

DECISION AND ORDER

Decision Issue Date Friday, April 12, 2019

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): GAMAL ABEDALMALAK

Applicant: GAMAL ABEDALMALAK

Property Address/Description: 43 TOTTENHAM RD

Committee of Adjustment Case File: 18 228321 NNY 25 MV

TLAB Case File Number: 18 254125 S45 25 TLAB

Hearing date: Thursday, April 04, 2019

DECISION DELIVERED BY Ian James Lord

APPEARANCES

NAME	ROLE	REPRESENTATIVE
VIOLETTE ABEDALMALAK	OWNER	
GAMAL ABEDALMALAK	APPELLANT	AMBER STEWART
BAHMAN GHOLAMI	PARTY	
WING-HANG LOK	PARTY	
HOP-SIN KWAN	PARTY	

INTRODUCTION

This is an appeal from the refusal by the North York District Panel of the City of Toronto (City) Committee of Adjustment (COA) of a single variance in respect of premises under construction at 43 Tottenham Road (subject property).

The variance requested was "to legalize and maintain front yard setback." The specific variance is set out on **Attachment 1**, hereto.

Apart from the Applicant/Appellant, neighbours on both sides of the subject property assumed Party status and presented their reasons available in writing both before the COA and the Toronto Local Appeal Body (TLAB), in support of the COA decision.

The Parties were in attendance and had requested a continuance to permit discussion. Ultimately, the Parties settled their outstanding disagreement and Ms. Stewart was able to state proposed conditions, should an approval be granted.

She provided an undertaking to put the suggested conditions in writing.

BACKGROUND

The subject property has been the subject of a series of COA applications, some aspects successful, some not.

As a result of the prior applications, redevelopment of the subject property has proceeded pursuant to an issued building permit that complies with applicable zoning and COA relief on such matters as minimum front yard, side yard elevations, height and all applicable performance standards, except for 'front yard setback'.

As Ms. Stewart explained in opening remarks, it was only upon the site having advanced to the stage of significant construction and forwarding to the City 'as built' footprint drawings, that Staff determined the incorrect placement of the dwelling.

The history of this issue was then traced and is set out in the detailed Witness Statement of Mina Abedmalak, son of the Applicant/Appellant, signed February 2, 2019, with attachments. I accepted the Witness Statement for its information and assigned it Exhibit 3 to the Hearing, without the necessity of proof.

The sense of the submission from my reading of the Witness Statement, confirmed by Ms. Stewart and not challenged by the Appellant's planner, Mr. Romano, or anyone else, was to the effect that an inadvertent error resulted in a wrongful pegging, pouring and placement of the dwelling foundations, approximately one (1) metre closer to the road than approved by the COA in a previous application.

The City issued a Stop Work Order to Comply.

I was advised that the builder was also present to respond to any issues and confirm the history presented in the Mina Abedmalak Witness Statement.

Again, in brief, the explanation given is to the effect that while the correct surveyed site plan was the basis of the building permit issued, in fact the grading plan

used for the staking had not been updated to the site plan, resulting in the placement and construction error.

Mr. Abedalmalak, who was present with the Applicant/Appellant at the Hearing, concluded his Witness Statement with the following:

"9. Ultimately, we are very regretful of the circumstances that have happened to date. However, this has not happened as a result of our actions. It was our intention to build in accordance with the approval that was granted by the Committee – to be clear, our house is built to the approved 27.9% coverage and all other approved dimensions, except front yard setback. The house has not gotten larger. This issue has caused us significant expense and delay, as we were hoping and expecting to move into the house by the end of 2018. We also obviously had no intention of having to reapply for a third minor variance application or the associated TLAB appeal."

It is not clear whether this history was before the COA. In its refusal of the requested variance set out in **Attachment 1**, the COA provided no greater insight into its reasons than the standard statement of the applicable tests and the determination they had not been met to the satisfaction of the COA.

I explained that I had attended on the subject property and read the file material.

The foregoing brief overview is expository and for information only. While it demonstrated quite clearly that the circumstance arose out of inadvertent (if foreseeable) error and that no gain or advantage resulted, the issues of culpability, disbenefit and the burden of proof on those circumstances is not before me.

As I explained and Ms. Stewart acknowledged, it is the application for variance relief that is before the TLAB on appeal. It is to be considered as if no construction had occurred. The variance requested must stand or fall on the application of provincial policy and the applicable tests, below recited.

I therefore did not find it instructive, on that line of inquiry, to hear further from Mr. Abedalmalak or the builder on how the circumstances present, arose. The actual presence of the building is irrelevant to the variance consideration and evaluation. That said, its presence, even in an unfinished form, does have some utility in visualizing the effect of built form implied by the variance on the streetscape.

MATTERS IN ISSUE

The Applicant/Appellant carries the burden of demonstrating to the satisfaction of the TLAB on appeal that the location of the dwelling unit, to be situate 7.74 m from the front lot line, is appropriate on set considerations listed below. The Parties had agreed

on a set of proposed 'conditions' of variance approval, should that occur. These are contained in **Attachment 2**, hereto.

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 Applicant/Appellant called Mr. Franco Romano to provide land use planning opinion evidence. His was the only evidence called in the Hearing. I qualified Mr. Romano to give expert opinion evidence in the discipline of land use planning and admitted his Document Book and Expert Witness Statement as Exhibits 1 and 2, respectively.

Mr. Romano identified a somewhat constrained study area of 60 dwellings, reflective of the 'enclave' boundaries of the arterial street system of Leslie Avenue to the west, Lawrence Avenue to the north and the greenway belt to the east, unbroken by any street crossings in the vicinity of the subject property.

He described a curvilinear street pattern and topography, replicated by Tottenham Road, that resulted in a varied streetscape in terms of substantial detached dwelling representation to the street; some sited side-by-side, others pushed in front or behind their neighbours. He noted the presence of identifiable new builds on the street and presented a 10-year matrix (Decision Summary Table) of some 16 COA variance approvals. Of these, several at 1, 3, 16, 37 and 40 Tottenham Road engaged front yard variances greater and smaller than that proposed.

Mr. Romano described the streetscape as 'undulating' building frontages reflective both of the street pattern and historical by-law provisions.

He advised that the former North York zoning by-law had a 'static' front yard setback number set at 7.5 m minimum, but which could be varied 1 m in either direction resulting in a range of front yard setbacks, from 6.5m to 8.5 m.

It is this by-law that, he said, was in full force and effect at all relevant times. However, the City harmonized Zoning By-law was also being enforced as an enactment of Council, but subject to appeal to the (then) Ontario Municipal Board (since renamed and continued as the Local Planning Appeal Tribunal).

The subject site had a COA approved front yard setback of 8.74 m.

It has an 'as-built ' front yard setback of 7.74 m.

The current standard and the subject of the appeal, under By -law 568-2013, set the front yard setback as the average between adjacent buildings, or a 9.55 m front yard setback for the subject property.

The planner described that the approved site plan demonstrates greater than required side and rear yards.

He noted that the 'as-built' main front wall overlaps with that of the previous structure, thereby continuing an established built form.

By air photography, pictures, a sun/shadow study and the undulating, irregular building placement on the street, he opined there would be no undue adverse impact in granting the front yard setback variance.

On the policy front, he asserted consistency with the Provincial Policy Statement and conformity with the Growth Plan. He said an existing secondary plan added nothing of significance to the policy of the Official Plan, in its evaluation criteria (s. 4.1.5), environmental or Built Form language. He included a detailed review of s. 3.1.2., .3., 4.1.5 and 4.1.8. in his evidence and Exhibit 2.

In summary, he was of the opinion that the variance, if granted would result in a compatible, detached residential dwelling use that was consistent with the varied frontage conditions of the street in a manner complimentary to and that reinforced and respected the built form and physical character of the study area.

Specifically, he was of the opinion that the front yard setback is appropriate to frame the street in a manner already occurring. With the sun/shadow study, he indicated that some impact on light and privacy is expected in an urban redevelopment setting but here, the net effect was negligible with 'more than adequate access to light' being maintained and with no unacceptable adverse impact.

He described the purpose of the zoning by-law to yield an orderly and compatible detached residential neighbourhood. He felt that varying the front yard setback

standard was appropriate given the historical use of the lot, the curvilinear street pattern and historical zoning responses in place to guide built form.

He expressed the view that the variance was appropriate and desirable as the site design and built form fits and is compatible; there is no effect on the public realm, there being no sidewalk.

Finally, as to the test of being minor, he felt that under the history of zoning, the magnitude of the variance was envisaged and effectively implemented by decisions in the matrix of variances and on the street. Further, that it could be allowed, recognized and made present without any undue adverse impacts.

He felt that if the conditions, **Attachment 2**, helped to mitigate the concerns of neighbours as to the one metre 'advance' of the building, that they should be supported as reasonable and appropriate to be satisfied prior to the closure of the building permit.

At the close of his evidence, Mr. Romano was asked several confirmatory and explanatory questions by Mr. Wing-Hang Lok, respecting the application of By-law 569-2013. Mr. Romano agreed that the appeal would not be present to be resolved in the manner agreed without the City interpretation and application of that By-law.

Mr. Romano noted that the averaging approach to lot frontages, adopted in By-law 569-2013, was common in the other municipalities, prior to amalgamation.

ANALYSIS, FINDINGS, REASONS

The evidence of Mr. Romano, both qualitatively and quantitatively, was persuasive and unchallenged. I find it was based on an adequate information base compiled for the study area, personal area exposure and practitioner experience.

'Front yard setback', while a specific regulatory performance standard, is not elaborately detailed as a matter of provincial or local policy. That said, it casts and engages for consideration elements of massing, streetscape presence, built form compatibility, design, public realm and impact aspects, all elements of good community planning.

I find persuasive:

- a) the fact that the previous building on the subject property experienced the near identical front yard setback;
- b) the fact that previous zoning standards accommodated the proposed setback and was in effect and a control in place on the date of the application; and
- c) that a variance from the authorized COA setback of 8.74 m by 1 m to 7.74 m, on the evidence received, is minor and appropriate given the existing

curvilinear streetscape, the redevelopment occurring, and the existing and planned built form.

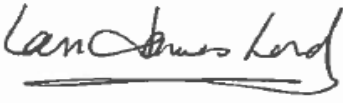
On this basis I accept the recommendation of the planner for the Applicant/Appellant that the variance should be approved, subject to the conditions as agreed, as a matter of good community planning.

The Parties are thanked for their contributions and spirit in working to a mutual agreement on terms, in an obviously difficult circumstance for all concerned.

DECISION AND ORDER

The decision of the Committee of Adjustment is set aside, and the appeal is allowed on the following terms:

1. The variance set out on **Attachment 1** as proposed, is approved.
2. This variance approval is conditional on fulfillment of the conditions identified in **Attachment 2**.

X 

Ian J. Lord
Panel Chair, Toronto Local Appeal Body
Signed by: ilord

ATTACHMENT 1

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

1. **Chapter 10.5.40.70(1)(B), By-law No. 569-2013**
The required minimum front yard setback is 9.55 m.
The proposed front yard setback is 7.74 m.

ATTACHMENT 2

43 Tottenham Road – Conditions of Approval

Decision of Toronto Local Appeal Body Panel Member: I. LORD
TLAB Case File Number: 18 254125 S45 25 TLAB

1. The Owner shall plant on the Subject Property, a row of Emerald Cedars that are at least 1.8 m tall adjacent to the north side lot line and the south side lot line, commencing at a point that is 3.87 m east of the front lot line, extending to a point that is:
 - a. on the north side, to a point that is adjacent to the westerly end of the existing hedge on the adjacent property to the north (45 Tottenham), which westerly edge commences to the east of the attached garage on that property; and,
 - b. on the south side, at least 1.2 m east of the main front wall of the adjacent dwelling to the south (41 Tottenham).
2. The Owner shall plant a tree in the front yard, of a native deciduous species.
3. The plantings required by the above-noted conditions shall be installed no later than the first spring following occupancy of the dwelling, and prior to the building permit being closed by the City of Toronto.