

DECISION

Decision Issue Date Wednesday, November 11, 2020

Appellant(s): MICHAEL STALTARI

Applicant: FRANCO ROMANO

Property Address/Description: 57 NINTH ST

Committee of Adjustment Case File: 19 264302 WET 03 MV (A0687/19EYK)

TLAB Case File Number: 20 121152 S45 03 TLAB

Webex date: Friday, October 02, 2020

DECISION DELIVERED BY TED YAO

APPEARANCES]

Name	Role	Legal representative
Michael Staltari	Owner/Appellant	Amber Stewart
Franco Romano	witness	
Lone and Larry Smith	neighbours	
Dave Godley	witness and interested person	

INTRODUCTION

Background

In 2018, Mr. Staltari severed a lot in ~~2018~~ and began construction of two new houses. During the course of construction, he received a stop work order (in late 2019) because the buildings were contrary to approved plans. He applied a second time to the Committee of Adjustment for five additional variances, one of which was an extension to a previous variance and one of which was completely new — building height. The Committee denied his request. Mr. Staltari appealed, and so this matter arrived at the TLAB. However, after this refusal, Mr. Staltari voluntarily cut some length

from his half-completed buildings, reducing the number of sought for variances from five to three.

To recapitulate, Mr. Staltari's first obtained variances for FSI, exterior main walls, and first floor height. His second application was for building height, an even greater increase in FSI, (and now no longer needed), for exterior main walls and also for first floor height. However, the main issue in this hearing is overall building height, which was not contemplated at the time of the first application. There are two remaining variances and these will be discussed separately.

As to the stop work order, Mr. Staltari said,

I've been building for a long time. It's never happened to me before. I bought this property on Ninth St as part of my business, to buy it, to sever it, to build two suite houses. I have a son Michael, who's interested in the business and he approached me and said, "Is it possible, maybe I can get involved in this? [Mr. Michael Staltari had studied real estate development at Ryerson, Ted Rogers School of Business]. It's what he wants to do. ...I wanted to help my son get started in life so I said, " Sure"... .So I actually sold him the property and I'm helping him do all the work for the property.

So, we got the permits, we started to build. During the building process Michael and I started talking about the space in the back. He said to me, "Is it possible to get a little more space in the back?" He wanted to do a basement apartment, potentially to help him with the rental income. So, we needed to make these changes. . . .

Because we are already in construction mode, we discussed them, and decided to go forward with them. I think, the main reason that I didn't apply right away or didn't apply before, was that Michael had just brought this to our attention as we were constructing. . . . And there's a builder down the road, I think his name is Steve, . . . he built two houses, and he had said to me that he had built with variances that were ten feet longer than the Code had allowed. So, I honestly didn't think that this was going to be a problem. . . .Because there was two buildings down the street. So, we did that, and because we've got people on site ready to pour, we made those changes, [to add 1.17 m (3.8 ft) to the rear of each house]. Obviously now I realize that was a mistake, I shouldn't have done that, and I regret that, which is one of the reasons why I cut back the houses [to 16.5 m instead of 17 m]. I realized it was my error.

He further indicated that an increase in overall building height was occasioned by a different mistake. He had a new site manager and the lumber supplier had a new manager as well.

They sent wrong lengths to the site and no-one caught them. So those were construction errors at the end of the day, not something that was planned."

Accordingly, he applied for five new variances to bring the building into compliance. At the Committee, he received a negative response; Mr. Romano states that the Committee was uninterested in even hearing his evidence. Subsequently Mr. Staltari cut back the length of the half completed structures, pursuant to approved plans, meaning that FSI and building length are no longer issues.

This TLAB hearing on the three remaining variances took place October 2, 2020 after a long delay occasioned by the TLAB's COVID-19 Suspension Period. Mr. Romano's witness statement is dated Sept 30, 2020. I conclude from its format, there were few revisions from an earlier document. It reads like a report primarily in support of an FSI of 0.77x, which is no longer needed.

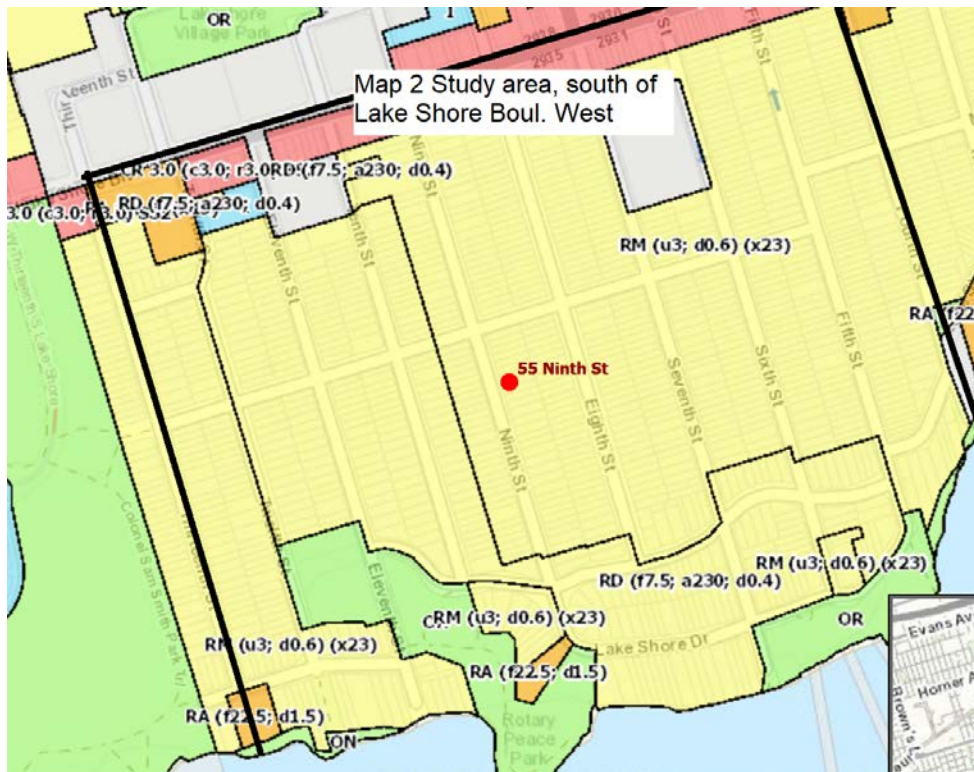
The neighbour to the north is apparently satisfied with Mr. Staltari's new requests. However, Ms. Smith (the owner of a triplex to the south), is still opposed, as she was to the first application. She recognizes that the first variances are now final and binding. She, like Mr. Romano, had prepared to deal mainly with the longer buildings, requesting Mr. Godley, a local expert, to attend with her. Since the extra length has disappeared, Mr. Godley position was he would have opposed the original severance had he attended. He took no position on the variances in this hearing.

<p align="center">Table 1. Variances from Zoning By-law 569-2013 (bolded means still being sought after cutting back)</p>				
		Obtained in 2018	Applied for in Feb 2020	Proposed Oct 2020
	FSI	0.7 (0.6 permitted)	.77	Abandoned. Or in Mr. Romano's words "This variance has since been adjusted to be removed"
	Building length	None sought	18.17 m (17 m permitted)	Abandoned, now 16.5m (17 m permitted)
1	Minimum first floor height	1.2 m	1.53 m	1.57 m
2	Exterior side walls height	7.3 m (7 m permitted)	8.33 m	8.33 m
3	Height	9.5 m	None sought	9.75 m

MATTERS IN DISPUTE AND KEY ISSUE

The variances must individually and cumulatively:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- be desirable for the appropriate development or use of the land; and
- be minor.



The building height variance must meet the Official Plan test: that it respects and reinforces the existing physical pattern in the neighbourhood.¹ Since Mr. Romano did not provide a study area map, I have taken the City's interactive zoning map and added

¹ 4.1.5. Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular: . . . ; c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;

his boundaries² (Figure 2 above). It will be noted that 55 Ninth is in an RM zone, but the study area also includes an RD zone.

EVIDENCE

I heard from Mr. Staltari and Mr. Romano in support of the variances. I qualified Mr. Romano as able to give land use planning opinion evidence. Ms. Smith gave evidence on her own behalf. I refer more directly to that evidence in the next section.

ANALYSIS, FINDINGS, REASONS

This case turns on whether Mr. Staltari has met the onus on him to justify each of the four tests, as there is no “right” to a variance. To summarize my conclusion on height, I feel I must be consistent with *30 Westridge*, which is a similar fact situation. That decision was also the subject of a detailed review request so I have the confidence that the TLAB Chair also considers it was correctly decided. This is despite a point by point analysis by Ms. Stewart of this review decision. I also base my decision on the insufficiency of Mr. Romano’s evidence.

When the application is to legalize an as-built structure

The rule for after-the-fact applications is to consider it as if the building **is not built**. So, the granting should not be to spare the owner the cost of fixing the construction, nor should an otherwise meritorious variance be withheld simply to punish the owner.

Incremental variances shouldn’t be encouraged

I will begin with the commonsense notion that a variance should not be obtained in piecemeal fashion. There is indirect support for this philosophy in s. 45(1.3) of the *Planning Act* that prohibits any application for a minor variance within two years of a site specific zoning by-law. Both situations contemplate that variance and consent applications should be made in one comprehensive fashion.

² 4.8 **For Official Plan analysis purposes**, I [Mr. Romano] have delineated the geographic neighbourhood snapshot to be the interior of lands bounded by Lake Shore Boulevard West to the north, Lake Ontario to the south, Thirteenth Street to the west and Fourth Street to the east [1113 lots]. The lands within this portion of the geographic neighbourhood can be considered to be contextually proximate to the Subject Site containing low rise, residential building types and zoning, lot size and configuration, street pattern, pedestrian connectivity and dividing features.

Should the precedent of 30 Westridge be distinguished?

Ms. Stewart was aware of this precedent and came prepared to distinguish it. In *30 Westridge Rd*, the owner had previously applied for a height variance in circumstances similar to here. Both variances are in the one foot range — 0.36 m (1.18 ft) in *30 Westridge*³ and 0.25 m (.82 ft or 9.8 inches) here.

Ms. Stewart first pointed out that the owner in *30 Westridge* had obtained a previous height variance, whereas this is Mr. Staltari's first request. I am not satisfied that this is sufficient to distinguish the two cases. In both, the owner has obtained large increases in development rights by a prior Committee of Adjustment decision. In both the new variance is a direct result of construction based on those variances. And here, the owner has obtained a consent. This allowed him to build long high walls, admittedly as of right, but resulting in Ms. Smith's complaint of having a loss of sunlight for all her north facing windows. (The previous owner of the property had a driveway on that side, so Ms. Smith benefitted from a large vacant space on the other side of her lot line. She states that the closed-in nature of the new wall has caused her to lose a tenant and also to forgo eventual planned relocation of her own family to one of the units.

Figure 3. Two apartment buildings on Ninth St. left 20 Ninth, right 53 Ninth (Ms. Smith's)

³ [the owner] obtained five minor variances, including a variance for building height: . . . of 9.99 m (where 9.5 m is permitted). . . . To recap, the August 2016 variance was for an exceedance of .49 m (1.6 ft) over what was permitted. The second variance (this appeal), May 2018, is for an exceedance of .36 m (1.18 ft). (*30 Westridge*)



Ms. Stewart then attempted to distinguish the *30 Westridge* case by reference to the zone category. Westridge is RD (Residential Detached) zoning whereas Ninth is in an RM zone (Residential Multiple). RD permits only detached homes, which in houses cannot exceed 9.5 m in height; RM can have other types, (duplexes, multiplexes) which can be as high as 12 m⁴. So, she says one would expect that there is more uniformity in RD and less in RM.

Ms. Stewart seems to be making a two pronged submission. One is based on a supposed empirical question: are the heights of houses on Ninth St varied? The other is interpretive and legal. Is there an intention in the RM zone to produce a variety of heights?

Like many neighbourhoods in Toronto, the primary low rise building form dates to the last mid-century or earlier. The question is how the phrase “**existing physical character**” should be applied to this neighbourhood. There was very little evidence on this question. Mr. Romano included photographs of four Ninth Street apartment-style buildings of which #20 Ninth appears to be the tallest. Even its height is roughly even with the building to the left, which appears to be a detached house. We know that 55 Ninth, (the unfinished building in the right hand photo, Figure 3) is close to 9.5 m high, so 53 Ninth (Ms. Smith’s, the building with a tall window and marked “53”) is not an

⁴ D 5.13 of Mr. Romano’s witness statement: It should be noted that any other building type in this multiple residential zoned area is permitted to be taller: 10.0m for a semi-detached house and maximum 12.0m for any other residential building (i.e., duplex, triplex etc.). These height regulations apply to flat/shallow or steeply sloped roof designs

exemplar of a taller triplex that has taken advantage of the maximum 12.0 m. The other two apartment style buildings (no photos shown here) show apartments less tall than houses. Mr. Romano's witness statement speaks of height only in very general terms. Accordingly, I find that there is no pattern that I can see that the character of RM neighbourhoods is skewed by tall multiplex buildings, despite greater permissible heights.

Ms. Stewart's rejoinder is that Ms. Smith could tear down her apartment building and rebuild to 12 m, and it is this planned context that is what I should consider

"Planned context" occurs in Chapter 2⁵ of the Official Plan and "existing physical character" occurs in Chapter 4. Not only are the two phrases different: "context" versus "physical character", but the Chapter 2 reference has a different linguistic context. The reference to site specific zoning by-laws and secondary plans suggests to me that the Plan intends "planned context" to be a tool for comprehensive redevelopment schemes for a larger area, especially where there are very large buildings that take a long time to plan and build, rather than an argument for one single small scale variance application. So, I find the "tear down and rebuild" argument also not convincing.

The final aspect is the **zoning intent** of RM versus RD, in which Ms. Stewart suggests RM height limits should be less strictly applied, since the building might be next to a 10.0 m or 12 m high multiple building. This is an interpretation issue; what significance, if any should I give to higher height limits for RM multiple dwelling unit forms?

The Official Plan policies are friendly to rental and affordable housing. Indeed, Ms. Smith's property is exactly the kind of built form that is needed but does not seem to

⁵ The existing context of any given area refers to what is there now. The planned context refers to what is intended in the future. In stable areas, such as Neighbourhoods and Apartment Neighbourhoods, the planned context typically reinforces the existing context. In growth areas, such as Centres and Avenues, the planned context generally anticipates change. Height and density aspects of the planned context of new development will be assessed on the basis of the Plan's policies, including Secondary Plans and site and area specific policies. Where there are no height and density limits in the Plan, height and density limits of area zoning that implements the Plan will be a benchmark for assessment of those aspects of the planned context. Where there are no height and density limits in the Plan and no area zoning implementing the Plan, height and density aspects of the planned context will be determined on the basis of an area review such as that undertaken to implement Subsection 2.2.3.3 b) of the Plan. In this case, in determining an application, Council will have due regard for the existing and planned contexts. In instances of apparent inconsistency between existing and planned contexts when interpreting the built form policies as they relate to height and density, the planned context will prevail.

be provided by market forces. In my view, the greater height latitude for multiple unit dwellings is to accommodate flexibility for that type of building, rather than to relax the 9.5 m height limit for detached dwellings. In other words, I do not consider the general purpose and intent of RM zones to encourage variances for building height for single detached homes.

The comparison to 30 Westridge

In *30 Westridge*, I made the following findings:

- Granting the variance would lead to instability, contrary to 2.3.1 of the Official Plan;
- I rejected the “you can’t see the difference from the street” argument;
- The total number of related Committee of Adjustment decisions was 16 out of 300;
- I found that a 10.35 m height did not constitute the pattern of physical development;
- I found the variance sought **was** minor;
- However, I did not find it desirable for the appropriate development of the land, relying in part by a Ms. Anderson (a ratepayers’ group president), who said “The initial application was for 9.9 metres while the by-law calls for 9.5 m. Now the applicant wants 9.9 metres to simply “morph” to 10.35, without any penalty. The reality is we don’t know, nor will we ever know, if the Committee of Adjustment would have approved 10.35 metres in height.”

I looked at about 15 other TLAB “as built situations”, including my own decisions where I granted the variances⁶. Like all TLAB cases, each is unique, but I found only two where the Committee was invited to “fix an error” in the construction process **and** there was a related previous COA decision. These were *66 Virginia* and *48 Playter Cr. No. 66 Virginia* involved an error in pouring the foundation and is the subject of settlement discussions.

So, this is a very rare occurrence statistically. The guiding principle of treating the requested variance as proposed means we apply the *Planning Act* in its usual way, which does not allow us to distinguish between errors of judgement, incompetence, errors within tolerances (*66 Virginia* was less than 2 cm) or intentional deviations from

⁶ For example, *76 Asquith*, where Ms. Stewart represented the owner.

the plans. All are to be disregarded, and we are to look only at the planning considerations.

The second consequence of two COA applications which are close in time is that there is at least a *prima facie* issue that the second variance is not “gradual”. This presumption can be rebutted; in *48 Playter*, also a height case, the owner hired a surveyor who took geodetic (i.e. measured from sea level) heights of nearby roofs and spires.) Here, I find no such evidence.

This lack of height evidence may be a result of the repurposing of an earlier planning report. Mr. Romano lists sixty-one Ninth Street addresses with their FSIs (clearly intending to support the longer building length and FSI, now no longer needed) but no information on heights. His Table of Variance Decisions shows 1113 lots in the study area, with 23 building height decisions, not including the subject site⁷. The average is 10.26 m, including four Ninth Street lots. Since there are only four, two more 9.75 m heights would form an important precedent.

I return to the comparison with 30 Westridge and whether it is distinguishable. There the owner produced 16 COA decisions in a study area of 300 properties. Here there are 23, out of 1113. In both there are too few COA height decisions for me to find that they are “the most frequently occurring” and too few to find 9.75 m heights for detached houses represent a physical character of the broader or immediate contexts.

Par. 2.7 of Mr. Romano’s witness statement seems to reject the idea of precedent:

2.7 One property’s form (or choice) of regeneration does not necessarily replicate itself onto other properties. In other words, **one property’s development does not set a precedent for another property to follow the same form of development choice.** This can be observed by reviewing the visuals accompanying this witness statement which illustrate individual choice and expression.

I find that this is contrary to the type of evidence advanced at most TLAB hearings and indeed the point of his own compilation of variance decisions.

Accordingly, I find that the respect and reinforce test is not met and the variance fails to meet the test of maintaining the general intent of this provision of the Official Plan.

⁷ There were also below 9.5 m decisions. I do not know the reason for this.

Less impact than the as of-right height

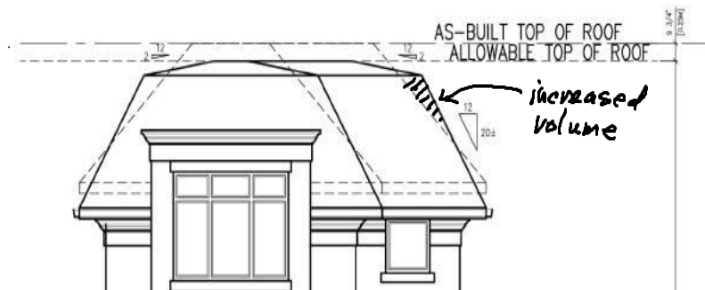


Figure 4

This argument was advanced by Mr. Romano and Ms. Stewart with the aid of the figure above. Figure 4 shows the “as built” roof (higher dotted line) and the “allowable” height limit of 9.5 m (lower dotted line partly obscured by the heavy black lines). Mr. Romano said that if the building height were lowered, the resulting roofline would “bulge” outward, (my word), creating more volume and massing and thus more impact. In her written submissions, Ms. Stewart suggested

The as-of-right massing also illustrates that lowering the roof height will increase the massing/volume of the roof and eaves lower to the ground, and closer to all lot lines. Mr. Romano testified that the as-of-right roofline would have a greater impact than the proposed roofline.

I note as the “bulge” is created, the eave line moves down, decreasing the massing in the opposite direction. In my opinion, whatever the net effect and whatever can be seen from ground level, this is outweighed by considerations of fairness. An important function of zoning is to assure that like owners are treated similarly. Although increased massing may occur moving the cross section from 9.75 m to the as-of-right height, the plans examiner never looks at comparative cross sections like this; just at the raw number for building height.

This is different from the standard way we compare different COA decisions — which is to accept the height measured from established grade as found by the zoning plan examiner. From this number we can then compare different heights of buildings anywhere in Toronto. The argument based on Figure 4 takes us away from this standard procedure. It may be of interest to the architect but does not convince me that this is a better way to ascertain the intent of the zoning bylaw.

Minor

As Mr. Staltari's sought for variance of 0.25 m is in the same range as 30 *Westridge* where I considered it minor, I think I may be consistent here too and find it minor.

Conclusion on height

I must be of the opinion that the “the **general intent** and **purpose** of the by-law and of the Official Plan. . . are maintained. The additional height has to respect and reinforce this pattern of almost 1000 homes, of which very few have applied for Committee of Adjustment relief for height. Owing to the unique way this hearing was held (Mr. Staltari saying he wanted a decision before the winter) Mr. Romano was unable to provide a full analysis of heights in the broader or immediate contexts. Since I cannot find that these tests are met, I cannot authorize the height variance.

The roughed in basements

The Official Plan supports affordable rental housing though a wide range of initiatives, including action by regulatory bodies, like the TLAB⁸ Mr. Staltari proposes to rough-in kitchens in both houses to give his son and the eventual buyer the option of supplementing their incomes through renting out a basement apartment.

I raised this issue in final submissions and Ms. Stewart agreed to investigate this further. She indicates that development charges per basement apartment would be in the range of \$29, 000⁹. Although the City is moving in the direction of eliminating

8 3.2.1.3 . Investment in new rental housing, particularly affordable rental housing, will be encouraged by a coordinated effort from all levels of government through implementation of a range of strategies, including effective taxation, regulatory, administrative policies and incentives.

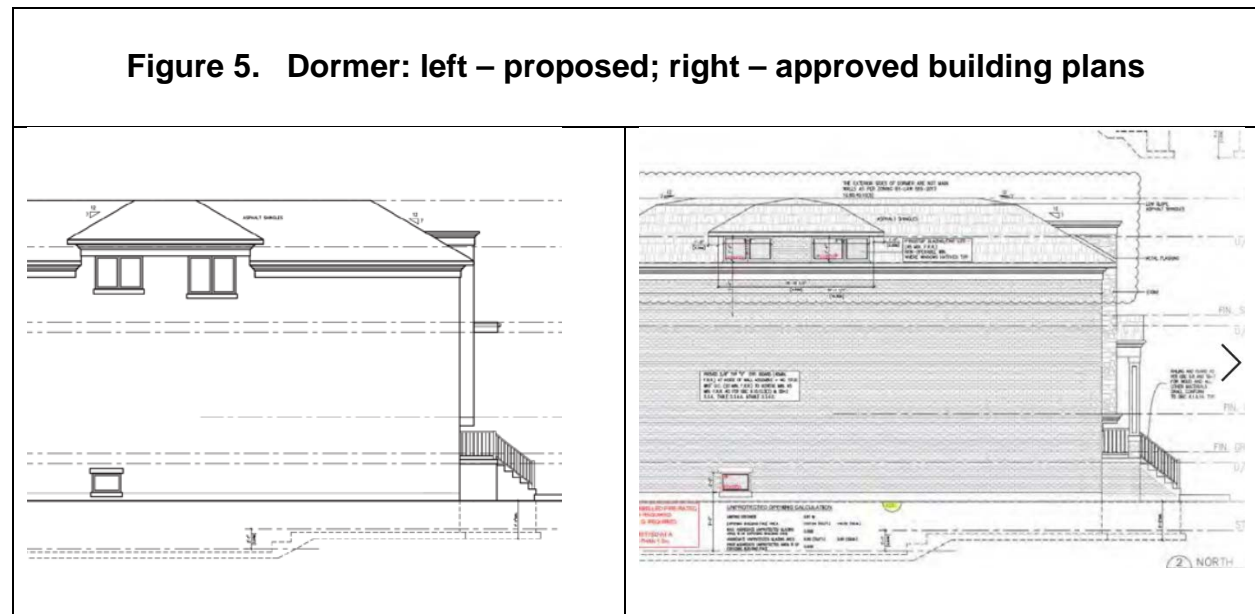
⁹ Ms. Stewart set out in an detailed memo the More Homes, More Choices Act that amended the Development Charges Act relieve against development charges for secondary suites. “This amendment were not yet in force when the COVID-19 pandemic arose. The CoVID-19 Economic Recovery Act replaced the More Homes Act and a Regulation under this Second Act came into force September 18, 2020. , This regulation confined the relief from development charges to existing residential buildings, and Ms. Stewart questions whether her client’s buildings would qualify, as the building permits remain “open”. Secondly, the Regulation does not offer relief where the owner of the existing residential building also owns the abutting lot, which is also the case here. Ms. Stewart concludes that if I granted the variances on condition that secondary suites be constructed it would “almost certainly” trigger the imposition of development charges of approximately \$60,000, which would make a small infill project

development charges for secondary units in detached homes, Mr. Staltari does not currently qualify because he is still the owner of both halves and the exemption or proposed exemption would be available only to existing detached houses. As Ms. Stewart fairly explains, the houses are still in the construction stage and do not qualify as “existing”. As a result, I do not pursue this any further.

The main wall heights and first floor height

Subsequent to his being served with a stop work order, Mr. Staltari submitted a fresh drawing to the Buildings Department, which has approved the plans (see red stamp on right hand plans.) The two are identical except that the eaves on the left stops at the dormer whereas the eaves on the right carries the complete length of the north wall. Mr. Romano wrote:

The dormers giving rise to the wall height measurement can be constructed as-of-right without triggering a wall height variance pursuant to being a dormer that occupies up to 40% of the wall width, as illustrated in this building permit drawing. It should be noted that the wall height provision has been appealed, is still under review and not in force.



“unfeasible”. She points out that a even if Mr. Staltari complied with the condition, a future buyer could remove the secondary suite, thereby defeating the purpose of the policies favouring construction of such suites. She suggests that if I were to grant the variance, I should just include a condition requiring the roughing in of basement kitchens. I thank Ms. Stewart for her careful and fair research. condary suite if desired.

The Committee granted an increase in wall height to 7.3 m, and Mr. Staltari desires the portion of the eaves above the windows to be 8.33 m, caused by his wanting the wall of brick around the window to be unbroken from top to bottom. Mr. Staltari said he thought this “looks better”. The imposition of the by-law limit appears to merely decrease the size of the windows, not to change the amount of the exterior main wall. This variance seems to me to be a technicality; I am prepared to find the tests are met.

With respect to the first floor height, Mr. Staltari first offered to abandon this variance since he thought he would just have to rebuild the foyer and lower it by three quarters of an inch. Mr. Romano was of the view that the entire first floor would have to be rebuilt and the difference was about twice three quarters of an inch. (0.04 m = 1.57 in.). When he heard this Mr. Staltari changed his mind. As a result, this variance must be considered. Just because the number seems similar I will reiterate that the variance is 1.57 m above established grade, when the maximum height should be 1.25 m, and if the variance were not given, Mr. Staltari would be required to lower the as-built first floor 0.04 m or 1.57 inches from this level.

On January 30, 2020¹⁰, Planning staff wrote a letter to the Committee of Adjustment pointing out that their earlier report had suggested that the first floor height variance should be lowered. It also pointed out that the second proposed variance of 1.57 m would be even greater than was given by the 2018 Committee. I accept Mr. Romano’s advice that this particular standard is still before the LPAT and in any event has no consequences for the exterior design and thus, while it does fall in the category of piecemeal planning, I am prepared to find that the four tests are met.

Decision and Order

I do not authorize the building height variance set out in Table 1 but I do authorize the wall height variance as shown in the dormer drawing on the left (Figure 5, page 13) and the first floor height variance of 1.57 m.

¹⁰ . Planning staff submitted a report on June 18, 2018 recommending that the first floor height for the proposed dwellings be reduced to be more in keeping with the intent and purpose of the Official Plan and Zoning By-law. The applications were approved by the Committee of Adjustment on June 21, 2018 with the standard conditions in addition to Engineering Construction Services conditions. Staff note that the proposed first floor height of 1.53 metres was approved without reductions.



X

Ted Yao
Panel Chair, Toronto Local Appeal Body