

DECISION AND ORDER

Decision Issue Date Thursday, December 20, 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): PETER JOHN EVANS

Applicant: W E OUGHTRED & ASSOCIATES INC

Property Address/Description: 161 GLENGARRY AVE

Committee of Adjustment Case File Number: 18 155803 NNY 16 MV

TLAB Case File Number: **18 195274 S45 16 TLAB**

Hearing date: Thursday, December 13, 2018

DECISION DELIVERED BY Ian James LORD

APPEARANCES

Name	Role	Representative
W E Oughtred & Associates	Applicant	
Alexandra Lapin	Owner	
Peter Evans	Appellant	Amber Stewart
Jonathan Benczkowski	Expert Witness	
Christine Oldfield	Participant	

INTRODUCTION

This is an appeal by the owner from a decision of the North York Panel of the City of Toronto (City) Committee of Adjustment (COA) refusing variances to, in effect, to recognize and maintain an existing deck.

The COA, in its decision dated June 28, 2018, had before it five (5) variances, two under the former By-law 438-86. These two related to the rear yard projection of the deck and its height above grade.

The variances requested from the 'new' City zoning by-law 569-2013 are identified on **Attachment 1** hereto. Differently framed, they relate to encroachments on setbacks and do not reflect the relief requested under the former By-law.

At the Hearing convened on the appointment date; the owners and their representatives were present. The sole Participant, Christine Oldfield, was not present. Ms. Oldfield, owner of the adjacent property to the east at 157 Glengarry Avenue, had advised the Toronto Local Appeal Body (TLAB) by e-mail on December 7, 2018 that she could not be in attendance due to an "unavoidable family circumstance". She requested that her written Participant's Statement be given due consideration.

In the end, the TLAB heard from two witnesses, Peter Evans, owner, and Jonathon Benczkowski, who I qualified to give expert opinion evidence as a Registered Professional Planner, both of whom had pre-filed their respective Witness Statements.

Ms. Stewart appeared as counsel with concise opening remarks and summation arguments.

BACKGROUND

This matter came before the COA as an application to 'legalize and maintain the existing rear deck'. A previous application, brought by different owners, had approved variances for the property at 161 Glengarry Avenue (subject property) on July 18, 2012. None of those four variances approved on July 18, 2012 related to a deck and none was proposed as the application then, apparently, was framed.

In his Witness Statement and evidence, Mr. Evans described acquisition of the as-built dwelling with a rear double French doors and 'Juliette balcony'. On taking possession, in addition to other contractor's work, construction of a deck and stairs to the rear yard was completed on advice that it was not in need of a building permit. A subsequent Zoning Examiners notice was received and the COA process immediately engaged.

The decision of the COA to not approve the current variances had the benefit of the attendance and advice of Ms. Oldfield; the COA offered only the standard recitation

of the four statutory tests as reasons, without further elaboration. The TLAB, of course, embarks on its own full *de novo* consideration.

MATTERS IN ISSUE

This is another, if rare, instance of construction occurring without the required oversight of an Ontario Building Code permit which, as to its zoning review component, has identified zoning infractions. There is no issue of the structural integrity of the deck; by all appearances it is of a good and workmanlike quality and is well maintained.

Two issues arise: the approach to an ‘as built’ structures; and its application to the required variances themselves, as are set out in **Attachment 1**.

It is to be noted that at the outset of the Hearing, Ms. Stewart assumed any risk and withdrew from consideration by the TLAB, the two variances refused by the COA under By-law 438-86. She advised that she had very recently received confirmation from the City’s Building Department that it no longer had the obligation to enforce By-law 438-86 - as the relevant appeals under its replacement by-law, 569-2013 were now resolved and the new zoning was in full force and effect related to those variances.

In the result, the TLAB had for consideration only the variances requested in **Attachment 1**.

On the issue of the proper approach to an application to ‘legalize and maintain the existing rear deck, I adopt the approach set out in *Re Turner*:

“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.”

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

Ms. Stewart took the step of calling the owner, Mr. Peter Evans to describe the process, above briefly described by which the construction occurred. That evidence, together with his Witness Statement, is instructive simply for the purpose of accepting the inadvertence that led to the presence of the deck and stairs. Although it is not entirely relevant to the considerations herein, I found Mr. Evans **credible** and genuinely apologetic for the oversight; not only for the personal trauma and expense incurred in its recognition, the COA application for relief and the appeal, but also for having to engage successive public entities in the review and consideration of a matter that could likely have been advanced without such scrutiny.

Mr. Evens presented renderings of actions his family were prepared to take to ameliorate the issues raised by the immediate neighbour to the east, Ms. Oldfield. Initially that concern was described as the impact of shadowing but evolved to a concern for overlook and privacy incursion by view planes into her rear yard.

These improvements suggested included further screening or slat-work on railings and the planting of cedar trees to screen observation points from the rear yard of the adjacent property.

The neighbour to the west had expressed in writing no concerns with the deck and stairs as built.

Jonathon Benczkowski was next called to address a land use planning assessment of the variances.

I requested that the evidence be focused on the variances and in particular their potential for impact on the use and enjoyment of the neighbouring properties. He accepted this direction and provided a useful description of the changing approach to 'decks' between the previous and now in-force zoning by-law.

Previously, rear yard decks were addressed by limitations regulating extensions of the building beyond a prescribed building depth. Relief from side yard setbacks

controlled the size and configuration of rear yard decks. Decks were not discrete entities as they are now recognized.

In the new zoning by-law, he explained, rear yard decks extending off the main floor level are permitted without circumscription of size, subject to side and rear yard setback controls. Height is regulated by the first floor height level, decks above the first floor have separate regulation, including a limit on the size parameter.

As a factual matter, by a coloured schematic contained in his Witness statement, Exhibit 1, page 16, he described a unique circumstance. Namely, that rear yard decks can extend 2.5 metres into the required rear yard, provided the required side yard setbacks are maintained. Stairs are exempted except that they cannot be closer than 0.6 m from a lot line.

The schematic demonstrates that the existing deck has no issues of height or size but encroaches via two rectangles (shown in yellow) into the side yard setbacks due to maintaining the existing main side wall alignments.

The stairs encroach by 0.01 m into the lot line setback.

Of significance, he demonstrated, that if the deck was built as-of-right 2.5 m into the rear yard setback (which it is not), almost the identical area engaged by the offending rectangles (shown in yellow on the schematic) would be present.

The disadvantage of the as-of-right construction is that an elevated deck, albeit narrower, would extend further back into the rear yard creating the potential for even greater overlook and privacy impact on adjacent properties. The width of this incursion would be entirely adequate to accommodate a dining table and chairs.

Under the old zoning, the unlimited size of the deck and its location was more severely constrained in relation to building length, depth and rear yard encroachment. This regulatory change has reduced the nature and type of the variances sought. Moreover, it suggests, according to Mr. Benczkowski that the concerns of Ms. Oldfield were either mis-interpreted as to the nature of the by-law protections or are no longer in effect.

In the simplest of terms, Mr. Benczkowski advised that the height of the deck is permitted as-of-right, its size is commensurate with what is permitted as-of-right and its existing floorplate is better situate closer to the house, than an as-of-right projection further into the rear yard. Further, that the as-of-right stair location is appropriate, given a basement entrance further to the west and its 0.10 m incursion towards the east side lot line is unnoticeable and provides no functional impediment or effect.

The planner took the panel, in Exhibit 1, through an extensive travelogue to demonstrate prior COA approvals of decks under the old zoning regime, in a larger neighbourhood. Limiting his own study area to the three residential streets and blocks north of Lawrence Avenue and by use of ground and drone photography, he

demonstrated that a neighbourhood characteristic consisted of vibrant new built housing contained first (and in many instances second and third) floor rear decks, as a common feature of the physical build form of the area. He made special note again through photography of the large maple tree on the boundary between the subject property and the neighbour to the east, Ms. Oldfield to the end proposition that it was the tree, and not the deck that contributed predominantly to shadowing in the neighbours yard.

Mr. Benczkowski's evidence was uncontested. He asserted a deck with the variances requested would comply with Provincial Policy and would conform to the Growth Plan. He opined that the design criteria of section 4.1.5 and the Built Form policies in section 3.2. of the Official Plan were met by the character defined attributes of the existing physical built form of the neighbourhood. He felt that the performance standards of the new zoning by-law were better recognized and implemented by the variances as no undue adverse impact resulted. He felt that a deck as proposed (and existing) was of a preferable configuration and desirable for the young family (and dog) as important amenity space. He saw no shadow impact. On the issue of privacy, in addition to the 1.6 m opaque screening in place, he recommended either additional slats on the railings or the planting of cedar trees along the east lot line to ameliorate any concerns for privacy. He noted that the staff recommendation for east and west deck sidewall privacy screens had been met and exceeded.

As such, he advised that the intent and purpose of the Official Plan and the zoning by-law were met by the three variances (giving recognition to the as-built form). He said that recognition would be both desirable and minor, without undue adverse impact being in a form and location superior to as-of-right sizing.

ANALYSIS, FINDINGS, REASONS

I acknowledge and accept the evidence provided by Mr. Benczkowski both in his witness Statement and orally, as above recited and as supplemented in the documentation.

I found his description of the changed approach to decks and deck structures between the old and the new zoning to be particularly enlightening.

I have no reason to doubt the evolution of the matter as described by Mr. Evans or to question Mr. Benczkowski's advice and recommendations.

In a mature City, no citizen should expect or rely on vague assurances that the construction of a structure can occur as-of-right without at least a minimum of rudimentary consultation - or without a permit.

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That said, I am satisfied that in this circumstance there was no willful culpability involved and that having that aspect addressed, even without relevance to the merits, presented a good judgment call by counsel.

Even so, as requested by the Participant in her e-mail above cited, I have given close consideration to Ms. Oldfield's Participants Statement and actively questioned Mr. Benczkowski on aspects of it. Had Ms. Oldfield taken the time or been given the opportunity to see and review the evidence of net cause and effect as demonstrated before me, I expect the differences might have been resolved earlier. Regrettably, the appeal was inevitable as all of the material before me was not available in advance of the COA hearing.

Still, with more discussion between neighbours a form of settlement proposal might have been agreed.

Ms. Oldfield's objection and the relief she requested was entirely framed on a concern for the implications of the construction and its infraction of a zoning standard no longer in effect. She was very clear as to the origin of her concern, as well as its perceived implications:

"4. The purpose of this Participant Statement is to ask, as I did at the Committee of Adjustment meeting in June, that you refuse approval for variance #4.

5. The zoning by-law pertaining to variance #4 "limits the projection of an uncovered platform into the required setbacks to a maximum of 2.5m from the front or rear wall" (per the Public Hearing Notice for the Committee of Adjustment meeting on June 28, 2018). The variance application asks for a projection of 3.66m, or over 12 feet, into the backyard. I am requesting that the depth conform to the required setback of 2.5m, or 8'4", from the rear wall. This depth is still a substantially sized deck by any measure and more than adequate to accommodate a barbecue and outdoor table and chairs. It is particularly spacious, given that the deck's proposed width is the entire width of the house, per variances #1 and #2."

Variance #4 was under the former by-law 438-86 which would limit the deck platform from extending more than 2.5 m from the main rear wall.

On the evidence, that regulation is no longer in effect and was withdrawn.

Under the new By-law, Mr. Benczkowski advised that there is no longer a limit on the size of a rear yard deck at the first floor level, and there is no height above grade limitation, beyond the constraint that the height not exceed the level of the first floor.

Given that height is not an issue and is as-of-right at the first floor level and given that size off the main rear wall is only limited by the encroachment on the rear yard

(which is not substantially occurring), I am satisfied there is no impact of significance. The houses in this area are modest to large with narrow side yards and considerable height. As such, a degree of privacy loss is expected in a tight urban environment. Finally, there are plenty of decks as a component of area character and I see no precedent adverse to the public interest being set by allowing this appeal.

DECISION AND ORDER

The variances under appeal from By-law 438-86 were withdrawn and form no part of this decision.

The appeal otherwise is allowed and the variances identified as proposed in **Attachment 1** are approved subject to the following conditions;

1. The deck and stairs as constructed and as depicted as built by the plan contained in Exhibit 1, volume 2 at page 209 and the elevation at page 211, is maintained without further extension.
2. At the discretion of the owner, a row of cedar trees be planted along the owners rear yard east lot line sufficient to impeded view planes into and from the neighbouring property to the east, of a type of evergreen tree capable of height growth necessary to accomplish that purpose OR the addition of added opaque slats along the east limit of the deck/balcony OR both, all within six (6) months of the issue date of this decision, failing which the appeal is dismissed.

Attachment 1

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

1. **Chapter 10.5.40.60.(1), By-Law 569-2013**
A platform without main walls, attached to or less than 0.3m from a building, with a floor no higher than the first floor of the building above established grade may encroach into the required rear yard setback 2.5m if it is no closer to a side lot line than 2.4m.
The proposed platform encroaches 1.38m into the required rear yard setback and is 1.13m from the west side lot line.
2. **Chapter 10.5.40.60.(1), By-Law 569-2013**
A platform without main walls, attached to or less than 0.3m from a building, with a floor no higher than the first floor of the building above established grade may encroach into the required rear yard setback 2.5m if it is no closer to a side lot line than 2.4m.

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The proposed platform encroaches 1.38m into the required rear yard setback and is 1.7m from the east lot line.

3. Chapter 10.5.40.60.(3), 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 0.6m. The proposed stairs are 0.5m from the east lot line.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord