

# DECISION AND ORDER

**Decision Issue Date**      Tuesday, April 05, 2022

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): SANJAY KONESWARAN

Applicant: STIJLTREE

Property Address/Description: 21 SPALL CRT

Committee of Adjustment Case File Number: 21 122890 ESC 25 MV (A0102/21SC)

TLAB Case File Number: 21 164057 S45 25 TLAB

**Hearing date:**      Tuesday, March 29, 2022

**DECISION DELIVERED BY TLAB Panel Member S. Gopikrishna**

## REGISTERED PARTIES AND PARTICIPANT

Owner/Appellant	SANJAY KONESWARAN
Appellant's Legal Rep.	DEEP SAHOTA
Applicant	STIJLTREE
Primary Owner	PAVANANTHAN KUMARASAMY
Participant	KELLY MOHAMMED
Participant	BERNARDO PELAYO
Participant	MAZHAR TAQI RIZVI SYED
Participant's Legal Rep.	MUHAMMAD SYED

## **INTRODUCTION AND BACKGROUND**

Sanjay Koneswaran and Pavananthan Kumarasamy are the owners of 21 Spall Court, located in Municipal Ward 25 ( Scarborough-Rouge Park) of the City of Toronto. They applied to the Committee of Adjustment (COA) for the approval of a variance that would enable them to “build a new rear elevated deck with cover, remove the existing structure, and retain the existing cover”.

The COA heard the application on May 12, 2021, and refused the Application. The Applicants then appealed the decision to the Toronto Local Appeal Body (TLAB), which issued a Notice of Hearing on October 26, 2021 setting a Hearing date of January 31, 2022. Neighbours Kelly Mohammed, Bernardo Pelayo and Muhammed Syed elected to be Participants.

At the Hearing held on January 31, 2022, the Applicant was represented by Mr. Deep Sahota, a Designer, while Messrs. Kelly Mohammed, and Bernard Pelayo represented themselves. Mr. Muhammed Syed said that he represented another Participant involved with this Appeal, Mr. Mazhar Taqi Rizvi Syed. This Hearing had to be adjourned because the Applicants did not submit any pertinent information, inclusive of Witness Statements, Elevations and Plans, in support of their Application.

As a result of Interim Decision dated Feb 15, 2022, the Appellant, and Mr. Pelayo, submitted updated Witness Statements- the Appellant also submitted updated Elevations and Plans for the balcony.

## **MATTERS IN ISSUE**

### **Chapter 10.5.40.50.(4)(C), By-law 569-2013**

A platform or deck that is accessed from the first storey may be no higher than 1.2 m above the ground at any point below the platform.

The existing/proposed rear platform is 2.75 m above the ground, and extends to 4.93 m beyond the rear main wall

## **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 for the Greater Golden Horseshoe for the subject area (‘Growth Plan’).

### **Variance – S. 45(1)**

In considering the applications for variances from 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**

At the Hearing held on March 29, 2022, the Appellant was represented by Mr. Deep Sahota, an Architectural designer, while Participants Bernard Pelayo, Mohammed Kelly represented themselves. As stated earlier, Mr. Mazhar Syed, one of the Participants, was represented by his son, Mr. Mohammed Syed. All the Participants live on Calverley Trail, and reside in houses whose backyard is adjacent to houses on Spall Trail- the backyard of 18 Calverley Trail, where Mr. Syed lives, is directly behind 21 Spall Trail. Mr. Bernard Pelayo lives at 16 Calverley Trail, while Mr. Kelly Mohammed lives at 12 Calverley Trail.

Mr. Sahota was affirmed to give evidence on behalf for the Applicant. He recited By-law 10.5.40.50(4), and stated that since this “property has a walk out basement, it renders the possibility of putting a deck to be accessed from the main floor impossible”. He said that in order to be able to construct a deck, the Applicants need to have an access point from some point higher than the ground, resulting in the requested variance. He added that the homeowner’s request for this variance was “fair, and should be approved”. He added that the community members in opposition were more concerned about issues not before the TLAB, such as the possibility the space on the deck would be enclosed, or the size of the deck.

When I asked Mr. Sahota about the relationship between the variance in front of the TLAB, and the Official Plan, he referred to the By-law 10.5.40.50(4), and attempted to discuss the same. I reminded him that the Zoning By-law, and the Official Plan were completely different documents, and specifically asked which policies in the Official Plan were applicable to the variance before the TLAB. Mr. Sahota admitted that he did not know the answer. When I asked him if he had consulted the OP as part of his preparation for the TLAB Hearing, he said that he had consulted the document, but could not remember the relevant portions.

Discussing the intention and purpose of the By-law, Mr. Sahota said that the intention of the Zoning By-law was to “maintain the characteristic of the neighbourhood”. He referred to the “massing of the building”, defined it to be “a 3 D accumulation” of the building, and claimed that they could “still build the addition”, which meant that the character of the neighbourhood was not being changed.

I next asked Mr. Sahota if he was familiar with the expression “performance standard” in the context of the Zoning By-law, to which he replied in the affirmative. When asked to provide a definition of a “performance standard”, he said that that the “deck was going out of its way”, before stating “ I am losing my vocabulary”, after which he again referred to how they were “basically not able to comply” with the Zoning By-law.

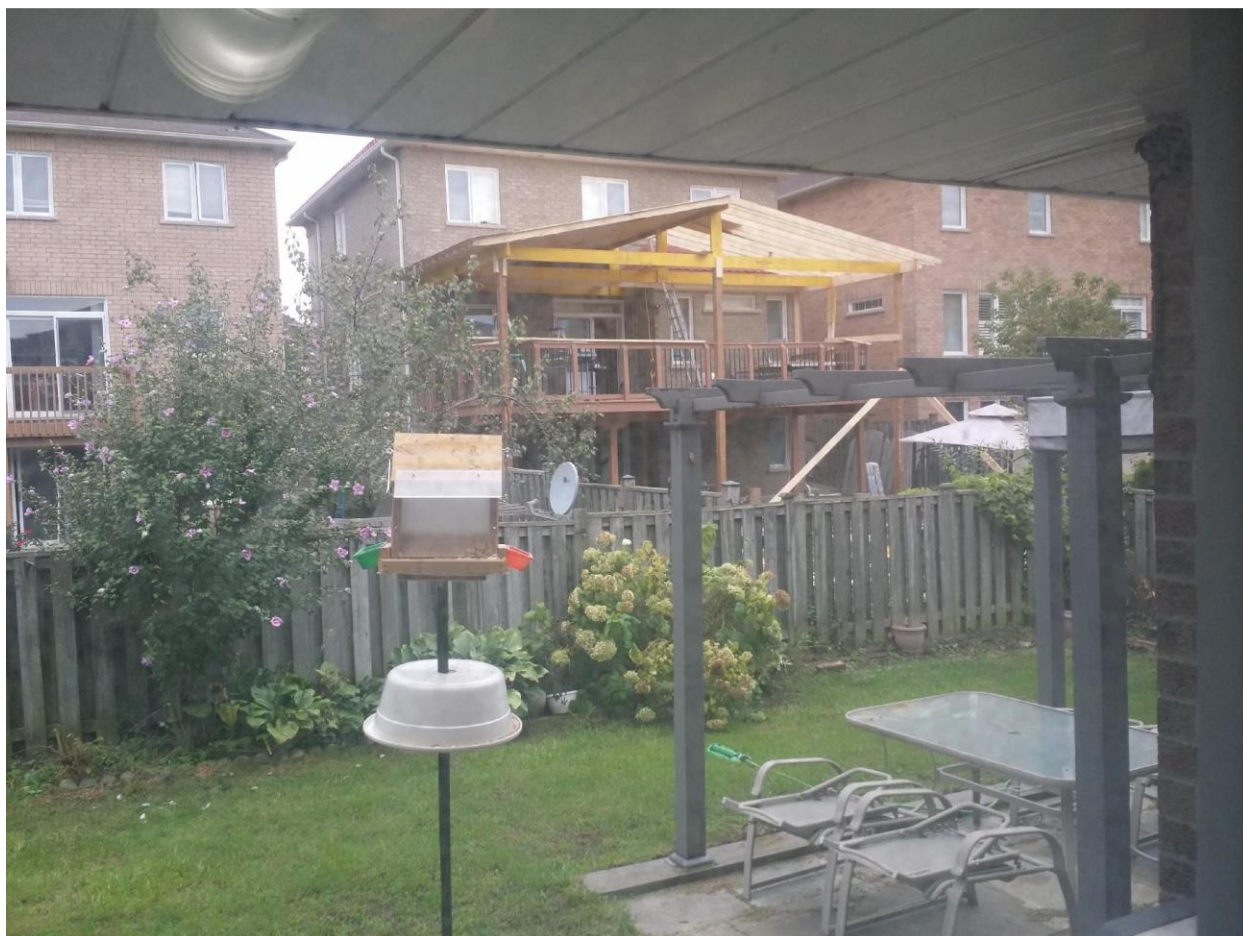
When asked about the test of appropriate development, Mr. Sahota said that many other houses in this neighbourhood had similar balconies, and brought up a Google picture of the backyards of the Subject Site, and its neighbour and pointed to “how big” the balcony at the adjoining house was. When asked how did he establish the size of the balcony in the neighbouring house, Mr. Sahota said that he “estimated” the size. He said that 50% of the houses on Spall Court had similar balconies at the back of the house, and added that he had estimated this from aerial photographs of the area.

When asked about the test of minor, Mr. Sahota stated in so many words that he hadn’t looked into the test of minor.

It is also important to note that in response to many questions from me about the character of the neighbourhood, establishment of the General Neighbourhood, and the Immediate Context, Mr. Sahota’s answers were “I have not looked into it”, or “I looked into it, but don’t the answer off the top of my head”, or “The neighbours’ objections have nothing to do with the variance”.

By way of an editorial comment, the comments provided by the Opposition are not recited detail, but are summarized below, for reasons discussed in the “**Analysis, Findings and Reasons**” Section. It may also be noted that there was significant overlap between the evidence provided by the members of the Opposition:

The history of the deck at 21 Spall was recited- according to the Opposition, the deck was enlarged from what was provided at the time of the construction of the house in early 2020 to its present size, and was referred to repeatedly as a “monstrosity”. The Opposition asserted that the covered deck “does not comply with the intent and purpose of the Official Plan because rain and snow melt is not allowed to absorb into the ground and is forced to run off into neighbours backyards”. As stated earlier, all the Members in opposition to this proposal lived on Calverley Trail, and emphasized that Spall is parallel to Calverley, but is at a higher elevation. The Opposition Members stated that because of the difference in height, and the extra height of the deck in question from the ground, the residents of 21 Spall could look into the kitchen, dining room, and backyard space of the houses of the three individuals in opposition. They were in agreement that the variance respecting the height of the deck should not be approved, because it deprives the neighbours of “privacy and use of their backyards”. They emphasized that the deck “is so high above grade” , and above the fence separating the properties, that there is overlook into all of “our bedrooms, family room, dining room and kitchen windows”. The individual living closest to the back of the Subject Property, Mr. Syed provided the picture that appears on the next page, to demonstrate the impact of the built deck:



**PICTURE 1- VIEW OF THE DECK BUILT AT 21 SPALL COURT, FROM THE BACKYARD OF 18 CALVERLEY, WHOSE OWNER ASSERTS THAT THE DECK IS A MAJOR INTRUSION ON THEIR PRIVACY**

In addition to privacy issues, the Opposition members also claimed, that because of the natural incline from Spall to Calverley, their houses are impacted by “basement and backyard flooding”. The Applicants also expressed a concern that the deck could be enclosed by a permanent roof, “eventually converting the deck to an unpermitted addition”.

Lastly, they expressed concerns that because the existing/proposed rear platform extends to 4.93 m beyond the rear main wall, the result “is a very big deck”. The Opposition asserted that “the rear platform is twice the size it should be”, and showed me photographic examples of smaller decks on other houses, as provided by the original builder. In response to a question, from me about the height of the first floor of the residences on Calverley Trail, they said that the height was 8 feet, which is how the residents of the property in question could look into the kitchen of the opposition.

Concerns were expressed about how not addressing this deck would result in the creation of a “precedence”- the trend to build “gigantic decks” would be promoted if this behavior were left unchallenged.

In Reply, Mr. Sahota stated that there was “negligible” impact as a result of the overview from the deck, and attempted to justify the view from his client’s deck into the neighbourhood through a hand-sketch made on the spot, and a reference to the Pythagoras theorem. I asked Mr. Sahota if he could apply the Pythagoras Theorem, when the latter applied only to a right angle triangle, which did not exist in the case on the Subject Property, because of the slope from Spall towards Calverley Train, as stated repeatedly by the Opposition. Mr. Sahota’s answer was that he had referred to Pythagoras’ theorem was for “explanation’s sake”, and that the inclined plane between the house and the property line was close to a right angle triangle, even if not a perfect right angle triangle. When asked if he had measured any of the three sides in the triangle formed by the base of the house, height of the deck, and their separation from the property line, he said that he had “visually estimated the same”, but did not provide any details. He also discussed how there was bound to be “some” overlook in a dense urban setting, but did not provide a specific answer about how the photograph provided in the previous page corresponded to such “overlook”.

I asked Mr. Sahota if he had any other information to provide, to which he replied in the negative.

I thanked the Party, and Participants, for their evidence, and stated that I would release my Decision soon.

## **ANALYSIS, FINDINGS, REASONS**

To state the obvious, the Hearing before the TLAB is a Hearing *de novo*, the implication of which is the burden of proof lies with the Applicants. In this case, the Applicants had little to offer by way of evidence. It is important to note that the Applicant has to prove that the proposal meets the four tests under Section 45.1 of the OP at a minimum; disproving the Opposition’s case does not automatically prove the Appellant right- Evidence is a not a zero sum game with dual outcomes, where the Appellant is right, or the Opposition in right. Claiming that the concerns of the Opposition have nothing to do with the proposal accomplishes absolutely nothing to prove that the variance satisfies the four tests under Section 45.1 of the Planning Act.

I am prepared to accept the explanation about why the deck cannot be built at house at the ground level, namely, because of a walk- up basement in the ground floor. According to the Applicants, the consequence of this is that the deck has to be built at the second floor level. It is important to note that the Applicants had no information whatsoever about the Official Plan, and could not identify applicable Policies, let alone apply them to the proposal- I was intrigued by their ostensible innocence about the Official Plan, because they discussed the Zoning By-law, when asked about the former.

**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna**  
**TLAB Case File Number: 21 164057 S45 25 TLAB**

I therefore find that the proposal does not satisfy the intent and purpose of the Official Plan.

The Appellants are in error, when they claim that the intention and purpose of the Zoning By-law is to ensure that the character of the neighbourhood is maintained. They couldn't explain what a "Performance Standard" means, as can be seen through their meandering answer, which began with the "deck was going out of its way", before joking about a "loss of vocabulary", culminating with a reference to how they were "basically not able to comply" with the Zoning By-law.

As a result, I find that the proposal does not satisfy the intent and purpose of the Zoning By-law.

I find that the proposal does not satisfy the test of appropriate development, based on the Appellants' asserting that 50% of the houses have large balconies, and that many of them are higher than the 1.2 metre height allowed under the Zoning By-law, because this assertion is not backed by accurate height measurements, but by visual estimation instead.

Lastly, no evidence was offered by the Appellants in support of the proposal's satisfying the test of minor. The Opposition's concerns focused on the impact of the height of the deck on their properties-the crux of their complaints was that the height of the deck, in conjunction with the slope of the ground between Spall and Calverley is such that somebody standing on the deck of the house at 21 Spall can clearly look into every room at the back of 18 and 16 Calverley. I find it highly inappropriate and inconsiderate that the Appellants tried to trivialize the Opposition's objections by claiming that they related to the size of the deck, and not the variance before the TLAB. I am not convinced by the Appellants' asserting that overlook is to be expected in an urban setting, because the Opposition's description is consistent with unacceptable adverse impact, as opposed to overlook that can be expected in any dense, urban setting.

Consequently, I find that the proposal does not satisfy the test of minor. Given that the proposal has not satisfied any of the four tests under Section 45.1 of the Planning Act, I find that the variance must be refused. As a result, I find that the Appeal respecting 21 Spall needs to be refused.

The evidence provided by the Opposition does not have to be recited, or analyzed in detail, because the Appellant, to reiterate, has not satisfied their onus in terms of evidence. I also find that while the issue of overlook and privacy brought up by the Opposition are relevant, other issues such as flooding are outside the jurisdiction of this Tribunal.

## FINAL DECISION AND ORDER

1. The Appeal respecting 21 Spall Court is refused, and the decision of the Committee of Adjustment (COA), dated May 12, 2021 is confirmed.
2. The following variance is refused.

### Chapter 10.5.40.50.(4)(C),

A platform or deck that is accessed from the first storey may be no higher than 1.2 m above the ground at any point below the platform.

The existing/proposed rear platform is 2.75 m above the ground, and extends to 4.93 m beyond the rear main wall

So orders the Toronto Local Appeal Body



X

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S. Gopikrishna  
Panel Chair, Toronto Local Appeal Body