

ISSUE DATE:

MAY 14, 2008



PL071264

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant: John Alpeza
Appellant: Marita Bagdonas
Subject: Minor Variance
Variance from By-law No.: By-law 438-86
Property Address/Description: 86 Deforest Road
Municipality: City of Toronto
OMB Case No.: PL071264
OMB File No.: PL071264
Municipal No. A502/07EYK

APPEARANCES:

Parties

Counsel*/Agent

M. Bagdonas

W. Roberts*

Diana & John Alpeza

Z. Radewych

**DECISION OF THE BOARD DELIVERED BY C. HEFFERON
AND ORDER OF THE BOARD**

Background

Ms Diana Alpeza and Mr. John Alpeza (the "Applicants") propose to add several rooms to their home at 86 Deforest Road, which is located near the intersection of Bloor Street West and Runnymede Road in the former Village of Swansea (now part of the City of Toronto). Their design requires five variances from the provisions of the Zoning By-law 438-86, including: GFA, front yard setback, west side yard setback, front yard landscaped open space, and height.

The City of Toronto (Etobicoke York Panel) Committee of Adjustment approved the application authorizing the variances in its decision issued November 27, 2007.

Ms M. Bagdonas (the “Appellant”) who lives beside the Applicants at 88 Deforest Road is appealing that decision.

The City of Toronto did not appear at the Board hearing.

VariANCES Requested

The variances from the provisions of the City of Toronto Zoning By-law 438-86 (the “By-law”) requested include:

1. Gross Floor Area: The altered dwelling will have a floor space index (FSI) of 1.03 times the area of the lot (277.45 square metres), whereas the By-law permits an FSI of 0.6 times the lot area. The Board was told the existing structure has a gross floor area (GFA) of 201.33 square metres and an FSI of 0.75;
2. Front yard setback: The By-law requires a minimum 3.7 metres, whereas the altered dwelling will be 3.6 metres from the south front lot line. The Board was told that the intrusion into the front yard setback will be from a “vestibule” that the applicants propose to add at the south corner of the dwelling;
3. The minimum required building separation is 0.9 metres whereas the side wall contains no openings. The altered dwelling will be located 0.47 metres from the adjacent dwelling on the west side (88 Deforest Rd);
4. The By-law requires 50% landscaped open space between the front lot line and the front wall of the dwelling. In the present case, 34% is proposed;
5. The maximum permitted height is 9.0 metres above grade. The altered dwelling height will be 10.82 metres. The Board was told this is as measured to the mid-point of the shed dormer roof rather than to the mid-point of the gable.

Testimony of the Participants

While the Applicants presented a signed petition from a number of the homeowners and residents in the area, no one from that number actually appeared at the hearing to support the proposed addition. On the other hand, several people presented themselves to voice their opposition to it including Mr. Brian Gibbons, who

owns a home on Mayfield Road. Mr Gibbons' backyard partially overlooks the rear of the subject property.

Ms Bagdonas' appeal is supported by the Swansea Area Ratepayers Association, whose president, Mr. Nick Singh, testified and by Ms Kate Lawson, who lives at 92 Deforest Road. Ms Lawson, the Board was informed, is not only Ms Bagdonas' daughter, but also an officer in the Swansea Area Ratepayers Association. Although Ms Lawson presented herself at the hearing, she did not testify.

The Appeal before the Board

The Board was told that the application before the Board constitutes the second application to the City of Toronto (Etobicoke York Panel) Committee of Adjustment. The first application was submitted in September, 2007 but was withdrawn before the Committee could consider it. It was subsequently modified and resubmitted for the November 22, 2007 Committee hearing. The variances applied for were approved at that hearing and the decision published November 27, 2007.

Mr. Zenon Radewych represented the Applicant. When Mr. Radewych's plan to act as both agent and witness for the Applicant was challenged by Mr. Roberts, counsel for the Appellant, Mr Radewych opted to act as agent because he wanted the opportunity to cross-examine the Appellant's expert witness, Mr. Barnett.

Mr. R. E. Barnett, who is a registered architect, was qualified by the Board to offer expert opinion evidence on architecture and building design.

The Board notes that Ms Bagdonas' appeal appears to the Board to have at least a few of the characteristics of a classic back fence dispute. Her distress, apparent at the hearing, seems to have begun before the Applicants' proposal to expand their home was made public. The Board heard testimony from Ms Bagdonas herself that the Applicants have installed ventilation equipment in their home that exhausts noisily into the narrow space between their house and the Bagdonas' house. As Ms Bagdonas does not have air conditioning in her home, she must leave the windows open for ventilation during the warm months. The noise from the Applicants' exhaust vents as well as other alleged activities carried out on their property constitute, she told the Board, a serious annoyance to her.

Mr. P. Bagdonas who now resides near Barrie told the Board he often stays overnight in his mother's home. He corroborated Ms Bagdonas' testimony.

The Four Tests

While it understands that the Applicants simply want to build an addition to their home to accommodate their growing family, the Board is nonetheless obliged to consider the public policies respecting such proposals. Ontario has what has been characterized as a "policy-driven" land use regime. In other words, a property owner is not free to do whatever it wishes in response to a real or perceived need or hardship. Any proposal to change a land use must comply with both Provincial policy and with municipal policy. Policy at both levels of government is manifested through plans – in the case of the City of Toronto through its Official Plan. The City of Toronto Official Plan is then implemented in large part through Zoning By-law 438-86.

To be permitted, variances from the provisions of the Zoning By-law must pass four tests listed in Section 45(1) of the *Planning Act*. The tests speak to satisfying the intent and purpose of both the Official Plan and the Zoning By-law. A proposal must then be judged to be desirable for the appropriate development of the site, and the variance(s) requested must be "minor". The term, "minor" in this case does not refer solely to numbers but also to the impact of the variance(s) on the surrounding properties.

If the proposed variance requested does not meet each of these four tests, the Planning Authority – in this case, the Ontario Municipal Board – is obliged to turn it down.

Evidence and Findings

The Board asked Mr. Radewych to present an overview of the facts of his clients' proposal. He was cautioned that he was not permitted to give evidence. However, in the interests of shedding light on the issues in contention and with the indulgence of Mr. Roberts, the Board allowed him considerable leeway.

Mr. Radewych submitted that his client is being penalized on the gross floor area calculation since almost 650 square feet of the existing gross floor area ("GFA") are on the basement level and include the garage, laundry and storage area. This space is

counted in GFA, he contends, solely because of the slope of the site on which the home sits. If the basement area were entirely below grade – it is approximately half or four feet below grade – it would not be counted in GFA and the variance required would be numerically significantly smaller. This, he maintains, is manifestly unfair to his client.

He also contends that the other variances requested for the front yard, west side yard and landscaped open space deficit are relatively inconsequential and are not totally out of keeping with what one finds with other properties in the neighbourhood. To demonstrate this point Mr. Radewych showed the Board a number of photos of homes in the area that the Applicant had included in its Document Book (Exhibit 1). The Board might agree with Mr. Radewych if only the numerical differences from the provisions of the By-law were taken into account. However, the Board is obliged to consider their cumulative impact both on the surrounding properties and on the neighbourhood itself.

Speaking for the Appellant, Mr. Barnett contends that the design of the proposed addition and exterior modifications is both out of character and incompatible with the surrounding area and, at some 2,900 square feet in area, the altered dwelling will be too large given the size of the other houses in the immediate area. Moreover, at 10.82 metres in height it is also considerably taller than the other houses in the immediate vicinity.

Together with the other variances required, the proposal does not, according to Mr. Barnett, satisfy the general intent and purpose of the By-law.

The Board notes from the photo evidence presented by both parties (Exhibits 1 and Exhibits 9 – 16) that several houses in the area – including the Appellant's own dwelling at 88 Deforest - would appear to be considerably larger than the Applicant's dwelling as it exists today and perhaps even as large as or larger than the altered dwelling proposed. The Board also notes that many of the setback and other deficiencies from the provisions of the By-law in the Applicants' proposed design can be seen in other homes in the area – if, that is, the photos are reflective of what actually exists there.

Nevertheless, the Board is not satisfied that the proposed design meets the general intent and purpose of the By-law.

With respect to the Official Plan of the City of Toronto, the Board recognizes that the proposal represents a significant new investment in a mature neighbourhood, one which is well served by the existing excellent infrastructure including high level transit (subway). Investment of this type is encouraged by the Official Plan in order to stimulate the preservation of stable and healthy neighbourhoods (such as the part of Swansea).

However, the Board is mindful of Mr. Barnett's expert opinion evidence as a long-practising architect regarding the incompatibility of the proposed design with the "predominant form of development in the neighbourhood." The proposal, he contends, violates several of the Policies under Chapter Four of the City of Toronto Official Plan – specifically, policies 4.1.5 (c) (d) (f) and (g) and Policy 4.1.7. The latter indicates that the criteria under Policy 4.1.5 will be used to evaluate proposals to intensify development on streets within "neighbourhoods".

The Board accepts Mr. Barnett's expert opinion evidence that the proposed addition represents a significant departure from the existing physical design and character of the neighbourhood, and therefore offends the general intent and purpose of the Official Plan.

The Board also adopts and relies on the expert opinion evidence of Mr. Barnett that the cumulative impact of the five variances on the nearby properties cannot be considered minor and is not desirable for the appropriate development of the site.

Decision and Order of the Board

The Board orders that the Appeal against the decision of the City of Toronto (Etobicoke York panel) Committee of Adjustment issued November 27, 2007 is allowed. The variances sought, in their current form, are not authorized.

As the neighbours have indicated they are not opposed to a scaled-down addition, the Board's decision is without prejudice to such a further application.

So Orders the Board.

"C. Hefferon"

C.HEFFERON
MEMBER