THE CORPORATION OF THE CITY OF NORTH YORK

File No.: CA-84-304

Sub. No.: A-775/84

DECISION OF THE COMMITTEE:

IN THE MATTER OF SECTION 44 of the Planning Act and the City of North York Zoning By-law 7625, as amended,

IN THE MATTER OF land known as Lot 31, Plan 2633 Immediately to the east of 144 McKee Avenue

which land is zoned as: R-4 Single Family Detached Dwelling Zone

AND IN THE MATTER OF an application by: BUGLE CONSTRUCTION CO. LTD.

in respect of land herein described for a variance from the City of North York Zoning By-law 7625, as amended, to permit the construction of a two storey dwelling on the above noted property.

		VARIANCE:	BY-LAW REQUIRES:
Lot frontage & width	Approx.	7.62 m	15.00 m
West side yard setback	Approx.	1.20 m	1.80 m
East side yard setback	Approx.	0.90 m	1.80 m
Lot area	Approx.	294.97 m^2	550.00 m^2

This application was heard by the North York Committee of Adjustment on Thursday, November 15, 1984 due notice of such Hearing having been sent as required by the Committee of Adjustment.

IT WAS THE DECISION OF THE COMMITTEE OF ADJUSTMENT THAT:
this application be REFUSED. Grounds for refusal are that the variance is not minor, is not within the general intent of the Zoning By-law and is not an appropriate development of the property.

Certified to be a true copy of the North York Committee of Adjustment's Decision respecting this application.

G. Evangelista
Deputy Secretary-Treasurer,
Committee of Adjustment

(Signed) P. Graham
CHAIRMAN

Signed this 15th day of November, 1984 by all Members present and concurring in this Decision.

(Signed) R. Maragna
(Signed) B. Salmon
(Signed) R. Dhar

Update Week 2004-49

Planning

Case Name:

Sokolski v. Toronto (City) Committee of Adjustment

Hanna Sokolski 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 (Humber York Panel) which granted an application by Cidalia Palacio and Cesar Palacio numbered A40/04HY for variance from the provisions of By-law 438-86, as amended, respecting 36 - 38 Evelyn Avenue
O.M.B. File Number V040083

[2004] O.M.B.D. No. 1180

File Nos. PL040155, V040083

Ontario Municipal Board

N.M. Katary, Member

November 15, 2004.

(28 paras.)

COUNSEL:

I. Kagan, for Cidalia and Cesar Palacio.

J.M. Alati, for City of Toronto.

DECISION DELIVERED BY N.M. KATARY AND ORDER OF THE BOARD:--

1 The purpose of the application is to legalize an existing as built illegal third dwelling unit in the basement that is currently occupied by tenants. The applicant is a Councillor for the Ward in the City.

2 In order to do so the applicant needs a variance to the Gross Floor Area (GFA). Whereas the By-law

permits a GFA of 183.29 sq. m. (0.6 x lot area), the proposal is to increase the GFA to 324.79 sq. m. (1.06 x lot area).

3 At the very beginning of a long day hearing the Board made it clear to the parties that the established Board practice reflected in several cases is to treat the application as a new application brought forward by the applicant to seek the variance. The Board therefore simply disregards the current situation, namely, that the third dwelling unit in the basement is already built and occupied by tenants.

4 The principal issue is whether or not the intent of the Zoning By-law is maintained merely because the proposal does not cause an unacceptable adverse impact upon existing development.

5 Counsel for the applicant argued that the proposed basement dwelling did not cause an unacceptable adverse impact upon existing development as demonstrated by the as built and occupied dwelling and therefore, the intent of the By-law was maintained.

6 Counsel for the City argued that regardless of the degree of impact the proposed basement dwelling fundamentally altered the intent of the By-law by its mere presence because the By-law regulated character of the built form and intensity of land use by limiting the amount of GFA.

7 The appellant, Ms Sokolski, on the other hand, contended that the proposed basement dwelling not only caused unacceptable adverse impacts but also did not maintain the general intent of the By-law.

8 Who is to prevail? That is the question.

9 Mr. Paul Johnson, a land use planner, gave evidence in support of the application.

10 The following people gave evidence in opposition to the application: Mr. Julius De Ruyter, a land use planner; Mr. William Saundercook, a resident of the area who is the Councillor for Ward 13 in the City of Toronto; Ms Hanna Sokolski, the appellant who lives on the street where the subject property is located; Mr. Witold Sokolski, the husband of the appellant; Ms Louisa Sannuto, Mr. Gino Ariano, Ms Susan Chernenko, Ms Kamman Cheung, and Mr. Michael Blain - all residents who live on the street where the subject property is located.

11 The appellant, Ms Sokolski, during her evidence-in-chief, stated that the current application before the Board represented a pattern of conduct by the applicant where he acted first and applied to legalize later. She was not cross-examined on this point. The Board stated that it could not do anything about past or present conduct, per se, but could only deal with the application before it on its merits. The appellant expressed her dissatisfaction with the Board's ruling.

12 Using a set of documents (Exhibit 1), the planner for the applicant explained in detail the nature of the application and how it met the four tests set out in Section 45(1) of the Planning Act. His main point was that creating a basement apartment through the variance to the GFA did not cause any unacceptable adverse impact and therefore the variance ought to be authorized. He added with a good deal of circumspection that the actual impact of the proposed basement apartment was already in evidence because the dwelling unit was in place and that neither the unit nor the tenants living there had caused any adverse impacts.

13 Using a set of documents, photographs, and a map (Exhibits 6, 7, & 8), the planner for the City explained how the basement apartment created through a variance to the GFA did not meet the tests set out in the Planning Act. His principal opinion was that based upon an examination of the character of built form (Exhibit 6, Tab 6) although the Official Plan permitted three dwelling units on the subject property the Zoning By-law regulated the character of a neighbourhood through GFA and that in this

instance the third dwelling unit was singular and violated the norm in the neighbourhood. He pointed out that 59.6 percent of dwellings in the neighbourhood were single detached dwellings and that 36.8 percent of buildings had no more than two dwellings in the neighbourhood. He added that only one (1) building had three (3) dwellings and one (1) other building had four (4) dwellings. It was his view that in the light of the altered built form through a third dwelling unit the application did not generally maintain the intent of the Official Plan as a whole and of Section 8.12.1 in particular with respect to compatibility.

14 Several witnesses who appeared in opposition to the application were most concerned about the current application before the Board setting a "precedent" if it was approved. They pointed out instances where such conversions of basement into additional dwelling units could potentially occur. The Board made it clear that the established practice of the Board reflected in many cases was that each application is considered on its merits and the potential of the current application, if approved, setting a "precedent" was not the primary consideration for the Board in its decision.

15 What is of greatest interest to the Board, however, is maintaining the intent of the By-law. In doing so, the Board has to take into account how the character of the built form is likely to evolve in the foreseeable future. If the basis of the decision on the current application is solely the degree of impact and not the intent of the By-law then it is likely to have consequences that need to be examined. Disregarding the "precedent" aspect but taking into account only the evolution of the character of the built form, if all future applications on the street are assessed only on the degree of impact that they caused and each one approved because it individually did not cause an unacceptable adverse impact, then over time, the character of the built form would change and the intent of the By-law would be completely undermined. The street would change from single detached dwellings with some having two dwellings on the first and second floors into a street consisting of buildings with three dwellings including the basement dwelling.

16 Such a change in the character of built form should occur through a change to the intent of the By-law and not through incremental changes based upon assessing the degree of impacts individually and disregarding the aggregate impacts over time. The Board cannot do that.

17 The degree of impact determines the degree of compatibility. Unacceptable adverse impact does not, however, determine the extent to which a proposal maintains the general intent and purpose of the Zoning By-law.

18 Also, unacceptable adverse impact deals only with physical invasion. Non-physical invasion can adversely affect intent by introducing a new use or expansion of an existing use. Expansion of an existing use in instances where it may not cause unacceptable adverse impact, however, can still cause an increase in intensity of use. A quantitative change that is significant can result in qualitative change. Hence, potential for similar expansion of uses on the street is not an inconsequential consideration.

19 If the intent is to maintain character of built form through the GFA standard, then unacceptable adverse impact is not the sole consideration. GFA change in some instances with no unacceptable adverse impact can lead to change in built form.

20 GFA with two dwelling units is different from GFA with three dwelling units. The intent of the maximum permitted GFA is not only to limit the number of dwelling units but also the intensity of use. The suggestion that a large household with the same number of occupants in the basement and the first floor is functionally equivalent to two separate households occupying two separate dwellings in the basement and the first floor is an inaccurate analogy. The inaccuracy in the analogy stems from the difference in the intensity of use. This is not a case of distinction between one household and two separate households, a distinction that has the potential to draw us into the space between people zoning

and use zoning. The distinction between one household and two separate households is firmly rooted in the intensity of use. A mini kitchen for the same household in the basement whose main kitchen is on the first floor is functionally not the same as a full kitchen for a separate household in the basement that is used everyday. Similarly, a guest bathroom in the basement that is used infrequently is not the same as a full bathroom for a separate household that is used everyday. Analogies that appear plausible need to be parsed when it comes to examining intent.

21 In the view of the Board, intent means the state of mind at the time of undertaking the formulation of a by-law, whereas purpose means the object towards which one strives, that is, the effect that is intended. Original intent (or understanding) refers to the principles of the text, whether zoning by-law or official plan, as generally understood at the enactment. The Board is bound to apply the by-law as those who made the by-law wanted the Board to apply it. When the principles in the text are clear, few misreading arise. When the principles are less clear, the Board exercises its discretion in the most circumspect manner by drawing upon neutral principles that can be clearly seen as lineal descendants from the text.

22 In either case, the Board refrains from making or applying any policy not reasonably to be found in the by-laws or other statutes. In doing so, the Board takes account of both the human factors involved and the larger interests of the different publics involved. This is the common everyday view of what law is. Common sense is emphasized here because the applicants are pleading with the Board to read into the text their most sincerely held value preferences that they believe are contained in the text. It is of course true that the Board to some extent must make the law every time it decides a case. However, to adapt the words of Justice Robert H. Bork, "it is minor, interstitial lawmaking. The drafters of the by-laws put in place the walls, roofs, and beams; the Board preserves the major architectural features, adding only filigree."

23 In clarifying the original intent, the Board is aware of the difficulty in finding the original meaning of some by-law provisions. The Board is also aware of the fact that in the past it may have from time to time given a clearer meaning to the text of a by-law where the by-law may have been drafted in haste. The Board clearly recognizes that the framers of a by-law do not mean to freeze it so that it would lose its character as a document intended to serve for some time to come. It is also aware of the inherent difficulty in attaching interpretive weight to the subjective intentions of the framers that might appear in notes and other background papers leading up to the final text. In the final analysis, it is the text that speaks and sets the bounds.

24 Based upon a review of evidence with respect to character of the built form, the Board finds that increasing the number of dwellings from two to three on the subject property does not maintain the intent of the Zoning By-law. In assessing the desirability of development and whether or not the variance requested is minor in nature, the Board usually takes account of the following factors to ensure that site specific circumstances do not deny a property owner the right to enjoy her or his property. The following five factors are viewed only as aid to the determination of whether or not the variance sought is desirable and minor and not as either additional tests or as a substitute to the four tests in the Planning Act. The Board explained these points at various times during the hearing that went into the evening and they are repeated below for convenience.

1. A hardship based upon unusual conditions in the size, shape, topography, or orientation of the property.
2. The unusual conditions which may be peculiar to the property in question or to not more than a few properties in the zoning district. (A general condition would be a subject for action by the municipal council).
3. The hardship must be on the property itself. (Personal hardships caused by

other factors, e.g., financial, are generally not considered).

4. The hardship must not have been self-created by the present owner or by any previous owner subsequent to the effective date of the zoning regulations in question.
5. It must be clear that a literal application of the regulations would deprive the owner of a reasonable use of the property.

25 The uncontradicted evidence indicates that the variance requested does not stem from any one of the above reasons, either individually or collectively. A basement dwelling, in this instance, appears to be a preference by the current owner. Denying the variance does not deprive the owner of a reasonable use and enjoyment of his property.

26 On the basis of an analysis of all of the evidence, the Board finds that the application does not meet the tests set out n Section 45(1) of the Planning Act.

27 Accordingly, the Board does not authorize the variance requested.

28 The Board so Orders.

N.M. KATARY, Member

qp/e/qlcct