Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, February 08, 2022

PROCEEDING COMMENCED UNDER Section 45(12) of the *Planning Act*

Appellant(s): ANN MASTERSON

Applicant(s): LANESCAPE INC

Property Address/Description: 1798 DUFFERIN ST

Committee of Adjustment File Number(s): 21 126938 STE 09 MV (A0475/21TEY)

TLAB Case File Number(s): 21 211597 S45 09 TLAB

Hearing dates: January 27, 2022

DECISION DELIVERED BY T. YAO

Ryan Fernandes	Owner
Craig Race	Expert Witness
Ann Masterson	Appellant

INTRODUCTION

The proponent and owner, Ryan Fernandes, wishes to build a two-storey laneway house at the rear of his house at 1798 Dufferin St. To do so he needs three variances as set out in Table 1.

Table 1. Variances sought for 1798 Dufferin

From Zoning By-law 569-2013			
		Required/Permitted	Proposed
1	Distance from main residence	At least 7.5 m	Only 6.0 m
2	Front main wall of laneway	Can't penetrate the angular plane	Penetrates the angular plane

3	Height of laneway suite building	4 m	6 m

On August 25, 2021, the Committee of Adjustment granted these variances. Ms. Masterson, owner of the property next door, appealed and so this matter came to the TLAB.

Variance a privilege

There is no right to a variance; the obligation is on the proponent, Mr. Fernandes, to demonstrate his application meets all the prerequisite elements of s .45(1) of the *Planning Act*, relating to variances.

MATTERS IN ISSUE

The three variances require some explanation, and I will try to explain that at base, since we are dealing with only one variance; the height and angular plane variances being subordinate to the separation distance variance.

If the laneway house was built 7.5 m from the main building, Mr. Fernandes could build 6.0 m high as of right. He would be required to create an "angular plane" which means the roof must slope back 45º, starting at the top of the front wall, which will be 4.0 m (13 feet) high. The proposed house respects these second requirements (height and angular plane) but needs these two additional variances because a house that is closer than 7.5 m can only be 4.0 m high and the closeness makes the angular plan "penetrate" in an unpermitted way.. So, this is in effect one variance, with two related geometric measurements.

Notwithstanding, each of variances must cumulatively and individually:

- 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 main Official Plan policy is s. 4.1.5 of the Official Plan of the City of Toronto in which the physical form of the development must "fit in" physically with the surrounding neighbourhood. However, a proponent of laneway housing does not have to "start from scratch"; Council has already decided that a laneway house that is located 7.5 m from the main house can have the same profile measurements (height and angular planes) that Mr. Fernandes's architect, Craig Race, has specified. In other words, laneway housing is acceptable at the height proposed, at the requisite separation distance. The question then is does this same laneway house, but with reduced separation distance still "fit in"?

EVIDENCE

Mr. Fernandes called his architect Mr. Race, whom I qualified as able to give opinion evidence in the area of architecture. Ms. Masterson, assisted by her son, Mr. Goldstein, testified on her own behalf.

Ms. Masterson's evidence consisted of an Expert's witness statement, in which she asks to have the status of local knowledge expert, photographs, and a form letter signed by 17 persons who share her concerns, her master witness statement and a calculation of interior volume. She also filed a planning report dated November 9, 2021, which both parties used, and will be referred to from time to time in this decision.

I attended at the premises prior to the hearing to conduct a site visit. The purpose of the site visit is not to gather my own evidence but to better understand the context and the evidence to be presented.

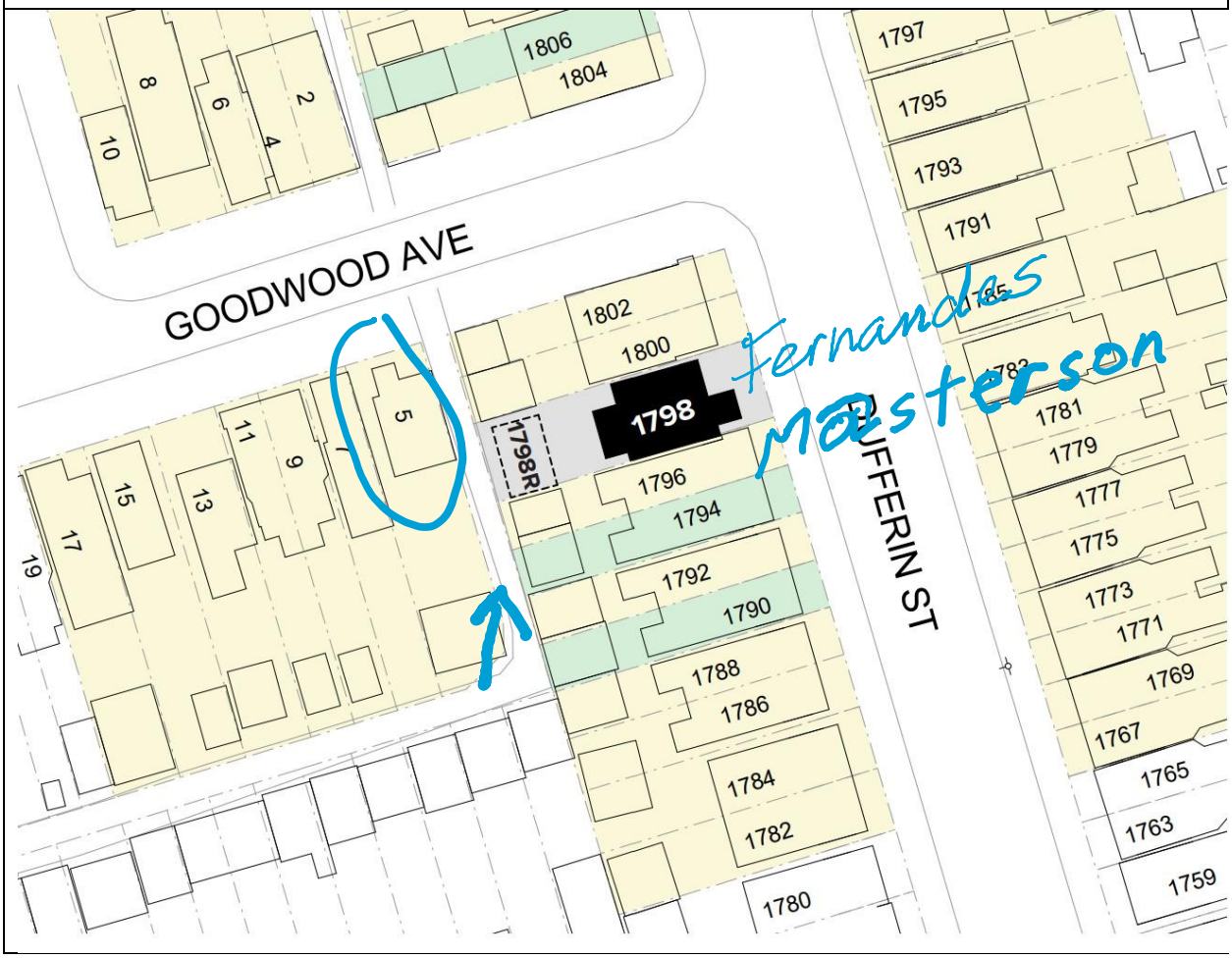
ANALYSIS, FINDINGS, REASONS

The issue is the separation distance; not laneway housing in general

Ms. Masterson believes that that Mr. Fernandes ought to have restricted himself to an as-of-right building; that is, should not have applied for a variance at all. She cited the November 9, 2021 report that said that only 30% of laneway suite applications were accompanied by a variance request. She asks, "Why couldn't Mr. Fernandes have similarly restricted himself?"

A by-law with application to the whole City cannot anticipate all circumstances. The Province has created the variance process; it is part and parcel of the *Planning Act*. Proponents must meet the four tests; it is not for the opponent to simply say that the proponent should be disqualified from this section of the *Planning Act.*

Figure 3. Plot plan of proposed suite[1]



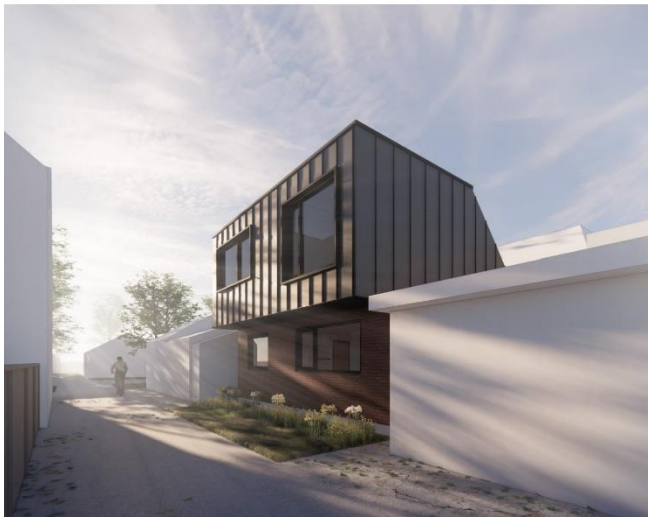
Mr. Race's thesis is that the Dufferin lots are shallower than a "standard" lot and if he adhered to the required separation distance, the second floor would be too thin front to back and therefore "unusable". He notes the Fernandes lot is 9.17 x **32.1 m** (30 by 105 feet) and this depth of lot has caused the request for the separation distance variance. If the Dufferin lots (i.e., those north and south) were the same depth as 5 Goodwood (circled in Figure 3 above), **38.1 m** or 125 feet, Mr. Race said he would not need a variance nor would he support one.

[1] The blue arrow indicates the direction and viewpoint of the artist making the sketch on page 5 of this decision.

Notwithstanding, Ms. Masterson objected to the closeness of the proposed laneway suite to her rear wall at 1796 Dufferin (3.81 m and 2.28 m to her window awning) and to its "looming oppressive presence".[2]

The by-law could have specified minimum distances to buildings or window awnings of adjacent landowners, but did not. The laneway corner nearest Ms. Masterson's building is close but it is only one storey. Figure 3 shows that the six semis south of #1798 Dufferin all have longer buildings than that of Mr. Fernandes. Given the lack of setback requirement for adjacent buildings, I find the 3.81 m from the laneway house to Ms. Masterson's should not be reason to reject the application.

As set out above, a second floor built to by-law standards would have a very short front to back dimension. With a larger floorplate, two second floor bedrooms can be accommodated. In my view, this is maintaining the intent of the Official Plan that promotes "complete communities", or, in Mr. Fernandes's words, a "family friendly" design. Ms. Masterson agrees that a two bedroom design is more conducive to a family with children than a one bedroom, although she remains opposed to the application.



A 6.0 m high building with one bedroom, even if were 7.5 m from the main building, would have virtually the same shade, privacy and other impacts. These were tradeoffs intended by Council to find more housing in "*Neighbourhoods*".[3] I find the intent of the Official Plan is maintained by Mr. Race's design including its shorter building separation distance.

The relation to 5 Goodwood

The laneway suite's two west windows face 5 Goodwood's side wall and rear yard (5 Goodwood is the circled property). Mr. Race said the height of 5 Goodwood is "well above 6 m" and he felt his building was in an "appropriate" spatial relationship with 5 Goodwood.

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[2] "The proposed development is too close to the property in question and even closer to my house at 1796 Dufferin; my rear wall is 3.81m and my window awnings 2.28m from the proposed laneway suite (see attached photo B, C, D). Such proximity would be incredibly intrusive and domineering. . . ."
the mass and scale of a 6m structure will cast us all in shade, impinge privacy and create a looming oppressive presence. (Masterson witness statement)

[3] Capitalization and italics are used to show defined terms in the Official Plan. The Neighbourhoods designation, (that is, what the OP colours yellow) comprise about 70% of Toronto's land area.

The Min family (#5 Goodwood) wrote to the Committee of Adjustment in opposition to Mr. Fernandes on August 18, 2021 and signed the petition in December 2021. They said that they are considering installing windows on the face opposite the new laneway suite.

They did not make Ms. Masterson their representative. At some point I have to respect the TLAB Rules in that Ms. Masterson and Mr. Fernandes filed material, appeared and spoke at the hearing and the Mins did not. I accept Mr. Race's opinion of an appropriate relationship to the Mins' house over Ms. Masterson's testimony that the Mins' privacy is breached. I find the shortening of the separation distance would not unduly affect 5 Goodwood and this is a desirable use of the land.

The issue of "minor"

Ms. Masterson objected to any finding that the variances are "minor". She noted the mathematical difference between 4.0 m and 6.0 m (4.0 m being the allowable height for a closer separation, and 6.0 m being the maximum height for all laneway suites where there is no separation issue) is "**50%".** She said that if your mortgage payments increased 50% you wouldn't consider the increase "minor". I have appended a court case, *Colekin vs McNamara*,[4] in which the objector made a similar argument. In *Colekin*, the court said the decision maker has wide discretion to interpret "minor".

Here, the intent of the zoning by-law is to require a 7.5 m separation distance, which is to ensure some private amenity space for the residents of both the main house and the laneway house. Mr. Race testified that the resulting back yard would still be bigger than each of the 6 back yards south of the proposed laneway suite. Notwithstanding Ms. Masterson's argument, I consider the reduction in separation distance from 7.5 m to 6.0 m to be minor. It is not a percentage calculation against the by-law standard but a purposeful analysis of the degree of reduction, informed by the context, the various policies and importance of the reduction in the overall city building goals as specified by Council.

The November 2021 zoning amendments

Council has created somewhat of a moving target for Ms. Masterson, which is to Mr. Fernandes's benefit. The report of Nov 9, 2021 was a two year review of the

[4]McNamara was the successful owner of the building and Colekin was the unsuccessful neighbour.

laneway amendments[5]. As a result of this review, Council passed new amendments[6] "tweaking" the dimensions in a way that favours laneway housing. For example, a suite can be closer to the laneway and higher. These amendments mean that should Ms. Masterson prevail in her appeal, Council has changed the standards to pretty much allow Mr. Fernandes to build the same thing. This is certainly a powerful argument that this application maintains the intent of the zoning by-law of the City of Toronto.

In conclusion, I find the statutory tests are met cumulatively and individually.

DECISION AND ORDER

I authorize the variances in Table 1 on the following Conditions of Approval:

1) The two-storey laneway suite shall be constructed substantially in accordance with the plans date stamped received by the Committee of Adjustment on March 14, 2021. Any other variances that may appear on these plans and are not listed in the written decision are NOT authorized.

2) Prior to the issuance of a building permit, the applicant/owner shall comply, to the satisfaction of the Chief Engineer and Executive Director, Engineering & Construction Services, with the following: (i) Submit revised site plan drawings to show the following along with the respective dimensions:
   (a) An at grade waste storage area on private property that is at least 3 m x 1 m with a 1.5 m height, configured to allow bins to be transferred to Dufferin Street for City collection; and
   (b) Suitable/compliant fire access route(s) for laneway suites with entrance from the Municipal Street OR laneway.

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[5] In 2018, along with approving By-law and Policy changes to allow the construction of laneway suites, City Council directed City staff [to] monitor the implementation of laneway suites and begin drafting a report on the monitoring period with in the earlier of 2 years or the issuance of the 100th laneway suite building permit.

In 2021, the City retained Gladki Planning Associates to assist in the Laneway Suite monitoring work. The report from Gladki Planning Associates was submitted to the City in October 20,21. . . .The City's Final Report on the Laneway Suites Monitoring Initiative will be published online in advance [of] the November 25, 2021 Planning and Housing Committee meeting. (from the City's website)

[6] By-law 1107-2021, adopted Dec 15, 16 and 17, 2021.

Ted Yao
Panel Chair, Toronto Local Appeal Body

Re McNamara Corporation Ltd. et al. and Colekin Investments Ltd.

15 O.R. (2d) 718
ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
EVANS, C.J.H.C., WEATHERSTON AND ROBINS, JJ.
19TH APRIL 1977.

Planning legislation -- Zoning -- Minor variances -- Meaning of "minor" -- Whether variance amounting to complete elimination of requirement of by-law may be minor -- Planning Act, R.S.O. 1970, c. 349, s. 42.

Pursuant to s. 42 of the Planning Act, R.S.O. 1970, c. 349, a committee of adjustment, and thereafter the Ontario Municipal Board, has power to authorize minor variances from the provisions of any by-law. The term "minor variances" is a relative one and should be flexibly applied. It is not proper for the Committee of Adjustment or the Board to determine that its jurisdiction automatically ends whenever the variance sought amounts to a complete elimination of a requirement of the zoning by-law.

APPEAL from a decision of the Ontario Municipal Board allowing an appeal from a decision of the Committee of Adjustment permitting a minor variance.

[Re 251555 Projects Ltd. and Morrison (1974), 1974 CanLII 750 (ON SC), 5 O.R. (2d) 763, 51 D.L.R. (3d) 515; Re Perry et al. and Taggart et al., 1971 CanLII 488 (ON SC), [1971] 3 O.R. 666, 21 D.L.R. (3d) 402; R. v. London Committee of Adjustment, Ex p. Weinstein, 1960 CanLII 162 (ON CA), [1960] O.R. 225, 23 D.L.R. (2d) 175 sub nom. Re City of London By-law; Western Tire & Auto Supply Ltd. and Weinstein, refd to]

M. J. McQuaid, for appellants.

I. A. Blue, for respondent.

The judgment of the Court was delivered by

ROBINS, J.:-- This appeal raises a question of jurisdiction of the Ontario Municipal Board and committees of adjustment to authorize minor variances under s. 42 of the Planning Act, R.S.O. 1970, c. 349.

The appellants are the owners of a building located at the corner of Yonge St. and Dundas Sq. in downtown Toronto which in 1973 was converted from a theatre to retail stores and office space. In 1975 Classic Bookshops rented 3,490 sq. ft. on the ground and second floors of the building for the retail sale of books and subsequently an additional 5,968 sq. ft. in the basement. No access was available from the ground floor of the store to the basement, and consequently the owners agreed to construct a stairwell connecting the two areas. They duly applied to the Building Department for the building permit necessary to do the renovations. Their application was, however, refused because City of Toronto Zoning By-law 20623 requires that retail stores with a floor area in excess of 6,000 sq. ft. have loading facilities. Here the owners would be required by the by-law to:

> ... provide and maintain at the premises loading facilities, on land that is not part of a highway, comprised of one or more loading spaces, each not less than thirty (30) feet long, twelve (12) feet wide and having a vertical clearance of at least fourteen (14) feet, according to the floor area of the building or structures as follows:
>
> Number of Floor Area Loading Spaces
>
> 6,000 square feet or less none
>
> from and including 6,001 square feet to and including 25,000 square feet 1 loading space.

While no loading space was needed for premises the size of the existing store, the addition of a basement section produced a total floor area of 9,450 sq. ft. bringing into play the by- law calling for one loading space. Because, however, the building occupies the entire parcel of land on which it stands, it is impossible for the owners, short of demolishing a part of it, to comply with the by-law. In an effort to solve the problem they retained an architect to design an alternate system for unloading merchandise. He devised a "loading chute" that is to be located at the rear of the building within easy access from the street and which, it appears, constitutes a safe, efficient and satisfactory method of unloading, equal or perhaps superior to the method stipulated in the by-law.

The owners then applied to the City of Toronto Committee of Adjustment for relief from the provisions of the zoning by-law. The committee found the application a reasonable one and, acting under the jurisdiction conferred on it by s. 42(1) of the Planning Act, R.S.O. 1970, c. 349, to authorize minor variances, exempted the owners from the by-law requirement on condition that a loading chute be installed instead.

This decision was appealed by the respondent, the owner of a nearby building in which a Coles Book Store is located, to the Ontario Municipal Board.

On an appeal to the Municipal Board, the Board, by virtue of s. 42(16) of the Planning Act, may dismiss the appeal and may make any decision that a committee of adjustment could have made on the original application. The power of a committee in the first instance and the Board on appeal to authorize variances is found in s. 42(1):

> 42(1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that implements an official plan or is passed under section 35, or a predecessor of such section, or any person authorized in writing by the owner, may, notwithstanding 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 is desirable for the appropriate development or use of the land, building or structure, provided that in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

In this case the Board, after hearing the appeal and considering the requirements of s. 42(1) -- see Re 251555 Projects Ltd. and Morrison (1974), 1974 CanLII 750 (ON SC), 5 O.R. (2d) 763, 51 D.L.R. (3d) 515 -- concluded: (i) that the variance requested is desirable for the appropriate development or use of the land, building or structure; (ii) that it is in keeping with the general intent and purpose of the zoning by-law; and (iii) that it is in keeping with the general intent and purpose of the official plan. But holding as a matter of jurisdiction that neither it nor the committee is empowered to authorize as a minor variance one which totally eliminates a by-law requirement, the Board allowed the appeal and set aside the committee's decision. Its reasoning was expressed in the following terms:

> ... a variance from one loading space to no loading space, which is what is requested here, cannot be considered minor. The by-law says that between 6,000 square feet and 25,000 square feet, you must provide one loading space. To consider that variance as minor would in my view, amount to completely obliterating the requirement, not just shaving it a little but obliterating it. To put it another way, it is not a variance but an exception. It completely eliminates the requirement and in my view that can only be done by the legislature, in this instance, the City Council of this City by an amendment to its zoning by-law. There is no jurisdiction, in my view, in the Committee of Adjustment or in the Board to find a variance from one to zero which completely eliminates the requirement as minor.

(Emphasis added.)

The Board erred, in my opinion, in its interpretation of the scope of its jurisdiction. By s. 42(1) it is empowered, as is a committee of adjustment, to authorize **"such minor variance ... as in its opinion is desirable for the appropriate development or use of the land, building or structure ...". There is nothing to be found in the section which deprives a committee or the Board of jurisdiction in the event a variance eliminates a by-law requirement or fully exempts an owner from it; nor, in my view, can the section be construed so as to preclude the Board or committee from granting as a minor variance one which completely releases an owner from a provision of a by-law.** (my bold)

The Legislature by s. 42(1) confided to committees of adjustment and ultimately to the Municipal Board the authority to allow "minor variances". The statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relative one and should be flexibly applied: Re Perry et al. and Taggart et al., 1971 CanLII 488 (ON SC), [1971] 3 O.R. 666, 21 D.L.R. (3d) 402 (Ont.H.C.). No hard and fast criteria can be laid down, the question whether a variance is minor must in each case be determined in the light of the particular facts and circumstances of the case. In certain situations total exemption from a by-law will exclude a variance from falling within the category of "minor variances". But not necessarily so. In other situations such a variance may be considered a minor one. It is for the committee and, in the event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as "minor".

Whether the variance proposed is in fact minor, is desirable for the appropriate development or use of the land, building or structure and maintains the general intent and purpose of the by-law and official plan are all matters to be judged by the committee and Board in relation to all the surrounding circumstances of the application. There is no warrant for concluding, as the Board here did, that its jurisdiction and that of a committee of adjustment is automatically cut off whenever a variance amounts to a complete elimination of a requirement of a by-law. It is for the Board and committee to decide whether, to take the case of the by-law in these proceedings, an owner of retail premises having an area more than 6,000 sq. ft. is entitled to a "minor variance" exempting him from the loading space provision; this issue is not removed from their jurisdiction solely because the effect of the variance is total exemption. Similarly, to take another example, in the case of side or rear yard set-back requirements, the fact the exemption sought is the full elimination of the set-back distance does not of necessity mean that the variance is not minor and must be beyond the jurisdiction of the committee and the Board. With the multitude of by-laws covered by s. 42(1) and the number of details they contain, there must be many instances where full exemption can properly be considered no more than a minor variance. It is, as I have said, for the committee and Board to make that determination.

Section 42 was enacted to provide a more expeditious and less cumbersome procedure than that required to effect a by-law amendment: R. v. London Committee of Adjustment, Ex p. Weinstein, 1960 CanLII 162 (ON CA), [1960] O.R. 225, 23 D.L.R. (2d) 175 sub nom. Re City of London By-law; Western Tire & Auto Supply Ltd. and Weinstein (C.A.). The owners in this case are entitled to have their application determined under the procedure of s. 42 and not required, as suggested, to seek relief from City Council by amendment to the zoning by-law unless the Board determines if it does on the merits of the matter that the exemption sought is not, as the Committee of Adjustment found, a minor variance.

In sum, the Board erred in law in concluding it was without jurisdiction in respect to the variance in question. As a result it improperly declined to exercise its statutory powers under the Planning Act. The appeal must therefore be allowed and the matter remitted to the Municipal Board for decision. Costs of the appeal and the application for leave to appeal will be paid by the respondent.