

DECISION AND ORDER

Decision Issue Date Monday, June 17, 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): HONGYU ZHANG

Applicant: GOLDBERG GROUP

Property Address/Description: 37 WILKET ROAD

Committee of Adjustment Case File: 18 139777 NNY 25 CO, 18 139770 NNY 25 MV

TLAB Case File Number: 18 243170 S53 25 TLAB, 18 243167 S45 25 TLAB

Motion Hearing date: Tuesday, June 11, 2019

DECISION DELIVERED BY JUSTIN LEUNG

INTRODUCTION

This decision pertains to a written motion by a Party (Jason Park of Devine Park LLP representing appellant Hongyu Zhang) for a request to permit a motion issued in writing, to allow revised site plan, survey and related drawings to be entered as evidence, and to allow the introduction of a new minor variance request relating to the proposed severed lot on the northern portion of the subject property. This minor variance would allow a single detached dwelling to be built on this site.

MATTERS IN ISSUE

At issue is whether it would be within the appropriate purview for the Toronto Local Appeal Body (TLAB) to permit additional materials to be submitted in relation to this appeal which would act to also allow the introduction of a new minor variance at this stage of the appeals process.

JURISDICTION

TLAB's *Rules of Practice and Procedure* relevant rules are as follows:

Matters Not Dealt with by the Rules

2.6 Where procedures are not provided for in these Rules the TLAB may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost-effective manner.

Relief and Exceptions to the Rules

2.11 The TLAB may grant all necessary exceptions to these Rules, or grant other relief as it considers appropriate, to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost-effective manner.

Disclosure of Documents

16.2 Parties and Participants shall Serve on all Parties a copy of every Document they intend to rely on or produce in the Hearing, except: a) any Document previously Filed with the Committee of Adjustment; b) any Public Document listed on the TLAB's List of Public Documents; and, c) any Document previously Filed by a Party or Participant, and File same with the TLAB not later than 60 Days after a Notice of Hearing is Served.

TLAB may Require Motions to be in Writing or Electronically

17.5 The TLAB may require a Motion to be held in writing upon such terms as the TLAB directs.

The authority for a Tribunal to introduce a new minor variance request is actually outlined within the *Planning Act*, described as follows:

Amended application

(18.1) On an appeal, the Tribunal may make a decision on an application which has been amended from the original application if, before issuing its order, written notice is given to the persons and public bodies who received notice of the original application under subsection (5) and to other persons and agencies prescribed under that subsection. 1993, c. 26, s. 56; 1994, c. 23, s. 26 (7); 2017, c. 23, Sched. 5, s. 80.

Exception

(18.1.1) The Tribunal is not required to give notice under subsection (18.1) if, in its opinion, the amendment to the original application is minor. 2017, c. 23, Sched. 5, s. 98 (5).

EVIDENCE

Jason Park, a lawyer, filed a Notice of Motion dated May 27, 2019 on behalf of the applicant. With this was a related Affidavit sworn by Michael Goldberg, a Registered Professional Planner with Goldberg Group, which outlines that in subsequent analysis of their proposal, it has been found that an additional minor variance is required for a proposed dwelling on the proposed severed lot to the north and as shown in the attached Exhibit 'A'. Mr. Park and Mr. Goldberg opine that this was inadvertently discovered later on and is in fact part of their original proposal for two detached dwelling to be constructed on the severed (northerly portion) lot and the retained (southerly portion) lot. Consequently, after the filing of these materials to the TLAB, a Notice of Reply was filed dated June 10, 2019 by Mr. Goldberg which includes a set of site plan and drawings attached as Exhibit 'A' that further outlines their proposal for this subject property.

The City of Toronto subsequently provided a Notice of Reply dated June 5, 2019 by city solicitor Matthew Schuman. This also had a related Affidavit sworn by city planner Simona Rasanu. The City argues that this minor variance request should not be accepted by the TLAB at this juncture. In earlier requests by the applicant, the City did not object as it resulted in the withdrawal of minor variances and related to the proposed retained lot. In addition, the applicant hasn't previously indicated that the minor variances were needed for the proposed severed lot. This proposed lot is currently subject to an Application to Amend the Zoning By-law and an Application for Site Plan Control for 5 unit townhouse. City planner Simona Rasanu states that while the applicant had shown a preliminary concept of a detached dwelling on the severed lot, more comprehensive information such as potential variance requests related to this had not been revealed to them earlier. The City further contends that the power to allow an additional variance as outlined under s. 45(18.1) of the *Planning Act* is not applicable in this instance. They cite other case law in supporting their position that when this authority was used, it was to allow variances which were technical in nature or to permit a variance which would be considered a slight adjustment which did not differ from the overall original proposal. Here, the City argues that this is in essence a new minor variance being sought which they don't believe should be considered within the forum of the TLAB.

Brad Teichman, a lawyer with Overland LLP, also filed a Notice of Reply dated June 5, 2019 on behalf of Janny Vincent and 1531750 Ontario Ltd. Mr. Teichman response is that this is an entirely new request being made that had not originally been expressed to the other interested parties to this appeal. He also states that he does not believe the TLAB has the authority to grant such a request. In addition, the introduction of this minor variance may affect their participation in this appeal which would require additional time for analysis and review. The currently scheduled hearing date of June 27 and 28, 2019 would not provide sufficient time for the interested parties to prepare.

Jason Park has submitted a Notice of Reply dated June 10, 2019 where he responds to the issues raised by the previous two respondents. Mr. Park contends that the argument that the TLAB does not have the authority to grant a new minor variance

has not been supported by any discernable evidence. In terms of having inadequate time to prepare for the hearing due to this new information, Mr. Park states that their planner Michael Goldberg had submitted as part of their Witness Statement dated January 11, 2019 drawings and materials which did show a proposed house on the severed lot. As such, Mr. Park believes the interested parties were aware of his client's proposal for this subject property as early as January 2019 and could have organized their approach to the appeal hearing in June 2019 within an acceptable timeframe.

ANALYSIS, FINDINGS, REASONS

Pursuant to TLAB Rules 2.6 and 2.11 and S.45(81) of the *Planning Act*, the tribunal must consider whether the request to allow this additional minor variance and the related revised site plan, survey and drawings to be entered as evidence as part of this appeal's materials is appropriate or not. If this request were granted, TLAB Rule 16.2 would also need to be considered so as to ensure all interested parties were promptly notified on the revisions that have been made to the appeal materials.

In reviewing this property's TLAB appeal, there is a previously issued Motion Decision dated April 2, 2019 where a request to submit revised drawings for this appeal was granted by the TLAB presiding member. In this instance, the revised drawings also resulted in a series of minor variance requests to be withdrawn, thereby decreasing the potential development impact to the neighbourhood. As such, the assessment for that Motion Decision was made based on a different set of planning considerations. Here, the applicant is requesting an additional minor variance to facilitate the development of a detached dwelling on the severed lot. The minor variance request is for a front yard setback of 12.0 metres, whereas Zoning By-law 569-2013 requires front yard setback of 36.64 metres. It should be noted that this request constitutes more than half of the original front yard setback requirement of the By-law. This proposed detached dwelling could raise questions about compatible building design for this residential neighbourhood. In addition, applicant does not appear to have consulted with municipal planning staff on whether the minor variance request is the appropriate process for such a request. These issues are usually contemplated for in a more comprehensive manner when an applicant takes initial steps at submitting a planning application to the City.

Sullivan v. Toronto (City) Committee of Adjustment, [1995] O.M.B.D. No. 263 provides clear legal and planning direction where the presiding Ontario Municipal Board (OMB, recently reorganized as Local Planning Appeal Tribunal) member found that the granting of the minor variance in question would not be prejudicial to the appellants as the minor variance to be granted does not substantively change the proposal which was before the OMB. The presiding member used the framework of fairness and equity in their assessment as to whether to utilize powers as prescribed under S. 45(8.1) of the *Planning Act*. Ultimately, they found that their granting of the minor variance here for front yard setback requirements met this assessment framework as this newly granted variance was due to the introduction of a new Zoning By-law. The front yard setback provisions contained in this new Zoning By-law are similar in nature to the previous one.

As such, adverse impact to the interested parties is minimized and the public interest would continue to be preserved.

The City of Toronto's Application Information Centre (AIC) website outlines that this subject property is also currently subject to Applications to Amend the Zoning By-law and Site Plan Control for a 5 unit townhouse proposal. The AIC lists these planning applications as 'under review'. It should be noted that the *Planning Act* does not have provisions relating to simultaneous planning applications submitted for a property. As such, the applicant's decision to also submit a concurrent minor variance request is not within TLAB's authority to comment on. However, this proposed minor variance request for a proposed detached dwelling for the same site could be deemed by planning staff as a pre-mature application as the concurrent applications for a townhouse development has not yet received a decision by City Council. Such a consideration would usually be reviewed during a pre-application consultation with planning staff prior to submitting a planning application to the City. However, this request to allow such a minor variance during an appeals process would not facilitate for such discussions to occur.

The respondents to this Motion request have provided similar arguments that this minor variance request has only recently been revealed to them. While the applicant had submitted conceptual drawings earlier which do show a potential for a detached dwelling to be built respectively on the severed and retained lots, the detached dwelling for the severed lot did not provide more comprehensive information on this aspect of their proposal to interested parties. Furthermore, the impending TLAB hearing dates also presents the interested parties with a potential challenge to re-calibrate their approach to this appeal within a shortened timeframe. In addition to the two respondents who have party status, there are 12 participants to this appeal as well. This would also raise questions relating to their ability to properly be informed and engaged in this appeal. The TLAB's authority to grant a minor variance is not under question as it is clearly defined within the *Planning Act*. This authority has been exercised in appeals to the Local Planning Appeal Tribunal (LPAT) in the past, which is another tribunal with similar powers as those exercised by the TLAB. However, the relevant LPAT case law provides a clear precedent that such a power has been exercised with discretion by tribunal members. Where it has been used, it has been in such a manner where the overall development proposal is still substantively conforming to the original proposal. If this threshold is not met, the tribunal member would invariably refuse such a request which would necessitate the applicant to submit a fresh planning application to the respective municipality for their review or they would have to abandon such a request.

Based on the documents which have been submitted, the TLAB does not feel that the request to submit revised site plan, survey and site plans and to allow an additional minor variance request to be appropriate and acting within the overall intent of the *Planning Act* especially as it relates to S. 45(81). Previous case law has established a clear practice direction on instances where this authority can be exercised. It has outlined that it must be a minor request, technical in nature, results in a development proposal which remains relatively similar to the original one and/or is done within a spirit of public fairness. Here, this request does not appear to meet this threshold as it could be seen as not being a minor request as the variance request is

more than half of the numerical requirement for front yard setbacks contained in the relevant Zoning By-law, would not be considered technical in nature and not in keeping with the original proposal as the proposed severed lot has a townhouse development proposal currently in process whereas this request pertains to a newly introduced proposal for a detached dwelling. Finally, in terms of public fairness, with less than two weeks timeframe until the scheduled appeal hearings, the granting of such a request could adversely affect interested parties abilities to be sufficiently prepared as they may not have sufficient time to properly review and consider such new materials. If the applicant did wish to proceed with such a minor variance request, a new minor variance application should be submitted to the North York Committee of Adjustment (COA) where it could be properly reviewed by municipal staff and comprehensive discussion could occur at the relevantly scheduled COA meeting between the Committee members, applicant and members of the public.

DECISION AND ORDER

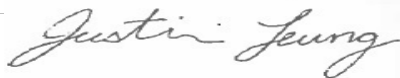
The request for a Written Motion is allowed.

The request to allow revised site plan, survey and drawings to be submitted as evidence to form part of this appeal is denied.

The request to allow a minor variance request for the proposed severed lot is denied.

The hearings set for June 27 and 28, 2019 can proceed as originally scheduled.

X



Justin Leung
Panel Chair, Toronto Local Appeal Body