

DECISION AND ORDER

Decision Issue Date Thursday, May 30, 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): DAVID JARMAN

Applicant: ANDREW DEANE

Property Address/Description: 59 BERNARD AVE

Committee of Adjustment Case File: 18 133259 STE 20 MV (A0312/18TEY)

TLAB Case File Number: 18 233517 S45 20 TLAB

Hearing date: Monday, March 18, 2019

DECISION DELIVERED BY S. TALUKDER

REGISTERED AND PARTIES AND PARTICIPANTS

Owner	Joan Gilmour
Applicant	Andrew Deane
Appellant	David Jarman
Party	Paul Rosenberg
Party	Joan Gilmour
Party's Legal Rep.	David Bronskill
Party	Sondra Fink
Expert Witness	Jane McFarlen
Expert Witness	Ryan Guetter

INTRODUCTION

1. This is an appeal by David Jarman of the decision of the Committee of Adjustment (COA) approving an application for minor variances for the property located at 59 Bernard Avenue (subject property).
2. Mr. Jarman is the owner of the property at 57 Bernard Avenue, which is adjacent to and east of the subject property.
3. The subject property is located in the Annex Neighborhood of Toronto, southwest of the intersection of Avenue Road and Davenport Road.
4. The owners of the subject property are Joan Gilmour and Paul Rosenberg. They filed an application at the COA for approval of variances to build a new three-storey detached dwelling and a rear detached garage. Their application was approved by the COA.
5. Sondra Fink, the owner of the property located at 61 Bernard Avenue, is a party to the appeal and opposes the approval of the minor variances sought at the COA and at appeal. Ms. Fink's property is adjacent to and west of the subject property.
6. At the hearing, I informed the parties present that I visited the subject property and surrounding area prior to the hearing.

MATTERS IN ISSUE

7. At issue is whether the appeal by Mr. Jarman should be allowed and the decision by the COA overturned. The variances approved by the COA are reproduced below (the approved variances are italicized):

Under By-law 569-2013

1. Chapter 10.5.40.70.(3), By-law 569-2013: The minimum required front yard setback is 3.1 m.

The detached dwelling will be located 2.4 m from the front lot line.

2. Chapter 10.10.40.70.(3), By-law 569-2013: The minimum required side yard setback is 0.9 m.

The detached dwelling will be located 0.13 m from the east side lot line.

3. Chapter 10.10.40.10.(2)(A)(i)&(ii), By-law 569-2013: The maximum permitted height of all front and rear exterior main walls is 7 m.

The height of the front and rear exterior main walls will be 11.25 m.

4. Chapter 10.10.40.40.(1)(A), By-law 569-2013: The maximum permitted floor space index of a detached dwelling is 1.0 times the area of the lot (276.79 m²).
The detached dwelling will have a floor space index equal to 1.07 times the area of the lot (296.56 m²).

5. Chapter 10.5.40.60.(7), By-law 569-2013: Roof eaves may project a maximum of 0.90 m provided that they are no closer than 0.30 m to a lot line.
The eaves for the pitched roof will project 0.88 and will be located 0.03 m from the east lot line, and the eaves for the flat roof will project 0.90 m and will be located 0.00 m from the east lot line.

6. Chapter 10.5.50.10.(3)(A), By-law 569-2013: A minimum of 50% (44.27 m²) of the rear yard must be maintained as soft landscaping.
In this case, 39% (34.22 m²) of the rear yard has been maintained as soft landscaping.

7. Chapter 10.10.40.30.(1), By-law 569-2013: The maximum permitted depth of a detached dwelling is 17 m.
The detached dwelling will have a depth of 18 m.

8. Chapter 10.5.40.60.(8)(A), By-law 569-2013: Wall mounted vents, pipes, or utility equipment may encroach into a required setback 0.60 m provided that it is no closer to a lot line than 0.30 m.
The fire shutter will be located 0.00 m from the east side lot line.

Under By-law 438-86

1. Section 6(3) Part II 2(II), By-law 438-86: The minimum required front yard setback is 3.10 m.
The detached dwelling will be located 2.40 m from the front lot line.

2. Section 6(3) Part II 3.B(II), By-law 438-86: The minimum required side lot line setback for the portion of the building exceeding a depth of 17.0 m is 7.5 m.
The 1.0 m portion of the detached dwelling exceeding the 17.0 m depth will be located 0.13 m from the east side lot line and 2.89 m from the west side lot line.

3. Section 6(3) Part III 1(A), By-law 438-86: A minimum of 30% of the lot area (83.04 m²) shall be landscaped open space.
In this case, 26% of the lot area (73.30 m²) will be landscaped open space.

4. Section 6(3) Part I 1, By-law 438-86: The maximum permitted gross floor area of a detached dwelling is 1.0 times the area of the lot (276.79 m²).
The detached dwelling will have a gross floor area equal to 1.07 times the area of the lot (296.56 m²).

5. Section 6(3) Part III 3 (D), By-law 438-86: A minimum of 75% (14.32 m²) of the required front yard landscaped open space shall be in the form of soft landscaping.
In this case, 64% (12.20 m²) of the required front yard landscaped open space will be in the form of soft landscaping.

8. The approved variances are subject to the following conditions:
- (1) Where there are no existing street trees, the owner shall submit a payment in lieu of planting one street tree on the City road allowance abutting each of the sites involved in the application or elsewhere in the community if there is no space, to the satisfaction of the Supervisor, Urban Forestry, Tree Protection and Plan Review, Toronto and East York District.
 - (2) Permeable pavers shall be installed along the entire length of the driveway leading to the proposed rear garage.
 - (3) The front yard setback of 2.4 m shall be limited to the bay window projection as shown on the Site Plan drawing received on March 22, 2018. Any other variances that may appear on these plans but are not listed in the written decision are NOT authorized.
9. I note that there is an error in the wording for Variance no. 3, as pursuant to Chapter 10.10.40.10.(2)(A)(i)&(ii) of the By-law 569-2013, the maximum permitted height of front and rear exterior main should be 9.5 m and not 7 m. The requested variance of 11.25 m for the front and rear exterior main wall does not change as a result of this error.

JURISDICTION

Provincial Policy – S. 3

10. 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)

11. 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

David Jarman's Testimony

12. Mr. Jarman described his neighbourhood as the "East Annex," which is an eclectic neighbourhood with old houses built over the period of 150 years. The lot sizes in this area vary significantly, some with large houses and some smaller lots with small houses. His house and the subject property are on smaller lots. The houses around his area are not densely packed in. The houses on 55, 57, 59, and 61 Bernard Avenue are part of a set of Tudor-style homes (Tudor homes) that were built as a matching set and are almost identical in height and design. The original house on 63 Bernard Avenue before the new house was built was the 5th member of this set.
13. Mr. Jarman said that proposed building would disrupt the continuity of the 4 Tudor homes and change the character of the street.
14. Mr. Jarman was concerned about the depth of the proposed building (variance 7). He produced a photograph that showed the back of the subject property taken from the rear deck of his backyard (Exhibit 1). He superimposed the length of the proposed building on the subject property. Based on this superimposition, Mr. Jarman noted that the view from his backyard would be blocked by the proposed building. The building wall will 1m from his garage, which is located at the back of his property. Mr. Jarman believed that the building depth was 18.6 m and not 18 m.
15. Mr. Jarman said that the extension of the dwelling unit in the back would block the sunlight from entering his garden and would also block the view from his windows facing the subject property. He believes that the upper deck would allow his neighbours to sit near the lot line and look down into his backyard, and thus, encroach on his privacy.
16. Mr. Jarman reviewed the COA decisions and the analysis submitted by the witness, Mr. Guetter (Exhibit 4). Mr. Jarman said that no variance of building depth was granted unless the lot was of a larger size and 150 ft deep. Also, no variance in the East Annex was granted for building height unless the houses on the neighbouring properties were large and of the same height. Therefore, the building with the approved height did not tower over the adjacent homes. Mr. Jarman stated that he based this observation on his experience of living in the neighbourhood for 21 years, walking in the neighbourhood, and relying on Google maps.
17. Mr. Jarman was concerned about the side yard setback for the east lot line (variance 2). This variance along with the variance to increase the building depth would create difficulties of using the driveway at his own property, as he would have difficulty navigating a long narrow driveway. He believes that the Applicant is attempting to make their driveway wider by shifting the property towards his property and thus affecting his ability to use his driveway safely.

18. On cross-examination, Mr. Jarman confirmed that his garage was built in 2001, next to the lot line, and that the eaves of the garage overhung into the subject property. Mr. Jarman acknowledged that the proposal would not impact the width of his driveway. He agreed that having a fence on the property line would have a similar impact to his driveway as would having a wall in the subject property.
19. Mr. Jarman testified that the decrease in soft landscaping (variance 6) in the back yard along with the decrease in back yard space would result in flooding in the basement. This issue of water management is not mitigated by permeable pavers, which may divert the water into the neighbours' property.
20. Mr. Jarman was questioned whether his main amenity space was on the east part of his house, away from the lot line of the subject property, and sitting adjacent to the driveway of the neighbour on the east side (55 Bernard Avenue). He did not admit to this proposition and stated that his whole back yard was used for amenities. He also confirmed that there was not much grass in his backyard. He did not agree that his property contributed to water shedding due to the lack of soft landscaping in the back yard as he had extensively planned on the property on how to deal with watershed. He acknowledged that the buildings on 55 and 63 Bernard Avenue had rear walls that extend further than his rear wall.
21. During the direct and cross-examination of Mr. Jarman, much time and attention was spent on the features of the new building on 63 Bernard Avenue, which was originally part of the set of Tudor homes. While I appreciate Mr. Jarman's description of the property, I must accept the description provided in the decision by the Ontario Municipal Board (OMB) as being the most accurate description of the new building on 63 Bernard Avenue.

Sondra Fink's Testimony

22. Ms. Fink was concerned that the proposed building would disrupt the continuity of the four Tudor homes along Bernard Avenue.
23. She believed that the variances are not minor because they are not within the 3-5% deviation from what is permitted.
24. Ms. Fink testified that the proposed building would affect her enjoyment of her own front and back yards. She indicated that the proposed building would block sunlight from entering her backyard and her gardens. The skylight on her building above her kitchen in the south of her house would be blocked from having any sunlight because of the proposed building.
25. Ms. Fink's main concern is that the proposed building would be 10 ft or 14 ft above her property's roof line. According to her, it would be a monster home which would affect the streetscape of the neighbourhood block. She believes that the variances for larger houses approved in her neighbourhood are on larger lots and not on smaller lots as the subject property.

Ryan Guetter's Testimony

26. The Applicant called one witness, Mr. Ryan Guetter, a Registered Professional Planner. Mr. Guetter was qualified to give professional land use planning opinion evidence.
27. Mr. Guetter described the study area for his analysis of the neighbourhood to be bordered by the major streets, Avenue Road to the east, St. George Avenue to the west, Davenport Road to the north and Lowther Avenue to the south. He stated that the neighbourhood has mostly two-storey and three-storey buildings, with the third storey having mostly sloped roofs and with a living area smaller than the lower levels. The subject property is between two storey houses but there are three storey-houses across the street and nearby on the block. In the area immediately surrounding the subject property, the predominant building type is three-storey buildings, which are usually adjacent to two-storey buildings.
28. Mr. Guetter stated that the houses in the neighbourhood have various architectural styles, including modern styles. Some of the architectural elements have been incorporated into the design of the proposed building, which include the front bay window projection, front gable, and the pitched roof.
29. Mr. Guetter referred to a summary table of 195 COA decisions for properties in the study area that he compiled (Exhibit 4). About 79 decisions in the study area had similar variances as the ones requested for the subject property. For example, in the last ten years, there had been four wall height approved variances, sixteen approved variances for floor space index (FSI), and ten approved variances for side-yard setback. The requested variances for the subject property are within the range already approved by the COA or at appeal.
30. Mr. Guetter referred to the current survey of the property (Exhibit 3, Tab 1) and pointed out some features of the subject property and the adjacent properties. Each dwelling in these properties has a front projection in the form of a window and the driveway is on the west side of the dwelling. Each dwelling is near the lot line of the adjacent property on the east, with some portions at 0 m from the lot line and other portions set back from the lot line. This setup of dwelling followed by driveway, and followed by the next dwelling with its driveway, is replicated in the proposed development.
31. Mr. Guetter referred to the composition of Bernard Avenue in his aerial photographs, which is undulating and curves southwards. He asserted that the curving of the road results in a setback of the property line along the road eastwards and creates variation in the position of the dwellings with respect to each other on this road. For example, the rear of the buildings at 55, 57 and 59 Bernard Avenue do not align as a result of the curve of Bernard Avenue. This results in the rear of the dwellings to be variable and not aligned.
32. Mr. Guetter stated that the intent and purpose of the zoning by-law for front yard setback (variance 1 under both by-laws) is to ensure adequate separation from

the street. Mr. Guetter stated that the current survey shows that the setback is 3.36 m. from the front lot line, which is more than the required 3.1 m front yard setback. The proposed front of the building will be set on the current building line, so that the front yard setback will remain at 3.36 m and the 2.4 m requested variance is for the window projection only. The condition no. 3 set out in COA's Notice of Decision limits the approval of the setback of 2.4m for the bay window projection only.

33. With respect to side yard variances which includes variances 2, 5 and 8 for zoning by-law 569-2013, Mr. Guetter stated that the intent of the zoning by-law of the side yard setback was to ensure adequate separation between the dwellings. However, the composition of the buildings close to the subject property on Bernard Avenue, includes zero side yard setback from the lot line, such as those in the subject property and the properties of Mr. Jarman, Ms. Fink and the property at 63 Bernard Avenue. The proposed variance of a uniform 0.13 m side yard setback will be an improvement of the current setback which varies between 0 m to 0.13 m and will create a greater separation from the neighbouring property. With respect to variance 5, the variances for the eaves, at its narrowest, reflects the existing condition of a 0 m setback.
34. Mr. Guetter stated that the intent of the zoning by-law with respect to building depth (variance 7) and length is to control the length of the building to ensure that there is sufficient space in and around the building and for amenity space. The third storey is set back 0.75 m. from the property line from the east and west side, which Mr. Guetter believes mitigates the effect of the building depth and massing. In addition, the height of the second storey at the rear is lower than the height at the front of the building, allowing for a further setback for the third level. Mr. Guetter opined that the composition of the building based on building length and setback on the third-floor results in a minor variance given that the requested variance is 1 m more than what is allowed as of right. The setback of the third storey is similar to the other third storeys in the neighbourhood where the third storey is smaller than the lower levels. Mr. Guetter stated that the permissible depth of 17 m already extends beyond the rear wall of adjacent properties.
35. Mr. Guetter stated that variance for the front and rear exterior main wall is triggered because the front gable and the pitch of the roof at the rear occupies more than 60% of the building width. He noted that these components of the architecture are compatible and reinforces the existing characteristics in the neighbourhood, which include houses with front gables and pitched roofs. The portion of the roof that is at 11.25 m height is approximately 8.5 m long and is in the centre of the building, resulting from the pitch of the roof and the third-floor setback. The building height is 7.23 m, which is less than the permitted height of 9.5 m. However, the composition of the gable has resulted in the requirement for variance of the front and rear main walls height. Mr. Guetter stated that if Mr. Jarman's calculations in his exhibit depicting the front elevations are correct (Exhibit 2), then the difference between the eaves of the proposed building and the adjacent buildings (Mr. Jarman's and Ms. Fink's) is 1.29 m and the difference between the top of the roof of the proposed building and the top of the roof of the

adjacent buildings is approximately 2.86 m and not 14 ft, as suggested by Ms. Fink.

36. Mr. Guetter commented that the intent of zoning by-law with respect to floor space index (FSI) is to control the overall massing. Mr. Guetter opined that the request of increase of 17 sq. m. in FSI is minor and is not enhancing the utility of the property, as the dwelling is intended to serve a single family. There are examples of variances in FSI in the study area where the FSI of greater than 1.0 times the area of the lot was approved.
37. Mr. Guetter commented on the privacy overlook and shadowing concerns of the neighbours. He reviewed an aerial photo (Exhibit 4) of the subject property and the surrounding land. He opined that as the dwelling is aligned in the north and south direction, there will be no shadows to the south of the new dwelling wall. Only the two storey portion of the building with the shortened portion of the rear of the two storey will extend about 3.5 m beyond the main wall on Mr. Jarman's property. Any shadow cast by the two storey portion of the proposed dwelling will be on the laneway of the subject property, the driveway and garage of Mr. Jarman's property. This level of shadowing is acceptable because the building will be facing north and south, the portion of the rear second floor having a shorter wall length and the third storey having a further setback. The set back of the third storey also limits overlook into the neighbouring properties. The side yard setback of the proposed building on the west side is increased, which will result in the building being further away from Ms. Fink's property, and therefore, limiting the overlook from the third storey of the property.
38. Mr. Guetter opined that the general intent and purpose of the Official Plan is maintained based on his evidence. He stated that the dwelling type of the proposed building is consistent with the predominant dwelling type in the neighbourhood and the massing proposed in the form of modified three storey building. The proposed dwelling meets and respects the physical characteristics of the neighbourhood even though it is larger than the adjacent properties. In his opinion, the variances are minor and satisfy the general intent and purpose of the zoning by-laws. He opined that the proposed development was desirable and an appropriate use of the land in the Annex.
39. During cross-examination, Mr. Jarman asked Mr. Guetter to acknowledge that that the east side of Bedford Drive has distinctive characteristics different from the west side of Bedford Drive. Mr. Guetter acknowledged this statement and further stated that one would need to look at the broader neighbourhood to analyze the characteristics of the neighbourhood, including physical and geographic characteristics. During Mr. Jarman's cross-examination of Mr. Guetter, Mr. Jarman pointed out that Mr. Guetter made an error in defining the section of Bernard Avenue between St. George Street and Bedford Avenue to be a one-way street when it was in Mr. Jarman's opinion a two-way street.
40. Mr. Jarman asked Mr. Guetter to give examples of properties that had approved variances for building depth which were situated on 100 ft long lots. By reviewing

his COA decision analysis and the photographs he provided in Exhibit 4, Mr. Guetter estimated that lots on 48 and 94 Admiral Road have shallower depths and were authorized with greater building depth.

41. Ms. Fink confirmed with Mr. Guetter the percentage increases for the requested variances. Mr. Guetter responded that percentages in respect to assessment of variances do not bear a significant weight in determining what is good planning, and that the relevant tests to consider are the four tests under the Act.

ANALYSIS, FINDINGS, REASONS

Procedural matters

42. There were several procedural issues that were addressed at the hearing. I am outlining one of these procedural issues for the benefit of the parties.
43. Mr. Andres, counsel for the Applicant, expressed concern that part of the oral testimony of the opposing witnesses was hearsay evidence and was therefore inadmissible. He also stated that the written closing submissions of the other parties were also similarly inadmissible or contained new information.
44. Tribunals, such as the TLAB, have a relaxed approach towards the admissibility of hearsay evidence. In many cases, hearsay evidence may be admitted by a tribunal, pursuant to section 15 of the *Statutory Powers Procedure Act*. However, it is an evidentiary rule that all evidence tendered must be relevant to be admissible. Without going into great depths to individually separate out inadmissible evidence, I did not consider any information that was not relevant to this proceeding and which did not relate to proving facts at issue.

Analysis of Evidence and Decision


45. The applications for variances do not conflict with the Provincial Policy Statement and the Growth Plan for the Greater Golden Horseshoe, 2017, as these policies are centered on intensification and the requested variances promote intensification and redevelopment of land.
46. Based on the evidence provided by the parties and the site plan, I note that the depth of the building is 18 m and not 18.6 m, which is what is being requested at appeal.
47. Mr. Guetter has aptly described the neighbourhood for the purposes of this appeal. While Mr. Guetter may have erred in determining whether a street is one way or two way, such an error is minor and does not negate Mr. Guetter's detailed analysis of the neighbourhood. In addition, I need to consider properties beyond the four Tudor homes to determine whether the statutory tests are met in order to grant the variances.

48. I also cannot only compare the proposed building with the new building on 63 Bernard Avenue. While this new building can be used as an example, I must consider the composition of the whole neighbourhood. I acknowledge as per the OMB's decision on 63 Bernard Avenue (Exhibit 4), the building is a three-storey building with a third storey having reduced space than the lower levels, resulting in the bulk of the building being a two-storey building. The proposed building on the subject property is similar with respect to the characteristics of the third floor as discussed below.
49. Whether a variance should be approved is not based solely on an analysis of percentage increases or on architecture and aesthetics alone. An approval for variance must meet the tests under the Act as described under the "Jurisdiction" section.
50. Mr. Jarman and Ms. Fink have genuine concerns about the lack of privacy and lack of sunlight access on their properties if the proposed building, with the requested building depth and height, on the subject property is built.
51. Mr. Guetter, in his testimony, clarified the proposed effect of the building depth and building height in detail. I accept Mr. Guetter's testimony that the proposed building will not provide an unacceptable shadowing effect as a result of the positioning and setback of the third storey, the lower rear height of the second storey and the positioning of the building. In addition, the portion of the roof that requires a variance for front and rear exterior main wall height is located at the center of the building and will not cause an unacceptable adverse effect with respect to overlook into the neighbouring properties. I also accept that as a result of the curving of Bernard Avenue, the rear of the buildings on Bernard Avenue are not aligned, which has resulted in the rear of many houses to extend further than the rear of the adjacent houses. The building depth requested is 1 m more than the permitted depth, which is minor. The requested variances for front and rear exterior wall which are limited to the middle of the building results in limiting the effect of massing and overlook from the third floor.
52. The front yard variance (variance 1 under both zoning by-laws) is associated with the bay window at the front and not for the full front façade of the proposed building. The side yard variance of 0.13 m (variance 2 under both zoning by-laws) is an improvement of the current condition of most of the building being on the lot line on the east side and the eaves and fire shutter locations on 0.00 m on the east lot line are existing conditions which are adopted in the new building. These conditions are common in the neighbourhood, especially in the properties close to the subject property. Mr. Jarman's concern that his driveway will be affected by the proposed side-yard setback is without merit. Mr. Jarman's driveway will not be narrowed and his access to his driveway will not be compromised by any development on the subject property. The uniform set back of 0.13 m from the lot line is an improvement of the existing condition and will create greater distance between Mr. Jarman's driveway and the proposed building.

53. Mr. Jarman and Ms. Fink opposed the request for variance for the FSI. In their view, the COA only approved the development of large buildings with larger depth, height and size in lots larger than the subject property. I do not have evidence of this reasoning in the COA, TLAB or OMB decisions that have been produced (Exhibit 4). After reviewing the summary table of recent COA decisions (Exhibit 4), I note that variances for FSI between the range of 1.07 to 1.87 times the lot area have been granted for properties in the neighbourhood, while most of the variances granted are in the lower range. For example, 53 Bernard Avenue was approved for a variance of 1.11 times the lot area and 51 Bernard Avenue was granted an FSI of 1.18 times the lot area. An increase of 0.07 is a minor increase and appropriate for the re-development of the subject land into a three-storey building.
54. Not much evidence was provided with respect to front and rear yard landscaping (variance 6 under By-law 569-2013, and variances 3 and 5 under By-law 438-86). I do not have any evidence to analyse or substantiate Mr. Jarman's comment that decreased landscaping will result in flood and diversion of water to neighbouring properties. I have reviewed the summary table for recent COA decisions for properties in the neighbourhood and note that variance for landscaping under both by-laws have been previously granted. While a decrease in landscaping may not be the best option, the effect of the decrease is hoped to be mitigated by the use of permeable paver for the driveway.
55. As summarized in the preceding paragraphs, I have considered the admissible evidence of all the witnesses. I am satisfied that the variances taken individually and collectively meet the four tests.
56. The three conditions set out in the COA decisions are also appropriate for the approval of the variances.

DECISION AND ORDER

57. The appeal is dismissed and the decision of the COA is upheld. The conditions imposed as set out in the COA decision are also upheld.

X 

S. TALUKDER

Panel Chair, Toronto Local Appeal Body

Signed by: Shaheynoor Talukder