

DECISION AND ORDER

Decision Issue Date Friday, September 25, 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): CANADIAN MUSHARAKA ESTATES INC

Applicant: AHMAD ELKARANSHAWY

Property Address/Description: 2577 EGLINTON AVE W

Committee of Adjustment Case File: 19 120896 WET 05 MV

TLAB Case File Number: 19 247848 S45 05 TLAB

Hearing date: Wednesday, June 24, 2020

DECISION DELIVERED BY S. Talukder

APPEARANCES

NAME	ROLE
REPRESENTATIVE	
AHMAD ELKARANSHAWY	APPLICANT/EXPERT WITNESS
CANADIAN MUSHARAKA ESTATES	APPLICANT/OWNER JOHN NUNZIATA

INTRODUCTION

1. The Applicant appeals the decision by the Committee of Adjustment (CoA) with respect to the property located at 2577 Eglinton Avenue West (Subject Property). The Applicant, as owner of the Subject Property, requested approval of variances at the CoA to permit the Applicant to maintain residential and commercial units in the building on the Subject Property. The CoA approved all the variances except the variance to permit habitable rooms in the cellar.
2. The Applicant was the only party at the virtual hearing.
3. At the hearing, I informed those present that I had visited the site of the Subject Property to familiarize myself with the neighbourhood where the Subject Property is located.

MATTERS IN ISSUE

4. At issue is whether the variances before the CoA and now before the Toronto Local Appeal Body (TLAB), should be approved. The variances at issue are as follows (in italics):

1. Section 40.10.20.40.(1)(B), By-law 569-2013

In a CR zone, dwelling units are permitted in a mixed use building provided there is an "r" value greater than 0 as referenced in Section 40.5.1.10(3)(A)(ii).

The existing dwelling units will be located in the mixed use building which does not contain an "r" value.

2. Section 40.10.40.1.(1), By-law 569-2013

In a mixed use building, all residential portions of the building must be located above non-residential use portions.

The altered mixed use building will have residential use portions located adjacent to the non-residential use.

3. Section 3.4.6, By-law 1-83

Habitable rooms may not be located in a cellar.

The altered building will have habitable rooms located in the cellar.

4. Section 200.5.1.10.(2)(C), By-law 569-2013 & Section 3.2.1(a)(i)(3), By-law 1-83

A parking space shall be a minimum of 2.6 m wide and 6.7 m in length.

The proposed parallel parking spaces will be 2.6 m in width and 6.5 m in length.

5. Section 200.5.10.1.(1), By-law 569-2013

A total of 4 parking spaces are required.

A total of 3 parking spaces will be provided.

6. Section 3.2.1B.2, By-law 1-83

A total of 1 parking spaces is required for the commercial school parking use.

Section 3.2.1D.1, By-law 1-83

A total of 3 parking spaces is required for each dwelling unit.

Section 3.2.1B.2, By-law 1-83 & Section 3.2.1D.1, By-law 1-83

A total of 3 parking spaces will be provided.

7. Section 40.10.80.20.(1), By-law 569-2013

A parking space that is not in a building or structure must be set back at least 0.5 m from a lot line.

The proposed parking spaces will be set back 0 m from the rear and west side lot lines.

5. The CoA approved all of the variances except variance #3 which refers to allowing habitable rooms in the cellar.

JURISDICTION

Provincial Policy – S. 3

6. A decision of the TLAB must be consistent with the Provincial Policy Statement (PPS) and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area (Growth Plan).

Variance – S. 45(1)

7. In considering the applications for variances from the Zoning By-laws, the TLAB Panel must also be satisfied that the applications meet 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, ANALYSIS, FINDINGS, REASONS

8. The hearing before the TLAB is an appeal but also a *de novo* hearing. This means that the TLAB must determine whether all the variances in the application cumulatively and individually satisfy the four tests for variances as set out in section 45(1) of the Act. At the hearing, the Applicant's main evidence was mostly for variance #3 instead of all the variances.
9. The Applicant's representative, Mr. Nunziata, submitted that the CoA decision made an error regarding the purpose of the application. Mr. Nunziata noted that the purpose of requesting the approval of the variances was to maintain current existing residential units and not to convert a part of the main floor for additional commercial space, as stated in the CoA decision.
10. The Applicant called two witnesses, Muhammad Farooq, the President of the Applicant, and Ahmad Elkaranshaw, the architect for the Applicant. Mr. Elkaranshaw was accepted as an expert witness in the area of drafting architectural plans, limited to the plans he drafted for the Applicant. His evidence was limited to the architectural plans for the Applicant's building.
11. Mr. Farooq stated that the Applicant bought the Subject Property six years ago. The building on the Subject Property has three residential apartments and one commercial unit which fronts on to Eglinton Avenue West. The residential apartments are located on the second floor, on the first floor behind the commercial unit and in the basement. He noted that the building does not have a cellar, but instead has a basement. The main floor is at level with the street at the front; however, the back side has a lower grade. As such, the part of the basement can be seen from the back, with 3 feet underneath the ground and 4 feet above the ground.
12. He noted that the building is an old building and was probably constructed when the area was under the City of York jurisdiction. He surmised that based on a map that was filed by

the Applicant and created by Patricia Morphet of the Survey and Mapping Services of the City of Toronto in 2003, the building was probably built between 1945 – 1960 (part of Exhibit 1).

13. He provided details about the residential tenants and the monthly rent received from these residential units. He further confirmed that the commercial unit has been vacant because of the Eglinton LRT construction in front of the Subject Property. He emphasized the lack of affordable housing in Toronto and how his residential units have low rents and contribute to affordable housing for Toronto residents. He also noted that he cannot legally evict residential tenants under the current landlord and tenant laws.
14. Mr. Farooq stated that his architect, Mr. Elkaranshawy, drafted plans to satisfy Ontario's Building Code imposed by the City of Toronto (City). Mr. Elkaranshawy, during his testimony, reviewed the architectural plans in detail and confirmed that the plans comply with the Building Code. The TLAB does not address building code requirements but whether the variances requested satisfy the four tests set out in the Act. Even if the TLAB approved the variances, the Applicant would have been required to comply with the Building Code of the City – failing which, the necessary building permits would not be issued, notwithstanding the TLAB's approval of the variances. While compliance with the Building Code is essential for obtaining the building permit, the tests for variances require evidence of the planning nature. As such, compliance with the Building Code is not a relevant factor in approving the variances.
15. Mr. Elkaranshawy noted that adding another parking spot would impede into the current available landscaping.
16. Mr. Farooq also produced about twelve support letters from neighbouring property owners or tenants on approval of residential dwellings in the basement. Many of these letters confirmed that neighbouring buildings also have basement residential units. Mr. Farooq noted that the Applicant is the only owner in the neighbourhood who is required to remove the basement unit whereas there are many buildings in the area with basements used as residential units.
17. As noted earlier in my decision, the hearing before the TLAB is a *de novo* hearing, and evidence on why all the variances should be approved must be provided. The TLAB panel member in making their determination may give appropriate consideration towards the CoA decision. With respect to this matter, I am prepared to defer to the CoA's decision with respect to the approval of the six variances.
18. With respect to variance #3, during the hearing, I did not hear any clear evidence on how this variance meets the general intent and purpose of the Official Plan or the Zoning By-Laws. Expert evidence is not necessarily required – but clear evidence is required to make any positive determination on these two tests. During his closing submissions, Mr. Nunziata had stated that the Official Plan allows for mixed use and there is no bar in the Zoning By-Laws to prevent a residential unit in the basement. These are simply submissions which were not supported by any evidence of the two witnesses.

19. I have accepted both the witnesses' testimonies that the building has a basement and not a cellar, although the categorization of this specific unit does not change my decision. I do not have any evidence before me that residential units in basements in mixed use buildings are zoning by-law compliant. In fact, variance # 2 refers to By-law 569-2013, Section 40.10.40.1.(1), stating that all residential portions of the building must be located above the non-residential use (i.e., commercial use) portions. In this case, the commercial unit is on the main floor above the basement or cellar.
20. Mr. Farooq, based on his personal experience, confirmed that there are basement residential units in many of the buildings fronting on Eglinton Avenue. Further, his own basement unit was in existence prior to his purchase six years and possibly for a long period of time. Therefore, I accept that the presence of the Applicant's basement residential unit will not create any adverse impact in the area where basement units are common or acceptable in the neighbourhood.
21. Finally, with respect to whether the variance # 3 is desirable for the appropriate development or use of the land, I do not have sufficient evidence before me to accept the submission by the Applicant that this is the case. While I appreciate that the basement units provide much needed income to the landlords and accommodation to residents, the monetary benefit received by the Applicant or the benefits received by the tenants are not the appropriate planning considerations for this test.
22. The appeal is denied for the foregoing reasons. I am also cognizant that the effect of the COVID-19 pandemic can create significant challenges with respect to housing, eviction of tenants and financial stability of the residents of Toronto. As such, the Applicant shall have twelve months from the date of issue of this decision as a period to comply with the order below.

DECISION AND ORDER

23. The appeal in respect of variance 3, above, is denied; the Committee of Adjustment's decision is confirmed.
24. The Applicant shall have twelve months from the date of issue of this Decision and Order to comply. Should compliance not be present thereafter, the appeal in respect of all of the variances is denied.

X 

Shaheynoor Talukder
Panel Chair, Toronto Local Appeal Body
Signed by: Shaheynoor Talukder