

ISSUE DATE:

**Feb. 18, 2009**



PL081332

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: John Verbunt  
Applicant: Jorge Roque  
Variance from By-law No.: 87-57 (Ancaster)  
Property Address/Description: 15 Oldoakes Place  
Municipality: City of Hamilton  
OMB Case No.: PL081332  
OMB File No.: PL081332  
Municipal No. A-221/08

**APPEARANCES:**

**Parties**

John Verbunt

Jorge Roque

**Counsel\*/Agent**

J. V. Kranjc\*

M. Alkerton

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

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This was a hearing in the matter of an appeal by John Verbunt (the Appellant) from a decision of the Committee of Adjustment for the City of Hamilton (File A-221/08) that authorized the following minor variance, for a property known municipally as 15 Oldoakes Place, in the City of Hamilton. The variance sought is from Zoning By-law No. 87-57 of the City of Hamilton (formerly the Town of Ancaster) and is as follows:

“To recognize the location of a swimming pool pump and filter for an existing in-ground swimming pool accessory to a single family dwelling notwithstanding that a minimum southerly side yard of 1.1 metres shall be provided for the swimming pool pump and filter instead of the minimum required 1.5 metre side yard.”

The variance authorized by the Committee of Adjustment was subject to the following condition:

1. The owner/agent shall install a wooden fence with a minimum surface density of 20 kg/m<sup>2</sup> and be designed with no cracks or gaps around the swimming pool pump and filter in the side yard to eliminate/ reduce the noise to the satisfaction of the Planning & Economic Development Department, Building Services Division.

## **THE CONTEXT**

In 2006, the Ciccarelli Group began the work associated with the construction of the pool and accessory landscaping on the Roque property. Access for the work, which took place in the rear yard, was through the side yard between the Roque and Verbunt homes. This access was given with the consent of Mr. Verbunt. The extensive work that was undertaken is shown on a plan prepared by Ms Alkerton being Exhibit 4. The work was undertaken without the benefit of the requisite permits required by the Municipality. As part of this work, the swimming pool pump, filter and heater were eventually located in the side yard between the Roque and Verbunt homes. It is the location of this equipment that has caused the dispute.

It is important to note that when Mr. Verbunt built his home some 18 years ago, he placed windows to a solarium, his kitchen and dining room in the side wall of his home, facing east to what is now the Roque home. Mr. Verbunt has developed this side yard as an outdoor patio area, which is integrated with the character and function of adjacent rooms in his home as shown on a series of photographs at Exhibit 2. The property is designated Residential by the Town of Ancaster Official Plan (now in the City of Hamilton). Both properties are zoned residential Zone R3 by By-law No. 87-57.

These facts are not in dispute.

## **THE EVIDENCE**

The Board during the course of this hearing, heard from two witnesses, Mr. John Verbunt, the Appellant and Mr. Dwayne Sterling, an estimator and project manager with the Ciccarelli Group Landscape Contractors. The Ciccarelli Group was the main

contractor with respect to the pool and landscaping project that occurred on the Roque property.

Mr. Verbunt, in his evidence, freely admitted that he was not opposed to the pool and landscaping that has occurred and that he provided access across his property so that the works could be done. It was his impression at the time that the pool equipment now located in the side yard was to be located in the Roque rear yard either in or behind the pool shed constructed as part of the works. It was his evidence that when the pool equipment was located in the side yard that he complained to the City and learned that the work had begun without the required permits. His evidence to the Board was that during the pool season the pump equipment runs 24/7 and that the noise from this equipment has seriously impacted his ability and that of his family to enjoy their patio area. On cross-examination, he maintained that he was not satisfied that the condition imposed by the Committee of Adjustment would resolve the problem. He maintained that the noise coming from the equipment impacts his enjoyment and use of his property and in particular, the patio area. He contended that if the pool equipment had been located behind the pool shed, as he originally was lead to believe, he would have no difficulty with the project. Nor in his opinion, would any neighbour be impacted as no residential properties abut the rear yards of his or the Roque properties.

The Board then heard from Mr. Sterling, a project manager, with the Ciccarelli Group. He admitted that he was not the project manager for this project and could not provide any plausible reason why this project proceeded without the required permits. He noted that upon being informed in late 2006 that permits were required, it took his firm until June of 2008 to complete the site alteration permit application to the City and at that time, they were informed by the City of the necessity for a variance with respect to the pool equipment located in the side yard. He could not provide any compelling reasons for the location of the pool equipment in this location and freely admitted under cross-examination, that at the time of construction, this equipment could have been located in a variety of locations within the Roque's rear yard. Ms Alkerton who prepared the drawings, found at Exhibit 4, told the Board that the equipment was originally to go behind the pool shed but that based upon instructions from the owner, the pool contractor subsequently located the equipment in its current location, in the side yard next to Mr. Verbunt's patio.

Mr. Sterling suggested that the pool equipment was located in the side yard, on the basis that the pool subcontractor believing that only a 0.75 metre side yard was required, while in fact the by-law required a 1.5 metre setback. He proffered that a reduction of the side yard setback requirement of 0.4 metres was minor. He provided no compelling evidence to the Board that the fence required, as a condition of the variance, would attenuate the noise coming from the pool equipment.

## **FINDINGS AND CONCLUSIONS**

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

The Board can give little weight to the evidence of Mr. Sterling as he was not the project manager for the project and his knowledge of events was limited at best. He provided no credible planning evidence, with respect to the mitigation measures being proposed, in the Committee of Adjustment decision. It should be noted that the City's planning report to the Committee of Adjustment expressed no concerns on the merits of the application. The Board can only assume from the City's report found in the Board's file that there are no conformity issues with the Official Plan in force and effect. Nor in the Board's findings are there any consistency issues with Provincial Policy. This is truly a local matter.

Subsection 45(1) of the *Planning Act* provides for the four tests that the Board must have regard for in considering whether a variance should be authorized. The Board for the purpose of clarity will reproduce the applicable Section of the *Planning Act*.

### **Powers of committee**

**45. (1)** The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is in effect under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained. R.S.O. 1990, c. P.13, s. 45 (1); 2006, c. 23, s. 18 (1).

The four tests set out in Subsection 45(1) are separate and distinct and for a variance application to be successful it must meet all four tests. Failure to meet one of the tests is sufficient to defeat an application. The Board has no evidence before it that the application does not meet the intent and purpose of the Official Plan of the City of Hamilton (formerly the Town of Ancaster). It is equally clear that the By-law No. 87-57 requires a minimum side yard setback of 1.5 metres. The tests for the Board in this case are whether the reduction to 1.1 metres is minor and results in appropriate development for this area.

It is unfortunate that a skilled contractor with many years of experience, in the City of Hamilton, commenced the construction of this very significant project without first checking with the City and then securing the necessary permits for the undertaking. If this had occurred, the problem that has resulted among neighbours might not have occurred. However that being said the mere fact that the equipment was installed in contravention of the by-law is not a determinative factor. The Board must view and decide the appeal within the context of Subsection 45(1) and determine whether the variance sought would result in appropriate development for the area.

In this regard, the Board prefers and accepts the uncontradicted evidence of Mr. John Verbunt that the proximity of the swimming pool pump, filter and heater create an unacceptable noise impact, which restricts the enjoyment and use of his property. The Board is not satisfied from the limited evidence provided that the condition imposed by the Committee of Adjustment is sufficient to reduce the negative impacts on the Verbunt property.

It is clear to the Board from the evidence that this equipment could have and can be located within the Roque's rear yard with little or no impact on any neighbour and that from a planning perspective this is to be preferred. The side yard separation setback requirements of the By-law are a minimum standard, designed to provide separation between buildings and structures in this residential area, and are in place to ensure a reduction of negative impacts on adjacent residential properties, which are situated in close proximity. It is the finding of the Board that the variance applied for in the context of the immediate area is not minor and the location of the swimming pool equipment in this area has resulted in serious negative impacts on the Verbunt home. This, in the Board's findings, constitutes inappropriate development not contemplated

by the Zoning By-law for this part of the City of Hamilton. The variance is not minor, the development it would sanction is not appropriate development for this area, and the variance should not be authorized.

Accordingly and for the reasons contained in this decision;

THE BOARD ORDERS that the appeal is allowed and the variance to By-law No. 87-57 of the City of Hamilton (formerly Town of Ancaster) is not authorized.

This is the Order of the Board.

“J. P. Atcheson”

J. P. ATCHESON  
MEMBER