

ISSUE DATE:  
**MAY 7, 2008**



PL080125

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

Appellant:	Virginia Candelaria
Applicant:	1541021 Ontario Incorporated
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	749A Barton Street East
Municipality:	City of Hamilton
OMB Case No.:	PL080125
OMB File No.:	PL080125
Municipal No.:	A-322/07

**APPEARANCES:**

**Parties**

**Counsel\*/Agent**

Virginia Candelaria

Daniel Ribiro

Glen Perron, 1541021 Ontario Inc.  
("Corporation")

D Collins\*

**DECISION DELIVERED BY J. P. ATCHESON AND ORDER OF THE BOARD**

This was a hearing of the Ontario Municipal Board in the matter of an appeal from a decision of the City of Hamilton Committee of Adjustment (File HM/A-07:322), that authorized minor variances for a property known municipally as 749A Barton Street East.

The variances sought are from By-law 6593 of the City of Hamilton and are as follows:

1. An average floor area of 62.2 square metres shall be provided for all dwelling units instead of the required 65.0 square metres; and,

2. No parking shall be provided instead of the minimum required 7 parking spaces.

The purpose of the variances if authorized would permit the conversion of the second floor of an existing two-storey building which contains commercial uses on the ground floor and one dwelling unit on the second floor to five dwelling units on the second floor while maintaining the ground floor for retail commercial purposes.

The Board, during the course of the hearing, heard from five witnesses, Ms Debbie Majors and a Mr. Alex Candelaria spoke on behalf on the appellant.

Mr. Joe Gravina a qualified Planning Technician employed by the City of Hamilton and who prepared the planning report on the current variances to the Committee of Adjustment gave evidence under summons. Mr. Perron the owner of the property and Ms Shelly Worrod a local resident spoke on behalf of the variances.

## **BACKGROUND**

1541021 Ontario Inc. ("Corporation") acquired 749A Barton Street East, Hamilton in December, 2005. This property is 35' wide with a depth of 120'; has a building which takes up the entire lot; and, has no space available for any on-site parking. At the time of acquisition, according to Mr. Perron, the building was vacant and had previously been used as a pawnshop.

Since the zoning by-law applicable to this lot allows for building conversions to be not more than ten dwelling units, the Corporation, immediately following acquisition, converted, without any municipal approvals, the second floor to eight apartment units.

A complaint concerning the creation of the eight apartments was lodged with the municipality in the late spring of 2006. As a result, the Corporation sought and obtained the following variances from the Committee of Adjustment:

- (i) Permission to have an average floor area of 38.2 square metres instead of the minimum required 65 square metres ("Floor Area Variance"); and

- (ii) Permission to have the building situated 61 metres from another building converted under the zoning by-law instead of the minimum separation of 180 metres (“Radial Separation Variance”).

Virginia Candelaria, the owner of property immediately to the east of the subject parcel appealed the Committee’s decision to this Board. The Board in a decision dated July 27, 2007 (Decision/Order 2132) based upon uncontradicted planning evidence at that time, allowed the appeal and did not authorize the variances.

The applicant subsequently revised his application to construct only five apartment units on the second floor and in January of 2008, applied for a different set of variances as set out in this decision. Ms Candelaria has appealed this decision to this Board.

## **THE EVIDENCE**

The uncontradicted evidence of Mr. Gravina as set out in his planning report, Exhibit 4, is that the revised application with a reduction in the number of dwelling units to five and an increase in the floor area of the proposed dwelling units is an improvement over the previous application and is in keeping with the policy directions of the Official Plan for the City of Hamilton as set out in Section C.7 (Residential Environment and Housing Policy). He noted that the Official Plan encourages infilling and the conversion of multi-storey buildings in this part of Hamilton. Conversion of such existing buildings is a permitted use in the zoning covering this site. Mr. Gravina also reviewed for the Board, the applicable sections of Zoning By-law 6593 and in particular, Sections 14 and 19, which contain the dwelling unit size and conversion regulations of the Zoning By-law respectively.

His uncontradicted evidence to the Board is that the intent and purpose of the Official Plan and Zoning By-law are met in this case. He noted that since a conversion building existed at 770 Barton Street, the Zoning By-law requires that this proposed development provide seven off-street parking spaces. It was his analysis that there is sufficient parking in the area and that since the subject property is situated on a public transit route, there is a reduced need for off-street parking. He sees the revised

development as desirable for this part of Hamilton and considers the revised variances as minor. Ms Worrod, a local tenant who lives two doors from the subject property, advised the Board that she uses the city parking lot situated at the corner of Barton and Barnesdale Avenue some four properties to the west of the subject property. Her evidence is that this lot has about 15 parking spaces and is never fully used. She sees no parking impacts resulting from the proposed development as a result of the relief being sought.

Mr. Perron reviewed for the Board a series of Photographs (Exhibits 8 to 15). These exhibits clearly show a series of windows on the east-facing wall of the building that overlook the Candelaria property and the actions taken by Ms Candelaria to obstruct the view from these windows by the placement of garden sheds and a steel shield in front of several of them. It is clear that these windows are at the root of the dispute between the applicant and the appellant.

The appellant's witness expressed concerns regarding the existing windows and their overview on the Candelaria property and garbage in the lane at the rear of the property. They allege that the windows are not in compliance with the Ontario Building Code and should be removed. They contended in their evidence that municipal officials have taken no action in this regard and that this is why Ms Candelaria is appealing to this Board. Mr. Ribeiro in his submissions to the Board freely admitted that Ms Candelaria has no concerns with the variances and the uses that would result but is deeply concerned with the impact from what she sees as illegal windows facing her property.

## **FINDING AND CONCLUSIONS**

The Board after carefully reviewing the evidence, the exhibits filed, and the submission made by the parties, makes the following findings.

The issue of whether the windows installed on the east-facing wall of the subject property are in compliance with the Ontario Building Code is not a matter properly before the Board. Building Code compliance in this case is a matter solely within the jurisdiction of the Chief Building Official of the City of Hamilton.

The Board's jurisdiction in this case is to determine among other things, whether the variances sought meet the four tests as set out in Section 45 (1) of the *Planning Act* and in this case, whether the variances being sought would result in any negative planning impacts on abutting properties if the development were allowed to proceed. The Board has carefully reviewed the photographic evidence and the submissions made and finds that the windows as proposed for the two dwelling units that would overlook the Candelaria property, pose no significant negative impact and are no different from the view that the Candelaria property has on the subject property. In dense urban areas, techniques such as window blinds and coverings are common methods used to overcome this issue and are preferable to the use of garden sheds as shown on Exhibit 12. The Board finds no negative impact resulting from the size and location of windows on the east-facing wall of the subject building.

The Board accepts the uncontradicted planning evidence of Mr. Gravina that the variances now being sought meet the intent and purpose of the Official Plan and Zoning By-law of the City of Hamilton, that allowing five dwelling units on the second floor in the manner set out in the application is appropriate and desirable development for this part of Hamilton and that the variances both individually, and collectively, are minor in nature and should be approved.

**THE BOARD ORDERS** that the appeal is dismissed and the variances to By-law 6593 of the City of Hamilton as set out in this decision are authorized.

This is the Order of the Board.

"J. P. Atcheson"

J. P. ATCHESON  
MEMBER