Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, March 03, 2020

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): YANAN WANG

Applicant: ALEX BOROS

Property Address/Description: 38 LORRAINE DR

Committee of Adjustment Case File: 19 121264 NNY 18 MV (A0168/19NY)

TLAB Case File Number: 19 161165 S45 18 TLAB

Hearing dates: September 30, 2019

December 18, 2019

February 21, 2020

DECISION DELIVERED BY S. Gopikrishna

REGISTERED PARTIES AND PARTICIPANTS

Applicant	Alex Boros
Appellant	Yanan Wang
Appellant's Legal Rep.	Simon Van Duffelen
Party	City of Toronto
Party's Legal Rep.	Jason Davidson
Expert Witness	Alexander Boros

INTRODUCTION AND BACKGROUND

On May 8, 2019, the North York Panel of the Committee of Adjustment refused an application filed by Yanan Wang, owner of 38 Lorraine Drive, requesting minor variances, at the Subject Property. By way of information, 38 Lorraine Drive is located in Ward 18, in the City of Toronto. On June 6, 2019, the COA's decision was appealed to the Toronto Local Appeal Body (TLAB), which scheduled a Hearing on September 12, 2019, which was subsequently adjourned three times consecutively, to September 30, 2019, December 18, 2019, and February 21, 2020, respectively. The first adjournment was granted because the Appellant's lawyer was not available on September 12, 2019, the second was granted to enable the Appellants to circulate notice about the variances resulting from the Settlement, and the third adjournment was specifically granted to enable the Appellants to submit an Expert Witness Statement that outlined how the proposal was consistent with Sections 3, and 45.1, of the Planning Act, followed by an opportunity to provide oral evidence at the Hearing scheduled for February 21, 2020.

It may be noted that the Appellants did not submit a Witness Statement, nor were they prepared to provide adequate evidence to the TLAB at the Hearing on December 18, 2019. As stated earlier, the Hearing was adjourned to provide the Appellants to submit an Expert Witness Statement, and provide pertinent evidence; I had specifically advised the Appellants that upholding the public interest required that a Settlement could not be rubber stamped, and approved by the TLAB, without adequate evidence from the Appellants.

At the end of January 2020, the City brought forward a Motion to dismiss the case without a Hearing, based on the Appellant's apparent inability, to satisfy deadlines for submission of the Expert Witness Statement. While the Motion to dismiss the case was refused through an Interim Order released on February 19, 2020, it is important to note the leitmotif of late submissions, with less than adequate quality, because this is a factor in the final Decision on this file.

Lastly, it is important to reiterate that the Appellants were advised repeatedly about the need to present adequate evidence satisfying the tests under Section 45.1, and Higher Level Provincial Policies, both by way of discussions at the TLAB, as well as the three interim Decisions released with respect to this Appeal.

MATTERS IN ISSUE

1. **Chapter 10.20.30.40.(1), By-law No. 569-2013**

The maximum permitted lot coverage is 30.00% of the lot area. The proposed lot coverage is 32.00% of the lot area.

2. **Chapter 900.3.10.(5), By-law No. 569-2013**

The minimum required side yard setback is 1.80m. The proposed west side yard setback is 1.55m.

3. Chapter 10.5.80.40.(3), By-law No. 569-2013

Vehicle access to a parking space on a corner lot must be from a flanking street that is not a major street. The proposed vehicle access to a parking is from the fronting street.

4. Chapter 10.20.40.70.(6), By-law No. 569-2013

The minimum required side yard setback for a corner lot is 3.00m. The proposed east side yard setback is 1.82m.

5. Section 13.2.3(b), By-law No. 7625

The minimum required side yard setback is 1.80m. The proposed west side yard setback is 1.55m.

6. Section 13.2.4, By-law No. 7625

The maximum permitted lot coverage is 30.00% of the lot area. The proposed lot coverage is 32.00% of the lot area.

7. Section 13.2.3(b), By-law No. 7625

The minimum required side yard setback for a corner lot is 3.00m. The proposed east side yard setback is 1.82m.

8. **Chapter 10.5.100.1.By-law No. 569-2013**

The maximum permitted driveway width is 6.0m. The driveway width is 8.4m.

9. **Section 6A(5)a, By-law No. 7625**

The maximum permitted driveway width is 6.0m. The driveway width is 8.4m.

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 form 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 Hearing, held by way of teleconference, commenced at 1:30 PM on February 21, 2020. The teleconference was attended by Messrs. Simon Van Duffelen and Alex Boros, respectively, the lawyer, and the Expert Witness, representing the Appellant, and Mr. Jason Davidson, lawyer for the City.

At the beginning of the Hearing, Mr. Van Duffelen asked if the City was amenable to granting his client time till May 31, 2020, to reconfigure the driveway, should the TLAB approve the variances. Mr. Davidson replied that the Settlement had been "negotiated a long time ago", which meant that the Appellant knew what was expected of them, and that the City would prefer that the agreed deadline of April 30, 2020, be adhered to. Mr. Van Duffelen replied by stating that this "was not a major sticking point", and agreed that the deadline of April 30, 2020, would be adhered to, for the purposes of completing the reconfiguration of the driveway.

Mr. Boros was sworn in, and recognized as an Expert in the area of land use planning. His evidence, as orally presented, closely followed his Expert Witness Statement submitted to the TLAB on February 4, 2020.

He stated that the Subject house was completed and built in 2008, and that the Appellant had received approval from the COA in 2016, "unknown to" himself, and "not disclosed by the owner" , for the development of a 6 m width driveway leading to a double car garage. Mr. Boros added that a third, smaller garage was shown on the Plans approved by the COA, and was labelled "motorcycle space". However, the Appellant had installed a regular three car garage, in place of what had been approved by the COA.

In Mr. Boros' narrative of the trajectory of the Appeal respecting 38 Lorraine Drive and its journey to the TLAB, "seven out of nine variances", identified by the Zoning Notice Examiner, had been approved in 2016, and two variances had been refused. The two refused variances were then submitted in the form of a new application to the COA, where they were heard and refused on May 8, 2019. The applicants appealed these two variances to the Toronto Local Appeal Body (TLAB), because the other variances had been approved by the COA. The fact that the Appellants had reached a Settlement with the City, was stated, repeated, and reiterated throughout the Hearing.

In terms of the description of where the Subject property lay, Mr. Boros said that Lorraine Drive looped into Blakeley Road, "a dead-ended " road, and was located close to Beecroft Road, which parallels Yonge Street, and added that the Subject Property is approximately 900 m away from Yonge Street. Beecroft Road represents the divide between the mid-rise and high-side residential buildings facing and serviced by Yonge Street. According to Mr. Boros, "this difference of use in reflected both in the by-law designation (RD), and Official Plan designation (Neighbourhood)". He said that the neighbourhood had experienced regeneration and replacement of older housing stock, which "typically results in large 2 storey dwellings". The neighbourhood has been experiencing regeneration, and replacement of older housing stock, resulting in larger two storey dwellings, some with two car garages, and others with three car garages.

By way of editorial comment, neither the Witness Statement, nor the evidence identified the area described above, as the Immediate Context, or a Geographic Neighbourhood, as defined under the new Official Plan, or a Study Area, as defined in the old Official Plan.

Mr. Boros described the proposed solution of how the Applicants would reduce the width of the driveway to 6 m till the property line, after which it would retain its existent, widened breadth of 8.4 m.

Addressing the first of the four tests under Section 45(1), Mr. Boros discussed Policy 4.1.5 of the Official Policy, and asserted that the proposal satisfied the OP, because the "proposed configuration of the driveway could fit within other lots, and new houses within the neighbourhood, in massing, scale and dwelling type of nearby residential properties, prevailing building types, setbacks and driveway widths. The proposed reconfigured driveway would be consistent with the physical character of other new houses in the neighbourhood".

Mr. Boros then discussed the second test under Section 45.1 of the Planning Act, which speaks to the ability of the variances to maintain the general intent, and purpose of the relevant Zoning By-Laws. He said that it was his" opinion that with the new reconfiguration of the driveway, it (i.e. the driveway) would respect the intent and spirit of Sections 10.5.100.1 of By-Law 569-2013, and Section 6 a(5a) of By-Law 7625." He added that the "intent of the Zoning By-Laws, is to achieve orderly, compatible development,, with a character and built form that fits within the neighbourhood", and opined that "the proposed driveway configuration does not significantly depart from the zoning in place for the area, and that the general intent, and purposes of the City-wide Zoning By-Law 569-2013, and the former City of North York By-Law 7625".

Speaking next to the third test, or whether the proposed variance is desirable for the appropriate use of the land, Mr. Boros reiterated that the Appellants would reconfigure the built driveway, such that the mouth of the driveway would be 6 m in width up to property line, after which the driveway would widen to service the three car garage. In Mr. Boros' opinion, this "modest change", while satisfying his clients' needs, would also be desirable, and appropriate for the street, without any negative impact on the neighbourhood, and thereby satisfy the test of appropriate development.

Lastly, speaking to the fourth test of how the proposed variances are minor, Mr. Boros said that the proposed variances are minor in nature, because they would cause no undue adverse impact on adjacent neighbourhood.

I asked Mr. Boros if the proposal satisfied the Higher Level Provincial Policies, and his response was in the affirmative. When asked to name the Provincial Policies, Mr. Boros said that he could not remember the names of the higher level Policies. When Mr. Davidson named the Growth Plan, and he Provincial Policy Statement, Mr. Boros reasserted that the proposal was consistent with these higher level Provincial Policies, without an explanation of how the variances satisfied the policies in question

I then asked Mr. Boros why he did not speak to the other seven variances, respecting side yard setbacks, coverage, and access from the street listed in Schedule B, he said

that they had been already approved by the COA. I pointed out that the *de novo* nature of the Hearing required evidence to be presented with respect to all requested variances, and asked Mr. Van Duffelen for his comments on what a *de novo* hearing entailed of the Parties. Mr. Van Duffelen confirmed that evidence had to be presented regarding all variances, and said that he "was relying on Mr. Boros for the needful". When Mr. Boros volunteered to send in a written submission about the other variances . I advised him to refrain from making the submission, because he had been given numerous opportunities to make submissions, and prepare evidence in support of the Appeal.

I then asked Mr. Boros if there were any recommended conditions of approval if the Appeal were allowed, to which he said "No". Mr. Davidson pointed out that conditions had been agreed upon as part of the Settlement, and read the conditions agreed to by the Parties , which are as follows:

1) Submission of a complete application for a permit to injure or destroy a City-owned tree(s). A *Contractor's Agreement to Perform Work on City-owned Trees* will be required prior to the removal/injure of the subject tree(s). Form located at *www.toronto.ca/trees/pdfs/contractor_services_agreement_information.pdf*.

Submission of a tree protection guarantee security deposit to guarantee the protection of City-owned trees according to the *Tree Protection Policy and Specifications for Construction Near Trees* or as otherwise approved by Urban Forestry. Accepted methods of payment include debit or card, certified cheque or money order payable to the *Treasurer of the City of Toronto*, or Letter of Credit.

2) Submission of a complete application for permit to injure or remove privately owned trees.

3) The subject property be developed in accordance with the Revised Site Plan dated September 2019, and attached as Schedule C to the Minutes of Settlement

4) Any other variance(s) that may appear on these plans but are not listed in the written decision are NOT authorized.

5) The owner shall not extend the width of the proposed driveway more than 6.0 metres on public property

Mr. Van Duffelen submitted that the proposal should be approved based on Mr. Boros' evidence. Mr. Davidson asked that the Minutes of Settlement be attached to the Decision, if the proposal was going to be approved. He also pointed out that the due date to complete the modification of the existing driveway, stated as January 1, 2020, in Paragraph 11 of the Minutes of Settlement, had to be updated to April 30, 2020, based on discussions between the Parties, in advance of the Hearing.

By way of reference, the relevant paragraph referring to the date of expected compliance, is reproduced below:

11. *The City shall advise the TLAB that it has no objection to a decision from the TLAB approving the Requested Variances (for the existing dwelling and a portion of the existing driveway) in accordance with these Minutes of Settlement, so as to permit the Application subject to the following condition.*

The Applicant shall modify the existing driveway in accordance with the site plan prepared by Alexander Boros Planning + Design Associates for 38 Lorraine Avenue and dated September 2019 which are attached hereto as ***Schedule "C"*** *(the "****Revised Proposal****"). This modification to the existing driveway shall be completed by no later than January 1, 2020;*

I advised the Parties to update the Minutes of Settlement and send it to the TLAB, and reserved my Decision.

ANALYSIS, FINDINGS, REASONS

It may seem trite to state that the approval of an Appeal by the TLAB requires the Appellants to submit evidence, adequate to satisfy Sections 3, and 45.1 of the Planning Act . At the risk of repeating myself *ad-infinitum*, I have stated in my Interim Decisions that the threshold of proof to obtain approval, is the same irrespective of whether a Settlement proceeds to the TLAB, as a Settlement, or a contested proceeding.

Notwithstanding the above, and my taking the unusual step of adjourning the case on December 18, 2019, to enable the Appellants to put forward adequate evidence, I am disappointed that the Appellants did not submit a thoughtful, and detailed Witness Statement speaking to various tests, in support of their Appeal. The Witness Statement, submitted on February 4, 2020, did not discuss how the proposal satisfied the higher level Provincial Policies, nor did it define a Study Area, to establish the character of the area in which the Subject Property is situated.

Arguably, the most egregious omission is the listing of all the variances, to be ruled on by the TLAB. Notwithstanding the listing of nine variances respecting lot coverage, east and west yard setbacks, access from a flanking street, and driveway width, in Schedule B of the Minutes of Settlement, the Appellants' Statement was restricted only to the variances, speaking to the permitted driveway width, under By-Laws 569-2013, and 7625.

In response to my question about why the other seven variances, respecting side yard setbacks, coverage, and access from the street, all of which were discussed as part of the Settlement, had not been submitted to the TLAB, or spoken to by way of oral evidence., Mr. Boros' answer was that seven of the nine variances had been approved by the COA, and only the two that had not been approved, were being brought forward to the TLAB. When asked about what a Hearing *de novo* entailed of the Parties, Mr. Van Duffelen conceded that all the variances had to be discussed, and that he "had relied on Mr. Boros for the needful "(my paraphrase). I refused Mr. Boros' offer to make a subsequent written submission, because the Appellants had been granted numerous opportunities to submit an Expert Witness Statement. I am also of the opinion that the TLAB ought not to reward a Party' seemingly indifferent, if not cavalier approach, towards an Appeal, by granting them extra time to make submissions, after having

adjourned a previous Hearing to provide them with an opportunity to submit a fulsome Witness Statement.

I was not impressed by the unpreparedness of the Appellants, when they stated that there are no conditions to be imposed on the approval of the proposal, because the Settlement of Minutes specifically refer to various conditions of approval, at the end of Schedule B. This raises questions about their ability, and intentions, to adhere to the conditions, which effectively nullifies the purpose of the whole proceeding before the TLAB.

In response to my question about how the proposal complied with the higher level Provincial Policies, Mr. Boros initially asserted that the proposal was consistent with the Provincial Policies, but when asked to name the relevant policies , his answer was that he did not remember what the policies were, nor could he expand on how the proposal was compatible with the policies, after Mr. Davidson referred to the “Provincial Policy Statement, or the Growth Plan” . I fail to fathom how an Expert Witness can be unaware of important policies such as the Provincial Policy Statement (2014), and the Growth Plan for the Greater Golden Horseshoe (2017 or 2019), and more importantly, assert compliance with these policies, without providing any details about the policies.

Consequently, I conclude that the compliance between the proposal, and the higher level Provincial Policies, has not been demonstrated.

The fact that neither the Expert Witness Statement, nor the evidence provided at the Hearing referred to the seven variances listed in Schedule B of the Minutes of Settlement, respecting side yard setbacks, coverage, and access from the street, let alone address them, results in my refusing these variances, for lack of adequate evidence.

With respect to the two variances that were spoken to respecting the driveway width, under By-Laws 569-2013, and 7625 respectively, the discussion was threadbare, and barely scratched the surface of demonstrating compliance with the Official Plan, or the Zoning By-Laws. To begin, there was no identification of which Official Plan is being discussed; the evidence asserted that the reconfigured driveway would be compatible with the neighbourhood, or the other driveways in the neighbourhood , without offering details. The fact that no Study Area was delineated makes it more difficult to understand the determination of compatibility, or impact, including unacceptable adverse impact, key to the test of appropriate development, and the test of minor. Consequently, I conclude that the evidence has not demonstrated how the proposal is consistent with tests respecting the Official Policy, or the tests of appropriate development, and minor.

The evidence speaking to the Zoning By-Laws again asserted compliance with the Zoning By-Laws, and spoke to the intent generically, without reference to the driveway. Based on this slew of evidence, I conclude that there is insufficient evidence to demonstrate compliance between the variances before the TLAB, and the Zoning By-Laws.

Based on the above discussion, I find that the Appeal should not be allowed, since the evidence is inadequate to demonstrate that the four tests under Section 45(1) of the Planning Act, as well as the higher level Provincial Policies, have been satisified.

It is important to note that while I had indicated that the updated Minutes of Settlement be submitted to help me come to a Decision, at the Hearing completed on February 21, 2020, the Appeal's overall failure to meet the requisite tests means that the Decision can be issued without waiting for the Minutes of Settlement. The only requested change to the minutes was the date of compliance, which is no longer important because the variances themselves are refused.

I would like to address the public interest implications stemming from this Decision.

I was constantly, if not incessantly, reminded that a Settlement had been negotiated between the Parties; I got the impression that it was being suggested that the Appeal had to be allowed, based solely on the negotiation of a Settlement between the Parties . Parties should disabuse themselves of the notion that a Settlement is the key, that magically unlocks the door to their Appeal being allowed- the TLAB does not owe the Parties an approval, solely based on the negotiation of a successful Settlement.

In the processing of this Appeal, ample opportunities were provided to the Appellant to facilitate their coming forward to the TLAB with adequate evidence. I am cognizant of the substantial effort invested by the City to arrive at the Settlement, the details of which are documented in its Motion to dismiss the case without a Hearing, dated January 31, 2020, and the Reply dated February 6, 2020. In my Decision addressing the Motion to dismiss the case, dated February 19, 2020, I had suggested that the temporary pain be endured, in the hope of long term again, notwithstanding my broad agreement with the analysis put forward by the City.

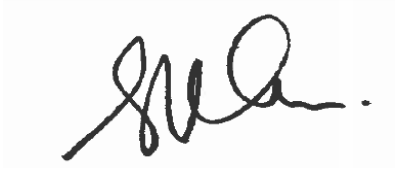
However, it has proven impossible to fructify the hard work of the City, because the Appellants seem unable to help themselves through advancing even a modicum of evidence in support of their Appeal. Regrettably, the time, and effort invested in the processing of this Appeal, by Mr. Jason Davidson, the City's lawyer, and Ms. Ameena Khan, the City's planner, on this file have been in vain; in plain language, their efforts are down the drain. While the loss of time and money is regrettable, I believe that public interest is best upheld by adhering to the principle of having Parties provide adequate evidence in support of their application.

I conclude by stating that while the TLAB is committed to generously interpreting Rules to achieve timely, and results beneficial to the Parties, its generousness should not be confused with weakness- I reiterate the TLAB cannot be prevailed upon into approving variances, solely on the basis of a Settlement between the Parties.

DECISION AND ORDER

1. The Appeal respecting 38 Lorraine is refused, and the Decision of the COA, dated May 8, 2019, is confirmed.

So orders the Toronto Local Appeal Body

X 

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body