

ISSUE DATE:

June 05, 2008



PL080174

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 and Appellant: Mohammed Abdo
Subject: Minor Variance
Property Address/Description: 3248 Bethune Road
Municipality: City of Mississauga
Variance from By-law: 0225-2007
OMB Case No.: PL080174
OMB File No.: PL080174
Municipal File No.: A4-08

APPEARANCES:

Parties

Counsel

Mohammed Abdo

City of Mississauga

A. Wilson-Peebles

DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD

Mohammed Abdo is seeking relief from the provisions of Zoning By-law No. 0225-2007, as amended, to permit the basement entrance stairwell to remain in the existing side yard of his residence at 3248 Bethune Road in the City of Mississauga. The by-law does not permit stairs, stairwells or retaining walls to facilitate an entrance located below grade at any point or to facilitate a direct entrance to the basement and are not permitted in interior side yards and exterior side yards.

The Applicant represented himself. A. Wilson-Peebles represented the City of Mississauga. City Planner Krystina Collins was qualified and she provided both contextual planning and professional opinion evidence in the case at hand. The subject property is designated residential Low Density II in the Erin Mills District Secondary Plan and zoned Exemption R4-52 in the Zoning By-law. While the general R4 zoning provision has a side yard setback requirement of 1.2 metres on each side of a dwelling, the subject zone has a reduced side yard setback requirement of 1.2 metres on one side and 0.61 metres on the other side of a dwelling.

When the City discovered that the Applicant had built the side stairwell entrance to the basement on the west side elevation prior to obtaining a building permit, an inspector issued an order to comply in August 2007. The Committee of Adjustment denied the Applicant's application in December 2007.

The Applicant provided a number of reasons for building the side stairwell but none of these were based on planning grounds. The principle reason was to accommodate his in-laws' health and mobility issues and to afford his mother-in-law a degree of privacy during her medical treatments. Both the Board and the City are sympathetic to the in-laws' health concerns and these were not in dispute but they do not constitute sufficient reasons for the Applicant's action, which was to build a prohibited stairwell in a side yard without a building permit.

The Applicant also testified that he relied on his next-door neighbour, a local contractor, who offered to build the stairwell for him and who also has an illegal stairwell in his side yard as the City advised the Board. The Applicant said the contractor told him that a building permit was not required as there was four feet of clearance. The contractor allegedly went to the City to apply for a permit anyway but told the Applicant that he did not require a permit. Work commenced and was allegedly completed in June 2007. The City inspector arrived at the Applicant's property the third week of June and told the Applicant to do nothing else to the property – the Applicant's reason for not adding a railing to the stairwell.

The Applicant acknowledged that he made a mistake in relying on the next-door neighbour to build the side basement entrance without a permit but he said another general contractor inspected it and said it is solid. The City questions the sturdiness of the retaining wall and provided pictures of it bowing into the stairwell – visual evidence that the Applicant neither questioned nor disputed. The Applicant added that the stairwell harms no one; it is not visible from the street as it is fenced; and it was done "...to facilitate a humane cause" (a private entrance for his in-laws to their basement suite).

The City argued that this is further evidence that the Applicant has created a second dwelling in his home; something the planning instruments prohibit. The Applicant confirmed his in-laws would live in the basement suite – a self-contained living space that includes a bathroom and kitchenette.

The Applicant later stated that the side basement entrance will serve as an emergency exit for his in-laws in case of fire, but the City planner noted that a great number of homes do not enjoy a separate access entrance to the basement and it is not a building code requirement. The City also explained to the Applicant that an entrance to his basement from the rear yard is acceptable and does not require a variance.

The Applicant provided the Board with three older cases where side yard stairwells were approved but these cases must be distinguished from this hearing in that those matters dealt variances for reduced side yard setbacks to accommodate wheelchair and related mobility issues. Moreover, those cases pre-date the existing zoning by-law that prohibits side yard stairwells. Those cases may be distinguished, therefore, from the case at hand.

The City disputed all of the Applicant's reasons for building the stairwell. While offering to keep the stairs clear of snow during the winter, the Applicant acknowledged it was difficult to do during last winter's heavy snowfall and the Board accepts the City Planner's uncontraverted evidence that it would not be easy for paramedics to manoeuvre a stretcher down snow-covered stairs let alone access that area. In addition, the City provided photographs of the stairwell that were taken in December 2007. What is most telling from these photos is that they undermine the Applicant's testimony that he had finished and completed the stairwell in June 2007. The photos reveal all kinds of construction materials stacked up in front of the stairwell as well as lying up against the neighbour's house – an indication that the construction had not been completed. Further, the entire area is covered with snow, indicating no evidence of keeping the area clear of snow as alleged.

Basement apartments are not permitted in the City of Mississauga and it is clear to the Board that he constructed the stairs in order to facilitate access to a separate, self-contained apartment in the Applicant's basement

The City also expressed concerns with the Applicant's driveway, which is wider than other driveways in the area. As with the stairwell situation, the City also issued the Applicant a notice to comply by reducing his driveway to the proper size. The City is concerned whether there is encroachment of the driveway and whether the stairwell entrance encroaches onto the neighbour's property. The R4 zoning provisions state that a driveway cannot be larger than 50% of the lot frontage and driveways need a setback of .6 metres from the property line. Photographs taken during Ms Collins May

15 site visit confirm that the driveway indeed extends beyond the house and from the City's perspective, this lends credibility to their concern that the stairwell leads to a self-contained apartment that can be used as a second dwelling.

The City is also concerned that as the Applicant has by-passed proper procedures by failing to obtain a building permit for the stairwell, construction cannot be properly evaluated and further, that further variances would likely be required, the most obvious one being a reduced side yard setback. Ms Collins testified that the front of the retaining wall for the stairwell is on the property line with the adjacent property (survey in Exhibit 1, Tab 7). The Applicant has not furnished the City with structural drawings. Ms Collins opined that the stairwell's footings almost certainly encroach onto the neighbour's property but without structural drawings, the City cannot confirm whether proper work was done. As Counsel for the City noted later in her closing arguments, the Board has no jurisdiction to permit a variance for this staircase when it is entirely unclear whether the wall footings are on the neighbour's property. As the planner noted, with the location of the stairwell wall, there must also be something on the neighbour's property. While the onus is on the Applicant to demonstrate this to the City and Board, he did not do so.

A .61-metre setback is also required on this side of the property line and the stairwell is closer and at most is only .025 centimetres away. The Applicant responded that had he known he needed a variance for a reduced side yard setback, he would have applied for one. The City noted that even if the Board were to approve the stairwell, which the Board will not do, the Applicant would still need at minimum at least one other variance for the side yard setback. To reiterate, the City's planning and building department were unable to verify whether the Applicant needs more variances as no building permit was obtained.

Ms Collins opined that the stairwell causes an undesirable view from the street if exposed and is not in keeping with the character of the street. The Applicant has built a fence to hide the stairwell from view, but he has constructed the fence door in such a way that the only way to access the stairwell is by treading on the neighbour's property to enter the stairs. As the City showed in evidence through the parcel register for the neighbouring property, there are no easement agreements between that property and the Applicant's property. While the Applicant and his neighbour may find this to be an

acceptable arrangement today, there are no guarantees that future owners would abide by this understanding in the absence of a formal easement agreement.

Another major concern for the City is the fact that the Applicant's illegal stairwell has disrupted the drainage pattern (Exhibit 1, Tab 8) for lots in this area. The new entrance has now forced drain water onto the Applicant's neighbour's property. The current drainage plan is a rear-to-front plan for the subject property in that water is intended to drain through side yard swales located on either side of the property. The two rear-abutting residential lots to the Applicant's rear yard are also intended to partially drain the water from their backyards through the swales on the Applicant's property. Given the entrance location of the illegal stairwell and the fact it takes up an entire side yard swale, all the drain water intended to flow through this swale is now being directed onto the neighbouring property at 3244 Bethune Road.

Ms Collins reviewed all of the four tests for a minor variance and cited the relevant Official Plan policies and the Zoning By-law. Her unchallenged and persuasive professional planning evidence demonstrated satisfactorily to the Board that a variance for the stairwell fails all four tests for a minor variance under Section 45(1) of the *Planning Act*. Ms Collins made specific reference to the relevant policies and planning standards and offered comprehensive evidence and supporting rationales for her specific opinions related to the four tests. The Applicant provided no planning evidence whatsoever.

Side yards are supposed to remain unencumbered; provide separation distance between dwellings and provide open space as well as access to rear yards. The Applicant's stairwell undermines all of these planning requirements.

As for the Applicant's assertion that the completion of the stairwell pre-dates passage of the Zoning By-law, 0225-2007 was passed in June 2007 and approved by the Board in September 2007. Further, for a non-conforming structure such as this, a building permit would have had to be issued on or before the passage of the by-law. Since this was not done, the provision for a legal non-complying structure does not apply.

Ms Collins opined that the variance to permit a stairwell on the subject property is not a minor one as it completely restricts rear yard access and inhibits that feature; the Applicant needs to access the stairs through his neighbour's property and all drainage

overflow drains now drains onto the neighbouring; and there may be a need for yet another variance for a reduced side yard setback. She opined that the variance is neither appropriate nor desirable as the stairs were constructed without a building permit and as she opined, the convenience of constructing the stairs without a building permit cannot be equated with desirability. The convenience to the Applicant and his family is not desirable for the appropriate development of the subject property and there is no planning evidence to support this condition. Ms Collins noted that potential future owners could rent out the basement and the corresponding issues related to parking and servicing are concerns for the City and would be difficult to monitor. The planner added that the potential to create and use a second dwelling in the existing residence is great, especially where the City has already sent a compliance notice to the Applicant to reduce the width of his driveway that is wider than other driveways in the area.

The Board accepts Ms Collins' uncontradicted evidence that the stairs do not respect the built context of the area; it does not preserve the open space and the design is incompatible with the site condition; and the resulting impact on drainage and its redirection of drain water onto the neighbour's property is unacceptable. Further and as stated, the lack of any easement agreements between the neighbour and the Applicant creates a totally unpredictable situation in the long term.

The City's book of authorities contained cases that were directly relevant to the situation at hand by showing cases where the Board has upheld the City's requirement that no side yard staircases should be built and at least one of the cases was determined based on the City's new by-law. The commentary in those five cases is as applicable to, and germane in those examples as they are in the case at hand.

The Applicant provided no persuasive evidence that the stairwell should be allowed. His reasons for constructing the stairwell without a building permit are without planning basis and the Board assigns no weight to his evidence. While the Board is sympathetic to the convenience and privacy issues for his elderly in-laws, these are not genuine planning reasons for authorizing a variance to permit an illegal stairwell.

This case demonstrates the importance of all citizens to seek and obtain proper authorization and approval from their local municipality before unilaterally undertaking changes and additions to their dwellings or lands. In this case, the only planning evidence received was that furnished by the City planner and the adopt assigns significant weight to her testimony and professional planning opinion.

Having considered all of the evidence, the Board dismisses the appeal and does not authorize the variance as it fails all four tests as set out in section 45(1) of the *Act*.

So orders the Board.

“R. Rossi”

R. ROSSI
MEMBER