Toronto Local Appeal Body

40 Orchard View Blvd, Suite 211
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

DECISION AND ORDER

Decision Issue Date Wednesday, February 10, 2021 and minor corrections made Wednesday Feb 17, 2021

PROCEEDING COMMENCED UNDER section 53, subsection 53(19), section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")
Appellant(s): SUKUMARAN SUNIL KUMAR

Applicant: ARBEN SHPATI

Property Address/Description: 777 WILSON HEIGHTS BLVD

Committee of Adjustment Case File Number: 18 173462 NNY 10 MV

TLAB Case File Number: **18 260947 S45 10 TLAB**

Hearing date: Friday, July 12, 2019, Tuesday, February 02, 2021

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Role	Representative
Sukumaran Kumar	Appellant	For 2021 hearing, Ron Kanter For 2019 hearing, John Wenus
City of Toronto	Party	Marc Hardiejowski, (throughout)
Bruno Vivona	Participant	For 2021 hearing Paul Mitassov For 2019 hearing, unrepresented

This hearing has an unusual history, commencing in 2019 as a conventional variance appeal and finishing in 2021. I allowed a great deal of time before finalizing it to give time to the parties to work out, and hopefully settle, a parallel but not directly related dispute: what to do about an encroachment. This decision closes the variance matter but does so without favouring or supporting either party in the encroachment one, where the jurisdiction lies with the courts, not the TLAB.

The attempt by Mr. Kumar to legalize as-built additions

I rendered a decision on July 17, 2019. Large parts of that decision have been cut and pasted into this decision because of the complicated history. The subject property is owned by Sukumaran Kumar who acquired it in 2016. Mr. Kumar acquired a building with many prior additions built by Carmelo Pazzano, a predecessor in title; so many that I identified them by letters: A to F (Diagram 1).

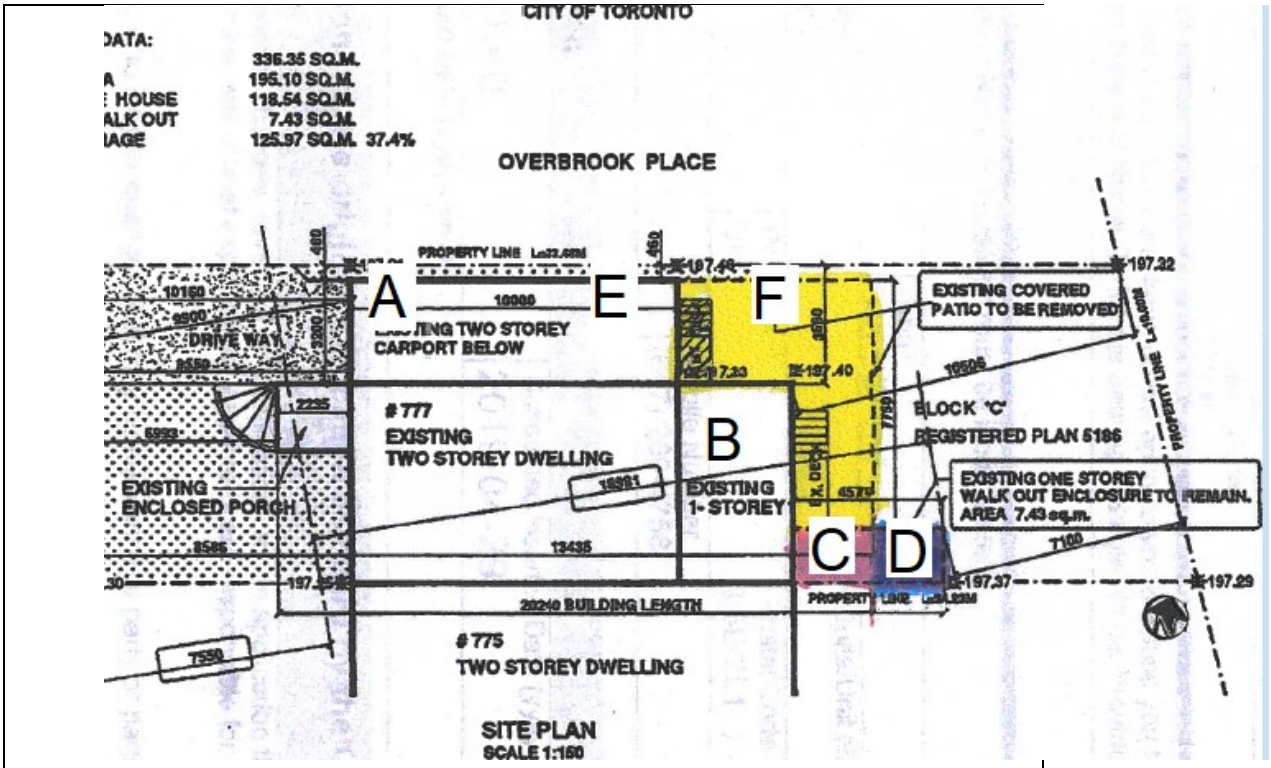

Diagram 1. Previous additions to 777 Wilson Heights Blvd

A carport converted to enclosed garage

B rear single storey addition, pursuant to a 1981 building permit. Portion B encroaches 10.5 cm (4 in) on Mr. Vivona's property

C a further extension of B, part of which also encroaches on Mr. Vivona's property

D a further extension of C, some of which may encroach on Mr. Vivona's property

E a second story addition was added to the garage A.

F a "patio" addition, an open-air structure, made of pillars and rafters, that counts as GFA (gross floor area).

In an effort to "legalize" all these additions, Mr. Kumar applied to the Committee of Adjustment in 2018. Prior the July 2019 TLAB hearing, he abandoned the quest to legalize addition F, and tore it down, with the encouragement of the City of Toronto. The City then supported his application for the remaining additions, but obviously could not support any encroachment. The lawyer for the City of Toronto, Mr. Hardiejowski, has taken no active part, although he kept a watching brief.

The Encroachments

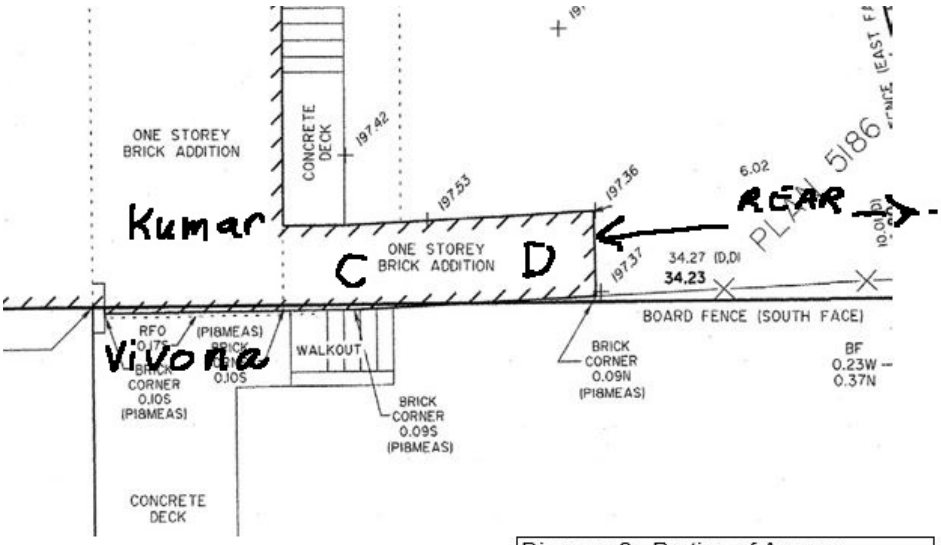

Diagram 2. Portion of Aregers survey, December 11, 2016

Above is Diagram 2, the survey. The Kumars' semi is to the north; Mr. Vivona's to the south and the lot line slants slightly with respect to the party wall, with the Kumar buildings encroaching on the Vivona land. At the rear of the property the mutual fence curves northward so the situation is reversed; the Vivonas occupy some of the Kumar land. I have marked the word "rear" to show conceptually where the rear yard setback is measured. Building length also uses the same rear wall of D as an end point. **This wall is completely on Kumar land** and so the encroachment plays no part in either of those variances (building length and rear yard setback, 2 and 3 of Table 1). This is understood by Mr. Mitassov because he confined his submissions to lot coverage only. Because both lots are zoned RM, no side yard setback is needed for portions C or D.

The Variances

At the first hearing I received planning evidence from a qualified land use planner, TJ Cieciura. He testified that all the variances met the statutory tests under the *Planning Act,* and I accepted his evidence and stated as much in the Interim Decision of July 2019.

The variances are contained in **two** Tables because in July 2019 there was a last minute modification to add addition E into the mix. In the 2021 portion of the hearing, Mr. Kanter, who had been retained after Mr. Wenus, confirmed that the numbers below are what his client seeks as variances.

The Tables are repeated here:

Table 1. Variances sought for parts A, B, C, D of 777 Wilson Heights Blvd

Variances from By-law 569-2013

		Required	Proposed
1	Lot coverage	35%	37.55%
2	Building length	17 m	20.24 m
3	Rear yard setback	8.46 m	7.1 m

Table 2. Variances for portion E

Variances from By-law 569-2013			
1	Eaves	No closer than 0.3 m to north lot line	0.16 m
2	Lot coverage	35%	35.2 %
3	Side yard setback	1.5 m	0.46 m
Variances from Former North York Bylaw 7625			
4	Side yard setback	3.9 m	0.46 m
5	Lot coverage	35%	35.2 %

Does a variance on encroached land imply "owner"?

Mr. Mitassov suggested that granting these variances, particularly item 1 of Table 1, lot coverage, was tantamount to compulsory transfer of property. He cited s. 45(1) of the *Planning Act*:

> Powers of committee
> 45 (1) The committee of adjustment, **upon the application of the owner** of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, **or any person authorized in writing by the owne**r, may, despite any other Act, authorize such minor variance . . . from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion . . .

If anything, this reinforces my conclusion that there is no implication that this tribunal is taking sides in the encroachment dispute. The *Planning Act* states the owner may apply and the Committee may grant a variance with respect to the owner's land. Clearly Mr. Kumar is a non-owner of Mr. Vivona's land on which the encroachment lies and therefore neither the Committee nor the TLAB can grant any variance with respect to Mr. Vivona's land.

This is supported from the preamble to the Committee of Adjustment decision:

> PURPOSE OF THE APPLICATION:
> To maintain the existing dwelling, covered patio, existing one-storey walk out enclosure~~,~~ and structures as constructed.
> REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:
> 1. Chapter 10.80.30.40.(1), By-law No. 569-2013
> The maximum permitted lot coverage is 35.00% of the **lot area.**
> The lot coverage is 47.1% of the lot area (~~including the covered platform).~~
> 2. Chapter 10.80.40.20.(1), By-law No. 569-2013
> The maximum permitted building length is 17.00m.
> The building length is 20.24m.
> 3. Chapter 10.80.40.70.(2), By-law No. 569-2013
> The minimum required rear yard setback is 8.46m (25% of the lot depth).
> The rear yard setback is 7.1m.
> ~~4. Chapter 10.5.40.60.(2), By-law No. 569-2013~~
> ~~A canopy, awning or similar structure, with or without structural support, or a roof over a platform which complies with regulation 10.5.40.60(1), are subject to the following: (A) a roof, canopy, awning or similar structure above a platform meeting the requirements of regulation 10.5.40.60(1) may encroach into a required minimum building setback to the same extent as the platform it is covering which is 2.5m, and no closer to side lot line than the required minimum side yard setback; 1.5m.~~
> ~~The canopy is permitted to encroach (existing encroachment of 1.139m) but is setback 0.46m from the north lot line.~~
> ~~5. Chapter 10.5.40.60.(5), By-law No. 569-2013~~
> ~~An architectural feature (columns) on a building may encroach into a required building setback a maximum of 0.6m, if it is no closer to a lot line than 0.3m.~~
> ~~The architectural feature(s) (columns) encroach 1.139m into the rear yard setback and is 0.46m from the north side lot line.~~

After his application was denied, Mr. Kumar decided to remove F (the covered patio) as stated previously, hoping that this would improve his chances with the remaining additions. Thus, the 47.1% coverage figure above has been reduced to 37.55% as he

no longer needs coverage related to F. The “F-related” variances have been marked with strikeout.

Mr. Mitassov was concerned that this 37.55% lot coverage variance might include the sliver of encroachment land. Both the planner Mr. Cieciura and the 2018 plan examiner, Nada Azzouz, are experienced in the application of the zoning bylaw; they are under no illusion that “lot area” (bolded) can refer to land that is not the owner’s. Mr. Cieciura testified to this effect. Nor am I, the decision maker, taking the position that I have any power to affect ownership. The position taken by the plan examiner in the application of the by-law is conclusive.

My July 2019 Decision concluded:

> I am prepared to authorize the variances in Tables 1 and 2 when the TLAB receives notification from Mr. Wengus (copied to the City of Toronto and Mr. Vivona) that an encroachment agreement satisfactory to Mr. Vivona has been registered and the patio addition F has been removed.
>
> There is a time limit of six months, that is, January 15, 2020, at which time I would ask Mr. Wenus to report to the TLAB whether the conditions have been satisfied or not. If I do not hear from Mr. Wenus, or if he is unsuccessful, I will issue an Order to refuse the variances.

I did hear from Mr. Wenus before the deadline.

Further decision of January 07, 2020

Mr. Wenus reported that addition F had been removed and that he had drafted an encroachment agreement, which Mr. Vivona refused to sign. Mr. Wenus asked for further time because a representative of the title insurer needed time to investigate and I gave that time. My next Interim Decision concluded:

> Since Mr. Wenus reported in a timely fashion, the order to refuse does not have to be made. I asked that a telephone conference be convened with the title insurance representative invited. Apparently, this is not possible, and it is obvious the matter will have to be resolved through that process, and not at the TLAB. Accordingly, I am asking Mr. Wenus to report back to me January 15, 2021 and either I or the TLAB member assigned to the file in 2021 will decide what to do. For my part it appears that Mr. Wenus’ client has acted in good faith up to this point and **I do not see why the variances should not be granted if the encroachment issue can be resolved.**

In September 2019, Mr. Vivona retained Mr. Mitassov who negotiated first with Mr. Wenus and then with Mr. Kanter, culminating in an exchange of letters in December 2020. Mr. Kanter asked that I finalize the matter pursuant to the last sentence of the January 2020 Decision. Mr. Mitassov replied:

> Despite further good faith negotiation by the Vivonas, the encroachment issue has not been resolved. Specifically, the following parts of the most recently proposed (On Nov 19, 2020) encroachment agreement are not agreeable to the Vivonas:
>
> - The prohibition on using their own side of the dividing wall (this request appears to have been dropped by Mr. Kanter in his Dec 03, 2020 letter to you).
> - The proposed compensation – The Vivonas' most recent request was for $19,500.00 (reduced from their original request).
>
> Your previous decisions are quite clear: the variances can only be granted if the encroachment issue is resolved. Although the parties' positions are quite close, the encroachment issue is not yet resolved.

Upon consideration of Mr. Mitassov's 2020 letter I studied my bolded words and although they could have been better worded, it is my view that I left open all options if the encroachment agreement could **not** be resolved. Indeed, new information came from Mr. Kanter on a possible way to deal with the encroachment outside this hearing.

I convened a video hearing for Feb 2, 2021 to finalize the matter. Mr. Kanter's position was that while I had no authority to deal with ownership, he was prepared to agree to a condition that **some form** of agreement be registered, which would preserve either party's right to seek possessory title from the courts and leave open the question of compensation. For obvious reasons I do not think I should attempt to enter into those negotiations. Mr. Mitassov's position was that no variances should be granted for the reasons set out in his letter. His oral submissions did not dissuade me from granting the variances, because the variances **are** justified, based on the uncontradicted planning evidence I heard from Mr. Cieciura. I find the variances individually and cumulatively met the tests of *the Planning Act* and are minor and appropriate.

There exists jurisdiction in the *Planning Act* for me to attach a condition to a variance along the lines of what Mr. Kanter suggested, if I find that it is "advisable"[1]. I do not. While it was appropriate for me to allow the parties to discuss the issues with a view to settlement, that time has ended. I think in finalizing this decision, my first duty is to do so, without "putting my thumb on the scales" of the continuing encroachment dispute.

DECISION AND ORDER

I authorize the variances set out in Tables 1 and 2, on these conditions:

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[1] Conditions in decision 45 (9) Any authority or permission granted by the committee . . .may be for such time and subject to such terms and conditions **as the committee considers advisable** and as are set out in the decision.

1. that construction is in substantial compliance with Diagram 1 in this Decision, minus addition F;
2. nothing in this authorization implies a right to encroach on land that is not owned by Mr. Kumar.

X

Ted Yao
Panel Chair, Toronto Local Appeal Body