

DECISION AND ORDER

Decision Issue Date Friday, May 24, 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): LEN DESYATNIK

Applicant: LEN DESYATNIK

Property Address/Description: 301 ELLERSLIE AVE

Committee of Adjustment Case File: 18 249793 NNY 23 MV

TLAB Case File Number: 18 269694 S45 18 TLAB

Hearing date: Friday, May 10, 2019

DECISION DELIVERED BY T. YAO

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Len Desyatnik, Tania Desyatnik	Appellants/Owners	Matthew Di Vona
Jane McFarlane	Expert Witness	
City of Toronto	Party	Matt Schuman
Angelo Di Pardo	Participant	
Krzysztof Adamski	Participant	
Cristina Bossio	Participant	

Valerio Polesel	Participant
Neela Adamski	Participant
Fernando Iannucci	Participant

INTRODUCTION

Tania and Len Desyatnik wish to add onto an existing bungalow to build a two storey home. In February 2017, they obtained the needed variances, chiefly a building length variance of 18.8 m from 17 m permitted.

At the rear is a one storey garage which the Desyatniks intend to retain as a home gym. It is too close to the lot line shared with west side neighbour Valerio Polesel. However, the Desyatniks did **not** seek a variance for this side yard. They relied on an exception in the 569-2013 Zoning By-law (City wide) that permits an owner to reuse existing ground floor walls (in this case all four walls), to take advantage of any non-conforming setbacks. The cut-off point for this exemption is that 50% of the old walls must be preserved¹. During the course of construction, the contractor discovered the walls were poorly built and had to be completely removed.

Accordingly, the Desyatniks now need a side yard variance for the garage, but more importantly, the whole garage is now considered “new construction”, and when it is counted, the “building length” goes from 18.8 m to 30.3 m. The neighbours consider this unacceptable.

The Desyatniks received a stop work order, ceased construction, and re-applied to the Committee of Adjustment in December 2018, for essentially the same design. They were unsuccessful. The Desyatniks appealed and so this matter comes to the TLAB.

MATTERS IN ISSUE

The Desyatniks originally obtained 6 variances in 2017 as shown in Table 1.

Table 1 Variances obtained Feb 9, 2017
From By-law 569-2013²

¹ 5.10.1.10 Interpretation (4) Substantial Demolition A building is not lawfully existing if 50% or more of the main walls of the first storey, or above, are removed or replaced. (By-law 569-2013)

² The present City-wide zoning by-law was adopted in 2013 and because appeals are still being resolved, the City’s zoning examiners require two sets of zoning compliance (testing for any variances from 2013 zoning by-law and the previous North York Zoning By-law).

Table 1 Variances obtained Feb 9, 2017			
		By-law Standard	Proposed
1	Side yard setback	1.8 m	1.2 m
2	Distance from main building to ancillary structure	1.8 m	1.69 m
3	Maximum permitted building length	17. m	18.8 m
4	Maximum permitted building depth (the same concept as length; see discussion below)	19 m	20.35 m
5	West side yard setback	1.8 m	1.2 m
From North York By-law 7625			
6	Maximum permitted building length	16.8. m	30.33 m (includes garage)

In December 2018 (the second Committee of Adjustment application) they sought eight variances and although the design is identical, except for a “link”, to be described later, the variances all seem to be different. The reason for this is that the walls both garage and main building are completely rebuilt and this will be discussed further in the next section.

Table 2 Variances denied in December, 6 2018			
By-law 569-2013			
		By-law Standard	Proposed
1	Side yard setback	1.8 m	.23 m (this is caused by the rear garage)
2	Front porch elevation	1.2 m above grade	1.44 m above grade
3	Rear porch elevation	1.2 m above grade	1.5 m above grade
4	Maximum permitted building length	17. m	30.3 m
5	Maximum permitted building depth	19 m	31.85 m

6	Driveway width	3.58 m	4.45 m
7	First floor height	1.2 m above grade	1.44 m above grade
8	First floor finish height	1.5 m above grade	1.71 m above grade

The “existing wall” exception

I will explain how variances are calculated for the non-technical reader. For both by-laws (City and North York), “building length” is defined as the distance between the front main wall and rear wall³, and the rear wall is defined as that wall which is closest to the rear lot line. “Depth” is the equivalent concept but measured from the front yard setback, instead of the front main wall. “Building length” and “depth” are equivalent concepts.

The reason why a 31 m building length was sought in Variance #6 (2017, in the earlier decision) and a building length of 18.8 m in Variance #3 (also 2017) is not clear to me. Variance #3 (2017) excludes the garage, because the Desyatniks had not started construction and they and the objectors expected that the garage would be largely untouched. But in that case, it seems to me that Variance #6 could have excluded the garage and would also have been in the 18.8 m range.

The larger variances of 30.33 m (Variance #4, 2018) and 31.85 m (Variance #5, 2018) were flagged in the plans examination process⁴ because Mr. Raia, (the architect) could no longer apply the “existing wall” exception (footnote 1, page 2).

So, the length variance is the crux of this case. I must be satisfied that it meets the four 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 desirable for the appropriate development or use of the land; and
- is minor.

I have examined the other variances relating to porch height, driveway width and so on. I presume they are a result of main walls of the house also having to be demolished as well as the garage walls. I find they meet the four tests and have no impact on the pattern of physical development in the neighbourhood.

³ Building Length means the horizontal distance between the portion of the front main wall of a building on a lot closest to the front lot line, and the portion of the rear main wall of the building closest to the rear lot line, measured along the lot centerline

⁴ In this case, the Desyatniks proceeded by waiver, and their consultant was Anthony Raia.

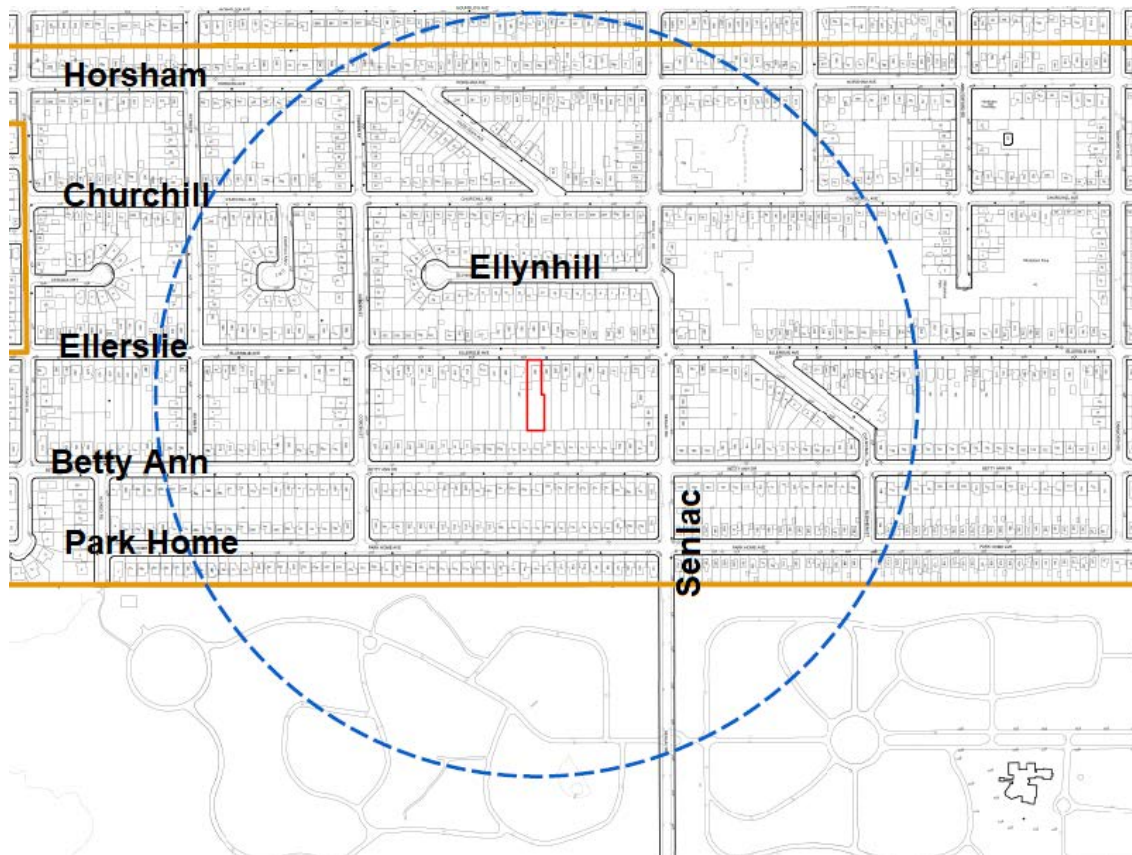
EVIDENCE

Jane McFarlane, the Desyatniks' planner, was the only planning witness. I qualified her as able to give opinion evidence in the area of land use planning. The City of Toronto appeared in the form of legal counsel who filed a full brief of material but did not call any witnesses of its own. In opposition to the Desyatniks, I heard from three interested persons: Fernando Iannucci, Neela Adamski, and Valerio Polesel.

ANALYSIS, FINDINGS, REASONS

Geographical context

The Desyatniks bought their bungalow in 2013. This house is on the south side of Ellerslie, about three and a half blocks east of Bathurst and a half a block west of Senlac. (Please see Ms. McFarlane's study area below). No 301 Ellerslie is 19.2 m by 92.96 m (63 ft by 305 ft), a very large lot (.44 acre), with an unusual depth, within walking distance of Yonge (20 min). These lots fall into a pocket of very deep lots on the south side of Ellerslie between Senlac and Wynn Road, a situation not replicated on Betty Ann to the south, or Elynhill Drive to the north.



History of the garage

The existing bungalow has a driveway 6.5 m wide (21.3 ft) on the west side, leading to the rear garage which is the subject of this case. Today, a 21-foot sideyard for a driveway would be considered an underuse of valuable frontage, and so the Desyatniks wished to use this space for the new house. I understand no one objects to this, nor to the porch height nor driveway variances.

How did this garage get built? Evidently, twenty years ago, unattached garages were common and the two persons who were neighbours decided they both wanted garages at the rear. The two persons were Valerio Polesel's father, (307 Ellerslie), and another person who was the owner of 301 Ellerslie before it was purchased by the Desyatniks. They built them cooperatively. The survey shows the 307 Ellerslie garage as "concrete block" and the 301 Ellerslie garage as "stone" but the two are virtually identical in size and both are too close to the property line by present-day by-law standards.

Mr. Polesel's garage is 0.32 m from the lot line (1.05 feet) and the Desyatniks' garage is 0.24 m (9.44 inches). However, the Desyatniks seek a variance of **0.23 m** (9.05 inches). Mr. Polesel has asked the Desyatniks to rebuild the garage 1.8 m from the property line and calls their refusal to agree to this "greedy".

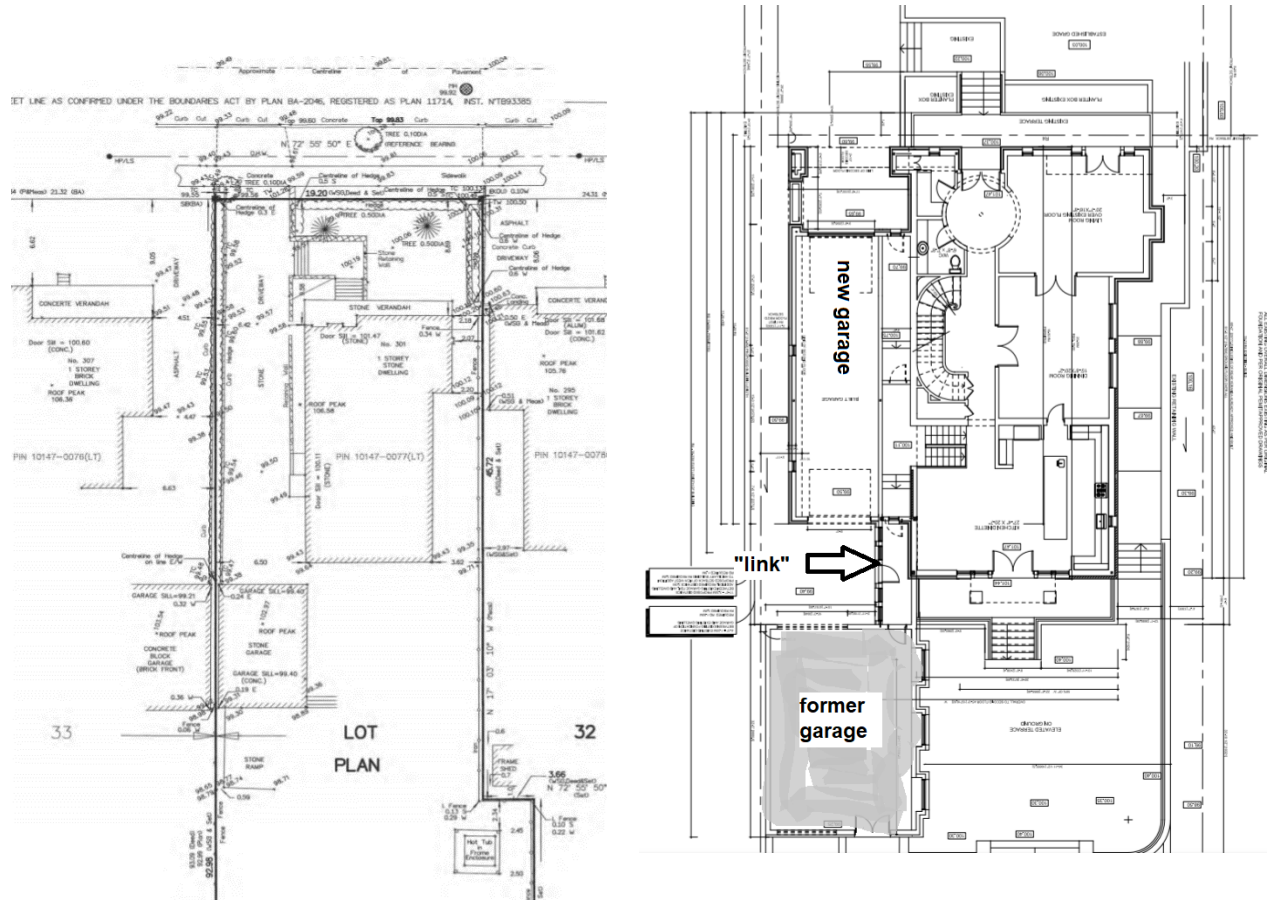
I will deal with Mr. Polesel's objection now, out of sequence. Mr. Polesel says that the Desyatniks have reinforced the wall by relocating it on the foundation, which may explain why a variance of .23 m is sought instead of .24 m. I consider the difference of .01 m minor.

The jurisprudence⁵ states the decision maker is "to pretend that the structure is not there". When I do this, I found it impossible to overlook the unique history of the lot. It is true that in 2019, no-one would ever permit a solidly constructed accessory building within 10 inches of a neighbour, when the owners have a lot of the size of the Desyatniks'. However, if one were to "pretend" that it does not exist, what better place would there be to place it alongside another existing accessory structure, itself 1.05 feet from the property line?

⁵ *Turner v Vaughan* [1994] O.M.B.D. 2036, as cited in *Mazzawi v Toronto* [2014] O.M.B.D. No. 425. I did not find either of these cases on CanLII, a free legal information service. The latter case is available on the LPAT website under May 30, 2014 Case No. PL131366.

In my opinion, variance #1, which affects only Mr. Polesel, is reasonable, in light of the fact it is was Mr. Polesel's father who had input into its location and it appears it was a common intention to have substandard side yards to minimize the building-to-building distance and maximize the usable width of their rear yards. I add, and I will use bold lettering, that **this is not intended to be a precedent for other side yard variances in this neighbourhood and is unique to the history and geography of this lot.**

Building length and depth (variances #4 and 5)



Ms. Adamski and Mr. Iannucci objected to the length variances although they did not object to Variance #6 (2017). Above is the configuration **before** construction (left) and the **current** site plan (right).

On the left side of the current site plan are:

- the new integral garage, now part of the house;
- the “link” a covered one storey passageway; and
- the former garage shaded in a light colour.

The original design had a rear terrace accessed by French doors leading to the house with no link, only a privacy screen facing Mr. Polesel. This is the design that I will approve. To be clear I do not approve the “link”.

The opposing parties' positions are straightforward; the objectors (including the City) say that the 30 m numbers in variances #4 and 5 (2018) will be misinterpreted by developers in the future and will lead to 30 m long walls in this neighbourhood. Ms. McFarlane (the Desyatniks' planner) says that all the Desyatniks are seeking is what they sought in 2017 when, all the present opponents, including Mr. Polesel, agreed to the variances in writing.

The neighbours argue that other developers will seize upon this number, without regard to the underlying facts. I cannot accept this position. Participants in the variance process, whether they be planners, lawyers, interested persons or decision makers, must be presumed to read all relevant documents, including TLAB decisions. However, I have referenced the circumstances in order to “flag” the unique aspects of this case.

I agree with Ms. McFarlane that the neighbours had fair warning of the use of the rear garage. I find as well that these variances are minor and desirable, since they are already approved by the Committee of Adjustment. Thus, it represents the “planned context”, i.e. what has planning approval, even if the construction is not yet completed.

Therefore, I find the four tests are met for the garage.

Why I am not approving the “link”

I have placed great emphasis on the previous Committee of Adjustment decision which did not include the “link” building⁶. In my opinion, given the complexity of the planning process and the lack of general understanding of whether joining the two buildings physically has any effect on “building length”, I should not add confusion. It is not clear to me whether the former garage remains an accessory building. I am not clear how planners in the future will interpret the building length number of 30.33 m (exclusion of the garage) in 2017 and the same number in 2018 (inclusion of the garage).

Assuming that there is a building-to-building distance of 1.69 m (please see Variance #2, page 3) and when added to the previously sought 18.8 m building length, the combined length is 20.49 m. This would be the variance for the building length, had the Desyatniks elected to construct the “link” in the first place. Table 3 below is a list of Ms. McFarlane's list of Committee of Adjustment decisions, and while 20.49 m is not the largest length, it seems to be at the top end and so might not have been granted in the

⁶ The City Planning report had no objections to the link as it cannot be seen from the street. However, neither can building length and the objectors have made this the issue in this case.

context of the all the variances sought in 2017. I note that the test under the Planning Act is for all the variances, individually and cumulatively, to meet the four tests. This is an onerous test and the link adds to the scale of the enterprise, once the “existing building” exception is lost.

Table 3 Other Committee of Adjustment decisions			
		Side Yard	Building Length
375 Ellerslie Ave	2014	1.22m	18.3m
290 Churchill Ave	2014	1.52m	21.3m
286 Churchill Ave	2014	1.22m	18.2m
314 Horsham Ave	2015	1.22m	17.68m
255 Ellerslie Ave	2015	1.2m	19.51m
253 Ellerslie Ave	2015	1.52m	17.07m
65 Cobden St	2018		17.78m
324 Ellerslie Ave	2017	1.5m	18.4m
271 Horsham Ave	2017		17.93m
241 Park Home Ave	2017		18.83m
232 Ellerslie Ave	2018	1.5m	17.61m
216 Betty Ann Dr	2016	1.51m	17.58m
379 Ellerslie Ave	2016	1.22m	17.98m
266 Betty Ann Dr	2014	1.2m	21.03m

I concede there is an element of pragmatism in this decision, but I am authorizing the variances in Table 2 only if the link is excised. I presume no new variances will be created and thus am prepared to approve this in the form of a Final Order. If this is not the case, I would ask the parties to contact me and I will reopen this decision.

The building length and building depth variances, of 30.3 m and 31.85 m respectively, are a combination of a main building and a separate rear garage, for which previous Committee of Adjustment approval was granted, and should NOT

be considered a “precedent” for a single two storey dwelling which purports to achieve this building length or depth. It is based entirely on facts unique to this property.

DECISION AND ORDER

I authorize the variances set out in Table 2 to accommodate development on the existing foundations of the garage and the unique circumstances of this case (**please see the bolded sentences in the body of this decision**), on condition that the link addition is not included and that the owners construct in substantial compliance with the plans as altered.

X



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