

DECISION AND ORDER

Decision Issue Date Thursday, May 24, 2018

PROCEEDING COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): VIRAJ TANNA

Applicant: VIRAJ TANNA

Property Address/Description: 454 RHODES AVE

Committee of Adjustment Case File Number: 17 218514 STE 30 MV

TLAB Case File Number: **18 110922 S45 30 TLAB**

Hearing date: Tuesday, May 22, 2018

DECISION DELIVERED BY Ian James Lord

APPEARANCES

| Name | Role | Representative |
|--------------------|-----------------------------------|-----------------------|
| Viraj Tanna | Applicant/Primary Owner/Appellant | |
| Dale Fenton Kehler | Party/Owner | |
| Matthew Rice | Participant | |
| Maria Ljungmark | Participant | |
| Sharon Van Son | Participant | |

INTRODUCTION

This was an appeal by the Applicant Appellant from a decision of the Toronto and East York District Panel of the Committee of Adjustment ('COA') of the City of Toronto ('City'). The COA refused a variance for a reduced standard of soft landscaping and allowed a variance for reduced north and south side lot line setbacks for a pergola structure, without walls, to the rear of the dwelling located at 494 Rhodes Ave., (the 'subject property').

The co-owners of the subject property appeared and testified. Also present were two participants, Matthew Rice and Maria Ljungmark, owners and residents of 458 Rhodes Ave., the abutting property to the north.

The participant Sharon Van Son did not appear.

Those present had filed the requisite Statements generally compliant with the Rules and each spoke on their own behalf. No other persons were present and no professional evidence was tendered. The City did not appear.

I indicated I have been to the front exterior of the subject property and observed the street and surrounding area, pursuant to City Councils' direction to the Toronto Local Appeal Body (the 'TLAB'), on its constitution. As well, I had read most of the pre-filed materials but indicated matters of importance needed reference to become part of the evidence.

Apart from pictures tendered in evidence, very little reference was made to the pre-filed materials.

The parties and participants were cordial. The TLAB is appreciative of citizens who communicate their issues with frankness and candor and with a minimum of embellishment. Not only does this facilitate an expeditious and focused hearing, it permits the matters within the TLAB jurisdiction to be considered and addressed in a timely, focused and clear manner.

BACKGROUND

Dale Kehler provided background to the application and support for the variances, assisted jointly and separately by Viraj Tanna, the latter of whose main focus was the landscaping and construction aspects of the two variances on appeal.

The subject property was acquired in 2015 as a new build. Its rear yard was improved with a 'temporary' deck and grassed area. The owners set about to enhance the usability of the rear yard space by, among other things, constructing an outdoor patio, constructing a pergola extending from the rear of the main wall, and adding a hot tub and seating area. Perimeter fencing enclosing the space (but for a large Manitoba

Maple tree on the south lot line); planters, planting beds and cement paver tiles completed the improvements. The work was completed by a contractor, Royal Deck, who had apparently advised that no permits were required despite the structure and extensive in-ground and attendant electrical lighting.

As a result, all the work necessitating the variances has been completed; as such, the application is in the nature of a request to recognize and maintain the existing improvements, despite the by-law infractions.

From the photographs accessed, the improvements reflect a careful and attractive employment of the outdoor space.

MATTERS IN ISSUE

The owners appealed the COA's refusal to vary the soft rear yard landscaping requirement from a minimum of 50% to the now measured area of 21.8%

I advised that the TLAB is required to deal with both variances on appeal in a Hearing and is to have regard to the decision of the COA but is to be primarily guided by the evidence relevant to the statutory policy considerations and the 'four tests' recited in the decision of the COA.

The TLAB is to consider the variances from the perspective that the improvements have not yet been built.

The participants raised matters of concern to their property: improper drainage from hard surfacing, primarily between the buildings and down front access steps; lighting that was not unidirectional downward; activity, viewing from and use of the outdoor space in close proximity causing loss of privacy.

JURISDICTION

For variance appeals, the TLAB must ensure that the variances sought meet the tests in subsection 45(1) of the Planning Act (the "Act"). This involves a reconsideration of the variances considered by the Committee in the physical and planning context. The subsection requires a conclusion that each of the variances, individually and cumulatively:

- is desirable for the appropriate development or use of the land, building or structure;
- maintains the general intent and purpose of the official plan;
- maintains the general intent and purpose of the zoning by-law; and
- is minor.

These are usually expressed as the “four tests”, and all must be satisfied for each variance.

In addition the TLAB must have regard to matters of provincial interest as set out in section 2 of the Act, and the variances must be consistent with provincial policy statements and conform to provincial plans (s. 3 of the Act). A decision of the TLAB must therefore be consistent with the 2014 Provincial Policy Statement (‘PPS’) and conform to (or not conflict with) any provincial plan such as the Growth Plan for the Greater Golden Horseshoe (‘Growth Plan’) for the subject area.

Under s. 2.1 (1) of the Act, TLAB is also to have regard for the earlier Committee decision and the materials that were before that body.

EVIDENCE

In their direct evidence, the owners confirmed:

1. The pergola was constructed in an alignment that continued the side walls of the residence, without further encroachment and, as such, maintained the side yards of the original construction;
2. The pergola is an open post and beam construction with retractable canopy and accent lighting showing and demarking steps to grade;
3. The pergola deck is close to grade and without the requirement of railings, not being elevated;
4. Lighting is on timers, is not located in the Manitoba Maple tree and, unlike neighbours to the rear on Craven Road, the lights are extinguished manually or by timer at 11 pm; none are motion sensitive and the photography provided suggests that the lighting is largely confined to the rear yard;
5. The participants residence abutting to the north has two decks elevated and set back above grade with view planes into the rear yard of the subject property;
6. Fencing that is solid and presentable separates the rear yard space from abutting properties; to the north, the grade reflects that of the subject property pavers and to the south the grade falls off such that the property to the south, in its rear yard, is lower in elevation;
7. The impervious pavers collect and deposit rain and melt water into the planting beds without ponding;
8. Example photographs of some 26 properties showed a sample of 250 addresses proximate to the subject property with similar or less than the soft landscaping of the subject property; while some of these were components of rear yard driveways, the Multiple Listing Service and Google Maps search identified many examples where soil, grass and gravel had been hard surfaced on Ashland, Craven, Greenwood, Hiawatha, Hastings, Hertle, Redwood, Unity, Woodfield streets and at 481 Rhodes Ave.

**Decision of Toronto Local Appeal Body Panel Member: I. Lord
TLAB Case File Number: 18 110922 S45 30 TLAB**

Mr. and Mrs. Rice gave conjoined and separate testimony. As above identified, their evidence was focused on specific elements of the pre and post construction era and not specifically on the variances themselves. To reiterate:

1. A principle concern related to the hard landscaping between the houses, including the construction, alignment and underpinning of paver steps that directed water flow north towards their property;
2. Exhibit 1a and 1b are two photographs that clearly indicated a leader downspout drain depositing roof water onto the walkway and subsequently down the access steps and onto the Rice property; this water appears to access the Rice driveway and the tenant entrance at the south limit of the Rice driveway. Mr. Rice had spoken to a City Buildings Inspector representative, Ms. Charlene Diaz, requesting an inspection as to the drainage patterns, steps construction and shoring under the Rice retaining wall. An inspection was deferred pending the TLAB Hearing. He remains adamant a water test and inspection for weeping tiles, piped drainage and redirecting off-site flows is necessary to protect the foundation and tenant access to 458 Rhodes Ave., despite being unable to point to any immediate signs of damage.
3. The rear yard lighting has offensive aspects, notably the pergola post lighting with sconces shining both up and down; the upward beams of some 20 lights were said to extend beyond the site and are clearly visible to the adjacent neighbours;
4. Mrs. Rice, Maria Ljungmark, reiterated that the hard landscaping exacerbates the concern for ground water erosion, foundation damage and soil subsidence evidenced by cracks and potentially adversely affecting their 1927 residence at the 'cusp' of the grade change on Rhodes Ave.
5. She said use of their own back yard had become uncomfortable; the hot tub on the subject property is located below and adjacent their rear access; curtains had been added to enhance privacy.

Mr. Tanna returned to respond to the issue of directed water flows, evidenced by Exhibits 1 a and b. He introduced a photo montage that noted that: the rear yard of the north abutting property has limited soft landscaping; that the property survey appears to show a possible encroachment onto the subject property, apparently at the Rhodes Ave. frontage; the 'before' and 'after' condition of the intervening walkway and stairs to the street, between the two properties, claiming that the continued concrete pavers add safety to the rear yard access and were 'sloped to accommodate proper drainage'.

These pictures do not detail the roof downspout location of concern to Matthew Rice.

The photographs were said to be part of the uploaded pre-filings. I assigned them Exhibit 2 a and b, to the Hearing, and subsequently directed that all Exhibits be posted to the TLAB website.

I expressed my appreciation to the attendees for their contributions.

ANALYSIS, FINDINGS, REASONS

A variance appeal is normally accompanied by qualified professional evidence addressing the requisite considerations above detailed under 'Jurisdiction'. None of that was present here; no evidence was available that specifically addressed the specific statutory considerations. Lay opinion advice was provided.

That said, the owners did detail the nature of the construction of the pergola, its alignment and the details of the soft landscaping replacement – with non-allergenic hard landscaping, in the main. As well, numerous examples were submitted of extensive rear yard hard landscaping in the immediate neighbourhood, and beyond.

No specific objection was taken to either the location or built form of the pergola or to the presentation of the rear yard improvements, other than for the general concern related to the loss of soft landscaping.

On the evidence heard, I am satisfied that an effort was made in the rear yard landscaping to direct water flows to the areas of soft landscaping, the flower beds, planted areas and the Manitoba Maple tree, in a manner consistent with good surface water management. I accept that the rationale given for the hard landscaping and its presentation does not represent a departure from area characteristics, is desirable and in the circumstances presents a variation from the by-law standard that is minor.

In the absence of any contrary opinion as to the setback of the pergola or to the location, design or extent of the soft landscaping, excepting the issue of hard surfacing and water flows, I find that the variances sought are in keeping with the intent and purpose of the Official Plan and the zoning by-law.

The issues as they appeared in this hearing, confined as they were to the rear yard of a compact urban setting, did not generate the customary assessment of area physical character common to the policy direction of the Official Plan.

That is not to say that the concerns of the neighbours to the north were not genuine. Issues of privacy, activity and lighting can be a relevant consideration to the enjoyment of property and the protection of such amenities should not be lightly disregarded.

For the TLAB, its considerations are confined to the presentations, consequences and impact of the variances sought and their compatibility with provincial and local policy and regulations.

A nexus is essential to the variances in the consideration as to whether there should be an approval, rejection or attendant conditions. In this case, in considering the two variances necessitated by past construction that require recognition or removal, I was not able to attribute a direct connection in a meaningful way of some of the concerns raised.

I appreciate that the increased use of outdoor space made as a result of the improvements to the subject property can place people in a close juxtaposition, one to another, in an outdoor setting. However, across the City there are neighbourhoods where dense housing construction inevitably causes issues of loss of light, views, and overlook, privacy and personal discomfort due to the proximity of neighbours. This is the product of urban living; it is to be expected and is not unique to this City. Indeed, it is a credit to the human spirit for adaptation that changes can be accommodated. In this case, double fencing, quality improvements and seasonal usage of the rear yard of the subject property simply enhances the value of an urban living environment in a manner consistent with City policy for reinvestment in the urban living environment.

The nexus amounting to undue adverse impact was not clearly established in the evidence.

I find that the issues raised by the participants are peripheral to the variances themselves in this context. While the soft landscaping variance arguably accommodates indirect landscaping lighting, such lighting likely can occur as-of-right, independent of the variances sought.

However, both owners of the subject property noted the disadvantage and inconvenience of neighbours floodlights on their own enjoyment extending over the rear yards from Craven Drive. Such realization should heighten their awareness for the concerns now expressed by their own neighbours to pergola sconces directing unwanted light skyward. It would be a small step for them to curtail this inconvenience and I am requesting they do so in an effective manner.

I am not convinced there is a surface water management problem in the rear yard; the evidence points to proper directional flows and there is no contrary evidence.

Matthew Rice points to construction of the walkway and stairs between adjacent buildings. Issues of construction, encroachment and surface drainage in this area are unconnected to the variances sought and, in any event, are the purview of the City Buildings Department, not the TLAB in the main.

Clearly, residents of 458 Rhodes Ave., have identified a concern for surface water management of flows in this area being directed off the subject property to the adjacent building and its foundations. An inspection of construction practices has been requested and was said to have been deferred, pending this decision. Presumably that request will now be advanced.

While the TLAB has jurisdiction to order conditions that may entail improvements to storm water management practices, I am unable to conclude that in this area there is any connection to the variances sought. I do note that the roof downspout clearly directs flows to the intervening walkway and on down the steps, angled somewhat to adjacent property to the north. This can prove problematic over time but it is a matter for the City Buildings Department or, failing it, for the owners to resolve.

In like manner to lighting, it would be a small step to ensure that the roof drain, a main source of irritant and concern, is extended and delivered onto the driveway of the subject property. I decline to make this a condition of the decision on a jurisdiction basis, but invite its consideration by others.

DECISION AND ORDER

The appeal of the decision of the COA is allowed in part and the following requested variances are granted, subject to the condition that any rear yard pergola lighting directed skyward be effectively blocked or eliminated:

1. Chapter 10.5.50.10.(3)(B), By-law 569-2013

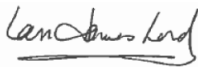
A minimum of 50% (34.11m²) of the rear yard must be maintained as soft landscaping. In this case, 21 % of the rear yard will be maintained as soft landscaping.

2. Section 6(3) Part II 3.B(II), By-law 438-86

The minimum required side lot line setback for the portion of the attached structure without walls exceeding a depth of 17.0 m is 7.5 m.

In this case, the portion of the attached structure without walls, exceeding the 17.0m depth, will be located 0.97 m from the north side lot line and 0.76 m from the south side lot line.

X



Ian James Lord
Panel Chair, Toronto Local Appeal Body
Signed by: Ian Lord