

ISSUE DATE:

SEP. 29, 2008



PL080390

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

Appellant:	E. Elaine Robinson
Applicant:	Angela Cerny
Subject:	Minor Variance
Variance from By-law No.:	0225-2007
Property Address/Description:	1484 Elite Road
Municipality:	City of Mississauga
OMB Case No.:	PL080390
OMB File No.:	PL080390
Municipal No.:	A005/08

APPEARANCES:

Parties

Angela Cerny

Elaine Robinson

Counsel*/Agent

M. Cerny

J.-P. Waldin *

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

This variance dispute centered on whether the scale/massing of a proposed replacement dwelling, with a 74-foot façade, would be out of character with its neighbourhood. Angela Cerny (the Owner) owns a wide bungalow in the City of Mississauga (the City), in an area characterized by large low-slung 1950's bungalows and split-levels on wide lots. She proposed to demolish it, to replace it with a two-storey home of the same width, but with a prominent hip roof extending noticeably higher than its neighbours (a total height of almost 28 feet). The proposal would require a variance.

- not for *height*, because the applicable Zoning By-law (adopted long after the subdivision was built) permitted a greater height than proposed (about 31 feet);
- but *width*, for although the proposal was no wider than the *existing* footprint,

the By-law called for a minimum *combined* side yard setback of 7.41 metres (24.31 feet), whereas the existing setbacks totalled 4.83 metres (15.84 feet).

City planning staff supported the application, and the variance was authorized by the Committee of Adjustment with standard conditions. Another proposed variance, previously under discussion, was dropped in due course. However, the neighbour to the immediate north, Elaine Robinson (the Appellant), appealed to the Board.

At the hearing, Mr. Michael Cerny served as Agent for the Owner, his wife. The Appellant was represented by Counsel, Mr. Waldin. The proposal's architectural designer, Mr. Mateljan testified in favour of the application; so did the City's planner on the file, Ms. Collins (under summons), but the City did not otherwise take part. Mr. Romano, the Appellant's planner, testified against the application. At the request of the parties, the Board conducted a site visit.

The Board has carefully considered all the evidence, as well as the eloquent submissions of both sides. The Board finds that the intent of the Official Plan and Zoning By-law was to limit the scale and massing of the dwelling, as part of a broader intent to preserve and enhance neighbourhood character;

- The width – by *itself* – would not contravene that intent,
- But would, when *combined* with the proposed height.

Accordingly, the Board authorizes the variance itself, but subject to a condition limiting height. The appeal is therefore allowed in part. The details and reasons are set out below.

PROJECT AND HISTORY

The subject property, at 1484 Elite Road in the Clarkson Lorne Park District of the City, is subject to Zoning By-law 0225-2007. The site includes a 1959 bungalow, about 74 feet wide, on a lot measuring 1170 square metres with 27.4 metres of frontage (90 feet). There is a north side yard of 3.0 metres (9.84 feet), and a south side yard of 1.83 metres (6 feet), so the side yards total 4.83 metres (15.84 feet).

The Appellant's home lies north at 1494 Elite Road. Elite Road is characterized by properties with substantial foliage and houses whose profile is primarily horizontal, not vertical. No houses within sight appear to exceed some twenty feet in height. Newer houses with more vertical profiles are nearby, e.g., to the east – but there is no easy street connection to them, and they therefore appear to be outside the periphery of close visible linkage – what the Appellant's planner called “dog-walking distance.”

The single variance application before the Board concerns the By-law formula for *combined* side yard setbacks. A further aspect of the formula is that combined setbacks for a one-storey building are less than what would be required for a two-storey building.

That formula was adopted years after construction. Whereas the bungalow had a combined side yard width of 4.83 metres (15.84 feet), the formula required combined side yards – in the case of a two-storey building – totalling 7.4 metres (over 24 feet). In other words, the proposed setbacks were insufficient for the *existing* 74-foot bungalow, and would be more insufficient for a *two-storey* building. To meet the By-law formula – at that proposed height – the façade would need to be narrower by about eight and a half feet (i.e., reduced from some seventy-four feet to about sixty-five and a half feet).

The Board was told that aside from one other district in the City, this By-law formula for *combined* setbacks is unique to this area. Other features of the proposal, however, comply with the By-law. The proposal complies, for example, with zoning for Gross Floor Area (GFA) and coverage. As mentioned, the By-law also allows a roof 9.5 metres high (31.16 feet), whereas the proposed roof would be 8.5 metres (27.9 feet).

The Board was advised of no change in population density, or “intensification” on that account.

APPLICABLE CRITERIA

For variances, the criteria (often called “the four tests”) are set out at Section 45(1), namely that a variance from the applicable By-law may be authorized if it is minor, desirable for the appropriate development or use of the property, and maintains the general intent and purpose of both the Zoning By-law and of the Official Plan (OP).

The Board's attention was drawn to many OP instructions for the preservation and "enhancement" of local "character", e.g.,

- 2.11.2.1 To respect the existing built context, community vernacular and streetscape in the design, placement and scale of development.
- 3.2.3.2 High quality and innovative residential design will be promoted in a form, which reinforces and enhances the local community character, respects its immediate context and creates a quality living environment.
- 3.18.2.4 Building and site design will be compatible with site conditions, and the surrounding context, features and the surrounding landscape and the intended character of the area.

For good measure, the OP also contains specific policies for this District, at Section 4.7, on the same theme:

- 4.7.2 The Clarkson Lorne Park District is a stable, established residential district... characterized by low-density housing on large spacious and often heavily treed lots. The focus of these policies is on preserving the low-density, low intensity character of existing neighbourhoods, and identifying areas for appropriate development. To satisfy compatibility concerns, infill development on detached dwelling lots will be required to recognize and enhance the scale and character of existing residential areas by having regard to the natural features, lot frontages and areas, building height, coverage, mass, setbacks, streetscape, privacy and overview....
- 4.7.3.2 For development..., the following shall apply:
 - a) Preserve and enhance the generous front, rear and side yard setbacks;
 - c) Encourage new housing to fit the scale and character of the surrounding area...;
 - f) Encourage buildings to be one to two (1-2) storeys in height. The design of the building should de-emphasize the height of the house and be designed as a composition of small architectural elements, i.e. projecting dormers and bay windows;
 - i) House designs which fit in with the scale and character of the local area...;
 - j) The building mass, side yards and rear yards should respect and relate to those of adjacent lots.

The above OP references to "character" and "streetscape", being preserved and "enhanced", are elucidated in the OP's Glossary Section:

- Character: The aggregate of the features including the attributes of the physical, natural and social dimensions of a particular area or neighbourhood.
- Streetscape: The character of the street (that) ... the building faces. Thus, the creation of a streetscape is achieved by the development of both public and private lands.
- Enhance: To complement and assist the aesthetic and intrinsic value of a neighbourhood, site or structure.

OBSERVATIONS AND FINDINGS

a) Overview

Primarily, the Appellant attacked the proposal's "visual massing", on two grounds: inconsistency with the Official Plan (OP), and inconsistency with the intent of the Zoning By-law.

During cross-examination, Counsel for the Appellant also suggested that the proposed house *could* be narrower, with no need to build beyond the as-of-right maximum allowable width and height. The Board is not convinced, however, that the latter scenario's "visual massing" would be better perceived by neighbours. Indeed, the Owner's designer suggested that the By-law would allow a structure that might appear even more incompatible, e.g. a monolithic façade extending to the maximum width and height allowed. However, that is not the question before the Board: the issue is whether the *current* application meets the four tests.

There were several suggestions that *if* proposed height were visually similar to the existing building, there might have been little or no dispute, even if side yard setbacks fell short of By-law standards. Indeed, the Board heard no objection to a variance to continue the visual situation that prevailed for almost fifty years. There was no suggestion, for example, that either side yard was individually inadequate, or failed to function as it should, or that there was encroachment on neighbours' privacy.

The trigger to this dispute was when the existing 74-foot width (exceeding the By-law formula by eight and a half feet) was combined with the new proposed 28-foot height. The City's planner considered that "the scale of the development is okay... It complies with the scale and character of the area". The Appellant's planner vigorously disagreed.

Counsel for the Appellant also urged the Board to prefer the opinion evidence of the Appellant's planner, Mr. Romano, with decades of experience, over that of Ms. Collins, on the job for less than three months at the time of the application. She testified, however, that the City's planning decisions had been based on a departmental consultative process which, in a sophisticated city like Mississauga, the Board has no reason to doubt. The Board will not discount her articulate testimony.

b) Intent of the Official Plan (OP)

That leaves the objective merits. Ms Collins said City staff was guided by several factors.

- First, she referred to a widespread staff view that this neighbourhood was an "appropriate area for infilling and redevelopment... Redevelopment will occur on these lots".
- Having reached that initial conclusion, the next question was what format such redevelopment would take. Again, Ms Collins indicated a broadly-held view that key factors were satisfactory, e.g., that foliage was maintained, and that the hip roof and dormers "de-emphasized height".

The Board finds this approach nonetheless problematic. In particular, the Board was not shown where the above approach was substantiated by the Official Plan:

- the Board's attention was drawn to *no* finding, in *any* duly-authorized planning document, that this neighbourhood was an "appropriate area for infilling and redevelopment (where) redevelopment will occur".
- On the contrary, there were multiple OP instructions, specifically directing the

preservation and enhancement of *existing* local character.

- These repeated references do not necessarily mean that redevelopment was discouraged; but they certainly emphasized compatibility. Indeed, it is hard to see how the OP could have been more insistent on prioritizing existing character.

The Board finds the above to be a clear articulation of OP intent. The next question is: how is compliance determined? In answer, "character" is in large part visual. It is trite to observe that visual impact, of specified factors like "scale" and "massing", is affected by how much of the field of vision they occupy. The effects of a building on the character of the vicinity and on "streetscape" is therefore not just a function of width, or height, but of a combination of both. Whether this proposal maintains that OP intent must be assessed accordingly.

c) The Intent of the By-law

The intent of the Zoning By-law, in Mr. Romano's words, was that "the taller you get, the wider the setbacks".

That is indeed exactly how the By-law formula works. Mr. Romano added that the *only* apparent planning intent, behind such a formula, would be to *limit scale*, i.e. the amount of space which the building occupies in the field of vision.

His reasoning was not contradicted, and the Board finds no dispute on that account.

The corollary is that widening the façade at its base necessarily means paying additional attention to the profile further up.

d) How Does the Proposal Fare?

If the intent of the OP is compatibility with neighbourhood character – and the intent of the By-law is to control scale – does this application (for a house 74 feet wide and 28 feet high) maintain those objectives?

Visually, Mr. Mateljan's design makes efforts to control mass. On the south side, the façade is indeed recessed at the second storey, and he uses dormers and bay windows, as the OP suggested. The question was whether the end result went far enough. Ms. Collins and her colleagues believed it did.

Mr. Romano disagreed. He also argued that further measures could have been used. In an apparent reference to expendable attic space, he opined that "you can design the roof to be part of the ceiling", e.g. with vaulted or cathedral ceilings. "There are many ways to do a second floor without this height", which could be reduced by "seven feet", to the upper ceiling line portrayed in the Exhibit 4 Site Plan. "That would be better than what's proposed", he said (though he stopped short of actual endorsement).

The only rebuttal was Mr. Cerny's objection that Mr. Romano lacked architectural expertise to suggest such revisions.

That response, such as it was, was in any event off-target: for the issue is less about architecture than about the planning aspects. Mr. Romano's suggestion would bring the profile of the house into closer conformity with its neighbours, and help return the visual emphasis to the horizontal plane, rather than the vertical plane – again like the neighbours.

Counsel for the Appellant also argued that, by combining a wider-than-standard 74-foot base with a vertical profile of some 28 feet, the cumulative effect would be "visual massing that would exceed that of neighbouring homes by 50%". That proposition was not rebutted. Indeed, the Board's site visit would have suggested an even higher figure.

But leaving aside mathematics, the fact remains that no other building within sight would have a profile even remotely similar. The proposed height would be 6-8 feet higher than the highest point on its visible neighbours. This protrusion might be noticeable enough on its own; but more importantly, it would be even more noticeable on a façade 74 feet wide, in excess of the formula provided under the By-law. The potential visual discrepancy might have been less of a cause for concern, if there had been other houses of similar dimensions and profile within sight (or almost); but that was not the case.

In short, the Board saw no ground on which to believe that the resulting massing and scale would "respect the existing built context and streetscape", "be compatible with the surrounding context", and "recognize and enhance the scale of the existing area", all as specifically required by the OP. Nor was the Board persuaded that the resulting scale maintained the intent of the Zoning By-law.

In arriving at that conclusion, however, the Board is mindful of two caveats. The first is that typically, one would not expect a variance application for *one* proposed dimension – side yard setbacks – to be affected by a *second* dimension – height – particularly if that second dimension is within By-law parameters, as here. At first glance, such an outcome may appear counterintuitive.

But even if the proposed height of the dwelling – by itself – were within By-law parameters, that does not mean that “scale” and “massing” (both of which are affected by both width and height, and both of which are separate planning items) necessarily were. Even if the proposed height of the dwelling were well within By-law height limits, that guaranteed neither that the resulting overall façade was compatible with the rest of the setback formula for By-law purposes, nor that the overall scale and massing was compatible with neighbourhood character for OP purposes. In the case of these planning documents, the question of height cannot be segregated, without doing violence to both the By-law and the OP on which it is based.

The second caveat is that, as mentioned, if it were not for the height, there might have been little or no variance dispute. Indeed, the City might have been hard-pressed to explain outright dismissal of a footprint that had been in existence (with no apparent dissatisfaction) for almost a half-century. As long as the variance was viewed exclusively in terms of *width*, it was not intrinsically objectionable, and could meet the four tests. It was the interrelationship with factors other than width (notably scale and massing, to which both width and height contribute), that made the application problematic.

This points to one outcome. That is that the variance concerning width – which in the *abstract*, was unobjectionable, be authorized subject to limitations to control height, which was objectionable.

Accordingly, the Board is prepared to authorize the variance for side yard widths, subject to conditions. The first conditions are those approved by the Committee of Adjustment, on which the Board heard no dispute.

The additional condition, however, is that the overall height of the project be reduced to a point more consistent with neighbourhood character. Mr. Romano had suggested 7 feet. The Board is prepared to compromise at approximately 6.5 feet, as outlined below.

CONCLUSION

THE BOARD ORDERS:

1. That the appeal is allowed in part; and
2. That the variance to Zoning By-law 0225-2007 of the City of Mississauga, as authorized by the Committee of Adjustment in its Decision of February 21, 2008, is hereby authorized, subject to the conditions below:
 - a) The Conditions approved by the Committee of Adjustment in its Decision of February 21, 2008; and
 - b) The condition that the height of the new dwelling shall not exceed 21.5 feet.

It is so Ordered.

“M.C. Denhez”

M. C. DENHEZ
MEMBER