degasperis, 2005 CanL11 24263 (ON S.C.D.C.)

² Section 45(1) of the *Planning Act* (paragraphs 11-20) provide clarification of the "four test" requirements

One of the unfortunate results of this is the gradual erosion of our stable neighbourhoods with monster houses on tiny lots.

It should be noted that according to the *Planning Act* as well as the court decision, even when the four tests are met, the CofA retains the discretion as to whether or not to approve the variance.

This paper identifies four main problems with the CofA process, including examples, and proposed solutions to making the process more effective, less time consuming and less expensive.

1. Too many applications with very large variances approved

The new OP for the City of Toronto requires the existing character of areas designated as *Neighbourhoods* to be preserved. One of the biggest problems is that the CofA process frequently approves variances that far exceed those allowed by the ZB. The explanation given is that if the application is refused, it will be appealed to the OMB which will then approve it.

In addition, the minimum density allowed for an increase in density or Floor Space Index (FSI) requested for a *new* house, for example, is from 0.60 to 0.69 – the allowance for a *renovation*. This allowance for renovations was put in place as an incentive not to demolish perfectly good houses but to renovate them; it was not intended as the starting point for reconstructed/ new houses. Frequently, developers indicate that they need the extra density or FSI to justify buying an older home, tearing it down and replacing it, which is not a valid planning reason.

Examples:

- At 464 St Clair Ave East, a FSI of 0.98 was approved representing a 64% increase over the maximum (0.60) allowed by the ZB. This is not a minor variance.
- At 323 Sheldrake Ave, a new house was approved with a FSI of 0.54 that is 55% greater than the 0.35 permitted by the ZB in this area. In addition, there were several other height and setback allowances allowed, some of which were greater than 100% more than allowed. Also, a 3-storey house was allowed, which is specifically prohibited by the new ZB in this area.

Recommended Solutions:

- The City should set up a Local Appeal Board (LAB) that is completely independent from the City administration. The LAB would replace the OMB and would handle appeals arising from CofA decisions, as it is allowed to do under the new City of Toronto Act. According to a 2010 City Staff Report, the implementation of the LAB would cost the City about \$1.9M per year, less any fees payable for the appeals. Note: If the other recommendations suggested here were to be put in place, there should be a saving of at least this amount through a lower cost of operating the CofA process.
- To maintain the general intent of the ZB and the OP, the CofA, (which derives its authority from the *Planning Act* (45(1)), should be directed to apply the “four tests” of the *Planning Act* for all minor variances. While it is recognized that there will be situations that call for some flexibility in the application of the ZB, these should be the exception and generally construction must adhere to the ZB. In particular, economic reasons (“I need the extra floor space to make this project viable”) should not be considered valid. If this recommendation was put in place and strictly adhered to, there would be far fewer applications made to the CofA.

2. The City should defend the Zoning By-laws

The City's ZB needs to be upheld. City Council should direct the Planning Division to support the CofA by reviewing all minor variance application against the four tests of the *Planning Act*. Generally, it is rare that the City's area planners will recommend against an application even when very large variances are proposed. They will frequently justify their position by saying that other similar variances have been approved in the past when they know, or should know, that previous approvals are not supposed to become precedents.

Furthermore, it appears as if some planners may not be entirely familiar with the ZB, particularly the application of the new ZB.

Examples:

- At 288 Mount Pleasant Rd, the planner found that a FSI of 0.93 (v. 0.60 allowed) was acceptable as were major variances requested for setbacks. The FSI requested is 53% greater than allowed.
- At 243 Rose Park, the planner was willing to accept a FSI of 0.87 for a 3-storey, flat roofed house which is expressly forbidden by the new ZB.

Recommended Solutions:

- The City should have a more active role in defending its OP and ZB by professionals at both the CofA and the OMB.
- The City should ensure that the CofA follow the provisions of the *Planning Act*, as interpreted by the 2005 Divisional Court decision.
- The CofA should advise applicants that variances will not be approved unless all aspects of the *Planning Act* with respect to minor variances are followed.
- City Council needs to ensure that its planners are expert on the ZB rules and their applications.
- The Planning Division should be asked to report back on the resources that it requires to adequately review ZB minor variance applications received.
- City Council should be prepared to approve additional resources to the Planning Division, if needed, to the Planning Division for the Cof A.

3. The current process is time consuming and costly to all the parties involved

There are far too many applications for "minor" variances being heard by the CofAs and far too many applications are approved, unchanged or with minor amendments. While most applications are reviewed by a Zoning Examiner, it is possible to bypass the Examiner and submit an application directly to the CofA with only the applicants' interpretation of the variances required. The CofA (and the OMB if an appeal is involved) can, by law, only consider the variances applied for. If an applicant fails to request variances that should have been identified, nothing can be done until the approved application reaches the Building Permit Department. If it finds additional variances, the Building Permit Department can refuse a building permit. In this situation, the entire process then starts again.

With so many applications and limited staff, the CofAs rarely have time to provide sufficient attention to often quite complex applications or to allow those opposed to the application reasonable time for dissent.

Examples:

- On any given day, the CofAs can be expected to hear upwards of 30 applications.
- The application for 243 Rose Park drive was allowed to bypass the Zoning Examiner even though a number of major variances were omitted. While these were pointed out to the CofA at the hearing, the CofA refused to consider them and instead approved the application that then had to be appealed to the OMB at considerable expense.

Recommended Solutions:

- All applications, without exception, should be subject to review by the Zoning Examiner prior to consideration by the CofAs.
- The CofAs should allow sufficient time for each application to be properly reviewed.
- The current process that allows very little time for interveners to analyze the appeal applications thoroughly, should be amended to allow for at least 3 weeks between the receipt of applications by interveners and the appeal hearing.
- A review should be undertaken to determine how the CofA process might be streamlined and simplified.

4. Appointments to the Committee of Adjustment

The current process of appointments is far from transparent and a number of appointments appear to be political in nature rather than on the basis of capability and expertise. There does not appear to be much consistency between the various CofA panels. Further, panel members are volunteers who receive a small per meeting stipend for their efforts

Recommended Solutions:

- The City should have a more active role in improving the CofA process by controlling the appointment process and ensuring that well-qualified members hear the applications.
- The appointment process should be open and transparent with each position appropriately advertised and candidates interviewed by an appropriate “striking” committee (including experienced staff).
- Appointments should be made on the basis of merit, not through political connections.
- Each CofA panel is required by law to apply the four tests for minor variances to determine whether an application is minor and should demonstrate in their report the application of the four tests to ensure that the law is enforced.

Conclusion

The implementation of these recommendations would bring about a respect for the City’s new harmonized ZB that would result in a reduction of the over development which is becoming so prevalent in old established neighbourhoods. In addition, the CofA process in the City of Toronto would be far more cost-effective, transparent and efficient.