

# DECISION AND ORDER

**Decision Issue Date**      Thursday, April 26, 2018

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

Appellant(s): YONGEN ZHAO

Applicant: TONY VALENTIN

Property Address/Description: 93 HERTLE AVE

Committee of Adjustment Case File Number: 17 123031 STE 32 MV

TLAB Case File Number: 17 229917 S45 32 TLAB

**Hearing date:**            Monday, March 05, 2018

**DECISION DELIVERED BY S.Gopikrishna**

## INTRODUCTION AND BACKGROUND

The residents of 93 Hertle Avenue applied to the Committee of Adjustment (COA) to alter a two-storey semi-detached dwelling by constructing a rear two-storey addition with an exterior staircase and the reconstruction of the rear detached garage.

On the 23<sup>rd</sup> of August, 2017, the Committee of Adjustment heard the application and refused the same. On the 23<sup>rd</sup> of October, 2017, the Applicants appealed to the TLAB and the hearing was scheduled for 5 March, 2018.

## MATTERS IN ISSUE

The following are the variances submitted for approval by the Toronto Local Appeal Body:

1. **Chapter 10.10.40.40.(2)(A), By-law 569-2013**

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The maximum permitted floor space index for additions to the rear of a semi-detached house erected before October 15, 1953 is 0.69 times the area of the lot (134.61 m<sup>2</sup>).

The floor space index will be 0.75 times the area of the lot (146.48 m<sup>2</sup>).

**2. Chapter 200.5.1.10.(2)(A)(i), By-law 569-2013**

A required parking space must have a minimum width of 3.2 m.

In this case, the proposed parking space will have a width of 2.74 m.

**3. Chapter 10.5.40.60.(3) (A)(iii), By-law 569-2013**

Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no closer to a lot line than 0.6 m.

The stairs will be 0.3 m from the south side lot line.

**4. Chapter 10.10.60.20.(1) (A), By-law 569-203**

The minimum required setback for an ancillary building or structure from a rear or side lot line abutting a street or lane is 1.0 m.

The north side lot line setback will be 0.68 m

**1. Section 6(3) Part VI 1(I), By-law 438-86**

1. Additions to the rear of a semi-detached house erected before October 15, 1953, or to a converted house, are permitted provided the residential gross floor area of the building as enlarged does not exceed 0.69 times the area of the lot (134.61 m<sup>2</sup>).

The residential gross floor area will be 0.75 times the area of the lot (146.48 m<sup>2</sup>)

**2. Section 6(3) Part VI 1(III), By-law 438-86**

Additions to the rear of a semi-detached house erected before October 15, 1953, or to a converted house, are permitted provided no part of the addition is closer to the rear lot line than 7.5 m.

The proposed rear lot line set back is 7.22 m.

**3. Section 4(17)(a), By-law 438-86**

The minimum required parking space width is 3.2 m.

The parking space width will be 3.05 m.

**4. Section 6(3) Part II 7(III), By-law 438-86**

An accessory garden or a storage shed of less than 9.0 m<sup>2</sup> in floor area or a private garage are all required to be setback 1.5 m from the main building.

In this case, the proposed setback will be 0.71 m from the exterior stairs.

## **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 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; and
- are minor.

## **EVIDENCE**

The hearing began with the Parties and Participants introducing themselves.

Mr. Tony Valentin introduced himself as the Agent for the Applicant/Appellant Yongjen Zhao. Mr. Valentin stated that he is a designer by profession. Ms. Summer Zhao, the daughter of the Appellant also introduced herself and said that she would be providing evidence.

Ms. Andrea Schneider of 108 Highfield Road introduced herself as a Party in opposition to the Appeal. Ms. Mildred Weidhaas, of 126 Hertle Avenue introduced herself as a Participant in the proceeding. Ms. Chang, who lived at 91 Hertle Avenue, then identified herself as a Participant. Since I didn't find her name in the list of Parties and Participants given to me by the TLAB staff, I asked Ms. Chang if she had completed Form No 4 in order to elect to be a Party or Participant. She said that she didn't know about the Form and was under the impression that she could participate as she had at the Committee of Adjustment hearing. I refused Ms. Chang Participant status because she had not completed the requisite paperwork. The process to become a Party or Participant is clearly stated on the TLAB website and should be followed by everybody who wishes to participate in a TLAB hearing.

When asked if he was going to give evidence, Mr. Valentin replied in the affirmative. Since the TLAB rules allow for an agent to be a witness, Mr. Valentin was sworn in.

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Mr. Valentin started that the purpose of the application was to add 2 storeys at the back of the house to the existing 2 storey house and reconstruct the rear detached garage. The Zoning Examiner had identified a number of variances for which Public Notice had been given. Ms. Valentin then stated that when the application was heard at the Committee of Adjustment (COA), there was one member who abstained from the vote, one who voted in favour and two who refused the application.

Mr. Valentin began his evidence by saying that in his opinion, the variances are minor and that the project represented a “compromise” between the lot and the needs of the family. Describing the variances, Mr. Valentin said that one of them was to permit the FSI (Floor Space Index) at 0.75 when 0.69 was admissible. According to Mr. Valentin, this was a consequence of the lot shape which was “strange” though it wasn’t significantly smaller than the neighbouring lots. Pointing to the Site Plan, Mr. Valentin pointed to the trapezoidal shape of the lot, albeit with rounded corners, and said that the shape didn’t give them options about how to build their house. There is a variance for the width of the parking space because of its proximity to the property line; in Mr. Valentin’s explanation, this is a consequence of the unusual property shape described earlier. Variance No 3, under 569-2013, is an existing condition. The first variance under By-law 438-86 is the same as the first variance under By-law 569-2013. Variance no 2 under 569-2013, refers to the distance of the addition to the house from the from the rear lot line. Likewise, Variance No 3, under By-Law 438-86, is related to the Parking garage variance described earlier under By-Law 569-2013; however the requested variance is for 3.05 m instead of the 2.74 m in the Zoning Notice. Variance No 2, under By-Law 438-86, refers to the setback for an ancillary building or the garage in this case, which was now being made 7.22 m instead of 4.09 m, as listed in the submission. The separation between the wall of the main house and the ancillary building needs to be 1.5 m, but was just 0.71 m in this case. However, this could be removed because it was not needed under the Building Code.

After describing the variances as stated above, Mr. Valentin described the variances as “minor”, and that they were the result of the “strange” shaped lot. He then requested that the variances be approved. I asked Mr. Valentin to demonstrate that the proposal was consistent with the hierarchy of policies beginning with the Provincial Policy Statement followed by policies of a local nature. Mr. Valentin looked confused and said that he didn’t know about these “rules” nor did he know that such adherence had to be demonstrated. He then requested for an adjournment of the hearing to a different day. When asked the reason for the adjournment, Mr. Valentin stated that it was to enable him to prepare and present evidence consistent with the hierarchy of policies. I asked Ms. Schneider for her position on the requested adjournment. Ms. Schneider vigorously objected to the request and stated that “people had taken time off work to be here” and that there were policies governing growth for a reason. She didn’t understand the reasons for adjournment and therefore opposed the adjournment request.

I ruled that we could adjourn for half an hour in order to enable the Appellants to research the policies and present evidence about how the proposal was compatible with the Policies. The reason behind this ruling is provided in the Analysis section.

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When we reconvened half an hour later, Mr. Valentin stated that the Property was governed by “Chapter 10 of the Official Plan” where Section 10.10.20 permitted use of the structure for “residential purposes”, a use that was not being changed. According to Mr. Valentin, the use satisfied the 1<sup>st</sup> test under Section 45.(1)- compatibility with the Official Plan. The proposal, Mr. Valentin continued, satisfied the 2<sup>nd</sup> test, i.e., compatibility with the Zoning By-Law, because the FSI increased by a mere 0.06

The proposal is desirable, according to Mr. Valentin, because the house is still residential and there are other developments in the same area with similar extensions, such as 78 Hertle, 104 Hertle and 34 Hertle. Mr. Valentin added that at 195 sq. m., 93 Hertle is comparable to other houses but looks bigger because it is on the corner triggering Variance 3 under 569-2013 and Variance 2 under 438-86. Mr. Valentin then stated that the driveway was impacted by the size but not the shape of the plot. He then proposed to remove the fire-escape eliminating Variance No 4 under 569-2013- the rationale for this was that under the Building Code, the house didn't require a fire-escape. Discussing the impact on the neighbours, Mr. Valentin asserted that there was no impact and that the scope of proposed development was consistent with other developments in the neighbourhood, such as 78 Hertle, 104 Hertle and 34 Hertle. When I asked Mr. Valentin about how large the development at 78 Hertle, he said that he did not know the specifics. Based on these comments, Mr. Valentin concluded that the proposal met the test of being “minor”. After recommending that the proposal be evaluated as modified (with the elimination of Variance No 4), Mr. Valentin stated that he had come to the end of his evidence.

Ms. Schneider then questioned Mr. Valentin in her capacity as a Party. She asked if Mr. Valentin had spoken to the neighbours about the impact, with specific reference to property owners to the south with whom the property at 93 Hertle shared a wall. Mr. Valentin replied in the negative. In response to the question about considering a smaller addition in order to not request so many variances, Mr. Valentin said that the proposed build corresponded to the needs of his clients. When asked if a 12 sq. m addition to the house was “minor”, Mr. Valentin replied in the affirmative because this was a “6% increase” on the existing area.

Ms. Zhao was then sworn in as the next witness. She said that her parents, lived at 93 Hertle, were both more than 75 years in age, and that she and her 2 children wanted to move in so that they could all live together. Ms. Zhao stated that she spoke to the neighbor at 104 Hertle who told her that she had received a 10 feet extension. She also said that she eyeballed the extension at 34 Hertle, which seemed like 15 feet to her. At 78 Hertle, the extension granted was 17 feet- apparently the information came to Ms. Zhao from the neighbor who is known to her. When asked if she had evidence of the actual extent of the extensions, Ms. Zhao asked to submit pictures of the two houses. I agreed to the submission of the pictures after the hearing. The only impact of the proposed build, according to Ms. Zhao, was that the neighbours opposite the house could no longer see the trees behind 93 Hertle, in her parents' backyard. However, they were planning to mitigate the impact of the loss of the view of that tree by planting trees at the property line in the front.

Ms. Schneider then questioned Ms. Zhao beginning with if there was a gas line on the side of the house to which Ms. Zhao replied in the affirmative. The next question

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was about the numbers of trees in the yard which had been cut down by the Zhaos in the past. Ms. Schneider asserted that 3 trees which had been cut down, one of which had been planted by the City. Ms. Zhao stated that they cut down two trees and that they were “less than 12 inches” and it was her understanding that one could cut trees less than 12 inches without consulting the City.

Ms. Schneider then asked if the neighbor to the right of 93 Hertle would lose their sight of the trees in the backyard as a result of the build? Ms. Zhao replied in the affirmative. Ms. Schneider stated that the view would be cut in half ; at present, Ms. Schneider claimed that there are no other buildings jutting out all the way which means that there is an unimpeded line of sight all the way to Dundas Street E. Ms. Schneider then asked if there were renters living at 93 Hertle. Ms. Zhao said that rooms in the proposed building wouldn't be rented because she would be moving in her with her children. Ms. Schneider pointed out that the house was not zoned for multiple units and it was her understanding that there were 3 rental units in the existing house. Ms. Schneider repeated that she was concerned that her sight of the trees in the backyard would be lost if the proposal were successful and that she would stare “at a box”. I told Ms. Schneider that she should restrict herself to asking questions and not make statements; she would be given an opportunity to present her views after Ms. Zhao completed answering her questions. Ms. Schneider said that she had no further questions for Ms. Zhao.

Ms. Schneider then provided her statement. She said that she lived at 108 Highfield Road since the last 7 years and had canvassed the neighbourhood to see how much support or opposition the proposal had when they first heard about it. Ms. Schneider said that no neighbor including herself had been consulted by the Zhaos, that there was significant opposition to the proposal and that 24 residents had signed a petition expressing opposition. I requested Ms. Schneider to submit the petition electronically.

Ms. Schneider then referred to the City of Toronto's Official Plan and said that this neighbourhood was 'zoned' “Neighbourhoods” under Chapter 4 of the Official Plan. Pointing out that Section 4.1 stated that new builds should be sensitive, and respect the neighbourhood, Ms. Schneider said this proposal did the exact opposite. The proposed build would block views and is out of character with the community, which is marked by big yards and small houses. The new build, Ms. Schneider claimed, would negatively impact the green space and the physical space between houses. Ms. Schneider asserted that the new build would create more rental units and described how stressed she and her neighbours were due to the presence of “strangers” in the neighbourhood , who would request for use of Wi-Fi from time to time. Ms. Schneider said that many neighbours had young children would rode bikes in the neighbourhood and the continuous stream of people who moved in and out of 93 Hertle made her neighbours feel really nervous and concerned. Ms. Schneider went to state that a number of rules had been broken in the past by the owners of 93 Hertle and that the property had been developed with no work permits. Neighbours had to call the City to report by-law infractions in the past and that she had no doubt that that the same scenario would replay itself. The proposal to eliminate the fire escape, as had been stated earlier, just gave Ms. Schneider more to be concerned about. Ms. Schneider became emotional at this stage and went on to state that the neighbours at 91 Hertle, the Chans, were really

alarmed by how “isolated” they would feel by the wall that they would be starting at from their property because of the proposed extension to 93 Hertle. Ms. Schneider asserted that the residents of the community valued their green space because it was a “large gardening community”. Green space, according to Ms. Schneider, was more important to the community, than larger houses. Ms. Schneider ended her testimony by stating that she felt like “a bomb had been dropped in the middle” as a result of this proposal. Mr. Valentin said that he had no questions for Ms. Schneider.

Ms. Weidhaas, the Participant living at 126 Hertle, then proceeded to give testimony. After being sworn in, Ms. Weidhaas spoke of how trees had been cut down indiscriminately by the residents of 93 Hertle. She asked the Zhaos how many people lived in the apartments in their house? Ms. Weidhaas went on to say that when she looked out of her window, she saw a “corridor of green” in a community of fairly large lots, large green spaces and small houses, which will be broken by the house at 93 Hertle. She did not see the proposal as being “neighbourly” nor was it sensitive to the concerns of the other residents. Neither Mr. Valentin nor Ms. Schneider had questions for Ms. Weidhaas.

In his rebuttal, Mr. Valentin stated that no tenant would live in the proposed extension to the house and that their proposal was for a single family home. The owners had built a fence between 91 and 93 Hertle and had made it a point to make it higher than required in order to protect the neighbor’s privacy. Mr. Valentin then said that it was possible to build the garage on a “floating foundation” which meant that there would be no excavation and consequently no issues with waterproofing. The Appellants would comply with an Arborist’s report, if asked for one. Mr. Valentin then said that they were willing to make the addition smaller if necessary but they “badly needed the addition”.

In summarizing his position, Mr. Valentin stated that a building with a 2 storey addition in that neighbourhood was “not completely out of line” and not inconsistent with the Official Plan or Zoning Bylaws. The property still remains residential and houses a single family. He opined that sight lines, which the neighbours had complained out, could be “negotiated”. He then requested that the proposal be approved.

Ms. Schneider then summarized her position by stating that she was in opposition to the proposal. The proposal ought to be rejected since “Mr. Valentin had not made his case”. She didn’t understand the comment about the impact of the plot’s having an odd shape on the size of the proposed project. Ms. Schneider said that green spaces and small houses describe the community and that is what attracted many community members to move to that neighbourhood. The proposed build, at 93 Hertle, she asserted, would house even more people, if approved and would set a “precedent” for similar builds in the community. Stating that new builds should respect the neighbourhood and the neighbours, Ms. Schneider rejected Mr. Valentin’s conclusion that there would be no impacted and asked that the proposal be rejected in its entirety.

## **ANALYSIS, FINDINGS, REASONS**

I would, first, like to discuss the reason behind granting an adjournment of half an hour to help Mr. Valentin prepare and present evidence on behalf of the Appellants. The

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adjournment of half an hour was a balance between providing a reasonable opportunity to the Appellant to present their case, the complexity of the case ( or specifically the straight forward nature of the proposal), possible prejudice to Parties if the cases were adjourned to a different day and efficient use of the TLAB's resources.

One of the unusual features of this case is the relative paucity of evidence. The Appellants did not introduce any evidence to demonstrate compatibility between their proposal and the framework of policies such as the Provincial Policy Statements (PPS) and the Greater Golden Horseshoe 'Growth Plan' policy. The two policies were not referred to, even in passing, in the Appellants' evidence. When the hearing resumed after the break to allow Mr. Valentin to prepare his witness statement, he began by referencing "Chapter 10" of the Official Plan. Given that that there is no Chapter 10 in the Official Plan and the absolute lack of relevant and meaningful evidence in his statement, Mr. Valentin's confusion and lack of familiarity with the Official Plan became evident. Indeed, it was only in reference to the test of "the variances being minor", did Mr. Valentin provide some evidence which was cogent and comprehensible.

Mr. Valentin's plans changed constantly to the point of being fluid and confused the question of what was being proposed- two variances were changed at the beginning of the hearing while halfway, Mr. Valentin proposed eliminating the fire escape in order to eliminate a variance. Even during his summation at the very end of the hearing, Mr. Valentin was still proposing changes as evidenced through statements such as "sight lines can be negotiated" and the "size could be made smaller". Given so many changes, actual and proposed, I am not sure what list of variances are accurate and submitted to the TLAB for a decision.

The opposition made the following points pertinent to planning principles in their statements:

- Under Section 4.1 of the Official Plan, new builds had to respect and be compatible with the existing community
- Their description of community character was that it consisted of small houses and large yards.
- Approving the proposal at 93 Hertle would result in a significant loss of sightlines which the neighbours were accustomed to.

These comments may be distinguished from other comments made by the opposition - related to gas leaks, lack of consultation with the neighbours and other matters which are outside the mandate of the TLAB.

The first two comments above, describe the nature of the community and are pertinent to establishing the character of what lies in the community now. Taken together, these two statements demonstrate a greater level of relevance to Section 45(1) than the evidence provided by the Appellants.

While both the Appellants and the Opposition introduced only a slew of pertinent evidence, I find that the balance favours the opposition, which may, therefore be given



greater weight than evidence from the Appellants. Given this conclusion, I find that it would be appropriate to refuse all the variances requested and thereby, confirm the decision of the Committee of Adjustment dated 23<sup>rd</sup> of August, 2017.

There are two aspects of my reasoning and decision that I will comment on below.

I note that Variance No 3 under 569-2013 was declared to be “an existing condition” by Mr. Valentin; however this has been refused with the rest of the other proposed variances. The approval of any omnibus of variances, both existing and proposed, is predicated on discussion and demonstration of compatibility with the PPS or Growth Plan followed by the framework of lower level policies in the hierarchy such as the Official Plan. Given this approach, the entire omnibus of variance fails, irrespective of whether the variances exist, or are proposed. By way of information, while presentations skipping references to the PPS and Growth Plan are experienced at COA hearings due to the paucity of time, they are an integral and inalienable part of presentations before the TLAB.

I also wish to remark on my noting, but excluding from the analysis, the oppositions’ conclusion about loss of sightlines and how this equaled bad planning. The present state of jurisprudence is fairly clear in stating that there is no right to a view or a sightline as described by the opposition. Factoring it into my analysis and then ruling in favour of the opposition could result in the unintended consequence of this decision being seen as questioning the current state of jurisprudence and advancing a new perspective that there is a right to a view. I note that omitting this observation as to area physical character and conclusion still does not alter the overall weight of evidence in favour of the Opposition.

## **DECISION AND ORDER**

The Toronto Local Appeal Body orders that:

1. The Appeal respecting 93 Hertle Avenue is refused in its entirety
2. The decision of the Committee of Adjustment dated 23 August, 2017, is confirmed. In other words, the variances listed below are held to be refused:

### **1. Chapter 10.10.40.40.(2)(A), By-law 569-2013**

The maximum permitted floor space index for additions to the rear of a semi-detached house erected before October 15, 1953 is 0.69 times the area of the lot (134.61 m<sup>2</sup>).

The floor space index will be 0.75 times the area of the lot (146.48 m<sup>2</sup>).

### **2. Chapter 200.5.1.10.(2)(A)(i), By-law 569-2013**

A required parking space must have a minimum width of 3.2 m.

In this case, the proposed parking space will have a width of 3.05 m.

**3. Chapter 10.5.40.60.(3) (A)(iii), By-law 569-2013**

Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no closer to a lot line than 0.6 m.

The stairs will be 0.3 m from the south side lot line.

**4. Chapter 10.10.60.20.(1) (A), By-law 569-203**

The minimum required setback for an ancillary building or structure from a rear or side lot line abutting a street or lane is 1.0 m.

The north side lot line setback will be 0.68 m.

**1. Section 6(3) Part VI 1(I), By-law 438-86**

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The residential gross floor area will be 0.75 times the area of the lot (146.48 m<sup>2</sup>).

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The proposed rear lot line set back is 7.22 m.

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X

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S. Gopikrishna  
Panel Chair, Toronto Local Appeal Body