

DECISION AND ORDER

Decision Issue Date Tuesday, October 30, 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): ROBERT DIETRICH

Applicant: ARCICA INC

Property Address/Description: 30 WESTRIDGE RD

Committee of Adjustment Case File Number: 18 124757 WET 04 MV

TLAB Case File Number: **18 176310 S45 04 TLAB**

Hearing date: Wednesday, October 10, 2018

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Role	Representative
Shahab Khoshsohbat	Owner/Party	Martin Mazierski
T.J. Cieciora	Expert Witness	
Robert Dietrich	Appellant	
Anne Anderson	Participant	

INTRODUCTION

Mr. Khoshsohbat owns 30 Westridge Road, a home in the Royal York/ Dundas St West area. On August 4, 2016, he obtained a minor variance in building height from 9.5 m to 9.99 m.

At the hearing today, he seeks a second variance, from 9.99 m to 10.35 m for the same house. Both the former Etobicoke by-law 1992-24 and the more recent City-wide harmonized By-law 569-2013 specify that the building height limit is 9.5 m.

BACKGROUND

This is an as-built situation. At the first Committee of Adjustment hearing (August 2016), Mr. Khoshsohbat obtained five minor variances, including a variance for building height:

- gross floor area of 430.7 m² (where 390.5 m² is permitted);
- building depth of 16.9 m (where 16.5 m is permitted);
- soffit height of 7.49 m (where 6.5 m is permitted);
- front exterior main walls of 9.23 m (where 7 m are permitted); and
- building height of 9.99 m (where 9.5 m is permitted).

These are now final and binding. He obtained a building permit and proceeded to build. On February 2, 2018, Building Inspector Randy Wallace gave Mr. Khoshsohbat an Order to Comply, advising that the building height was approximately 8" (0.203 m) higher than permitted.

Mr. Khoshsohbat promptly applied a second time to the Committee of Adjustment. His application dated Feb 23, 2018 states, "Current provisions of the zoning by-law do not allow for reasonably desired design (sic)." The Committee of Adjustment granted Mr. Khoshsohbat's request on May 24, 2018. Robert Dietrich, the next door neighbour at 45 Edgevalley Drive, appealed, and so this matter comes before the TLAB.

To recap, the August 2016 variance was for an exceedance of .49 m (1.6 ft) over what was permitted. The second variance (this appeal), May 2018, is for an exceedance of .36 m (1.18 ft). It was not explained why the exceedance was not 9.99 m + 0.203 m = 10.19 m.

EVIDENCE

Theodore Cieciora testified for Mr. Khoshsohbat. He was qualified as a witness able to give opinion evidence in the area of land use planning. Robert Dietrich, 45 Edgevalley Dr, testified for himself and other neighbours who appeared at the earlier 2018 Committee of Adjustment hearing. Anne Anderson, president of the Humber Valley Village Residents' Association, testified on its behalf.

MATTERS IN ISSUE

The test is whether the height variance meets the tests under s. 45(1) of the *Planning Act*; that is, whether it:

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

I must also be satisfied that the variance is consistent with the Provincial Policy Statement and conform to the Growth Plan. While Mr. Cieciora took me through these in detail and thought it did, I agree with him that there is very little direction from the Province on whether a height variance for a single dwelling should or should not be granted.

ANALYSIS, FINDINGS, REASONS

Mr. Mazierski (Mr. Khoshsohbat's lawyer) stated that this was a planning case in which the Order to Comply should not have any effect on the planning decision to be made¹. Thus, the starting point was a building with the permissions as given in the August 4, 2016 decision, notably a maximum building height of 9.99 m.

Mr. Cieciora, the planner, testified the proposed of 0.36 m (or 1.18 feet) increase was not visible to a person standing at ground level because of a "break" in the roof line at 9.82 m above established grade . A person would have to be 30 m away (Westridge is about 23 m wide) for the increased height to be visible. This was his main argument, repeated through his analysis of the four tests. While I should not reopen the 2016 case I will explain I should consider the massing considerations and not just consider the new height in isolation.

Official Plan compliance

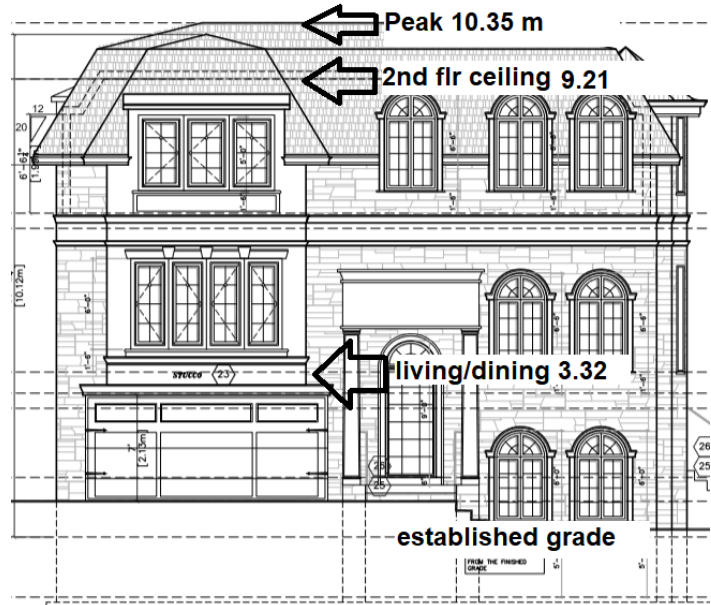
This is a difficult case for Mr. Khoshsohbat. The variance must comply with the Official Plan. I find that this application runs counter to typical Official Plan policies such as "2.3 **Stable** but Not Static: Enhancing Our Neighbourhoods and Green Spaces". A second minor variance within 18 months of the first is not "stable". The preamble to "Development Criteria" states, "Physical changes to our established Neighbourhoods

¹¹ When structures are built without a permit, the Board must not make a decision based solely on the fact that construction is illegal. On the other hand, it should not be motivated by its wish to spare the owner the expense of removing the construction. Our approach must be to pretend that the structure is not there, and to imagine what would be the planning consequences if the Turners were proposing to build these structures for the first time. *Turner v. Vaughan*, 1994 CarswellOnt 5488, November 25, 1994.

must be sensitive, gradual and generally ‘fit’ the existing physical character.” A second development application in this timeframe is not “gradual”.

A cornerstone policy is to ensure that new development in our neighbourhoods respects the existing physical character of the area, reinforcing the **stability** of the neighbourhood.²

Since the 2016 decision is final, the height of 9.99 m now is part of the existing physical character and must be respected, not tinkered with.



Mr. Cieciora tried to introduce an element of flexibility. He said:

[The use of the word “generally” to describe “fit”] does not mean that development must be identical or mimic the existing character of the neighbourhood, but that it must be “general” in nature and there is latitude for reading the policies “generally”.

I disagree; the word “generally” in the bolded words at the top of this page only applies to “fit”; the words “sensitive” and “gradual” are not modified by the word “generally”.

Mr. Cieciora relied on policies like 3.1.2³, that encourage **new** built form to “address the street”, since it is in a corner location. I have difficulty ascertaining how the additional height, particularly if not visible assists in addressing its corner location.

² 2.3.1 Healthy Neighbourhoods

³ 1. New development will be located and organized to fit with its existing and/or planned context. It will frame and support adjacent streets, parks and open spaces to improve the safety,

I admit that there is some practical relation between location and height since if you are to build upwards you are necessarily going to use as-constructed foundations. But there is no entitlement for a successful applicant to return to the Committee of Adjustment and request a further incremental increase on the strength of favourable arguments already made.

The key Official Plan provision is section 4.1.5:

4.1.5. Development in established Neighbourhoods will **respect and reinforce** the existing **physical character** of the neighborhood, including, in particular:

c. heights, massing, scale . . .of nearby residential properties;

No changes will be made through . . .minor variance . . . or other public action that [is] out of keeping with the **physical character** of the area. (my bold)

The study area

The first step in applying this test is to demarcate the study area, which Mr. Cieciora said was east of Royal York Road to the Humber Tributary, an area of some 300 homes. Westridge Road might have been intended to form a grand entrance to this subdivision, but today it is a typical street albeit with a centre grassed boulevard.

Westridge leads from Royal York to Edgehill Road, for which the odd numbered houses back on the Humber Tributary, a stream which flows into the Humber River. Westridge Road has had only one height application to the Committee of Adjustment (the subject) , whereas Edgehill Road has had seven (Table 2).

1	7 Edgehill Road	2016	11.88 m (flat)
2	11 Edgehill Road	2009	9.74 m
3	12 Edgehill Road	2010	10.36 m
4	32 Edgehill Road	2013, 2014	Both 11.34 m
5	38 Edgehill Road	2015	9.82 (flat)

pedestrian interest and casual views to these spaces from the development by: a) generally locating buildings parallel to the street or along the edge of a park or open space with a consistent front yard setback. On a corner site, the development should be located along both adjacent street frontages and give prominence to the corner.

Table 1. Edgewood Rd COA decisions			
6	51 Edgehill Road	2015	12.3 m
7	57 Edgehill Road	2016	15.61 (outlier)

Odd numbered properties on Edgehill are much deeper than other properties in the study area, including Mr. Khoshsohat's and Mr. Dietrich's. These deep lots back onto the Humber Tributary and not surprisingly, feature very large homes in a spacious setting, with large setbacks from the street and from side to side neighbours. I consider



them unique. Even so, they have the same height limit of 9.5 m.

Mr. Cieciora placed emphasis on the fact that the additional height would not be seen by the passerby. To the left is a photograph of 33 Edgehill Road. I include it to show that, views from street level observations can be deceiving and are not a

good substitute for properly drawn architectural plans. Number 33 Edgehill Road seems to be a very imposing building, and yet it has not applied to the Committee of Adjustment for any variances.

Mr. Cieciora's statistical analysis

Mr. Cieciora found twenty-one height-related applications in the study area and stressed that in his professional opinion, the data needed constant checking and double checking from other data sources. He excluded certain properties for various reasons:

- He considered the first 7 Glendarling, a refusal, as irrelevant and ignored it in his calculations.
- 57 Edgehill obtained two variances for the same cupola and the extent of the variance seems disproportionate. This decision was discarded as an outlier.

- The subject application is not for a "flat" roof, which is subject to a different by-law standard. Mr. Cieciora also discarded these properties (7 and 38 Edgehill Rd) in arriving at his average.

His conclusion was:

The average approved height is 10.91 m. And noting that the subject proposal is for 10.35 m. number one, **it is well within range of other buildings that exist in the neighbourhood, and it is below the average of the other buildings that have been approved in this neighbourhood.** So, seeing the other buildings that exist in the neighbourhood, the existing dwellings as shown through the photo study, the proposals for a built form similar to what already exists in this neighbourhood, for all of those reasons it is my opinion the application meets the general purpose and intent of the Official Plan. (my bold)

Existing physical character

The test is not whether the variance falls within the "range" or is below the average, but whether the height variance **respects and reinforces the existing physical character of the neighbourhood.** "Existing physical character" is what exists.

Although the odd-numbered Edgehill lots are different, when I perform the exclusions specified by Mr. Cieciora, I am left with only 16 or so height variances out of about 300 properties. This is a very small number. The existing character of the 300 properties in the study area is thus overwhelmingly a height of 9.5 m or lower with a few widely scattered higher buildings in the range mentioned by Mr. Cieciora, mostly on Edgehill and Valecrest. A height variance of 10.35 m does not respect and reinforce the existing physical pattern.

I find the intent of section 4.1.5: of the Official Plan is not met.

Intent of the zoning by-law

Mr. Cieciora repeated his argument that what cannot be visible must meet the intent of the zoning by-law. I think the analysis of the zoning intent is a more complex task.

Height regulation is important. It contains an element of fairness; people may not be able to expand horizontally, but they can always build upwards. And height and massing have to be considered together; the Official Plan uses the phrase "heights, massing and scale". I feel massing was disregarded in the evidence.

We don't know why there is a deviation

Although I am to assume the 10.35 m high building is not built, Mr. Mazierski supplied me with “as built” versus “original application” elevations. (Table 2 below)

Table 2. Original and as built heights (above established grade)		
	Original Application	As built
	Height above established grade	
Peak of roof	9.99 m	10.35 m
Main wall height	9.23 m	9.22 m
Second floor ceiling	Not supplied by Mr. Mazierski	9.21 m (30.2 ft)
Soffit height	7.49 m	7.49 m
Finished second floor	6.47 m	6.52 m
Living/dining room floor	3.32 m	3.32 m (10.9 ft)
Finished main floor	2.87 m	2.90 m (9.5 feet)
Edge of Building		.72 m (2.4 feet)
Established Grade	0	0

Mr. Cieciora did not testify as to how the as-built building has come to deviate from the approved plans. Nor did Mr. Khoshsohbat attend at the hearing. The only reason for introducing this document is to show that everything is on track, and inexplicably there is a deviation from approved plans, and possibly to negate an accusation of carelessness. But under the terms of analysis proposed by Mr. Mazierski, the motive is not a planning consideration.

Two levels over integral garage

Established grade is the base for measuring height; it is the level where a building would have zero height. Because Toronto has varied topography, and the zoning by-law wishes to prevent an owner from artificially changing grades in order to

gain an advantage, an off-property standard is used. The former Toronto by-law used the road surface; the present by-law uses the neighbour's property.

Modern homeowners desire integral garages; not attached or detached garages. For streetscape purposes the zoning by-law directs that the front door be reasonably close to the ground level. These two demands create a design problem to utilize the space over the garage and yet stay under the overall height limit. One solution in former times was to lower the garage by way of below grade driveway, which is now prohibited because of drainage, aesthetics and safety issues.

The prohibition of the below grade garage plus a desire for as much internal space as possible puts pressure on building heights. This has led to two solutions: one storey of living space above the integral garage, or two stories above the integral garage.

The prevailing typology in this neighbourhood is the one storey solution, which creates less pressure on height limits. Mr. Khoshsohbat's building is two stories above garage and although it does not contravene any zoning regulation by this solution, it creates a design challenge, which I will explain in the next section.

Flat roof.

The two storey solution presents as three stories. There is no zoning limitation on number of stories. Mr. Cieciora analyzed the proposal as a pitched roof proposal, which it is, but that does not mean that the zoning by-law is silent about massing.

The zoning by-law discourages flat roofs. Although it is the most efficient way to enclose space, it adds bulk to the upper stories and creates, height for height, a more imposing presence. Section 10.20.40.10(4) of the zoning by-law attempts to penalize flat roofs by imposing a height limit of 7.2 m and a limit of two stories. Even if a two storey solution does not contravene this section, it is evidence of the zoning by-law's intent to control massing. It was successfully explained before the 2016 Committee of Adjustment that this solution maintained the intent of the zoning by-law; it has to be considered and explained again for the new height.

The Photo Study

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Numbers 34 and 33 Edgehill (left and page 6) are both substantial homes built in the prevalent “one storey” typology and did not need minor variances. (I added this left photo of 34 Edgehill because 33 Edgehill is mostly obscured by trees.)

To be fair to Mr. Khoshsohbat, the photo study did depict three homes with the two stories solution, although Mr. Cieciora conceded “two floors over an integral garage” was **not** the prevalent typology in

the neighbourhood. The two storey examples are:

96 Edenbridge, no variance; (below, left)

9 Glendarling, variance of 9.7 m (below, middle)

7 Glendarling, variance of 9.7 m after a refusal at 10.31 m (below right).



For all three of these properties, the established grade is higher relative to the bottom of the garage door because of topography. 96 Edenbridge (left) is on a steep hill down towards the Humber Valley, with the house at the left (slightly out of the picture) on a higher elevation. For the Glendarling properties (middle and right photos) , the garage is partly below established grade, which allows a “sunken garage”; functionally similar to a below grade driveway, now prohibited. By contrast, after entering the 30 Westridge house’s “front” door (which is actually a side door), the person must immediately ascend 13 steps to get to the living/dining level, almost a full storey. While there is nothing wrong with that, it obviously leaves less room out of the 9.5 m “budget” to deal with the first floor storey, second floor and pitched roof.

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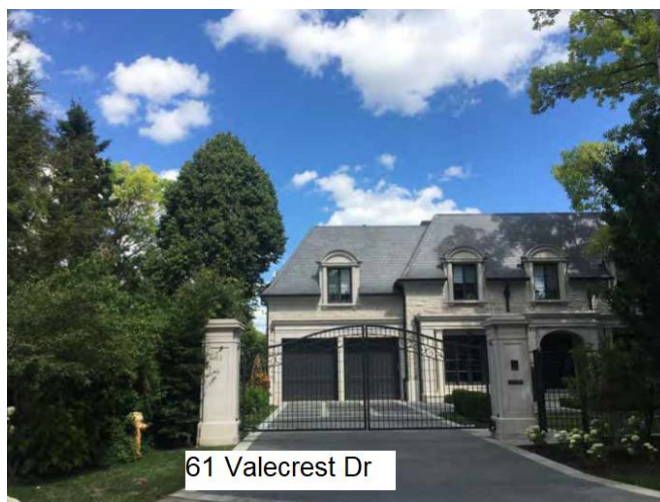
Number 96 Edenbridge did not require a minor variance, so I assume no one has put their mind to whether it met the zoning intent. Both Glendarling properties did go through the minor variance process but yet resulted in a built form with the upper floors tucked into the roof. Both have a lot of visible roof and relatively small dormer and window, and more sky view, which in my opinion is respectful of the prevalent neighbourhood typology.

Another piece of evidence of the general intent of the zoning by-law is that 10.31 m variance for 7 Glendarling was refused in 2008 and 9.7 m granted in 2009. (This is also alluded to by Ms. Anderson on page 13 of this decision). Number 9 Glendarling's 9.7 m was granted in 2010 and the one-year lapse between two decisions on neighbouring properties, perhaps even by the same developer, suggest that the design of the two houses were considered together, helping the Committee of Adjustment to find consistency with existing physical character of the neighbourhood. As a result, I find, on the evidence available to me, the intent of the zoning by-law is to produce either a one storey over integral garage, the prevalent built form in the study area, or if two stories over integral garage is desired, a form more like 7-9 Glendarling, and not like 30 Westridge.

It is true that the 2016 Committee of Adjustment decision granted 9.99 m height variance to 30 Westridge vs. the Glendarling's 9.7 m. But the 2016 Westridge case is not the decision before me.

I have plenty of evidence that suggests that what the passerby sees can be deceiving. There are homes like 96 Edenbridge and 34 Edgehill that look like they should have obtained variances, but did not, and those like 7 and 9 Glendarling that look like they did not need variances but did. One only has to compare the as built to the approved plans for the subject on page 4. The as built shows less sky views than one would think by looking at the architectural plans.

There are 49 photos in the photo study of "one storey above integral garage" and four (including the subject) of "two stories above integral garage". I haven't shown a "one storey" design with a minor variance, so I include 61 Valecrest, which received a variance of 10.0 m in 2013 (right photo).



When either “two storey” (7-9 Glendarling) or “one storey” (61 Valecrest) designs are considered, there is ample evidence that the Committee has found zoning intent **includes massing** regulations. Mr. Cieciora offered very little or no evidence on these sections of the zoning by-law. The onus of proof lies with Mr. Khoshsohbat, which onus was not met. I find the intent of the zoning by-law is not maintained.

Minor

According to *Degasperis*, the test of whether a variance is minor is whether it is numerically small and whether there is undue adverse effect. There is no undue adverse effect for the reasons advanced by Mr. Cieciora, because the additional height cannot be easily seen. Although I am somewhat concerned that a variance that fails three of the four tests doesn't seem presumptively minor and would further ratchet up the range of heights if granted, I would be prepared to find that the variance does meet the minor test under the *Planning Act*.

“Desirable”

Section 45(1) of the *Planning Act* reads:

45(1) The committee of adjustment, upon the application of the owner of an land, building or structure affected by any [zoning] by-law, or a predecessor of [any zoning by-law] . . . may, . . . authorize such minor variance from the provisions of the by-law, in respect of the land building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

The section reads “**may** authorize”. Authorization is discretionary, and part of that discretion should be exercised in favouring the upholding of the conditions to the decision already reached by a Committee of Adjustment. Both Mr. Dietrich and Ms. Anderson expressed this concern. Mr. Dietrich called this, “A variance within a variance”.

Ms. Anderson said:

One of the four tests is that the approval is considered to be in the public interest. In this case, our residents don't feel it is. Our association occasionally challenges residential development applications that involve severance requests, but as far as I know, we've never challenged a request for a variance. But this situation is exceptional, and we feel compelled to express our views here. Our issue is of the importance of adhering to process and we don't see that to be the case here.

Today the applicant has stressed that this is just about an additional 36 more centimeters. But we don't think it is. The initial application was for 9.9 metres versus

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what the by-law calls for, namely 9.5. Now the applicant wants 9.9 metres to simply “morph” to 10.35, without any penalty. The reality is we don’t know, nor will we ever know, if the Committee of Adjustment would have approved 10.35 metres in height. We simply don’t know.

We do know that when 9 Glendarling [she meant 7 Glendarling] applied for 10.3 metres; it was rejected by the Committee of Adjustment. When a new application came in for that property at 9.7 metres, that was approved. We don’t think it is up to the chair here [i.e. the TLAB member hearing this] to second guess what the Committee would have approved initially.

I agree with Ms. Anderson. What is at issue here is that Mr. Khoshsohbat seeks to be relieved of the condition to the August 2016 decision:

The dwelling shall be constructed substantially in accordance with the plans date stamped June 24, 2016 and held on file by the Committee Adjustment office, to the satisfaction of the Director, Community Planning, Etobicoke York District. Any other variances that may appear on these plans but are not listed in the written decision are NOT authorized.

The Committee of Adjustment and the TLAB are co-equal partners in creating a uniform and enforceable system of planning permissions. Enforcement of conditions are a “must” to make the whole system work. Section 1.1 of the *Planning Act* states:

The purposes of this Act are,
1.1 (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient.

It is not timely or efficient for the community or the Committee of Adjustment to plan in two steps what should be done in one.

In conclusion, I find that the variance sought is not desirable for the appropriate development of the land at 30 Westridge. The “desirable” test does not mean that it is desirable for Mr. Khoshsohbat, but that the result and the process followed is appropriate and in accord with the purposes of the *Planning Act*.

The application fails three of the four statutory tests under the *Planning Act*.

DECISION AND ORDER

The appeal is allowed, and the Decision of the Committee of Adjustment of May 24, 2018 is set aside and the building height variance to the dwelling (30 Westridge) for 10.35 m is not authorized.

X

Ted Yao

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