

DECISION AND ORDER

Decision Issue Date Thursday, November 02, 2017

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

Appellant(s): RICK KUBOWICZ for YOLANDA PANDOLFO

Applicant: SAM SPAGNUOLO

Subject(s): 45(1)

Property Address/Description: 68 MCGILL ST

Committee of Adjustment Case File Number: 16 264215 STE 27 MV

TLAB Case File Number: **17 179759 S45 27 TLAB**

Hearing date: Thursday, October 12, 2017

DECISION DELIVERED BY Ted Yao

The owners of 68 McGill Ave seek to build in their rear yard:

- a 4-person swimming pool (described as a "luxury hot tub", by their architect);
- a 2 m x 3 m shed; and
- a second-floor deck leading out from their kitchen.

They require 6 variances to the new zoning by-law (the new City wide harmonized by-law) and 4 from the old by-law (former City of Toronto). Side and rear yard setback variances form the bulk of variances needed.

My decision is to authorize variances but add certain conditions that will address matters raised in the hearing.

BACKGROUND

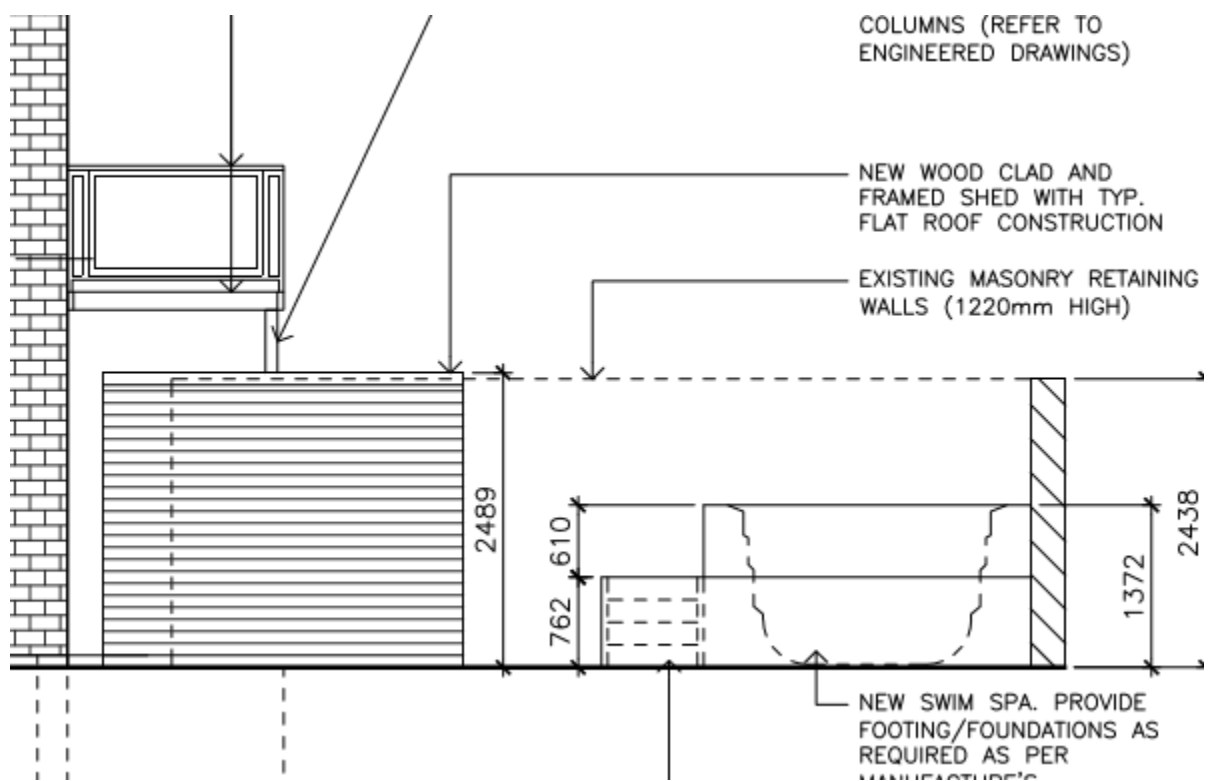
68 McGill is a tall narrow detached house on the north side of McGill Avenue, close to Church St. Yolanda Pandolfo and James Gardner, whom I will refer to as "the

Decision of Toronto Local Appeal Body Panel Member: Ted Yao
TLAB Case File Number: 17 179759 S45 27 TLAB

owners”, purchased it July 2015. The building to the west is owned by Shuang Niu. At the hearing, Ms. Li Xia, Shuang Niu’s mother, said she was “OK” with the project. On the west side, the owners are Biao Zhou and Juchu Zhou, who oppose the variances.

The owners commenced construction of shed in their rear yard, without obtaining a building permit. Mr. Zhou complained and the City served the owners with a stop work order and construction ceased. In going forward through the proper processes, the owners added the other two projects.

Their architectural firm, CS & P prepared drawings dated Dec 13, 2016. Sam Spagnuolo is a principal of the company and Andres Aguilar, prepared the plans. Shown below and forming part of this decision is a portion of the east elevation cross section.



The key physical fact about this lot is that the rear yard is sunken by about 4 feet compared to the surrounding lands. To the north is a parking lot of a commercial building. A masonry wall separates it from 68 McGill’s rear yard. On the north (parking lot side) this wall is about five and a half feet tall; from 68 McGill’s rear yard, it is about nine and half feet tall, the difference being attributable to the sunken nature of the rear yard.

I will now turn to the events immediately preceding the Committee of Adjustment hearing of June 7, 2017. On May 28, 2017, or thereabouts, the owners were attempting to reach a negotiated settlement of the upcoming hearing. Mr. Spagnuolo, their negotiator, was discussing the matter with Mr. Zhou, and Ms. Pandolfo, Mr. Gardner

and Mr. Aguilar were present in the room, listening by speaker phone. Following these discussions, Mr. Zhou prepared a “Neighbors’ Agreement” (which I will refer to as “the first Neighbors’ Agreement”) in which he agreed to drop his opposition in return for a payment of \$900, earmarked for specified improvements to the masonry wall. The document produced in this hearing was not signed by Mr. Zhou but contained the signatures of Ms. Pandolfo and Mr. Gardner. They paid the \$900 by e transfer.

Thereafter Mr. Zhou drafted two successive versions of the agreement, on June 5 and June 6, 2017, even though he had already received money under the May 31 agreement. In both he attempted to introduce new clauses to rectify the title location of the mutual wall between 68 and 72 McGill. Mr. Zhou was working with an older survey which he claimed showed he owned the wall. CS&P worked from a more recent survey, originally paid for by previous owner of 68 McGill. Information based on this survey may be different from Mr. Zhou’s survey. Mr. Aguilar said that he had no authority to change a plan of survey and said in the hearing that he was puzzled why Mr. Zhou was continuing to produce new drafts of an agreement that he had considered was concluded. Mr. Zhou’s emails show that he did not treat the agreement as a contract, even offering to return the \$900 at one point. Ms. Pandolfo and Mr. Gardner said they would be open to discussion about the survey issue if Mr. Zhou were to commission a fresh survey, which he has not done. I will deal with the first Neighbors’ Agreement in more detail below.

At the Committee of Adjustment, Mr. Zhou opposed the owners’ application, notwithstanding the agreement of May 31, 2017. The Committee refused to grant the variances and the owners appealed. On July 7, 2017 the TLAB set out a Notice of Hearing for October 12, 2017.

Six days before this hearing, the owners brought a motion for adjournment: saying “We were not aware of the severity of the process”, that is, they now wanted to hire a planner. I denied the motion because it appeared that the owners had not made the most elementary steps to ascertain whether they need a planner, such as consulting a professional on a timely basis to obtain a preliminary opinion.

EVIDENCE

Rick Kubowicz, a neighbour and president of the McGill Granby Ratepayers Association assisted the owners in the presentation of their case and made final submissions. Mr. Aguilar, the drafter of the plans and associate of Mr. Spagnuolo, testified for the owners. I found he was qualified to give opinion evidence in land use planning. Subsequently, Ms. Xia, Ms. Pandolfo and Mr. Gardner testified. Mr. Zhou testified on his own behalf.

MATTERS IN ISSUE

Since Ms. Pandolfo’s appeal triggers a fresh hearing, she, as the Applicant/Appellant, must demonstrate satisfactorily that each of the 10 variances, individually and collectively, meet the four tests under s. 45 of the *Planning Act*: namely, minor, desirable for the appropriate development of the property, and whether the

variance maintains the intent and purpose of both the Official Plan as well as the two zoning by-laws. A decision of the Toronto Local Appeal Body must be consistent with the 2014 Provincial Policy Statement and conform to the Growth Plan of the Greater Golden Horseshoe. To apply these tests, I also must consider the process by which a party brings evidence to support or disprove these tests. To put it another way, did the lack of disclosure prejudice the opposite party so that I should disallow late production? Neither side has complied with disclosure requirements.

ANALYSIS, FINDINGS, REASONS- MR. ZHOU'S SUBMISSIONS

I will begin by dealing with Mr. Zhou's submissions, in the order he raised them. He began by objecting to the two OMB cases produced by Mr. Kubowicz which he was now seeing for the first time. This objection goes to the heart of opinion versus non-opinion evidence and is worth some discussion. Indeed Mr. Kubowicz's opening submission was that the owners should prevail because they were the only party to adduce expert evidence.

I found Mr. Aguilar's formal opinion evidence was limited; it consisted of one sentence that in his opinion the project "fell within the *Planning Act*".

In *59 Metcalfe St*¹, one of the cases Mr. Kubowicz gave me, the owner, Mr. Skjodt, was attempting to justify a solarium rear addition to a townhouse. He was not a planner. The OMB member stated in paragraph headed "Desirable":

Both Ms. Manzer (an opponent) and Mr. Skjodt² expressed concerns with respect to their ability to hear any noise, including conversations that emanated from adjoining units through the rowhouse development. Mr. Skjodt pointed out that since the solarium walls will not be abutting the common walls between the units, it will be an area where one can have a private conversation without bothering either of the neighbours. It will offer more privacy than the outdoor area of the rear yard. The Board agrees that the construction of the solarium is desirable.

For this case the preponderance of my findings is based on factual evidence from both sides, together with excerpts of the zoning by-law and official plan filed with the Committee of Adjustment. Overall, these facts, are sufficient for me to draw a planning conclusion on the model of *59 Metcalfe St*. In other words, while including Mr. Aguilar's formal planning opinion, I am required to also consider the whole of the evidence before me, whether from an expert or not. In other words, I am accepting case material even if it has not been previously disclosed. I am using it to reject one of the submissions of Mr. Kubowicz.

Mr. Zhou went on to contrast the cogency of "his" neighbours' objection letters as opposed to the "owners'" support letters. He said that the objection letters (in opposition) dealt specifically with the deck, shed and pool, but the support letters were like "throwing an arrow in the dark", i.e. couched in very general terms. I found that

¹ PL161238 April 28, 2017, at Par. 15. This case was produced by Mr. Kubowicz.

² Perhaps the Board member meant to refer to the other opposing neighbour Ms. Sullivan instead of Mr. Skjodt.

none of the letters, for or against, were sufficiently specific; that is, that their concerns were tied to the minor variances with particularity. For example, Ms. Sarzetto wrote to oppose the variances because of noise emanating from the pool. But a pool use is permitted in an R zone; the issue is whether it should be 1.2 m from a lot line or some lesser distance. I will find that the lesser distances are minor.

Mr. Zhou went on to say the variances were not minor:

As the owner, James (Gardner) just testified, they have four floors including the basement, on this small lot, in downtown Toronto, and the front yard already changed from one parking lot to two, . . . according to the City's by-law, half of the size has to be included in the density and now they want to build three new projects in the back yard; the size is significantly larger.

As I set out below, the existing house exceeds the permitted floor space index and any additional inclusion needs a minor variance. But the parking spaces, second floor deck, and pool, all being unenclosed spaces, are not included in the calculation of the floor space index and cannot be "significantly larger" than what is permitted.

He then went on to say that soft landscaping in the front and back of the property had been removed. Ms. Pandolfo's reply was that she was in the middle of construction and intended to add landscaping in the future. Mr. Zhou went on to say the evidence in support was not reliable since the plans showed a bump out for a fireplace that did not exist, which Mr. Aguilar admitted was a CAD (computer assisted drawing) error.

He said the existing fence on the masonry wall was twice what is allowed and the Fence by-law only allows 2 m. There is a wrought iron fence on top of the masonry wall just in the Background and their combined height appears to be higher than 2 m. Mr. Gardner admitted that there is some irregularity there and that he has had problems with "crackheads and prostitutes" in the parking lot north of 68 McGill as well as a break-in. Apparently, the owners are meeting with the local Councillor and City staff to deal with this problem and the wrought iron fence atop the masonry wall is part of the discussions. This fence is not included in the project and no variance is sought. I have no jurisdiction to deal with it.

Finally, I should comment on the "survey problem", which Mr. Zhou said could affect the variance. The TLAB grants variances from the zoning by-law. Once granted, a variance, say a setback variance, must be confirmed in the field by another party. The plans state: "All existing and new dimensions to be site verified before construction . . ."

THE FIRST NEIGHBORS' AGREEMENT

I must decide whether this agreement is admissible and whether it is relevant. By 15(1) of the *Statutory Powers Procedure Act*, I have wide powers to admit documents. Section 15(2) says 15(1) does not override the law of privilege. I believe this document is admissible for two reasons; first it is a concluded settlement, which is ordinarily admissible and no privilege can be claimed. Second, this document was produced by Mr. Aguilar during Mr. Zhou's cross examination of him, at Mr. Zhou's

insistence, and therefore, Mr. Zhou waived any right of settlement privilege. The owners also did not claim settlement privilege. I marked this Exhibit "A" for identification, being unsure of its relevance until I had a chance to consider it in the light of all the evidence. I find it relevant.

This document was the first of 10 documents that were marked for identification because they were never disclosed. Now that the hearing is over, I have decided that all these documents should be made exhibits. The introduction of paper documents to the TLAB digital system without previous disclosure (and therefore not in digital form) was disruptive; and an imposition on the TLAB staff, who were forced to leave their desks, scan and upload documents just so that they could be placed on a common viewing platform.

Having decided it is admissible and relevant, I reproduce some of the paragraphs:

2. 72 McGill was built in the 1880s and 68 McGill was built in 1985. Before 68 McGill was built, its land was an alleyway to walk through Granby Street and McGill Street. The property of 72 McGill always has a steel fence and a brick wall at its west side to enclose its west side yard and divides the land of 72 McGill and the land of current 68 McGill. There was also a steel fence on top of this brick wall. This steel fence located at the western side of the brick wall which also proves the brick wall is always belongs (sic.) to 72 McGill. There were also slate stones on top of this brick wall and these slate stones were horizontal flat.

This historical backdrop to the property is helpful. This explains why the north lot (fronting on Granby St) is not a residence. It also helped me to contextualize Ms. Sarzetto's letter of Oct 11, which was brought to the hearing by Mr. Zhou. It was one of the "marked for identification" documents. It states:

My name is Francesca. I live with my husband and 9-year-old daughter at 57A Granby Street, Toronto, which is North side of subject property 68 McGill Street.

Ms. Sarzetto³ must be kitty-corner, to 68 McGill. The Agreement goes on:

³ I know the 68 McGill is applying Minor Variance Application for their projects in their backyard: A Deck, An Addition, and a spa pool. I want you know (sic) that our living room, my daughter's bedroom, and our backyard are all facing toward the proposed Deck and Pool of 68 McGill Street. We will be directly affected by this Deck and Pool. In our entire neighborhood, there is no other property which had made this kind of project before, as far as I know since I lived here (four and a half years).

We strongly oppose their proposal, because our privacy and daily family life will be affected by the noise of pool and party activities. We also do not like their new fence, which is significantly too high and blocks the light from the window and our view in the backyard.

Since my husband and I unfortunately cannot attend tomorrow's meeting, I authorize our neighbor Mr. Biao Zhou to print this letter and bring it to the Court tomorrow so that it can be presented to the Judges and read to the Court.

Decision of Toronto Local Appeal Body Panel Member: Ted Yao
TLAB Case File Number: 17 179759 S45 27 TLAB

3. On about June 4 or 5, 2016, the contractor hired by the owner of 68 McGill cut the steel Fence on top of the brick wall. They also trespassed into 72 McGill's backyard and replaced the slate stones on the top of the brick wall to new concrete stones with a slope angle to the side of 72 McGill which causes rain and snow all falling to 72 McGill's backyard.

Ms. Pandolfo admits that she replaced the stones on the walls with new coping stones. They do direct the water to Mr. Zhou's side.

4. Mr. Biao Zhou also has some concerns for the minor variance application of 68 McGill, such as: the proposed second storey rear deck will result in problems of *loss of privacy and noise*, (my italics) the proposed addition/shed with a flat roof could bring a safety issue because it is easy to walk from the roof to the top of the brick wall and jump into the back yard of 72 McGill; etc.

Settlement

5- First Neighbours Agreement provides that: the owners of 68 McGill shall pay \$900 by online e-transfer before 3:00 pm of May 31, 2017 to Mr. Biao Zhou as compensation of above mentioned issues in point 3 and 4. Mr. Biao Zhou will use this compensation to repair the coping on the brick wall and build a new fence on the top of brick wall to solve these issues.

6. The owners of 6S McGill agree to install a fixed wood fence with the wood boards tightly close to each other so that no gap to watch through from one side to other side, and with the same styles as in the following photos (front yard fence of 77 McGill and rear roof fence of 76 McGill). at the east side of the proposed second storey rear deck to solve the privacy and noise problems mentioned in point 4. The height of the fence should be 5 feet 5 inches and the width of the fence should be the same as the deck's width size. Once the fence is installed, Mr. Biao Zhou or his representative should be allowed and given chance to measure and confirm its size. This fence should not be lowered, changed, or removed in future by any excuse.

7. With the above two conditions mentioned in points 5 and 6 satisfied, Mr. Biao Zhou agrees to remove the opposition to the proposed application of 68 McGill.

Biao Zhou (unsigned)

Yolanda Pandolfo (signed)

James Gardner (signed)

Neither side made submissions on the neighbors' agreement. I do not comment on the enforceability of a private agreement; my interest is whether it can help me apply the four tests to the minor variances. Mr. Zhou sets out his planning objections in his own words: he is concerned about loss of privacy and noise of the second-floor deck. Moreover, he has proposed a solution that is acceptable to both sides and which I find reasonable.

DECK, SHED AND POOL VARIANCES

Decision of Toronto Local Appeal Body Panel Member: Ted Yao
TLAB Case File Number: 17 179759 S45 27 TLAB

I now apply the *Planning Act* tests to the second-floor deck. The deck will extend out 1.8 m out from the face of the building, for the width of the building. My first observation is that although the project is for a rear deck, shed and pool, the zoning plan examiner has not indicated the second-floor deck needs any variances at all. Variances 1, 2, 3, 7, 8, and 9 are for the shed; 4 and 5 are for the pool, and 6 and 10 are for the deck for the swimming pool.

The fence on the east end of the deck was a central issue in the Neighbor's Agreement. On May 29, 2017, once the \$900 was e-transferred, Mr. Aguilar thought Mr. Zhou was dropping his opposition and wrote to Mr. Jason Bragg, the City's zoning plan examiner that it was his intention to submit revised plans to:

- Provide a 5'-0" wrought iron and wood privacy screen on both neighbouring sides of the proposed metal deck.

Mr. Aguilar asked if Mr. Bragg had "questions or concerns". There is no indication that Mr. Bragg has concerns⁴. On June 4, 2017, Mr. Zhou wrote the owners to say, "According to by-law, the maximum height of fence on unroofed deck could be 2.0 meters"; in other words, he does not think the fence needs an additional variance. Therefore, even though I do not have the revised plans in evidence and even though it appears the owners could build a second-floor deck as of right, I will make the construction of these fences a condition of this decision.

I now turn to the shed. The only criticism of this came from Mr. Zhou, who states that it may permit people to jump down onto his property. To do so, they would first have to trespass into the rear of 68 McGill. The evidence before me was that all the residents of this section of McGill St. are concerned with intruders and break-ins, and so I find this to be an appropriate planning issue, that is, the impact of one use of land upon another. I do not think that the shed variances should be denied, but I feel that the area around the shed be equipped with some security device, such as a motion detector or camera. I am not making this a condition but I will leave it to the owners to install some measure on the honour system, and in consultation with Mr. Zhou.

The shed attracts a number of variances, some are technical⁵. It needs an increased floor space index as follows:

Permitted FSI	1.00 x lot area
Existing FSI	1.175 x lot area
Proposed FSI	1.21 x lot area

So, the shed causes an excess of .035 x the area of the lot, which I consider minor.

Finally, the pool. This is to be an exercise pool where the swimmer swims against water pumped in a counterflowing current. There will be decks at the east and

⁴ If this is not the case, could the parties write to me.

⁵ The plan examiner's notice refers to an *attached* shed, whereas the plans show a *detached* shed. Mr. Aguilar states that the variances sought could cover both.

**Decision of Toronto Local Appeal Body Panel Member: Ted Yao
TLAB Case File Number: 17 179759 S45 27 TLAB**

west ends. It is placed as far as possible from Granby and McGill residences. People who use the pool may laugh and shout, but this is, after all, a very urban location with plenty of activity already. The pool will be set back .39 m from the rear lot line, instead of 1.2 m. I am satisfied that this is minor, given the sunken nature of the lot. It will be 1.14 m from Niu/Xia family. It will be 1.05 m from Mr. Zhou’s lot line. This last variance is indicated as being sought for By-law 438-86 but not for 569-2013, which appears to be a clerical error and I will authorize the appropriate extra variance accordingly (bolded in the decision below). Overall, I am satisfied the pool and pool deck setback variances are minor.

Neither party mentioned the Official Plan. I am satisfied that the Provincial Policy Statement is not engaged with respect to these outdoor structures. The Toronto Official Plan designates this Downtown, where growth is to be encouraged. I am satisfied that the intent and purpose of the Official Plan is maintained.

In conclusion, I find the variances in Tables 1 and 2 below satisfy each of the four tests as set out in the section entitled “Matters in Issue” as well as being consistent with, and conforming to the higher order Policies and Plan.

DECISION AND ORDER

I authorize the following minor variances, subject to the condition that follows:

Table 1. Variances required under Zoning By-law No. 569-2013 and forming part of this decision contingent on its final approval			
		Required	Proposed
1.	Max permitted depth of detached building	17 m	17.32 m
2.	Max. floor space index	1.00	1.21
3.	Rear yard setback (shed)	7.5 m	4.8 m
4.	Rear yard setback (pool)	1.2 m	.39 m
5.	East and west side yard setback (pool) (bolded are my insertions)	1.2 m	1.05 m (east) , 1.14 m (west)
6.	Min. rear and side yard setbacks (pool deck)	.76 m	.26 (rear), .20 (east), .30 m (west)

Table 2. Variances required under Zoning By-law No. 438-86 and forming part of this decision			
		Required	Proposed
7.	Maximum gross floor area	1 x lot area	1.21 x lot area
8.	Minimum side yard setback (portion exceeding 17.0 m deep)	7.5 m	.58 (east), 5.14 m (west)
9.	Minimum rear yard setback	7.5 m	4.80 m
10.	Side and rear setbacks (pool)	1.2 m	.39 m (rear), 1.05 m (east), 1.14 m (west)

CONDITIONS

The applicants will construct a 5'-0" wrought iron and wood privacy screen on both neighbouring sides of the proposed metal deck.

X

Ted Yao

Ted Yao
Chair, Toronto Local Appeal Body
Signed by: Ted Yao