

DECISION AND ORDER

Decision Issue Date Wednesday, January 31, 2018

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

Appellant(s): Victoria Oddi

Applicant: F&A Associates

Counsel or Agent: Russell Cheeseman

Property Address/Description: 393 Maple Leaf Drive

Committee of Adjustment Case File Number: A169/16EYK

TLAB Case File Number: 17 19619 S45 12 TLAB

Hearing date: Friday, November 10, 2017

DECISION DELIVERED BY ENTER S. Gopikrishna

INTRODUCTION AND BACKGROUND

393 Maple Leaf Drive is a property close to Keele Street and Eglinton Avenue in Ward 12 of the City of Toronto (City). The owners of 393 Maple Leaf Drive applied to the Committee of Adjustment ("COA") started building a "cabana" in their backyard and applied to the COA, which triggered three variances under By Laws 569-2013 and 7625. These variances respect rear yard setback and the maximum permitted height of the cabana. On 15 June, 2017, the COA heard the application and approved the variances.

On 4 July, 2017, Ms. Michelina Lastella of 395 Maple Leaf Drive appealed the decision of the COA to the Toronto Local Appeal Body (TLAB). Ms. Victoria Oddi of 391 Maple Leaf Drive elected to be a Participant in the appeal.

MATTERS IN ISSUE

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 from 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
- are minor.

The following are the list of variances requested by the Applicants:

Variances to By Law 569-2013 (By-law under appeal and not yet in effect)

1. The minimum required rear yard setback for an ancillary building or structure is 2.38 m. The proposed structure will be located 1.03 m from the rear lot line.
2. The maximum permitted height of an ancillary building or structure is 4 m. The proposed structure will have a height of 4.76 m.

Variances to North York By Law 7625 (By Law in force)

3. The maximum permitted height of an accessory building is 3.7 m, measured to the mean height level between the eaves and the ridge of the roof. The proposed structure will have a height of 4.02 m.

.EVIDENCE

The hearing started with the Parties and Participants introducing themselves. Mr. Russell Cheeseman, Barrister and Solicitor and Mr. David Riley, an Expert Land Use Planner represented the Applicants. Ms. Michelina Lastella of 395 Maple Leaf Drive was the Appellant while Ms. Vittoria Oddi of 391 Maple Leaf Drive was a Participant in support of the Appellant. Both Ms. Lastella and Ms. Oddi were represented by Mr. Michael Loschiavo, a landscaper by profession.

Mr. Cheeseman elected to present the applicants' case first. He introduced Mr. Riley and reviewed his resume and Acknowledgement of Expert's Duty. Mr. Loschiavo had no questions for Mr. Riley, who was then recognized as an Expert Witness. After swearing

in Mr. Riley, I asked for clarification on what a “cabana” was and if there were special by-laws for cabanas. Mr. Cheeseman stated that a cabana was no different from an accessory structure and that there were no special by-laws for cabanas.

Mr. Riley began by stating that he had reviewed applicable policy, including Official Plan Policies and Zoning By law regulations as they related to the proposal and associated variances. He then followed up with a site visit to document the characteristics of the subject property and neighbourhood, all of which were utilized to present evidence before the COA on June 15, 2017 as well as the TLAB. Mr. Riley also stated that he had reviewed all the material filed with TLAB and had directed the preparation of materials to be relied upon at the hearing.

Mr. Riley then discussed the location of the subject property and its surroundings. He pointed out that Maple Leaf Drive is characterized by deep lots along the south side of the road and that the subject property is one of nine where the homes are set back further from the front property line in comparison to other homes on the same side of the street. He then explored the neighbourhood through a photographic tour to draw attention to some of the unique features, exemplified by many homes with an ancillary building in the backyard.

Mr. Riley discussed the high level nature of the policies of the Provincial Policy Statement (PPS) of 2014. Mr. Riley next discussed the Greater Golden Horseshoe (Growth Plan) which is applicable to all lands in Greater Golden Horseshoe, including the City. He remarked that such high level policies usually applied directly to larger projects and did not directly impact proposals such as ancillary structures. He then discussed the objectives of the Growth Plan (2017) and its promotion of “complete communities”. Nevertheless, the proposal complies with the PPS and Growth Plan (2017) because of the demonstrable compatibility between the proposal and the Official Plan, which adhered to the PPS and the Growth Plan.

Mr. Riley pointed out that the subject lands were designated as “Neighbourhoods” in the City of Toronto Official Plan. Further, Zoning By-law 569-2013 zoned the subject property as RD. After providing this background, Mr. Riley then commenced his commentary on how the proposal fit the four tests listed in Section 45(1) of the Planning Act. He started with the test of demonstrating that the proposal maintained the intent and purpose of the Official Plan.

Based on Policy 2.3.1 of the Official Plan, the areas designated “Neighbourhoods” are not meant to be static though physically stable. This policy requires development within neighbourhoods to respect and reinforce the existing physical character of buildings, streetscapes and open space patterns of the area.

In Mr. Riley’s opinion, the proposed variances, facilitating the placement and construction of the said cabana, maintain the intent and purpose of the policies of Section 2.3.1 of the Official Plan. The proposal respects and reinforces the existing physical character of the neighbourhood because it fits with the existing pattern and size of rear yards and ancillary buildings in the neighbourhood; it exemplifies evolution and is consistent with the Policy’s recommendation that neighbourhoods be “stable but not static”.

He then went on to demonstrate compatibility between the proposal and Policy 4.1.1 of the Official Plan which states that Neighbourhoods are physically stable areas made up of residential uses in lower scale buildings, including single detached dwellings. He then reviewed the criteria discussed in Policy 4.1.5 which provides specific development criteria for development within neighbourhoods and demonstrated that the proposal directly complies with , or is not impacted by Policies (a)-(h). The proposal doesn't impact street patterns, size and configuration of lots. There is no change to the prevailing dwelling type. The distance between the house and the back lot line and the depth of the lots is such that the impact of an ancillary structure at the back of the property is mitigated.

Given the consistency of the proposal with various criteria discussed in paragraphs above, Mr. Riley concluded that the proposal satisfied the test of maintaining the intent and purpose of the Official Plan.

Mr. Riley then discussed his findings regarding the second test, namely maintaining the intent and purposes of the Zoning By-law. He pointed out that the property is zoned RD (Residential Detached) in City Wide Zoning By-law 569-2013 and R4 in the North York Zoning By-law 7625. While two variances are required to facilitate the proposal with respect to City wide Zoning By-law 569-2013, one variance pertaining to building height is required under North York By-law 7625.

In relation to the reduced rear yard setback, Mr. Riley stated the proposed reduced set back satisfied the intention of the by-law by ensuring appropriate access to the rear of the ancillary building for maintenance purposes as well as mitigating any potential impacts from massing of the ancillary structure on properties adjacent to the rear property line. Mr. Riley demonstrated through photographic evidence that the proposed rear yard setback is compatible with that of adjacent ancillary structures and rear yard setbacks. With the help of elevation markers, Mr. Riley demonstrated that the lots slope towards the back which meant that the impact of the height of the ancillary building is mitigated.

Mr. Riley pointed out that correspondence from the Toronto & Regional Conservation authority (TRCA) dated 2 June, 2017 demonstrated that it had no objections to the proposed variances. TRCA noted that the proposed structure is outside the area of erosion hazard. They also noted that the subject property is located within the jurisdiction of the City's Ravine By-law and is subject to the approval of Urban Forestry. Urban Forestry staff indicated that there were no forestry issues in their communication dated 8 June, 2017. The proposal satisfied the requirements of the TRCA and the City's Urban Forestry Department. The intent of the Zoning By Law is also met because the ancillary building is no different in placement from other ancillary structures in the backyard; namely it is at the back of the property. Further, any potential impact of the extra height of the cabana is doubly mitigated by the large distance separating it from the rear walls of nearby dwellings and its' lower elevation than nearby dwellings. Based on these findings, Mr. Riley concluded that the variances, individually and collectively maintained the intent of the Zoning By-law.

Mr. Riley then addressed the issue of desirability of the proposal for appropriate development of the property. Given that the proposed variances have been supported

to be appropriate earlier in his evidence and the fact that the proposal has been built in the same location of the formerly existing ancillary structure without causing any adverse impacts on the neighbouring properties, Mr. Riley concluded that the proposed variances are desirable for the development of the property.

I note that the Appellants had completed the construction of the cabana by the time of the hearing before TLAB. The Analysis and Reasoning section discusses how the completed structure is factored into decision making.

Lastly, Mr. Riley addressed the issue of whether the proposed variances were minor. The point about the proposed ancillary structure being similar in size and location to its neighbours was reiterated. It was also pointed out that the height of the proposed structure was not much higher than the maximum permitted height. Given the separation distance and elevation of the cabana in relation to the dwellings, the impact of the height, in his opinion, is minor. Mr. Cheeseman stressed that the structure in this case had been built, which meant that the impact could garner experience as opposed to conjecture.

Mr. Riley concluded his evidence by stating that in his considered opinion, the proposed variances, individually and collectively, meet the four tests of Section 45(1) of the Planning Act, and should be approved.

Mr. Loschiavo then cross examined Mr. Riley. He wanted to know how Mr. Riley had established the grades for the cabana. Mr. Riley replied that he had relied on the plans and did not remeasure them. Mr. Loschiavo then asked if the height of the cabana was consistent with the heights of the neighbouring buildings. Mr. Riley replied that the structure to the west was lower while he couldn't confirm the relative heights of the building to the east.

Mr. Loschiavo asked about the date when the survey was completed to which Mr. Riley stated that it was the 22nd of September, 2015. Mr. Loschiavo then wanted to know if there was any change to the grade before the date of the survey? Mr. Riley stated that he wasn't aware of any changes to grade and that he was prepared to comment on the proposal but not on the grade nor the history of what happened before he accepted the retainer.

Mr. Cheeseman objected to the questions on the ground that the grade was not the subject of the proposal and that there were no variances associated with the grade. I then asked Mr. Loschiavo about what he intended to demonstrate through asking questions about the grade. Mr. Loschiavo replied by saying that the original grade had been altered by 30 inches which meant that the height of the cabana was much higher than what was being stated. He opined that the cabana ought to have been lower. I requested Mr. Loschiavo to confine himself to the proposal as presented by the applicant and not dwell on what the proposal could have been.

Mr. Loschiavo then asked Mr. Riley if he was aware if the Appellant had obtained a permit before he commenced construction. Mr. Riley replied that he didn't know the answer. Mr. Loschiavo responded by stating that it was important to submit plans to the City and get a permit before commencing construction, which was not the case here.

Mr. Cheeseman objected stating that the sequence of construction and indeed, the “legality” of the construction, as inferred from Mr. Loschavio’s remarks was not a matter before TLAB. I repeated my earlier request to Mr. Loschiavo about restricting himself to discussing the impact of the variances as submitted and requested

Mr. Loschiavo then stated that they were concerned about the height of the cabana which in his opinion, should have been lower to be consistent with its neighbours. He opined that the cabana should have been lower. When he attempted to ask Mr. Riley again if the cabana could be lower, then Mr. Cheeseman objected and I upheld the objection. I repeated my earlier observation about discussing the impact of the proposal and not what happened earlier. Mr. Loschiavo then stated he had no more questions for Mr. Riley, concluding the cross examination.

Mr. Loschiavo then introduced Ms. Michelina Lastella, the Appellant for the case., who was sworn in. Ms. Lastella stated that she had lived at her address, 395 Maple Leaf Drive, for the last 40 years. Mr. Loschiavo then showed her a picture (Exhibit 19) that was taken during the tenure of the previous residents of 393 Maple Leaf Drive . He asked Ms. Lastella to compare the relative heights of the ancillary building in her backyard and the cabana at the subject property. Ms. Lastella responded by saying that the height of the cabana at the subject property was much higher than the corresponding building in her backyard. Mr. Loschiavo then referred to various visual features that could be seen in the pictures in Exhibit 19 and asked Ms. Lastella if these features were visible presently if one went to the site. Ms. Lastella replied in the negative.

Mr. Loschiavo then asked Ms. Lastella if she knew the reason behind the change in the visibility of the features. Ms. Lastella replied that she thought that the change in height had been caused by infill on the ground around by the Applicants- the infill was so significant that the features referred to by Ms. Loschiavo on the outside of the shed were no longer visible. Mr. Cheeseman objected saying that Ms. Lastella should answer on the basis what she knew as opposed to what she thought or guessed. I advised Mr. Loschiavo not to speculate on the history and concentrate on the ground conditions as they existed now.

Mr. Loschiavo then asked Ms. Lastella if she was aware of any excavation and changes to grade at the site. Ms. Lastella said that she became aware of digging and excavation because the City had come to inspect the site since the debris resulting from the excavation had been thrown around carelessly resulting in clogging. Mr. Cheeseman again objected stating that changes to grading were not in front of TLAB. I again requested Mr. Loschiavo and Ms. Lastella to restrict themselves to discussing the impact of the proposal- the focus should be on what is requested in the proposal as opposed to the history of the proposal since the latter is not before TLAB.

Mr. Loschiavo expressed his frustration at how the Applicants had developed the proposal. They hadn’t obtained a permit before building the cabana. I reiterated that the 4 tests looked at impact and appropriateness of the development but didn’t concern themselves with the process of permits. I requested Mr. Loschiavo to direct his questioning such that the four tests could be spoken to.

Mr. Lastella then stated that she found that the height of the cabana at 4.76 m to be very high, more so since the changes to grade were not accounted for when determining the height. She drew attention to the photo (Exhibit 21) and again interpreted the positioning of various features in the picture to prove that the present owners had changed the height of the cabana by 36 inches. Ms. Lastella stated that the change in the grading coupled with the height of the cabana deprived her of the view of the foliage behind the houses and that three quarters of the trees couldn't be seen because of the imposing presence of the cabana..

Mr. Cheeseman began his cross examination of Ms. Lastella. He suggested to Ms. Lastella that the placement of various objects in the pictures shown by them compared to where they are now could be interpreted to mean that the original ground had been excavated and hollowed out before his clients started residing at 393 Maple Leaf Drive. Ms. Lastella disagreed with the suggestion

He then asked Ms. Lastella how the height of the roof of the cabana would impact her. Ms. Lastella repeated her argument about her not being able to see the trees- she would lose sight of three quarters of the trees behind the cabana because of the height. Mr. Cheeseman then drew Ms. Lastella's attention to a picture submitted by her of the cabana taken from the her balcony and she identified the trees that Ms. Lastella stated that she wouldn't be able to see as a result of the cabana being built. He pointed out that she would lose sight of no more than a couple of inches of the foliage. He asked Ms. Lastella if this constituted a significant loss of scenery? She insisted that the loss would be significant because she had seen the trees grow to their present height from when they were planted, an experience she compared to seeing children grow up. Mr. Cheeseman said that he had no further questions for Ms. Lastella. Mr. Loschiavo stated he too, had no more questions for Ms. Lastella.

The next witness was Ms. Vittoria Oddi, the neighbor at 391 Maple Leaf Drive. Since Ms. Oddi was not comfortable speaking English, I requested Mr. Loschiavo to interpret between English and Italian for his examination-in-chief and the cross examination. Ms. Oddi was sworn in and Mr. Loschiavo read out the letter submitted by her stating her objection to the proposal. In this letter, Ms. Oddi had stated that she was opposed to the construction of the cabana because it was too high and big for the neighbourhood; however it wasn't clear how the cabana would impact her property.

Through the interpretation from English into Italian, it emerged that Ms. Oddi too was concerned about the grade which had changed significantly as a result of the new owners at 393 Maple Leaf Dr. filling up the ground., Ms. Oddi and her husband have had to contend with significant flooding issues as a result of what she believed to be the changed grade at 393 Maple Leaf Dr. The excessive water had weakened the concrete floor of her accessory building and had led to so much erosion that a hole 2 metres wide has been created. The flooding has impacted the health of both herself and her husband.

In his cross-examination, Mr. Cheeseman asked Ms. Oddi if she had seen the elevations in the survey? Ms. Oddi said that she had seen them but didn't understand them. Mr. Cheeseman explained that the elevation figures on the survey illustrated the fact that the subject property was lower than her property. Since water didn't flow uphill,

one had to conclude that his clients' constructing the cabana wasn't the source of the flooding on Ms. Oddi's property. Mr. Cheesman said that he had no further questions for Ms. Oddi. Mr. Loschiavo too stated he had no further questions for Ms. Oddi.

Mr. Cheeseman then presented his closing argument. He stated that the application is for three (3) specific variances related to rear yard setback and height of the accessory building. He then pointed out that Mr. Riley's evidence as an expert witness demonstrated the compliance of the project with the PPS, Growth Plan and the City's Official Plan and the relevant zoning. Mr. Riley's evidence on these matters has not been contradicted. The impact of the height of the cabana is minimal because what Ms. Lastella wouldn't be able to see as a result amounted to a mere 2 feet in height. Mr. Cheeseman stressed that in this case, the impact of the construction was evident because the building had been built.

Mr. Cheeseman went on to say that the alleged illegality of the construction was not before TLAB whose jurisdiction was restricted to approving or refusing the requested variances. He also stated that the history of the grade was not before TLAB and that the flooding on Ms. Oddi's property couldn't have been caused by the construction of the cabana on his client's property because the relative elevation prevented water from flowing uphill to the neighbouring property. He then concluded his argument by stating that the appeal should be dismissed and that the COA decision be reinstated.

. Mr. Loschiavo stated that he did not have a formal closing statement. Their objection was to the height of the cabana and more importantly, how it got there. While he understood change, they didn't understand illegal construction and the principle of filling first and building later.

In his reply, Mr. Cheeseman reiterated out that the illegality of the structure is not a matter for decision by TLAB. He opined that the evidence brought up by the Appellants had nothing to do with the 4 tests under Section 45(1) and should therefore not be considered.

ANALYSIS, FINDINGS, REASONS

Given the nature of the appeal and the references to the history of the proposal it is important for me to reiterate what the TLAB can make decisions on. The TLAB Panel must be satisfied that the applications are consistent with the Provincial Policy Statements (2014) and confirm to Growth Plan. Further, that they 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

Before the variances are specifically analyzed, it may be important to first pay attention to the stated reasons for the opposition's Appeal and whether they fall within the jurisdiction of TLAB. The Appellants' objections may be phrased as:

- There is a change to the grade as a result of an infill that is not referenced in the Site Plan. Therefore the ostensible height of the cabana is higher than what is being stated.
- The Applicants did not obtain a permit to build the cabana before they commenced construction.
- The construction at 393 Maple Leaf Drive has resulted in flooding issues at 391 Maple Leaf Drive.
- The height of the cabana has caused a significant and negative impact on the neighbours

While the TLAB has the power to grant relief from many by-laws which reference average grade for measurement purposes, the actual determination of what constitutes average grade, its history and evolution is beyond that jurisdiction. Consequently, the whole discussion of whether the soil near the cabana was excavated, filled, or had other alterations made to it to alter the grade is of questionable relevance. It is for the Chief Building Official to determine applicable grades and the City Zoning Examiner to determine how much relief is required to build according to the plans supplied, and if so, by how much. It is the product of that process which appears at the COA and TLAB, on appeal, if circumstances so warrant.

The Appellants repeatedly brought up the Applicant's completing the construction of the cabana without waiting for a permit. I recognize the Appellant's concerns and take this opportunity to make a couple of observations

The TLAB does not have the power to make rulings on the alleged "illegality" of construction. While obtaining a permit before construction comes across as logical and reasonable, at least on a *prima facie* basis, there could be process related issues which may not make it possible for applicants to follow through the sequence notwithstanding their best efforts. Section 45 does not reference the permit process; no decisions are possible regarding construction sequences and permits under the current jurisdiction of the TLAB.

It is important to address how the completed cabana is treated from a decision making perspective. While the cabana may have been built, it is treated from the perspective of "to be built" for relief purposes though the impact is clearer to establish given that the structure is in place with a clear, discernable impact.

The issue of flooding at 391 Maple Leaf Drive is significant; I sympathize with the plight of an elderly couple who have to endure health issues as a result of

flooding. However, the height of the cabana has not been proven to be the cause of the flooding; the consequence is that no rulings can be made on the flooding matter. Notwithstanding my not ruling on this matter, I sincerely hope that a satisfactory solution can be found to the flooding issue given the stated impact on the health of an elderly couple.

I note that the opposition was informed repeatedly about the limits on TLAB's jurisdiction during the Examination in Chief of the Appellant

The last issue identified by the opposition, namely the impact of height of the cabana, is an issue that TLAB can rule on, because it is related to the test of desirable development and proposal being "minor" in nature. On this note, I revert back to the requested variances.

Of the three variances requested, 2 relate to height of the accessory building and one relates to the backyard setback. Mr. Loschiavo specifically stated that they had no issue with the backyard setback while Ms. Lastella and Ms. Oddi made no reference to this issue in their testimony. Given that the backyard setback is not in contention and Mr. Riley's uncontested testimony of how the variance related to the backyard setback satisfies the four tests listed in Section 45(1) of the Planning Act, I conclude that the COA decision allowing the backyard setback may be confirmed without further analysis.

The other two variances relate to the height of the accessory building. I note that we have uncontested evidence, which I accept, from Mr. Riley about how the variances, individually and collectively maintained the intent of the Zoning By-law and maintained the intent and purpose of the Official Plan. I agree that the cabana is desirable for the development of the property because it has replaced a similar ancillary structure in a neighbourhood where such structures are common

Lastly, we come to the issue of whether the variances are minor; impact is a major factor in this determination. On the matter of impact, Ms. Lastella stated that the cabana interferes with her view of the trees beyond. While I recognize that the construction of the cabana may change what she sees from her balcony, the impact is minimal because the difference in loss of scenery caused by the variance and what is of right amounts to two feet. Given this conclusion, I agree with Mr. Cheeseman and Mr. Riley that the impact is minor.

Given the above findings, I find that the four tests listed in Section 45(1) of the Planning Act are satisfied which means that the variances may be approved. Before issuing an order to this effect, there is one other matter which I wish to refer to in the next paragraph.

I wish to commend and thank Mr. Loschiavo for his willingness to interpret between English and Italian allowing the proceeding to be inclusive of Participants otherwise precluded because of their lack of fluency in English.

The ability to interpret meaningfully while performing the tasks of Examination in Chief and Cross Examination demands dexterity, skill and patience; I was impressed with how Mr. Loschiavo performed both duties patiently and diligently.

DECISION AND ORDER

The appeal to set aside the decisions of the Committee of Adjustment at 393 Maple Leaf Drive is dismissed.

The decision of the Committee of Adjustment dated 15 June, 2017 is reinstated. All requested variances described below, opposed by the Appellants, are held to be approved:

Variances to By Law 569-2013

1. The minimum required rear yard setback for an ancillary building or structure is 2.38 m. The proposed structure will be located 1.03 m from the rear lot line.
2. The maximum permitted height of an ancillary building or structure is 4 m. The proposed structure will have a height of 4.76 m.

Variances to North York By Law 7625

3. The maximum permitted height of an accessory building is 3.7 m, measured to the mean height level between the eaves and the ridge of the roof. The proposed structure will have a height of 4.02 m.

X



S. Gopikrishna
Panel Chair, Toronto Local Appeal Body