

DECISION AND ORDER

Decision Issue Date Thursday, September 14, 2017

PROCEEDING COMMENCED UNDER subsection 45 (1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant: Troy Ellener

Applicant: Arklab Inc

Counsel: Jennifer Meader (Babek Haji Ghassemi), Sara Amini (City of Toronto)

Property Address/Description: 223 Florence Ave

Committee of Adjustment Case File Number: 17 115804 NNY 23 MV (A0125/17NY)

TLAB Case File Number: 17 156134 S45 23 TLAB

Hearing date: Wednesday, September 06, 2017

DECISION DELIVERED BY (T. Yao)

INTRODUCTION

Troy Ellener, owner of 221 Florence Ave., appeals the decision of the Committee of Adjustment of April 20, 2017. The Committee granted 8 variances to Babak Haji Ghassemi for a proposed new house to replace the existing older house at 223 Florence Ave. Briefly, the variances relate to lot coverage, height and building length variances, ones that are typically sought when a home is demolished. The complete list is set out in detail on page 5 and forms part of this decision.

The original application requested a 9th variance for a below grade garage; but Mr. Ghassemi withdrew this prior to the Committee of Adjustment hearing. Council instructed Sara Amini and Victoria Fusz, respectively counsel and planner for the City of

Toronto, to attend in the hearing before me to ensure that no variances were granted for a below grade garage and they did so.

BACKGROUND

Mr. Ellener added a second storey and added a rear addition — technically a renovation — in 1995, entirely within North York zoning by-law 7625. He maintained the required front yard, side yard (with one exception), height and lot coverage requirements. Although his house looks like a new two and a half storey replacement house, he kept the side walls and so could use the existing setbacks of his older house.

MATTERS IN ISSUE

Since Mr. Ellener's appeal triggers a fresh hearing, Mr. Ghassemi now needs to prove he is entitled to each of the variances, not just the ones contested by Mr. Ellener's appeal. Each variance must meet the four tests under s. 45 of the *Planning Act*: minor, desirable for the appropriate development of the property, and maintaining the intent of the Official Plan and zoning By-laws. However, Mr. Ellener, both in his appeal letter and oral testimony, was concerned only with building length and side wall height.

ANALYSIS, FINDINGS, REASONS

The witnesses were Mr. Ghassemi's planner David McKay, whom I qualified as entitled to give opinion evidence on land use planning, and Mr. Ellener, who gave evidence on his own behalf.

Mr. McKay obtained 139 recent Committee of Adjustment decisions for the area extending from the 401 to Sheppard, Earl Bales Park to Yonge, from which he concentrated on a smaller area containing 207 properties, roughly a block and a half from 233 Florence in every direction. Most of Mr. McKay's discussion centered on how properties in this smaller area complied with the Official Plan, which requires proposed physical changes to fit into the "character of the neighbourhood". I accept this is a reasonable context to evaluate Official Plan compliance. It has many minor variance applications, (36% for coverage, for example), so the "character" is changing, although this is not carte blanche for any imaginable minor variance application. For example, credible planning evidence can force an applicant to reconsider; indeed, this occurred with the below grade garage. It is my task to look at each of the minor variances,

critically and skeptically, to see if they withstand scrutiny with respect to the four tests under the *Planning Act*.

Minimum foyer size

The purpose of this zoning requirement is to make sure the front entrance faces the street. Mr. Ghassemi's design does so, and Mr. McKay's evidence is that the smaller size of the foyer is then merely a matter of personal preference. Accordingly, I find that this variance meets the four tests and certainly is minor.

Lot coverage

Of the 207 properties, lot coverage ranges from 11% to 39.9% and 36% have a coverage over the permitted 30%. Since it is unlikely that many of the original homes exceeded the 30% limit, I infer that 36% are newer homes and this has changed the character of the neighbourhood. Mr. Ghassemi seeks a lot coverage of 31.98% and Mr. Ellener did not comment on this issue. According to Mr. McKay, 30% to 32% is typically acceptable to the Committee of Adjustment and I accept that this is at the low end of the range typically granted by the Committee. I conclude this also meets the four tests.

Building Height

Mr. McKay's evidence was that 18% of the 207 properties have sought minor variances for increased height since 2013. However, Mr. Ellener's objection is more site specific; he objects to a loss of privacy from overlook from two windows in the east side wall of 223 Florence, which faces his home.

When analyzed, the height variances Mr. Ghassemi seeks turn out to be for the front and rear walls; the east wall, is within by-law standards. Mr. Ellener is concerned that persons looking out windows in the second floor, east side, (from a bathroom and laundry room) would see into a skylight into his bathroom. According to Mr. McKay, a person looking out those windows would be about 3 to 4 inches above the skylight, and would mostly see the side of the skylight, but since a minor variance is a privilege, not a right, I am making it a condition that these windows be frosted or translucent to ensure privacy from the new building.

Building Length

This is Mr. Ellener's main objection. His appeal letter states:

The variance requested would extend a two story structure 0.52 m past the maximum permitted building length and extend past the back wall of our house. The extension of this wall will *have a significant impact on our backyard living space*. We currently enjoy the use *of a walk out deck off our family room*. If this

variance is permitted we will lose both our view and our enjoyment of the sun in the later part of the day.



Mr. Ghassemi seeks a 15.82 m-long building where 15.3 m is permitted. There are two reasons why I do not accept that the impact is “significant”. The first is that Council itself has now permitted a building length of 17 m under the City-wide harmonized by-law 569-2013. Therefore, a variance would only be necessary if all the appeals currently under litigation at the Ontario Municipal Board resulted a deletion of the 17 m provision.

Even considering that the previous standard of 15.3 m is found to govern, the Ghassemi house will extend only .28 m more beyond the rear of the Ellener house. Mr. Ellener states that impacts will be exacerbated by a second-floor bay window, which is permitted to project beyond this length and is not to be counted in the building length.

I considered this objection carefully. In such a dense neighbourhood, shadowing is to be expected. For example, Mr. Ellener’s house, which is roughly equal in footprint to 223 Florence, has cast shadows on it for 22 years, although this may have been confined to the early morning and affected only the front yard. Mr. Ellener justifies the alleged shadow effect by this photograph from the second-floor deck, taken at 5:14 P.M., June 3. Shadow photos are a matter of judgement. Usually the spring and summer equinoxes are chosen, and times that are neither too early or too close to mid-day. Thus, a time around March 21, at 10 am or 2 pm would be representative. Mr. Ellener’s photo is close to the summer solstice, which would minimize shadows, and is at 5 pm, which would maximize them. Assuming that these more or less cancel each other out, I still do not accept that they prove “significant impact”. They are taken from a second floor balcony, close to Mr. Ellener’s own house. If he chose a vantage point

farther away from the rear wall of his building, a 28-centimeter exceedance would in my opinion constitute much less interference with his enjoyment of his back yard, if any.

The official plan policy requires me to consider whether this variance is “in keeping with the neighbourhood”. “Neighbourhood” is a dynamic concept, and for the 207 property-neighbourhood canvassed by Mr. McKay, 40% have building lengths greater than 15.3 m. Accordingly, I would conclude that the 15.82 m building length is on the low side and is minor, and in keeping with the character of the neighbourhood and meets the other tests.

Mr. Ghassemi’s motives

Finally, Mr. Ellener stated that Mr. Ghassemi, “is going to sell and move on and I am left to deal with the consequences.” The *Planning Act* is not concerned with the motives of landowners and this appeal has been dealt with as carefully as I could under the statutory tests. The Official Plan’s intent is that neighbourhoods be stable, but it recognizes that there will be changes. This is particularly true of a neighbourhood like Mr. Ellener’s which is convenient to the Sheppard subway, the 401 highway and other desirable amenities.

In short, based on Mr. McKay’s analysis of all the variances, which evidence is not repeated here, I am satisfied that the appeal should be dismissed and I will grant the variances, as sought.

DECISION AND ORDER

I authorize the following minor variances:

Table 1 (forming part of this order)			
From Toronto Zoning By-law 569-2013			
		Permitted	Proposed
1.	minimum “foyer size”	10 sq m	6.81sq m
2.	maximum permitted lot coverage	30% of lot area	31.98% of lot area

3.	maximum height of all front exterior main walls	7.5 m	8.51 m
4.	maximum height of the rear exterior main walls	7.5 m	8.51 m
From former North York Zoning By-law 7625			
5.	maximum permitted lot coverage	30% of lot area	31.98% of lot area
6.	maximum permitted building height	8.8 m	9.02 m
7.	maximum finished first floor height	1.5 m	1.65 m
8.	maximum permitted building length	15.3 m	15.82 m

Conditions of Approval

1. The proposed dwelling shall be constructed substantially in accordance with the Site Plan and Elevations dated July 4, 2017 and filed as tab 17 of the Applicant's Documents.
2. The second-floor windows facing 221 Florence shall be frosted or translucent.

I do not authorize any variance permitting a below grade garage.

I wish to thank Mr. Ellener, Ms. Meader and Ms. Amini for their cooperation in streamlining their presentations so that we could finish this hearing in the time allotted.

9/14/2017

X 

Ted Yao
 Chair, Panel Member
 Signed by: Ted Yao