

DECISION AND ORDER

Decision Issue Date Thursday, June 30, 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): MICHELE ADELE CHANDLER

Applicant: CZC BUILDING CONSULTANTS LTD

Property Address/Description: 67 ALCORN AVENUE

Committee of Adjustment Case File Number: 20 211563 STE 12 MV (A0990/20TEY)

TLAB Case File Number: 21 163306 S45 12 TLAB

Hearing date: Wednesday, June 01, 2022

DECISION DELIVERED BY S. Gopikrishna

REGISTERED PARTIES AND PARTICIPANT

Appellant Michele Adele Chandler

Appellant's Legal Rep Robert Gilfoil

Primary Owner Donald Wong

INTRODUCTION AND BACKGROUND

The Introduction and Background to this Appeal, as well as my instructions issued orally to the Parties on February 22, 2022, can be found in my Interim Decision, released on March 14, 2022. The Parties followed through on my instructions, and completed their submissions by April 22, 2022.

The TLAB scheduled a second Hearing for June 2, 2022.

MATTERS IN ISSUE

1. Section 10.10.40.10.(2)(B)(ii), By-law 569-2013

The maximum permitted height of all side exterior main walls facing a side lot line is 8.5 m. The altered dwelling will have a side exterior main wall height of 8.99 m facing aside lot line.

2. Section 10.10.40.70.(2), By-law 569-2013

The minimum required rear yard setback is 7.5 m. The altered dwelling will be located 7 m from the rear lot line.

3 Section 10.10.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index is 1 times the area of the lot (119.65 m²). The altered dwelling will have a floor space index of 1.44 times the area of the lot (172.78 m²).

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

A minimum of one parking space is required for the dwelling unit. No parking spaces will be provided.

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 of the Greater Golden Horseshoe for the subject area ('Growth Plan').

Minor 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 June 1, 2022, the Applicant, Mr. Wong was represented by Mr. Hong Zhou, an architectural designer, while the Appellant, Ms. Chandler was represented by her husband, Mr. Robert Gilfoil.

At the beginning of the Hearing, I sought a clarification from Messrs. Wong, and Gilfoil, if a Settlement had been reached, because some of the material submitted by the Applicant alluded to a Settlement. It emerged that the Parties had discussions about

various issues respecting the Appeal, as a result of the Applicants had made certain “concessions”. According to the Applicants, the concessions that they were willing to make were sent to the Appellants by way of an email, with the understanding that this constituted a Settlement Agreement. As per the Appellants, the email in question had not been received by them- in other words, after the conversation between the Parties, there was no response from the Applicants, when the Appellants requested that “something be put down in writing”. On the basis of this information, I concluded, and stated to the Parties, that no Settlement had been reached, as per the TLAB’s understanding, and that we would proceed forward, as a contested proceeding.

Mr. Zhou was affirmed, and proceeded to give evidence in support of the proposal at 67 Alcorn. The highlights of his evidence are as follows:

Speaking to the street view of Alcorn Avenue, Mr. Zhou said that the majority of the properties on Alcorn, and its adjacent streets consist of 2-3 storeys. He added that the proposed massing and size of their proposal coincide “with that currently seen in the immediate area” (sic), before showing us examples of what he stated was the prevalent style in the neighbourhood.

Mr. Zhou clarified that they would be seeking an FSI of 1.44 X Lot Size,(as opposed to an earlier figure of 1.41) with respect to the FSI variance, as recited below:

The maximum permitted floor space index is 1 times the area of the lot (119.65 m²). The altered dwelling will have a floor space index of 1.44 times the area of the lot (172.78 m²).

Mr. Zhou then spoke to the “Zoning Intent”, and said that their design of the proposal provided for a significant setback at the rear yard to provide adequate green space and distancing. He stated that the requested height was well within what the Zoning By-Law allowed, to prevent shadowing impacts on adjacent properties, while side yard setback “were being maintained to provide easement, and access to rear yards”. Mr. Zhou stated that the proposed additions rest on “existing footprints and no substantial coverage is being proposed”. He emphasized that the proposal was “acceptable to the City’s Planning Staff”, because they had not raised any objections.

Speaking to the relationship between the proposal, and the Official Plan, Mr. Zhou referred to Chapter 4: Development Criteria, and recited the policy before pointing out how the proposal corresponded to specific components of Policy 4.1.5. He explained that the proposed design will maintain the street view of houses seen on Alcorn Ave, satisfying Component a)- *patterns of streets, blocks and lanes, parks and public building sites*. Mr. Zhou said that the façade of the building does not exceed other properties on Alcorn Ave and consequently satisfies Component (b) *prevailing size and configuration of lots*.

He emphasized that the proposed height of the building does not exceed the maximum building height, and maintains the style of “two and a half storey houses” seen on

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Alcorn Ave, thereby satisfying c) *prevailing heights, massing, scale, density and dwelling type of nearby residential properties*. Because the proposed style is “commonly found on Alcorn Ave”, Mr. Zhou asserted that the proposal satisfies component (d) *prevailing building type*, because the height and size of the proposed construction “does not exceed other houses on Alcorn Ave”, Mr. Zhou asserted that component (e)- *prevailing location, design and elevations relative to the grade of driveways and garages*, is satisfied. Because no changes are proposed to the front yard setbacks, Mr. Zhou said that Component (f)- *prevailing setbacks of buildings from the street or streets*, is satisfied. He relied on the proposal’s maintenance of the rear yard setbacks, “which provide adequate space in the rear yard, as intended by the By-law and does not exceed the maximum setback seen within the same block, Component (g) *prevailing patterns of rear and side yard setbacks and landscaped open space* is satisfied. Since there are no special landscape features, or heritage buildings on the Site, Components (h)- *continuation of special landscape or built-form features that contribute to the unique physical character of the Geographic Neighbourhood*, and Component (j)- *respecting heritage buildings, structures and landscapes*, do not apply.

When I asked Mr. Zhou about what was the prevailing type of building, and how had it been identified, he said that the prevailing type consisted of two, two and half, and three storeyed buildings, and said that he relied on a “visual examination of the community” to come to this conclusion.

When asked about how the proposal corresponds to the tests of appropriate development, or the test of minor, I was pointed to the table of variances approved by the COA for the neighbourhood, with a description of how the variances requested at the Site corresponded to what had been approved in the community, on the basis of which Mr. Zhou concluded that the proposal satisfied the test of appropriate development, and minor. Mr. Zhou drew my attention to “two townhouses in the vicinity, which were larger than the proposal”, but had been approved by the COA.

Mr. Zhou requested that the Appeal not be allowed, and that all the requested variances be approved, as requested. When asked about suggestions for conditions that could be imposed on the approval of the variances, he said that it “would be OK to impose a condition requiring the Applicants to build in substantial conformity with the submitted plans and elevations.”

I asked the Applicants to submit the updated variances by way of a Word Document, accompanied by the corresponding Plans and Elevations to the TLAB, within two weeks of the completion of the Hearing, to which the Applicants said that they could “get it in sooner”.

At the end of Mr. Zhou’s testimony, Mr. Gilfoil said that he wanted to ask questions of Mr. Zhou. Mr. Gilfoil asked a series of questions of Mr. Zhou to demonstrate that the character of Alcorn is different from other neighbouring streets included in the Applicants’ Neighbourhood, because the lot sizes, and houses on Alcorn are much smaller. Mr. Zhou said that the “style of houses is the same on Alcorn, and its

neighbouring streets, resulting in comparable character on the various streets being considered in the Neighbourhood". When Mr. Gilfoil pointed out to 72 Alcorn, (where a FSI variance had been granted by the COA), and asked Mr. Zhou whether the variance had been approved before the construction was completed, or whether the construction was completed before the variance was sought, I intervened to state that from a planning perspective, the sequence had no significance, and that what was important to note is the COA's approval of the variance, because they had the ability to refuse the variance if they thought it inappropriate. Mr. Gilfoil had other questions about excavation, constructions and other issues, on which I permitted limited discussion, because these issues are not relevant from a planning perspective. Consequently, the questions (and answers) are not repeated here.

The next Witness to provide evidence was Ms. Michele Chandler, the resident of 69 Alcorn Ave, and the Appellant in this matter. She said that the neighbourhood has its borders "dictated by restrictions to through traffic, with Cottingham St and the CN rail tracks to the south, Walker Ave to the North, and east/west borders are Avenue Road, and Yonge Street". According to Ms. Chandler, "each street in this area has its own distinct character". As examples," Burch and Cottingham are an open area with a collection of semi-detached homes surrounding the Cottingham Elementary School and Lionel Conacher Park". According to Ms. Chandler, "Walker Avenue consists of large, detached homes with large, 10-to-15-meter setbacks on the north side, and older semi- detached homes with smaller setbacks on the south, of which Alcorn Avenue is the most dense. The north side of Alcorn Ave has a large stretch of mid-1980's townhouses with laneway access behind. The number of houses on Alcorn Ave far exceeds the numbers on Birch, Walker, and Cottingham, and the narrow nature of Alcorn Avenue is the densest configuration of housing in the immediate neighborhood.."

After the detailed description of the neighbourhood above, Ms. Chandler stated that an important consideration that must be addressed is the impact of the all the variances taken together. "Looking at the complete picture", she concluded that "these variances cannot be considered "minor", and then justified her response by speaking to the impact of each variance, beginning with the variances respecting allowed floor space and FSI, and declared that the FSI should be more than 1.7, because of the basement", whose dimensions would add an extra 0.4 X Lot Area, to the net FSI. According to Ms. Chandler, the FSI would increase to more than 1.7, X Lot Area as opposed to an FSI of 1.44 X Lot Area, as stated by the Applicants

Ms. Chandler said that the Applicants are trying to build a 4 bedroom house on a Site "ill-suited" for the purpose, and compared the proposal to her house, which had "3 bedrooms on a lot almost twice the size of 67 Alcorn". Ms. Chandler then complained about the how the excavation to build the house could damage the existing trees on the back of her property, and create "structural issues" for their dwelling, as well as the impact on her "gas lines if the proposed exterior staircase were installed"

Ms. Chandler opined that the presence of stairs meant that the “basement could be occupied by tenants”, before drawing attention to the proposed height, followed by a discussion of how detrimental would the impact of the requested height be in “reducing the light falling on her house”; and pronounced the proposal to be an “eyesore, with an unappealing front view”.

Ms. Chandler then proceeded to introduce onto the Record, a decision by the OLT (Ontario Lands Tribunal) that ostensibly referred to protection of trees. I asked Ms. Chandler why the decision had not been filed earlier, because suddenly introducing new material towards the end of the Hearing, would prevent the Applicants from replying to new information in a meaningful fashion. She apologized for the late introduction of this information, and said that she had discovered this information “just before the Hearing”. I asked Ms. Chandler to submit this case to the TLAB, as well as the Applicants, as soon as possible, and added that I would give the Applicants up to June 17, 2022, to provide a response to how this case could impact the Appeal before me.

Mr. Wong said that he had no questions for Ms. Chandler by way of Cross-Examination. By way of Reply Evidence, Mr. Zhou clarified that the FSI of the proposed building was 1.44 X Lot Area, and not more than 1.7 X Lot Area, as claimed by the Opposition, and explained how the basement did not have to be taken into account for FSI calculation purposes. He also clarified that the height of the proposed building, could be built “as of right”, because the proposed height, was lower than what the Zoning By-law allowed.

I thanked the Parties for their evidence, and stated that I would reserve my Decision, because the Parties had to complete submissions.

ANALYSIS, FINDINGS, REASONS

It is trite to state that the Hearings before the TLAB are *de novo*, or “new Hearings”, which means that all variances, and issues have to be canvassed anew, irrespective of what happened at the COA hearing. A “*de novo*” Hearing means that irrespective of which Party launched the Appeal, the burden of proof lies with the Applicant- the important consequence of a *de novo* Hearing is that the Applicants have to demonstrate to the TLAB that their proposal satisfies all four tests under Sections 45.1 of the Planning Act. It is to be emphasized that this onus has to be satisfied, irrespective of how they address the concerns of the neighbours.

Notwithstanding my clear instructions to the Applicants on February 22, 2022, about my expectations of them by way of evidence, I was deeply disappointed that their Witness Statement, and their evidence focused on addressing the neighbour’s objections, rather than demonstrating that the requested variances satisfies the four tests under Section 45.1.

In terms of the test respecting the Official Plan, the Applicants spoke only to Policy 4.1.5, and did not discuss other important Policies, such as 3.1.2, which discusses Built

Form Policy, and its impact on the neighbours. The Applicants described the character of the surrounding community, but did not connect the character to Policy 2.3.1, which talks about the need for proposals to recognize, respect and reinforce the character of the community. Their identification of “two, two and half and three storeyed buildings” as the prevailing type, is not supported on the basis of a counting exercise, as is required by the OP, which describes the “prevailing type” to be the most frequently occurring. The classification of the “prevailing type” is too broad, if not all encompassing, because the only exclusions are one storey houses (e.g. bungalows), and four storey apartment buildings, which are not well represented in this Neighbourhood. Lastly, the numbers of storeys of houses are not included in the list of variables, specifically stated in Section 4.1.5, to determine the “prevailing type”.

When discussing the Zoning, the Applicants’ evidence focused on the reasonableness of the proposal by discussing the height of the proposal, which is less than the maximum granted by the By-law, and other factors which their proposal is in conformity with- while their thoughtfulness with not exceeding what the By-Laws is appreciated, this does not influence the TLAB’s Decision, which focuses on variances seeking relief from the By-law, as opposed to features which adhere to the By-law, and consequently do not require variances.

I find that the evidence meets the bare minimum to satisfy the test of appropriate development, by drawing attention to similar buildings in the vicinity of the Site. It would have been helpful to demonstrate that the proposal will not result in the destabilization of the community, through introducing a hitherto unknown, or unexperienced built form.

I find that there is no evidence to demonstrate that the test of minor was satisfied, because this test focuses on the possibility of unacceptable adverse impact arising from the proposal. The concept of “unacceptable adverse impact” was not canvassed, nor was it proven that the proposal will not result in unacceptable adverse impact.

Lastly, while I realize that the City did not provide any feedback, or objection to the proposal submitted by the Applicants, I don’t understand how this has been interpreted to mean that the proposal satisfies relevant Policies, or the intent and purpose of the By-law.

As a result, I find that the evidence is incomplete in that it does not make a comprehensive case, for the Appeal to be approved. As a result, there is inadequate evidence before me that the proposal satisfies the four tests under Section 45.1 of the Planning Act, on the basis of which I find that the variances have to be refused.

It is unfortunate that the Applicants spent significant effort to address the concerns of the Appellants, notwithstanding how the latter’s perspectives reflected misconceptions, or a fundamental misunderstanding of planning principles. As examples, the Opposition, both by way of evidence, and questions asked of the Applicants, focused on issues such as excavation, and construction, and the interaction between the two, before I intervened to inform them that these issues are irrelevant to the TLAB’s Decision. The Opposition’s calculation of the FSI of the house, included livable space in the basement,

when it is an established planning principle that the FSI is not impacted by livable space in the basement, with specific exceptions that don't apply to this proposal. The Opposition objected to the proposed height of the building, notwithstanding its being significantly lower than the maximum height allowable under the Zoning By-law, on the ground that it constitutes "an eyesore" - the issue of the building being perceived as an eyesore or eye-candy is irrelevant to the Decision, because the latter is independent of aesthetics.

Regrettably, discussion of such irrelevant issues eclipsed the more important information, pertinent to the four tests under Section 45.1 of the Planning Act, which should have been the focus of the Applicant's evidence. At the risk of belabouring the point, I take this opportunity to emphasize to the Applicants that it takes a good, high quality proposal, supported by high quality evidence that specifically addresses each of the four tests under Section 45.1 for their proposal to be approved, because it is the evidence that demonstrates the "fit" of the proposal, into the community.

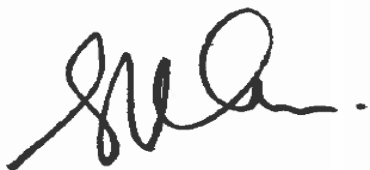
As a result of insufficient evidence to demonstrate that the proposal satisfies the tests respecting the Official Plan, Zoning By-laws, and minor, under Section 45.1, I find that the variances have to be refused. As a consequence, I find that the Appeal respecting 67 Alcorn Ave. should be allowed, and the decision made by the COA respecting 67 Alcorn Ave., on May 11, 2021, has to be set aside.

DECISION AND ORDER

1. The Appeal respecting 67 Alcorn Ave is allowed, and the decision of the Committee of Adjustment respecting 67 Alcorn Ave., dated May 11, 2021, is set aside.

So orders the Toronto Local Appeal Body

X



S. Gopikrishna
Panel Chair, Toronto Local Appeal Body