

DECISION AND ORDER

Decision Issue Date Tuesday, October 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): ANA MARIA KLIZS

Applicant: JOHN BOONE

Property Address/Description: 199 MACDONELL AVE

Committee of Adjustment Case File: 19 106449 STE 04 MV (A0068/19TEY)

TLAB Case File Number: 19 158267 S45 04 TLAB

Hearing date: Wednesday, October 09, 2019

DECISION DELIVERED BY T. YAO

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Ana Maria Klizs
Appellant's Legal Rep.	John Boone
Expert Witness	Adrian Litavski
Participant	Robin A. Burgess (opposed)
Participant	Sara Marie Merrifield (supportive)
Participant	Sam Biasucci (supportive)
Participant	Norman Kolasky (supportive)
William Habkirk	Observer
Stephan Trusevych	Observer
Dessy Daskalov	Observer

Joey Biasucci

Observer

INTRODUCTION

Michael and Ana Maria Klizs wish to add a rear and third floor addition:

It is composed of two parts:

- A bump-out to the rear, which will create extra space in the basement, 1st, second and third floors; and
- A third-floor addition, which is the only portion visible from the street. This third floor will be entirely new.

Their neighbour Robin Burgess opposes the application. However, she spoke only about the rear addition and its basement foundations, which will be new, and part of which will be adjacent to the common party wall. (The Klizses plan to underpin the existing foundation and dig down a similar depth for their addition.) Since Ms. Burgess shares the semi at 197-199 Macdonell with the Klizses, she is concerned that:

- working near the common lot line may cause her structural problems; and
- her basement flooding problem will be aggravated.

The Klizses need the following variances to build their additions:

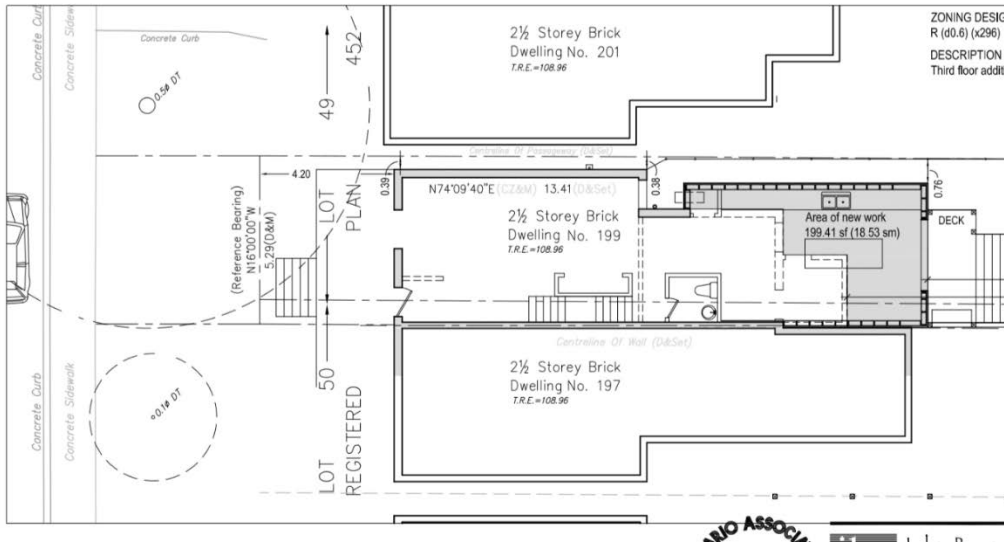
Table 1. Variances sought for 199 Macdonell Ave			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	Maximum permitted floor space in a semi	0.6 times area of lot	1.05
2	Side exterior main wall height	7.5 m	9.42 m
3	Roof eaves	No closer than 0.30 m	Only 0.08 from north lot line
Variances from Zoning By-law 438-86 (pre-amalgamation City of Toronto by-law)			
4	Min. side yard setback	0.9 m	zero m to 197 McDonell
5	Min. side yard setback	0.9 m	zero m to 197 McDonell

Table 1. Variances sought for 199 Macdonell Ave			
6	Maximum permitted gross area in a semi	0.6 6 times area of lot	1.05

Six years after passage of the Zoning By-Law 569-2013, the LPAT is still hearing appeals, so the final form is not completely confirmed. Therefore, the Buildings Department examines plans under both By-laws 438-86 and 569-2013, leading to a duplication of some of the variances.



Site Stat
Lot Area
Ground Floor
Ground Floor
Second Floor
Second Floor
Third Floor
Gross Floor A
GFA / Lot Are
Area of New
sf = Square Fe
sm = Square f
LEGAL DESCRI
Part of Lots 49 a



EVIDENCE

The evidence took the form of:

Argument (John Boone, the Klizses' architect, their planner, Adrian Litavski, whom I qualified as able to give evidence in the area of land use planning);

Counterargument (Robin A. Burgess the neighbour who shares the Klizses' semi to the south); then

Reply argument (Sara Marie Merrifield, the owner of the next semi, in a comparable location as the Klizses, Sam Biasucci, the Klizses' builder, and

Norman Kolasky, a neighbour and former member of the Roncesvalles-Macdonell Residents' Association but speaking on his own behalf.)

The argument

On the previous page is the Mr. Boone's rendering of the before and after third floor addition seen from the street and a site plan of the rear addition. The rear addition will extend about half a metre beyond Ms. Burgess's (below and labelled "2½ storey Brick Dwelling No. 197").

Mr. Boone, said:

The density of 1.05 is over, but still much less than many approved variances in the neighbourhood. . . .and I'm going to show you where this variance occurs because that's another important aspect to consider when contemplating the four tests. [The four tests] centre around the public aspect of the building, in particular, the Official Plan, which talks much more about streets much more than it talks about the back yards and for this purpose there is a lot of attention, a lot of concern and rightly so, that centres around the public disposition of buildings, **the way the buildings present themselves to the street**¹. [The Official Plan] expects the street character to be maintained, in some legitimate and cordial way. It doesn't expect repetition; it doesn't expect the static development; . . . it expects new development, and it refers to that new development using words such "harmonious"².

I find that this is a more-than-adequate interpretation of s. 45(1) of the *Planning Act*, that requires that I be satisfied that the variances individually and cumulatively:

- 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.

M. Litavski said:

We have here a young family, a growing family, the existing home, I mentioned, is 1241 sq ft, a pretty modestly sized home, certainly considering today's standards, and what is proposed is a new home with a total GFA of just under 2400 sq. ft. Likewise, quite modest by today's standards.

Of the 45 increases above the 0.6 standard, and those approvals ranged all the way up from 0.64 . . . to 1.74. . . .Of the 45 variances, 16 were above 1.0 times the area of the

¹City streets are significant public open spaces which connect people and places and support the development of sustainable, economically vibrant and complete communities. Official Plan, s. 3 1.1.5

²New development will be massed and its exterior façade will be designed to fit harmoniously into its existing and/or planned context. . . . Official Plan, s. 3.1.2.3

lot, and a further seven were between 0.9 and 1.0, so, close to the variances being sought here today.

It's very easy to see that the density proposed, at 1.05 is well within the range of these previous approvals, and ultimately will result in a sensitive building mass that is in keeping with the general intent and purpose of the by-law.³

The counterargument

Ms. Burgess has a rear two storey addition, constructed before she moved in. It has caused her problems and she said:

They are not minor variances, they are huge variances and maybe when the sewage backs up on Macdonell, people will; finally listen to reason.

I think it would be putting me at risk and when they did do renovations on the front porch, I incurred damages for which I received no apology or compensation. I am concerned about the sidewall and the footings; I didn't construct it I don't know what's there.

This subbasement is at a lower level and it fills with water ..[protected by a sump pump] and when this sump pump fails in the past if there's been any reason or is overloaded, water coming down the slope, this area fills up to about 10 inches, and it has happened many times in the twenty seven years since I've owned the house.

She went on to say that the addition should not be built up to the property line because she was concerned that her side of the party wall (built 30 to 40 years ago, prior to her purchase) might be damaged. Second, she said there was a significant difference in grade and that neither Mr. Boone nor Mr. Litavski seemed to have a plan for dealing with the water, which lack of planning she called an "embarrassment".

The reply to counterargument

Ms. Merrifield (the neighbour) said:

So, I have been at 195 Macdonell, for over 15 years, . . .I'm very excited to be able to speak in a forum such as this because I believe in the right to debate. . . .

So, the first thing I want to say, that because we have lived in this so long and . . .I think Mike and Ana's plan has done a wonderful job of fitting into the neighbourhood while addressing the needs of a dramatically growing family. I think, a number of people that have opposed the application actually have a bigger home to live in and don't have as big of a family to live within so they are not grounded in the same concern of five people living in 1200 square feet with one bathroom.

³ Development . . . will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular: . . . c) prevailing . . .density . . .of nearby residential properties; Official Plan s. 4.1.5

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She went on to say that her family had undertaken the same sort of rear addition as the Klizses and once they removed walls the “things we found . . . were quite frankly scary.”

We had wiring issues that were fire hazards. We had no insulation; we had windows that were problematic, and **yes there were drainage issues in our back yard**. So over the number of years that we’ve lived in our home, we’ve done a lot to make sure that we are addressing those issues. . . .I can only expect that as work is done appropriately, under permit, for Mike and Ana, so too will happen with their yard. . . .

The last thing I want to address is the idea of community. We are a community that has growing families . . . we need the ability to maintain families within our neighbourhood.⁴

Jim Reynolds, who is the party wall neighbour to Ms. Merrifield, wrote to the Committee of Adjustment to say:

In addition, I have reviewed Ms. Burgess’s notice disputing Ana and Michael’s renovation proposal and would like to explicitly highlight that her statements regarding the sale of 193 Macdonell are categorically false. At no point have we experienced any basement flooding whatsoever in 193 Macdonell Ave, and certainly have had no negative impacts resulting from our neighbor’s renovation

The builder Mr. Biasucci said:

We are the builders hired by the client, by Mr. Klizs. I just wanted to provide some level of comfort for Ms. Burgess, in a couple of ways. One that that should we be allowed to proceed with this we will .honor every word of the commitments, written or otherwise, that will serve to alleviate, as best as we can, from the party wall sharing to the additional foundation, to the best that **we can to contain whatever storm water runoff** there is on 199 property to remain on 199 property.

We’ve been quite successful, whether it’s been residential, commercial additions, in the last 38 years and understand what the pre- and post waterflows are to be. And we know we can control that, we know we can make sure that whatever water runoff, as minimal as it is, because we are in some hard cover, soft cover, will be contained within 199 property. I think everyone here understands and shares your concerns. I’ve worked with neighbours across the Province for 38 years. If you will be the one that won’t’ speak to me afterward, then you will be the first one that I have not been able to work out a relationship after I’ve done an addition, whether it was a party wall, or something even more intrusive.

I next heard from Norman Kolosky, a longtime resident and one with many years of participation in the Roncesvalles-Macdonell Residents’ Association.

Robin [Burgess] made me aware of her concerns. I even have a copy of the flier that she left at my house. When I reviewed this, I honestly could not find any strong objection to

⁴ The neighbourhoods where we grew up and now raise our children help shape the adults and the society we become. Some physical change will occur over time as enhancements, additions and infill housing occurs on individual sites. Official Plan, s. 2.3.1

the application. I was trying to understand what the real issue was, and I backed off a number of times in a number of discussions with Robin, saying I fully support you [Ms. Burgess]; I said, I cannot find anything. The only [thing] I can come up with in my mind, there has been a lot of tension, friction between Robin and her neighbour and I am very concerned about this.

ANALYSIS, FINDINGS, REASONS

The four tests

I find that although Ms. Burgess referred to light and privacy, her major concern is drainage from the Klizses' land onto her land and secondarily underpinning near her party wall. The latter must be intended by the zoning by-law since an owner does not need a variance for this construction. Drainage is not **primarily** a planning ground; (ultimately, planning connects everything). I find that "planning" aspects are dealt with by well-established protocols downstream in the process of building permits and inspections. Accordingly, I find that the Klizses have established the four tests under section 45 of the *Planning Act*.

Other TLAB decisions dealing with drainage

Under 15(b) of the *Statutory Powers Procedure Act*, I may, in making my decision

(b) take notice of any generally recognized scientific or technical facts, information or **opinions** within its scientific or specialized knowledge.

I presume other TLAB decisions fall under "generally recognized opinions . . . within its . . . specialized knowledge." I wanted to know how the TLAB as an organization deals with objections based on drainage issues, so I looked at other TLAB decisions, even though neither side cited them.

At *393 Maple Leaf Drive*, TLAB Member Gopikrishna was faced with an application for an illegally constructed cabana, which allegedly caused flooding on a neighbour's land. He concluded that "**It is for the Chief Building Official to determine applicable grades.**" Mr. Gopikrishna recounted the following allegation:

Ms. Oddi and her husband have had to contend with significant flooding issues as a result of what she believed to be the changed grade at 393 Maple Leaf Dr. The excessive water had weakened the concrete floor of her accessory building and had led to so much erosion that a hole 2 metres wide has been created.

In *72 Crescent Rd*, TLAB Chair Lord recounted the evidence of Mr. Page, the next-door neighbour and appellant, who "felt that the presence of a structure below grade would affect drainage and could cause flooding". Chair Lord stated:

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[Mr. Page] also raised the concern that hard surfacing and below grade space, the cold cellar and patio surfacing, may cause drainage difficulties and flooding, as past circumstances demonstrated and were ameliorated. I have no basis to conclude there is an issue that is either caused or accentuated by the proposal, including the 'cold storage' cellar. In any event, **I accept that on-site release and capture of storm water and its drainage are an element of the responsibility of the Chief Building Official and permit issuance.** There is clearly sufficient soft landscaping to attempt attenuation of storm water flow and management. (my bold)

In both these cases there is a reliance on the building permit process to police discharges of surface water and I accept this principle. However also I wish to comment on the lack of self-help on the part of Ms. Burgess.

Lack of self-help

Ms. Burgess's problems are obviously not caused by the Klizses' addition because it hasn't been built yet. Although flooding has persisted for 27 years and she is aware that when there is a power failure (which frequently accompanies heavy rains), the sump pump will necessarily fail, she has not installed a battery or generator back up system. Obviously, it is her right not to do so but I question how her lack of decision in this regard should be an obstacle for the Klizses.

BURGESS ROBIN ANDREA
197 MACDONELL AVE
TORONTO, ONTARIO
M6R2A4

January 19, 2010

Dear Homeowner:

Re: Downspout Disconnection Program - 197 MACDONELL AVENUE

Thank you for your interest in the Downspout Disconnection Program.

Members of my staff have assessed your property and have determined that it is not feasible to disconnect your downspouts because:

- no suitable discharge area due to walkway/driveway which may cause a safety hazard
- no suitable discharge area due to insufficient grassed areas
- grade of lot slopes towards building foundation + *WALKWAYS*
- there is a physical obstruction on property: A/C, deck, patio, porch, gas/hydro meter
- fascia board and/or eavestrough(s) in poor condition
- downspouts are already disconnected from the sewer system
- other: _____

According to the notice she received in 2010, **her** lot slopes down to her foundation + walkways, a situation that she may or may not have remedied since then.

A further reason why this is relevant goes to the integrity of this process. It could be that

the Klizses build their addition and there is a flood at 197 Macdonell and Ms. Burgess, will be able to say, "I told you so". However, a flood may happen even if I turned down the variance. The TLAB process will be criticized when everything was properly done.

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In all the circumstances I am prepared to follow a third TLAB case *142 Eilerslie*, what was not cited in the evidence but which I am prepared to use, based on the *Statutory Powers Procedure Act*. In that case, the property was in a known basement flooding Environmental Assessment study area and the City's Engineering and Construction Services Department imposed certain **standard conditions** (the numbering follows the ECS letter written in that case):

10. The owner shall install a sump pump in the dwellings for the purposes of draining private water from weeping tiles and any driveway catch basins to grade. [I note the Klizses do not intend to construct any driveway catch basins as the garage is by a rear laneway.]

11. This property is in a current basement flooding EA study area (Study Area #26). As a precaution, the applicant shall install back flow preventers to the satisfaction of the Executive Director, Engineering and Construction Services.

12. The owner in redevelopment of this property shall ensure that existing overland drainage patterns on adjacent properties shall not be altered and storm water runoff from the subject development shall not be directed to drain onto adjacent properties.

In my opinion condition 12 is just a restatement of the existing practice that everyone is already required to obey. So, the Klizses are not harmed if this is imposed.

Conditions 10 and 11 are good engineering practice and should be considered a prudent "insurance policy" against basement flooding. Accordingly, I am imposing these conditions unless I receive a written objection from the Klizses that the conditions are too onerous for some reason that they may make me aware of. I have imposed a time limit for making this objection and Ms. Burgess is given the right to comment.

PROVISIONAL DECISION AND ORDER

I authorize the variances in Table 1 on the following conditions:

1. Construction is in substantial compliance with the plans on file with the Buildings Department.
2. The owner shall install a sump pump in 199 Macdonell for the purposes of draining private water from weeping tiles to grade.
3. As a precaution, the owner shall install back flow preventers to the satisfaction of the Executive Director, Engineering and Construction Services.

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4. The owner in redevelopment of this property shall ensure that existing overland drainage patterns on adjacent properties shall not be altered and storm water runoff from the subject development shall not be directed to drain onto adjacent properties.

I will entertain an objection that conditions 2 and 3 are not warranted if I receive a written email addressed to hsingyi.chao@toronto.ca by November 8, 2019, copy to Robin Burgess.. The address "199 Macdonell" should be quoted in the "re" line. If such email is written, it will be considered a notice of written motion, and Ms. Burgess will have seven days to respond, her response considered as a response to written motion. I will then decide whether to uphold the conditions 2 and 3 or delete them. If there is no email, this order is final and binding on November 9, 2019. Conditions 1 and 4 are final in any event. If any of this is unclear could the parties please write to Ms. Chao.



X

T. Yao
Panel Chair, Toronto Local Appeal Body