

DECISION AND ORDER

Decision Issue Date Tuesday, January 16, 2018

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

Appellant(s): SILKE RUDELBACH

Applicant: SILKE RUDELBACH

Property Address/Description: 76 ASQUITH AVE

Committee of Adjustment Case File Number: 17 108897 STE 27 MV

TLAB Case File Number: 17 181904 S45 27 TLAB

Hearing date: Thursday, December 07, 2017

DECISION DELIVERED BY T. Yao

INTRODUCTION

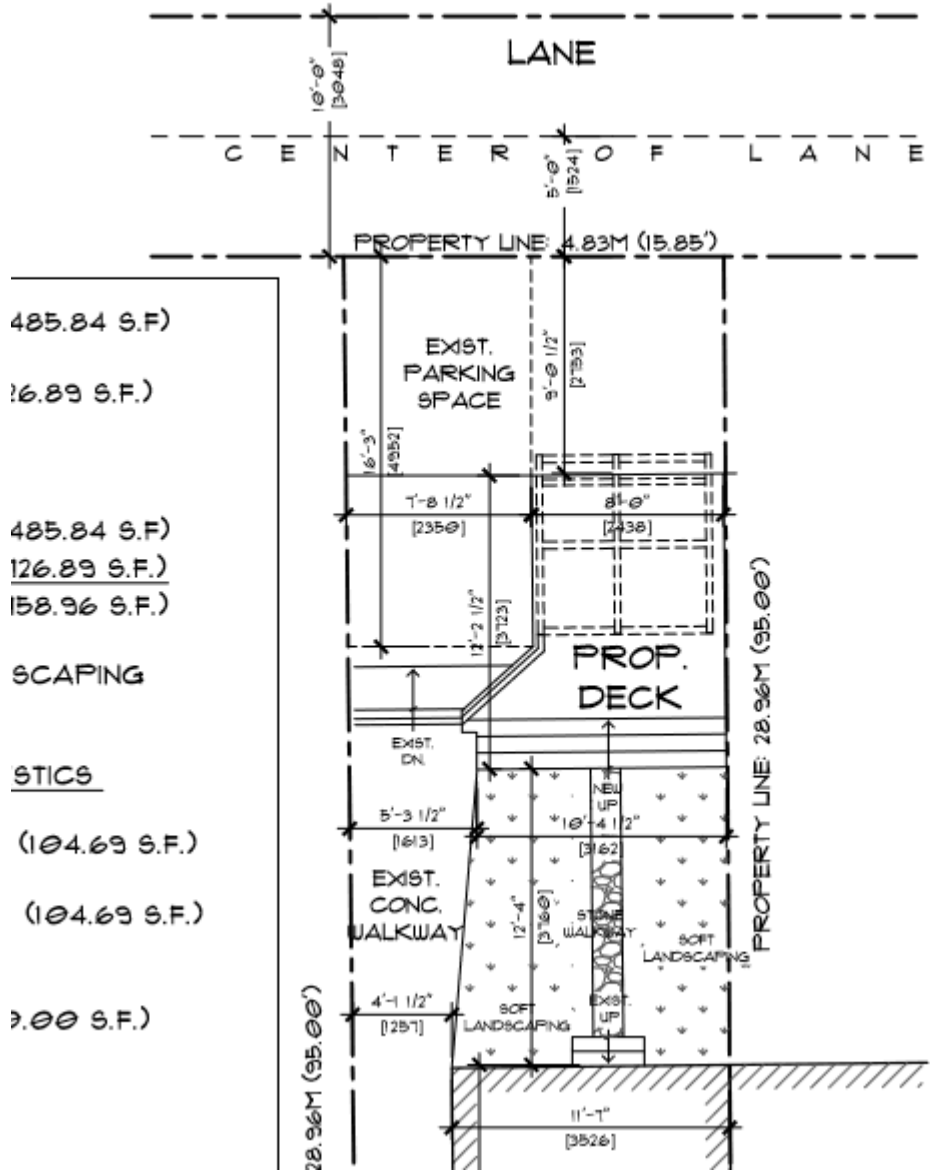
Silke Rudelbach seeks to legalize construction of a rear deck by obtaining 7 variances.

BACKGROUND

Two years ago, Ms. Rudelbach purchased 76 Asquith Ave, a three storey townhouse. She commenced construction of a new deck based on her contractor's advice that she could do this without a building permit. He was wrong; there was a complaint and the City served a stop work order, which she obeyed.

The back yard consisted of a slightly raised patio, on which there was a table and four chairs. Alongside the patio was a walkway leading to a gate/door and fence. Beyond the fence were two parking spaces accessible from a lane that serves houses on Collier St and Asquith Ave.

Figure 1. Site Plan



Ms. Rudelbach retained one of these spaces, virtually unaltered (left hand side in site plan). On the other parking space, she located the new raised deck, which needs a building permit; this has caused this minor variance application. Between the new deck and her back door, she will plant grass. The remainder of the second parking space, about 9 feet adjacent to the lane, is left vacant. It will be used for storage of garbage cans and to permit cars backing out from Collier St. properties to maneuver more easily.

I will now review the new construction to explain how it causes the need for variances to the zoning by-law. The new deck is located too close to the eastern neighbour; it is tight against the mutual fence instead of being a minimum of 1.36 m away.

This deck is also too large by zoning standards. It is 10 x 12 feet with steps. The remaining space between the deck and the house to be grassed covers less than 25% of the rear yard area. The irony is that the zoning by-law does not know that formerly the grassed area was covered with patio stones; and so, we are moving from virtually no soft landscaping to about 20%. By going through the minor variance process it looks like Ms. Rudelbach is worsening the situation when the opposite is true. The zoning by-law contemplates large suburban yards where less than 25% grass would be too large a deck.

A similar misconception arises out of the parking space variance. As stated, there used to be two parking spaces, each 2.35 m by 5.6 m. Both failed to meet the current requirement of 2.9 x 5.6 m (9.5 feet x 18.4 feet). The parking space being proposed has never changed and is large enough to park a family sized car like a Honda Accord or a small pickup truck.

So, the word “variance” is misleading, it is another way of saying that if 79 Asquith Ave, with the new rear deck were to be built tomorrow, the zoning examiner would advise that the parking space doesn’t meet the current zoning standards.

EVIDENCE

Understandably, Ms. Rudelbach was dissatisfied with the contractor and so she retained an architect, Gregory Reuter. The retainer took place after the Committee of Adjustment decision, so Mr. Reuter inherited the original design. I qualified Mr. Reuter as competent to give opinion evidence in architecture and design. His CV shows he has worked on very large projects; an early example is lead architect for Charles MGH Elevated Subway Station in Boston, but he gave this backyard deck the same thoughtful analysis that he gave to those larger projects. Ms. Rudelbach also retained Amber Stewart as her lawyer.

The following persons attended or filed participant statements or both. Linda Middleton, 78 Asquith; Anne Elliott 80 Asquith; Mara Jansons, Inese Dzenis, Andris Dzenis, 82 Asquith; Lynn Jonsohn, 153 Collier; Catherine Tillmann, 155 Collier; Sean Keeley, 157 Collier; Helen Keeley; 157 Collier; Meredith Uiska (Ms. Rudelbach’s vendor).

Richard Tillmann, Ms. Tillmann’s brother, acted as a representative for this group and conducted the cross examination of Mr. Reuter. Only Ms. Tillmann gave evidence. These neighbours worked together collaboratively so they could speak as a single voice, which was helpful to understand their viewpoint.

MATTERS IN ISSUE

The tests for minor variances from a zoning by-law 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.

I find, in a fine grained small development like this, that the Growth Plan and Provincial Policy Statement have no applicability.

As this case unfolded, the following sub-issues emerged, and it is convenient to address them right away and the responses form part of these reasons for decision.

Is it fair that residents should have to attend a minor variance hearing (both at the Committee and at the TLAB) to deal with Ms. Rudelbach's issues?

Response: Yes, this is what the *Planning Act* mandates. Ms. Rudelbach has a right to appeal a minor variance decision to this Body and our process, which is mandated by City Council, is more complicated than at either the Committee of Adjustment or the Ontario Municipal Board.

Does approval of an irregularly sized (i.e. smaller) parking space mean that Ms. Rudelbach is obtaining some sort of special approval, when in the past, a car parked on her land jutted slightly into the lane?

Response: No, all the regular parking by-laws still apply; however, they equally apply to other landowners, whose parked cars may also jut slightly into the lane

What implications does this application have for Ms. Rudelbach's security and the security of other residents?

Response: Mr. Reuter acknowledged that these were difficult issues, and suggested some physical improvements to improve security, which were agreed to by Ms. Rudelbach.

ANALYSIS, FINDINGS, REASONS

Mr. Reuter described the site context, which is obvious to any resident of Toronto. Asquith Ave and Collier St are within easy walking distance of Bloor and Yonge, the subway system's major hub. The block itself was built before 1880, which means that it predated both zoning bylaws. Mr. Reuter said that at that time, lot lines did not have the same importance as they do today, so that there always have been

minor discrepancies. He said the party wall between 76 and 78 Asquith does not appear to be exactly on the legal lot line.

The Parkette and the “cove”

To Ms. Rudelbach’s west is Milner Parkette, which was the site of an old service station. The former service station building’s north and east wall have been retained; its rear wall (north side of parkette) contains windows and forms a dividing line between the park and the lane at the rear; the blank east wall divides the parkette from Ms. Rudelbach and is a wall of the “undersized” parking space. According to Ms. Tillmann, this is the location of a “cove”, i.e., a public, but hidden area. Without ascribing blame for their behavior to Ms. Rudelbach, Ms. Tillmann states that park users use this “cove” area for public urination. Ms. Tillmann is concerned that the new raised deck and fence will shield a person from views in three directions, and so this negative behavior will be encouraged. I will elaborate further on Ms. Tillmann’s concerns below.

The lane and abutting back yards are hard surfaced

Just east of Ms. Rudelbach’s lot, the lane doubles in width, going from 10 feet to about 20 feet wide. This increased width does not appear to have been translated into different paving materials and so persons living in houses on Collier and Asquith, may have assumed that the lane is only 10 feet wide throughout its entire width.

Most owners abutting this lane have divided their rear yards into two: an “inner” rear yard used for one’s usual outdoor activities, and an “outer” rear yard, for storage of cars, open to any lane user. Both the lane and rear yards are hard surfaced, although Ms. Tillmann’s rear yard has permeable pavers. Previously, the back yard fences and patio fitted in with this built-form and the post construction deck and fences will continue to do so. Both before and after the construction, the portions of her land abutting the lane are hard surfaced, just like every other landowner, except Ms. Tillmann’s.

Because there are only a few users of this lane, there have evolved formal and informal arrangements as to its use and maintenance. For example, there is an association of owners who pay for snow clearing, which association Ms. Rudelbach has declined to join. May I respectfully suggest that Ms. Rudelbach consider joining, because the spirit of the Official Plan speaks of “using shared service areas.... including . . .lanes”¹.

¹ 3.1.2 BUILT FORM

2. New development will locate and organize vehicle parking, vehicular access, service areas and utilities to minimize their impact on the property and on surrounding properties and to improve the safety and attractiveness of adjacent streets, parks and open spaces by: a) using shared service areas where possible within development block(s) including public and private lanes, driveways and service courts; (page 3-7)

Mr. Reuter's review of the surrounding built form

Mr. Reuter stated that very little will change if the TLAB grants the requested zoning variances. The built form result will be physically similar to what others have done, probably also without benefit of a building permit.

For example, Ms. Rudelbach needs an east side lot setback of zero metres. The neighbour at 80 Asquith or her predecessor has built a higher deck extending the full width of the property, with zero metres on both sides. If that neighbour ever applied for a building permit, she would have needed the same variance that Ms. Rudelbach seeks.

Furthermore, the deck is high enough to park the hood of a car beneath. This is an indication that in this neighbourhood, every square centimeter is valuable, and Ms. Rudelbach's deck further reinforces this "prevailing pattern of physical development" that the Official Plan encourages.

Similarly, for the deficiency in soft landscaping.



I have mentioned all the outer yards are hard surfaced. It appears as well that there is very little soft landscaping in any of the nearby rear yards.

The parking space variance is for a space entirely on Ms. Rudelbach's land. If it is inconveniently small, it has been so for years, perhaps decades. It is very similar to many of the other neighbours' "parking spaces", for which no minor variance was

sought and therefore no public meeting was held to discuss their dimensions. For those lots farther east, abutting the wider lane, because the paving markings do not reflect the legal boundary of the lane, their spaces probably inadvertently “overhang” the City owned lane.

Ms. Rudelbach’s yard is 4.71 m wide (15.5 feet); and two 3.0 m setbacks from each side yards makes any accessory structure impossible without variances. If she shouldn’t have accessory structures, then neither should the other Asquith neighbours with equally narrow lots.

The *Planning Act* requires me to consider the Official Plan in which Section 4.1² requires that I look to see how Ms. Rudelbach has replicated the “prevailing pattern” and “continued the built form features”, which include the wall of Milner Parkette and the lane. I accept Mr. Reuter’s testimony the Ms. Rudelbach has done so, and her proposed deck thus conforms to the Official Plan. I find that therefore, all the other tests are met.

Resolution of planning disputes

Before I turn to Ms. Tillmann’s evidence, I want to set the stage, because, the neighbours like many people caught up in a minor variance hearing misunderstand how a person who can’t comply with the zoning can ask for an exemption. The reasoning for this is that it is impossible for one zoning standard to apply to all parts of a city with Toronto’s diversity: some parts of Toronto being built in 1880 and some in the 21st century.

This Asquith/Collier area has two distinctive features: the lane and its downtown location. Page 2.6 of the Official Plan says the laneway should stay in the “public realm”³, which means that owners should not appropriate lane right of way for their own use. I believe that all owners (including Ms. Rudelbach) have obeyed this section by

² 4.1 NEIGHBOURHOODS

5. Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular: . . .

- f) prevailing patterns of rear and side yard setbacks and landscaped open space;
- g) continuation of special landscape or built-form features that contribute to the unique physical character of a neighbourhood; . . .

³ 3. The City’s transportation network will be maintained and developed to support the growth management objectives of this Plan by:

. . .

- g) ensuring that laneways are not closed to public use and stay within the public realm where they provide present and future access and servicing to adjacent development(s); page 2-6

not fencing their lands and allowing others to cross over their lands to better use this narrow but essential access.

The second aspect of Official Plan policy stems from the fact that this is an oasis in an intensely downtown location. The plan says:

Given that this [i.e. the downtown] is one place in Toronto where “change is constant”, we must ensure that our built heritage is *respected, nurtured and improved.* (my italics)

Mr. Reuter’s testimony was that the improvement in soft landscaping and retaining the possibility of the use of her land for a “hammerhead” was respectful and an improvement. I find her plans for vines and plantings to be nurturing.

Finally, the Official Plan has this to say about community input into planning decisions:

Great leadership makes it safe to do the right thing – make the hard choices and reap the quality of life rewards. Toronto’s future as a city of leaders and stewards is one where: *individuals and communities actively participate in decisions affecting them;* page 1-5 (my italics)

Thus, the active participation of the neighbours at the Committee and the TLAB is welcome, and I wish to thank each of the persons mentioned on page 3 for responsibly attending what has been a three day hearing.⁴

Catherine Tillmann’s evidence

Ms. Tillmann said:

I have worked very closely with Community Policing, with (the local) Police Detachment, with the City Councillor’s office, with Homes to Streets, and with Shelter services. Parking is the number one issue and occupies 75% of all (our) time with Council office. The (other) number one issue with people who visit the (Milner) park is, people who visit, go down the back lane to urinate, to conduct illegal drug sales. . . .

We have achieved significant reduction in drug related crime. We have achieved significant reduction in inebriated brawls, and we have achieved, best of all, very significant reduction in public urination. We have done so by clearing sight lines into the park and by constantly having our eyes out into the park and we have preserved the openness of the lane by eliminating “possibilities” there. That said, it all still exists.

. . . There’s been a lot of testimony today about the community environment. That exists amongst the neighbours who use this lane. And I have talked to a very strong history of increasing safety and security, for all users of the lane and visitors to the park. While I would respect that it would be within Ms. Rudelbach’s right. . [to apply for a minor variance] if I was going to utilize the reference of community, I would also assert that one cannot rely on the foregoing accommodations provided by a communal society, when

⁴ Involving a day of hearing and two preliminary motions.

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one is attempting to negatively impact that communal society. So, by law, yes. By attitude, by desire for engagement, and shared respect for security, in my judgement it would not be.

I found these remarks on “communal society” very helpful, particularly in the context of page 1-5 of the Official Plan —, “active participation”. However, I do not accept that what Ms. Rudelbach is doing negatively impacts communal society; by bringing the deck closer to the cove, she brings eyes closer to a trouble spot. However, I applaud Ms. Tillmann’s outreach to the Police and City staff, which is tempered with an understanding of the plight of homeless individuals.

I would urge the neighbours to consider how fences can be lowered and openings created to create more “eyes on the street”. Ms. Rudelbach has agreed to install motion sensitive lights and a backup mirror and I am making the lights and mirror a condition of the approval. I repeat my suggestion that Ms. Rudelbach consider joining the snow clearing association, but I cannot make it a condition.

I do not make the following suggestion a condition either. Mr. Reuter can be a valuable resource. Perhaps he could suggest to Ms. Rudelbach ways of piercing the deck’s privacy fence and installing screening that both protects privacy and yet allows persons on the deck to see and monitor people on the outside of the fence.

DECISION AND ORDER

The variances set out in Table 1, below are authorized, subject to the Conditions of Approval.

| Table 1. Variances required under Zoning By-law No. 569-2013 | | | |
|---|---|--------------------------------|---|
| and forming part of this decision | | | |
| | | Required | Proposed |
| 1. | Maximum permitted coverage for ancillary structures | 5% | 7.28% |
| 2. | Minimum rear yard % of soft landscaping | 25% | 19.56% |
| 3. | Minimum side yard setback for platform .3 m from a building | 1.36 m | 0 m from east lot line |
| 4. | Minimum size for parking space | 2.9 m | 5.6 m |
| under Zoning By-law No. 438-86 | | | |
| 5. | Minimum setback for accessory structures | 3 m | 1.43 to west lot line, 2.75 m to north rear lot line |
| 6. | Maximum permitted area Rear deck | no greater than 5% of lot area | 7.28% of lot area |
| 7. | Minimum size for parking space | 2.9 m | 5.6 m |

Conditions of Approval

1. That the owner construct in substantial compliance with the plans Z1 and Z6 of *re:Placement Design Inc*, dated March 22, 2017
2. The owner shall install a motion-activated light at the rear of the proposed deck extension.
3. The owner shall install a wide angle convex mirror at the rear of the Subject Property to increase visibility of the laneway.
4. Submission of complete application for permit to injure or remove City owned trees under Municipal Chapter 813 Article II, Street trees.

X

Ted Yao

T. Yao
Panel Chair, Toronto Local Appeal Body
Signed by: Ted Yao