

# DECISION AND ORDER

**Decision Issue Date** Friday, March 22, 2019

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): LUIS CALLE

Applicant: LUIS CALLE

Property Address/Description: 45 HOLMESDALE CRES

Committee of Adjustment Case File: 18 195357 WET 17 MV (A0573/18EYK)

**TLAB Case File Number: 18 236795 S45 17 TLAB**

**Hearing date:** Thursday, February 28, 2019

**DECISION DELIVERED BY S. Gopikrishna**

## APPEARANCES

Appellant	Luis Calle
Owner	Analie Bumagat
Primary Owner	Jayson Condoy
Participant	Loretta Piattelli
Participant	Alida Miletic

## INTRODUCTION AND BACKGROUND

Analie Bumagat and Jayson Condoy are the owners of 45 Holmesdale Crescent, located in Ward 17 of the Municipality of the City of Toronto. They applied to the Committee of Adjustment (COA) to legalize and maintain a rear platform at the second storey level, which had been constructed some time before the application to the COA was commenced. On 13 September, 2018, the COA considered the application, and refused the same.

On 11 October, 2018, the applicants appealed the COA decision to the Toronto Local Appeal Body (TLAB), which scheduled a hearing on 28 February, 2019, to hear the case.

## MATTERS IN ISSUE

The requested variances are as follows:

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

#### 1. Section 10.80.40.50.(1)(B), By-law 569-2013

The maximum permitted area of a platform at or above the second storey is 4 m<sup>2</sup>.  
The rear platform at or above the second storey has an area of 19 m<sup>2</sup>.

#### 2. Section 10.5.40.60.(1)(D), By-law 569-2013

A platform without main walls, attached to or less than 0.3 m from a building, with a floor higher than the first floor of the building above established grade may encroach into the required rear yard setback 1.5 m, provided it is no closer to a required side lot line than 1.2 m.

The rear second floor platform encroaches 0 m into the required rear yard setback and is located 0.5 m from the east side lot line.

## JURISDICTION

### 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 held on 28 February, 2019, was attended by Mr. Jayson Condoy , the Applicant/Appellant and his agent, Mr. Luis Calle. Ms. Loretta Piatelli and Ms. Alida Miletic, who jointly own the neighbouring property at 43 Holmesdale Crescent, also attended the hearing to oppose the Appeal.

It is important to note that the Appellant was initially provided with an opportunity to present information about the proposal, as well as another opportunity to rebut arguments from the opposition, after the latter made their presentations. However, this Decision notes the evidence of the opposition first in order to better explain the nature of the Appeal.

The opposition, consisting of Ms. Miletic and Ms. Piatelli, described how they had inherited 43 Holmesdale Crescent from their parents, and the fact that they had spent fifty three years at this address. They complained about the size and proximity of the constructed deck at 45 Holmesdale, and how severely it impacted their privacy. They claimed that their neighbours could stare into their bedroom, patio and backyard from the deck and emphasized the fact that the deck was “five” times the allowed size. Ms. Miletic also stated that she was “legally blind”, and liked to spend a substantial part of her time gardening in her backyard, and lamented how she was deprived of this pleasure as a result of a decrease in sunlight as a result of the deck. She also expressed concerns about how the deck was built over a single weekend, without getting requisite permission from the City, and how her concerns were dismissed by Mr. Calle (the Agent for the Appellants). Echoing her sister’s concerns, Ms. Piatelli demonstrated the impact of the deck through a series of 6-7 pictures, followed by a petition, signed by the neighbours in opposition to the deck. She added that the deck was a “fire hazard” because of its size, material and combustibility.

By way of editorial comment, I thought it appropriate to illustrate the placement of the deck in question, and its relationship to the two properties at 45 and 43 Holmesdale through the photograph on the next page, introduced as an exhibit by the opposition.



As stated earlier, Mr. Calle presented on behalf of the Appellants.

After being sworn in, he briefly described the history of the project. He said that he had constructed decks similar to what was proposed at other properties close to the Subject Site, and had successfully obtaining requisite permits from the City of Toronto. He stated that the neighbour at 47 Holmesdale Crescent constructed a deck 24 m<sup>2</sup> in size, after getting a permit from the City of Toronto, and then proceeded to recite the permit number. In response to my question if he had enquired with the City about the reasons for treating the requests for decks from the property owners at 45 and 47 Holmesdale Crescent differently, Mr. Calle said that the only answer he could get from the City was “Every case is different”. Mr. Calle then said that since the deck would not count towards the coverage of the house, and because the allowable coverage of the house was 34%, it could actually be bigger.

He then acknowledged the neighbours' objections to the size of the deck, and the impact it had on overlook and privacy. In terms of a solution, he proposed that the overlook and privacy issue be mitigated through "filling 1 metre of space on the platform with flower boxes", as recommended in the COA Staff report. According to Mr. Calle, this would leave 1.5 metres of space between the properties at 45 and 43 Holmesdale", and result in adequate protection of the opposition's privacy. Further, he said that the Appellant was willing to erect a six feet foot privacy wall, which would effectively add to the factors protecting the neighbour's privacy. He disputed the opposition's claims about reduced sunlight because of the placement of the house, which faced the southwest, while the backyard faced northeast.

Lastly, Mr. Calle stated that the neighbours' concerns about the wooden deck being a "fire hazard" were misplaced because the deck served the purpose of being a "waiting place for Mr. Condo's family in case of a fire". I asked Mr. Calle to repeat his statement since the connection between the balcony and a "waiting place" was not clear. Mr. Calle explained that in the case of a fire, Mr. Condo's family of three could rush from their bedroom onto the deck, where they could wait till they were rescued by personnel from the Toronto Fire Brigade. He insisted that the deck was stable and structurally strong, on the basis of a letter provided to him by an engineer who had been called upon to inspect the deck.

Mr. Calle disputed some of the signatures on a petition circulated by the opposition members, and claimed that the neighbours didn't understand what they had been asked to sign, or lived on a different street. He also disputed Ms. Miletic's claims about being "legally blind" because he had seen her walk around without any assistive walking device, or special sun glasses. Mr. Calle concluded that the impact of the request changes was "minor".

I then asked Mr. Calle to clarify his remarks about the "minor" nature of the changes given that the deck dominated the backside of the two houses. Mr. Calle said that according to the City by-laws, "a 4 sq. m. balcony had no overlook", while the overlook of the planned 19 sq. m. balcony could be mitigated through the measures he had discussed, and then insisted that it was the COA which had advised him to reduce the size of the balcony to 12 sq. m. in order for it to be approved.

When I asked Mr. Calle to discuss the compatibility between the Official Plan, Zoning By-laws and the proposal, his reply reiterated the very points stated above, with no reference whatsoever to the Official Plan or Zoning By-laws. I asked Mr. Calle to submit proof of the permit for the neighbouring house which allowed for a 24 m<sup>2</sup> balcony, as well as the letter from the engineer attesting to the stability of the deck located at the back of 45 Holmesdale Crescent.

Mr. Condo spoke briefly after Mr. Calle's testimony, and stated that he wanted a deck at the back of the house, to provide extra space for his young, growing family. He added that he was not conversant with the COA or TLAB processes, and would respect the TLAB decision, irrespective of who it favoured, because he "wanted to live in peace" and that he did not wish to bring "stress" upon himself, and his neighbours.

I concluded by thanking both sides for attending the Appeal hearing and contributing to the discussion, and stated that I would reserve my Decision. I reminded Mr. Calle to submit the letter from the engineer attesting to the structural stability of the deck.

Subsequently, The TLAB staff forwarded an email from Mr. Calle with a letter signed by Mr. S.H.Katakkar, P. Eng., which stated:

*“On arrival at the site, it was seen that the above deck is 13’8” wide and 13’ long supported on 3.5” diameter sonotube footings at the south end. The north end of the deck is supported by the south exterior wall of the house. The author checked the loads and found that the soil bearing pressure on the middle sonotube footing was in excess of 1570 p.s.f. permitted by the OBC.*

*The author therefore asked Jonathan to excavate at the footing locations and widen the footing size to a minimum of 2’ square x 1’ deep with 4-10M rebars each way at the bottom and he agreed to do the same. “*

On 4 March, 2019, the TLAB staff forwarded me an email from Ms. Miletic, pointing out that the Appellants had made submissions after the last date for filing materials. Ms. Miletic suggested that the materials be struck off the record since they had been submitted late.

This submission is discussed in the Analysis, Findings and Reasons section that follows.

## **ANALYSIS, FINDINGS, REASONS**

I begin my analysis by noting that the proposal needs to be examined under the four tests listed in Section 45 of the Planning Act. The Appellants did not address the nexus between their Appeal, and the Official Plan, as well as the Zoning By-laws. The lack of evidence about these two tests is a matter of grave concern, and a negative inference is drawn from the lack of any germane discussion. The only evidence presented by the Appellants was relevant only to the tests of being minor, and appropriate development.

On the matter of the development being minor, it is difficult to understand Mr. Calle’s characterization of the proposal as “minor” when it physically looms over the properties at 43 Holmesdale, as seen in the picture in the “Evidence” section. In keeping with the adage about a picture being worth a thousand words, the pictures submitted by the opposition depict how the balcony looms over their property, and the consequent gloom caused by the loss of access to sunlight. This photographic evidence is preferred over the Appellants’ descriptions of the impact, which was discursive and nebulous, when not contradictory. An example is their asserting that a 4 sq. m. balcony would have no privacy impact, which contradicts the experience of impacts in an urban setting where all balconies have some impact; the test of minor distinguishes between “allowable” and “undue adverse” impact, as opposed to “no impact”. The contradiction was evident in their insisting that the deck was structurally sound, on the basis of the engineers’ letter,

when in reality the latter advised “Jonathan” to widen the supports to reduce the soil pressure.

I note that the deck was unfortunately constructed before the COA application was filed. The TLAB is obliged by practice, and on the authorities, to consider, (or more accurately pretend) any completed construction as if it did not exist. However, the fact of actual construction, may aid the adjudicator in assessing the impact of the construction, while making a decision. In this process, the TLAB does not adjudicate the cause, motive, cost, investment, or other aspects of the appropriateness of construction, but merely its merits from a planning perspective, and statutory considerations.

Notwithstanding my agreement with the authorities on this matter, I believe that it is important for applicants to obtain requisite permission and approval before commencing construction.

On the basis of the above findings, I conclude that the Appellants have not fulfilled their onus of demonstrating the proposal’s ability to fulfill Sections 45(1) of the Planning Act, and that it therefore would be reasonable to refuse the Appeal. I do not deem it necessary to analyze the opposition’s evidence in any great detail, given my conclusion about the inability of the Appellants to fulfill the onus of demonstrating compatibility.

I acknowledge the email from Ms. Miletic dated 4 March, 2019, in which she asks that the Appellants’ evidence be deemed not to be admissible by virtue of missing the submission deadline. No weight is given to this email, or its conclusions, even if the submission was accurate. An issue as important as adherence to submission deadlines should have been identified upfront, and discussed orally at the hearing, enabling the Appellants to explain what had happened, and request relief from the Rules through a Motion, if necessary. Submissions should not be struck off the record without providing Parties a reasonable opportunity to explain the reasons; I therefore attach no importance to the aforementioned email .

I conclude by reiterating that the Appeal is dismissed in its entirety, and that the decision of the Committee of Adjustment is confirmed.

## **DECISION AND ORDER**

- 1) The Appeal is dismissed in its entirety, and none of the requested variances are approved.
- 2) The Decision of the Committee of Adjustment dated 13 September, 2018, is confirmed, and final.

So orders the Toronto Local Appeal Body

X

A handwritten signature in black ink, appearing to read 'S. Gopikrishna', written on a light-colored rectangular background.

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S. Gopikrishna  
Panel Chair, Toronto Local Appeal Body