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DECISION AND ORDER

Decision Issue Date Tuesday, January 16, 2018

PROCEEDING COMMENCED UNDER subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): KYO JEEN SONG

Applicant: MICHAEL MACPHEE

Property Address/Description: 89 BOULTBEE AVE

Committee of Adjustment Case File Number: 17 143276 STE 30 MV

TLAB Case File Number: 17 227882 S45 30 TLAB

Hearing date: Wednesday, January 10, 2018

DECISION DELIVERED BY Ian James LORD

INTRODUCTION

This matter involves an appeal from a decision of the Toronto and East York Division Panel of the City of Toronto ('City') Committee of Adjustment (the 'Committee') in respect of variance approvals given to zoning By-law 569-2013 (the 'new zoning by-law', currently under appeal) and By-law 438-86 (the 'existing zoning by-law') for 89 Boultbee Avenue (the 'subject property').

The variances granted by the Committee are set out in Attachment 1 attached to and forming part of this decision.

The subject property is located on the south side of the street which runs easterly from Jones Avenue, south of Danforth Avenue, north of the rail corridor carrying GO Rail, and west of Greenwood Avenue. Boultbee terminates at the Toronto Transit Commissions Greenwood Yard, west of Greenwood Avenue. The subject property is on a grade that slopes westerly and southerly presenting significant, uninterrupted views, to the south. It is improved with a two story early 1900's dwelling with a paved drive aisle on its west limit.

Historically, the area between the subject property and the Appellants' property, to the immediate east, appears to have been improved with a concrete pavers and walkway and fenced, with a street side gate inhibiting access, affixed to both houses. The pavers and gate have been removed, the Appellants house has been recently reconstructed and occupied and the land area between the two now existing buildings is in dispute as to ownership.

The Applicants represented themselves. Mr. John Wenus appeared as counsel and represented the Appellants.

No professional evidence was called.

BACKGROUND

This matter had been the subject of a Motion to Dismiss, brought by the Applicants and dismissed by my former colleague, Ms. Ruddock. The request for a written hearing, opposed by the Appellants, was also refused.

It is clear from the discussion that ensued over the course of the sitting that the parties are having difficulties, as neighbours, in understanding and resolving their differing perspectives and concerns; fortunately, despite the fact of not reaching mutually acceptable terms, their communication commendably is not yet at the stage of failing to acknowledge matters of common courtesy.

The property rights issue looms large in the consciousness of both; Mr. Wenus advised of the intention to commence an application for the determination of rights of adverse possession and ancillary relief respecting the respective side yards, between the buildings. The Applicants have asserted claim to their paper title by the construction of a wood fence, braced against their dwelling in the disputed zone. No action has been commenced. There is hope, with the sensible demeanor exhibited by those who spoke, that the door for constructive discussion, as stated, remains open. Both properties would appear to benefit from rear yard access over the disputed lands.

Despite the tensions that have grown up swirling around the substantial intended and recent investments, by both owners, in maintaining protection and advancing interests in their respective properties, I explained that the appeal to TLAB is not the proper forum to pursue relief either in respect of: property rights claims: Building Code construction practices, approvals and standards; matters of electronic surveillance and privacy rights; or risk assessment and insurance matters.

Rather, the focus of TLAB is whether the requested variances respect and reinforce area character, constitute compatible development and cast no undue adverse impact on adjacent property.

It is to those matters, and specifically the tests listed below, which define my jurisdiction and are the subject matter of this decision.

MATTERS IN ISSUE

Related to the relevant variance relief requested by the Applicant, the Appellant focused on four specific themes: the adequacy of the Applicants disclosure in relation to the parking variance and the alleged intention for introducing to the subject property a 'second suite', accessed over the disputed lands; the receptiveness of the Applicants to concerns expressed related to the prior evaluation of needed construction practices, the integrity of construction and concerns over use of the same contractor who had built the 91 Boultbee Avenue property of the Appellant; 'discomfort' arising from a number observations: security cameras and privacy; various intervening fence actions; roof shingle maintenance and repair; and the supposition that if the adverse possession claim is advanced successfully, a TLAB decision on variances could be rendered moot because of changing lot parameters.

I return to each of these matters upon a review of the evidence.

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the Growth Plan of the Greater Golden Horseshoe for the subject area ('Growth Plan').

Minor Variance – S. 45(1)

In considering the applications for variances form the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- are desirable for the appropriate development or use of the land; and
- are minor.

EVIDENCE

In commencing the Hearing without the assistance of an independent professional qualified to research, distill and present independent opinion evidence, I advised the Applicant of the onus to satisfy the foregoing tests and to elect to be either a representative or spokesperson. Mr. MacPhee elected to give evidence; Mrs MacPhee acted in the capacity of a resource representative.

Mr. MacPhee asserted no qualifications and elected to rely on the decision of the Committee, which he supported by an impressive knowledge of the filed materials.

In Attachment 1, there are four variances to the new Zoning By-law and five to the existing By-law: of these, he identified that three are common: a requested floor space index ('fsi') of 0.8x, whereas a maximum of 0.6x is permitted; a reduced side lot line setback to 0.4 m for the east lot line, whereas the new and Existing By-laws require 0.9 m and 0.45 m, respectively; and the elimination of required parking, whereas one 'parking space' is required to be provided.

Under the new By-law, a roof eves projection approval to be located within 0.15 m from the east side lot line was requested, whereas 0.3 m is required.

Under the existing By-law, a rear ground floor deck projection of 3.44 m from the rear wall, inclusive of 1.0 m of stairs to grade, was sought, whereas 2.45 m is permitted as-of-right.

As well, under that By-law, relief for the elevation of the rear ground floor deck at 1.26 m above grade was sought, whereas 1.2 m is permitted as-of-right.

Mr. MacPhee took me to the plans prepared by Arsenault Architect Inc., dated April 4, 2017 and several decisions of the Committee in the neighbourhood wherein 'overlapping' variances to some or most of those sought were granted to a similar or greater degree than the plans proposed. These included; #'s 136, 124, 40,159, 139 and 91 (the Appellants property) Boultbee Avenue. By way of confirmation, in 2016 the Appellant sought and received variances for new construction not dissimilar to the Applicants proposal: fsi of 0.788 (0.8 proposed); east side lot line setback of 0.43 m (0.4 m proposed); zero parking spaces (same); and others.

He explained the intended construction was for an approximate 18 ft x 18 ft addition, replacing an existing shed, inclusive of a basement, dining room/kitchen at grade and second floor master bedroom. The extension requires no variance for height, rear yard setback on building length. It extends some 3 m short of the Appellants new dwelling, to the east. Its roof and eves line fall well below the Appellants property. The neighbour to the west has no objection.

The elimination of parking is curious given my observation of an existing driveway. Mr. MacPhee described the request for parking space exemption as 'mysterious'. He described a plethora of variances where the relief was sought and granted, including that applicable to the Appellants property, approved by Committee as an element in its recent reconstruction next door. He did not question the Examiners Notice of the need for exemption from the parking space requirement; he accepted Staff's recommendation without challenge. He said that the plans submitted identified existing parking. In discussion, he stated a preference to stay with the status quo as both he and his wife park, in tandem, on the existing driveway. He was not alert to the regulation parking dimensions of a 'parking space' in the City; the existing driveway is 2.08 m wide and while cars park on it, that standard is deficient under the regulation.

With respect to the deck related variances, he described the desire for a modest 2.44 m deck at the same level as the main floor of the kitchen and dining area. This causes a 0.06 m height variance, describable as imperceptible. The deck itself is less in depth than is permitted as of right at 2.45 m; however, the stairs to grade extend a

structure beyond the main rear wall extension another meter, giving rise to the variance requested. As noted, the deck portion is 3 m back from the main rear wall of the Appellants property. As later agreed by the Appellant, only on descending the stairs would there be an oblique look across both lots back towards the rear wall of 91 Boultbee Avenue. There is no issue of loss of sunlight as the west wall of 91 Boultbee is two-storeys in height, windowless, and extends beyond the main rear wall of the subject property, even with the extension.

Evidence on behalf of the Appellants was provided by Mr. Wenus calling a co-owner, Mr. Kyo Jeen Song.

Mr. Song said that the issue of parking two cars on the lot and the intention expressed to continue to do so was known by the Applicant and ought to have been disclosed to the Committee, before advancing an exemption from the requirement to provide one eligible parking space. He said the on-street parking permit process which he had pursued was a matter of minutes and it could have been perfected long before the TLAB hearing.

Similarly, he said the existence by the prior owner of a second suite tenant and the discussions he had with the Applicant on the possibility of a basement apartment accessed along the east side of the subject property was also a known by the Applicant and ought to have been disclosed to the Committee, before asking for relief.

He described his concerns and actions to advance a claim for adverse possession of the ‘walkway’ between the respective buildings, the mutual security cameras that observe use, the discovery of footage capturing a falling roof shingle from the Applicants property into the space and the construction of a new fence and the removal of a gate, posts and footings by the Applicant, within the space. This activity, he said, has produced no practical access to either rear yard and creates an unsafe maintenance circumstance impeding finalization and removal of his own construction debris.

Mr. Song had asked and had received a refusal for a pre-construction engineering assessment by the Applicant of base line conditions and footings for the addition. He described similar construction and the benefit of a subsidence study he experienced that permitted shoring to prevent injury to adjacent lands. His concerns extended to construction practices from the Appellants intended builder, with whom he had had a ‘sour relationship’, over own construction issues.

The Appellant provided a well-documented Affidavit for the Motion, entered as Exhibit 2, on which he placed reliance, especially photographs showing the proximity of eves, views, fencing, privacy and survey information.

Despite the dispute over property and apparent minor discrepancies in survey work, Mr. Song expressed appropriate support for keeping open channels of communication which had broken down - with the instance of the fence erection between the buildings.

No other relevant or reply evidence was tendered although discussion points in submissions ensued.

ANALYSIS, FINDINGS, REASONS

In the absence of professional evidence the TLAB can hear from the parties, examine the public record and consider the application of the relevant tests and consider the submissions made in its obligation to reach a decision on the appeal. In this case, the record provided ample graphic, pictoral, referenced decisions and oral evidence stemming from the pre-filed materials, the earlier Motion and the oral evidence of the Parties present.

There is nothing in the Application that invites conflict or any issue with the Provincial Policy Statements or the Growth Plan; indeed, the expansion of a single detached dwelling within a 'Neighbourhoods' Official Plan designation, in the absence of offended criteria, is demonstrative of renewal that respects and reinforces the neighbourhood. The record identifies these criteria, s. 4.5. a)-h), of the Official Plan; no aspect of offence was brought to my attention except for the discussion on the intervening side yard setback between the properties. In this regard, it is noted that the Appellant's themselves achieved a variance to this space premised upon a representation of the distance between dwellings, not the surveyed property line. The Applicants frame a similar request for relief premised on property survey lines.

For the purpose of this hearing, I accept the survey boundary for the purpose of variance consideration and ignore the dispute concerning title. Clearly, the location of the dwellings will not change for the foreseeable future.

For the reasons expressed throughout, I find that the Application meets the general intent and purpose of the Official Plan.

The siting of the Applicants building and proposed addition are instructive for the examination of meeting the intent and purpose of applicable zoning.

With a pitched roof both on the existing dwelling and the addition, the mass, scale, height and impact of the proposal fall well below the impressive character of the flat roof dwelling that is the Appellants property, itself being upgrade to the subject property's addition.

The comparables advanced by way of visuals, photographs and Committee decisions, the apparent consistency of lot pattern, including the shape and size of lots, make the representation of compatibility as to fsi, side lot line reduction and eves projection acceptable, consistent in a tightly spaced plan of subdivision, compatible and in keeping with the character of the neighbourhood.

I have no hesitation in finding that each of these respective variances, individually and cumulatively meet both the intent and purpose of the Official Plan and the zoning by-law to respect and reinforce the neighbourhood and its other criteria. The zoning exceptions proposed fall with the limit of acceptable revisions and meet the

intent of zoning to protect adjacent properties from issues of undue adverse impact. I find as well, that the enlargement of a single detached dwelling to the degree proposed is desirable for the enhancement and upgrade of this residential dwelling unit and that the variances are minor both in measure and impact, causing no offsite disturbances uncommon to new construction.

Variances are also sought for the elimination of a parking space and the construction of a rear deck.

Above, the parking variance is described as 'curious' and 'mysterious'. It was the subject of suggestion and innuendo by the Appellant as to potentially nefarious conduct for failing to disclose aspects to the Committee. I disagree. I accept, as it unfolded, the Applicants evidence, on face value, that the Plans Examiners' listing of a variance to eliminate the requirement of a 'parking space' was surprising to the Appellants, but unquestioned. As with the Appellants application, the requirement not to provide a 'parking space' was not exceptional or novel. Many lots on Boultbee Avenue do not have the opportunity for on-site parking. The by-law requirement for the provision of parking is therefore brought into play. There was no evidence brought to suggest that the City is actively enforcing the measurements of a 'parking space' and requiring owners of non-compliant off-street parking to cease and desist from the historical usage of driveways with physical in-site capacity, or seek a proactive variance. The City does capture this issue in an Examiners Notice review for building permission.

I find that the Appellants expressed concern in this hearing regarding the parking variance and the innuendo of a deliberate avoidance before the Committee of a desire to continue to park on-site, as disingenuous. The subject of parking, so the Applicant said, was before the Committee including the plans advice as to on site driveway parking. Parking was not raised as an issue in the Appellants list of objections received by the Committee on August 10, 2017. It is not unusual for a citizen not to know the exact regulated dimensions of a 'parking space' and even if known, to accept the Plans Examiners requirement that the lot be regularized to permit construction in accordance with all regulations of the by-law. The fact that the Applicant did not pursue alternative recognition of a reduced standard is as equally consistent with the absence of professional planning advice and not realizing an alternative option existed, as the subject unfolded, as it is with the innuendo of deliberate deception.

All agree that on-street parking is less convenient, at a premium and generally a challenge. The Appellants directed no evidence of impact or concern for the continuation of driveway parking on the subject property, apart from the purity of compliance with the regulatory standards. Indeed, the Applicants driveway is on the far side of the lot from the Appellants property.

I find the parking variance to be a non-issue and respect the Applicants preference for the continued use of the existing driveway, its convenience and its service to the community - by not requiring two additional on-street parking spaces.

For that to occur, I do not wish to place the Applicants in the position that continuing the historical use of the driveway places them exposed to a possible by-law infraction complaint and enforcement. Peace in the neighbourhood is a preferable

objective. I find that the variances in this regard to be both minor and desirable, consistent with the Appellants own application and not out-of-keeping with area values.

In a similar vein, I place no weight or relevance on the fact that a previous owner to the Applicants had accommodated a tenant or 'second suite'. None of the variances sought address this use aspect; the presence of a second suite and conditions related thereto is a matter under separate City jurisdiction. The Applicants disavowed before me any intention of a proposed second suite, even with the expansion proposed – whether or not it had been previously discussed as a possibility. There is no relevance to the variance relief sought in respect of this subject matter; it is entirely unseemly to suggest that tabling this subject before the Committee or the TLAB was an 'obligation' of the Applicants, the 'full disclosure' of which might have altered the considerations relevant to the variances sought. In the absence of relevance to the variances sought, there was no need to burden the Committee or the TLAB with this speculation.

The connection giving rise to this subject was the apprehension that if a second suite in the Applicants property was pursued, the access to it might or would be directed on the east side of the lot, involving the disputed title ownership to the less than 2 m space between the buildings. The Applicants may well be the author of their own misfortune for this topic arising in whatever conversations that may have been held. Even if that were the case, carrying it forward by the Appellants as a rationale to object to variances that are unrelated, or suggesting the clock be restarted by re-attendance before the Committee for the purposes of 'full disclosure' is an error in judgement as to relevance and import.

How and why the property dispute arose is not for the TLAB forum. Its presence, however regretful, is justification for both parties to enter into a wary dance and view the actions, motivations, reactions and interpretations of the other through a lens of protecting their various perceived interests. It is not my task to ascribe fault to the actions of either, even if there were any, but to employ the dispute resolution process for the Applications to resolve the land use planning merits of the requests identified and made. While it is true that the private property dispute could ultimately result in a determination that the paper survey title differs from actual ownership entitlement, as between the properties, this is not a basis for the TLAB to abandon its obligations. To do so might constitute declining jurisdiction, a reviewable error. Not only has there been no determination made by a court of competent jurisdiction on the issue, no application has as yet been made. I was advised that the title dispute in its formative stages had been alluded to before the Committee, possibly through objections styled as 'access and safety', 'loss of privacy'. The Committee proceeded to deal with its mandate, as must the TLAB.

On these reasons respecting the parking variance and the issue of the second suite, I give no countenance to the suggestion that the matter be remitted back to the Committee for reconsideration. Indeed, the Committee is *functus officio* and I have no jurisdiction to so direct even if so inclined, which I am not.

Two variances are sought in respect of the proposed rear yard deck. The deck does not extend beyond the Appellants rear sidewall and presents no observation potential into the Appellants residence. Its modest elevation request is the product of

grade falling off to the south and west. The Appellant described that an oblique view into the lower level of 91 Boultbee Avenue could occur from the steps leading off the deck, suggesting the potential invasion of privacy. I do not see either the deck or its exit stairs in the circumstances as contributing to an undue adverse impact or a circumstance warranting remedial action. Situations of overlook can exist in an urban environment but this example is at the low end of minimal intrusions. I will not set a condition of screening as suggested by Mr. Wenus in submissions as there was no evidence called to justify its appropriateness. Building standards may well require a railing and the Applicants should be free to provide such other protective measures as a growing family may find warranted.

A final matter needing to be addressed is the Appellants request that a pre-construction evaluation be made of the necessity for shoring to protect against subsidence and undermining the lateral integrity of the Appellants property and its foundation. The Appellant, it its construction, had seen the benefit of this remedial measure through two engineering assessments and had requested it of the Applicant. The Applicant refused. The Applicant is not entitled to undermine the lateral support of the neighbours property, or occasion property damage without the potential of incurring significant liability. Given the experience asserted by the Appellant, the condition of described sandy soils, the proximity of the excavation for the addition proposed to the common lot line (undisputed in this location) and the existence of a common chain link fence and residence, the Appellant is prudent to have informed, advised, suggested and requested that this evaluation be conducted.

Construction practices are, in the first instance, the bailiwick of the owners and their contractor, but ultimately the City's Chief Building Official. It is not for the TLAB to dictate construction practices or the owners' choice of contractor. The owners are free to act on the advice received or ignore it, possibly at their peril.

I have no reason to believe that the role of City Building's inspection, instruction, compliance and enforcement will or should differ on Boultbee Avenue as distinct from the City at large. Consequently, on the anecdotal evidence that I received, I decline to order as a condition that a pre-construction engineering report be obtained, as requested by the Appellants. I believe the Appellants interests are fully protected by the Chief Building Official and remedies at common law, if required. I am content, again on the evidence received, to leave the issue of the expense and pre-construction engineering investigations to the Office of the Chief Building Official.

In summary, I find that the variances requested, individually and collectively, meet the statutory tests set out above for the reasons described.

My jurisdiction extends to making any decision the Committee could have made on the original application. In that regard, parking relief was applied for and granted. I propose flexibility and to extend additional parking relief to permit, recognize and maintain existing parking on the subject property where it currently exists.

DECISION AND ORDER

The appeal is allowed, in part, and the variances described in Attachment 1 are approved with the following additional modification to both by-laws:

1. Despite the approval of the elimination of the requirement of providing a parking space, tandem parking for two cars on the lot in the location of the existing driveway is recognized and may be maintained with a parking space width of not less than 2.08 m.

The variances granted are on condition that construction proceed substantially in compliance with the plans identified in Exhibit 1, prepared by Arsenault Architect Inc. dated April 4, 2017, for the proposed rear addition to the subject property.

If difficulties arise in the implementation of this decision and order, the TLAB may be spoken to.

X 

I. Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord

Attachment 1

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:
1. Chapter 10.10.40.40.(1)(A), By-law 569-2013
The maximum permitted floor space index of a detached dwelling is 0.6 times the area of the lot (138.85 m2).
The altered detached dwelling will have a floor space index equal to 0.8 times the area of the lot (185.64 m2).

2. Chapter 10.10.40.70.(3)(A)(i), By-law 569-2013
The minimum required side yard setback is 0.9 m.
The altered detached dwelling will be located 0.4 m from the east side lot line.

3. Chapter 10.5.40.60.(7), By-law 569-2013
Roof eaves may project a maximum of 0.9 m provided that they are no closer than 0.3 m to a lot line.
The roof eaves will be located 0.15 m from the east side lot line.

4. Chapter 200.5.10.1.(1), By-law 569-2013
A minimum of one parking space is required to be provided.
In this case, zero parking spaces will be provided.

1. Section 6(3) Part I 1, By-law 438-86
The maximum permitted gross floor area of a detached dwelling is 0.6 times the area of the lot (138.85 m^2).
The altered detached dwelling will have a gross floor area equal to 0.8 times the area of the lot (185.64 m2).

2. Section 6(3) Part II 3.B(I), By-law 438-86
The minimum required side lot line setback for a detached dwelling is 0.45 m for a depth not exceeding 17 m and where the side walls contain no openings.
The altered detached dwelling will be located 0.4 m from the east side lot line.

3. Section 6(3) Part II 8 D, By-law 438-86
The projection of an uncovered platform into the required setbacks is restricted to a maximum of 2.5 m from the front or rear wall.
The rear ground floor deck and landing will project 3.44 m from the rear wall.

4. Section 4(4), By-law 438-86
A minimum of one parking space is required to be provided.
In this case, zero parking spaces will be provided.

5. Section 6(3) Part II 8 D(I), By-law 438-86
The maximum permitted height of an uncovered platform which projects into the required setbacks is 1.2 m above grade.
The rear ground floor deck will have a height of 1.26 m above grade.