

ISSUE DATE:

Aug. 03, 2010



PL091099

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:	Constantine Russo
Applicant:	Daniel and Maria Pimental
Subject:	Minor Variance
Variance from By-law No.:	0225-2007, as amended
Property Location/Description:	4282 Poltava Crescent
Municipality:	City of Mississauga
OMB Case No.:	PL091099
OMB File No.:	PL091099
Municipal No.:	A-349/09

APPEARANCES:

Parties

City of Mississauga

E. and C. Russo

D. and M. Pimental

Counsel*/Agent

A. Wilson-Peebles*
L. Vyas (Student at Law)

J. W. Sinclair

S. Periera

DECISION DELIVERED BY C. CONTI AND ORDER OF THE BOARD

Background

The Committee of Adjustment of the City of Mississauga approved an application by D. and M. Pimental ("Applicant") for variances to Zoning By-law 0225-2007, as amended, in order to permit the location of shed and a fireplace/smoker structure in the rear yard of a property at 4282 Poltava Crescent, Mississauga. E. and C. Russo ("Appellant") who reside immediately north of the subject property at 4286 Poltava Crescent, appealed the Committee's decision.

The purpose of the application is to obtain approval for the continued location of two accessory structures which have existed in the rear yard of the subject property for

a number of years. A shed approximately 13.94 sq. m. (149.99 sq. ft.) in size and a fireplace/smoker which is approximately 3.65 m. (12 ft.) in height are both currently located in the Applicants' backyard.

The property is within a residential area of the City of Mississauga, east of Dixie Road, and north of Burnhamthorpe Road. The property consists of a residential lot measuring approximately 9.15 m. by 45.72 m. within a residential subdivision. The lot backs onto Dixie Road. The shed is located in the southwest corner of the lot adjacent to Dixie Road, while the fireplace/smoker is located in the rear/central area of the backyard.

VariANCES

The application requires the following three variances from the provisions of Mississauga By-law 0225-2007, as amended:

1. The application proposes to retain the two existing accessory structures in the rear yard of the subject property whereas the By-law permits only one accessory structure in rear yards,
2. The shed in the rear yard of the subject property has an area of 13.94 sq. m. (149.99 sq. ft.) whereas the By-law permits a maximum floor area of accessory structures of 10.00 sq. m. (107.60 sq. ft.),
3. The height of the fireplace/smoker is 3.65 m. (12 ft.), whereas the By-law permits a maximum height of accessory structures of 3.0 m. (9.84 ft.).

These are the variances that were approved by the Committee of Adjustment and are under consideration in this appeal.

Evidence

The Board heard evidence in support of the proposal from Mr. Pimental.

The Board heard testimony from Ms Russo in opposition to the application.

The City of Mississauga also appeared at the hearing in opposition to the proposal. Krystina Collins, a Planner with the City's Development and Design Division provided testimony on behalf of the City. Ms Collins is a provisional member of the Ontario Professional Planners Institute and has approximately four years of professional experience. She was qualified by the Board as an expert in planning.

Apart from the testimony of Ms Collins no other expert evidence was provided at the hearing.

Mr. Pimental indicated that he simply wants to be able to retain the two accessory structures that are currently in his backyard. He stated that the fireplace/smoker has been in place for approximately 18 years. He indicated that he believes in part the reason for the Appellant's raising concern about the fireplace/smoker is because of a conflict between the Applicant and Appellant regarding the reconstruction of a fence between the two properties.

Mr. Pimental indicated that while he has owned the subject property for approximately 24 years, he did not occupy the house for a number of years and only moved back to the property in July of last year. While Mr. Pimental lived away from the property the fireplace/smoker was not used on a regular basis. However, since he has returned it is used about one or two times each week. Mr. Pimental indicated that he smokes fish and sausage in the fireplace/smoker which takes approximately one hour for each. He would like to be able to continue to use it.

Ms Russo indicated that she is opposed to the application because the fireplace/smoker causes pollution and odours. She stated that she has lived in the house next to the Applicant for approximately 30 years. The smoke and odour forces her to stay inside and close the windows in her house. In Ms Russo's opinion the chimney of the fireplace/smoker is too high. Ms Russo referred to photographs of the Applicant's back yard (Exhibit 2) which show the chimney of the smoker extending well above the tops of fences and the roof of the Applicant's shed. She also indicated that she is concerned about a fire hazard associated with the fireplace/smoker. She noted that when it is in operation the fireplace/smoker is often left unattended. She also

indicated that she has never noticed a portable fire extinguisher near the fireplace/smoker.

The City's position is that not all of the proposed variances meet all of the tests under subsection 45 (1) of the *Planning Act*. Ms Collins indicated that a number of properties in the subject area have accessory structures and that most have only one.

Ms Collins noted that the lands are designated Residential Low Density in the City's Official Plan and are zoned RM1-3 in Zoning By-law 0225-2007. The zoning permits semi-detached dwellings and some apartments. She referred to sections 2.2.1.1 and 2.2.2.3 of the City's Official Plan (Exhibit 1, Tab 11, pp. 35) which require compatibility of built form and orderly urban form. She also noted section 3.18.2.4 and section 3.18.2.5 (Exhibit 1, Tab 11, p. 38) which require that building and site design are compatible with the character of the area and that appropriate visual and functional relationships are created between buildings and open spaces.

Ms Collins indicated that allowing the application would disrupt the visual and functional relationships in the rear yard. Based upon the above, Ms Collins stated that the variances for allowing two accessory structures and for height do not maintain the purpose and intent of the Mississauga Official Plan.

With regard to the Zoning By-law Ms Collins referred to the height requirements for accessory structures (Exhibit 1, Tab 12, p. 40) and indicated that the fireplace/smoker exceeded the 3.0 metre requirement. She also noted that the shed exceeds the specification for maximum floor area of 10 sq. metres (Exhibit 1, Tab 12, p. 40). Ms Collins indicated that while the size of the shed is excessive, her opinion is that this should not be an issue unless the Board were to allow the variance to permit both structures. She stated that the intent of the by-law is for rear yards to be as open as possible, and that allowing both structures to continue with the combined floor area of both would be contrary to this intent.

Ms Collins also referred to section 4.1.2 of the By-law (Exhibit 1, Tab 12, p. 41) through which a gazebo and a play structure could also be permitted in the rear yard of the subject property. Ms Collins expressed the opinion that these other structures would occupy additional rear yard space and further compromise the By-law's intent to maintain rear yard open space.

Based upon these considerations, Ms Collins' opinion is that the variances for the height of the smoker/fireplace and for permitting two accessory structures do not maintain the purpose and intent of the Zoning By-law.

Ms Collins indicated that there would be negative impact if all three variances were allowed. She stated that maintaining both accessory structures would not be in keeping with the character of the neighbourhood.

Furthermore, based upon the above considerations, Ms Collins indicated that the variances for height and allowing two accessory structures are not desirable.

Discussion and Findings

The expert evidence in this matter provided by the City of Mississauga is uncontradicted. In addition to this evidence, the Board also notes that Mr. Sinclair in his argument referred to Mississauga By-law 49-03 which controls the operation of outdoor fireplaces and fires for cooking. Mr. Sinclair noted that the fireplace/smoker contravenes a number of the provisions of section 9 of the By-law.

Ms Wilson-Peebles submitted a number of authorities to support the City's position. The first two authorities, *Sousa V. Mississauga (City)*, [2007] and *Corrie v. Mississauga (City) Committee of Adjustment* [2001] are particularly relevant in that they deal with similar issues as the current appeal within the City of Mississauga. The former Decision refused an appeal which proposed two accessory structures, while the latter refused a proposal for an accessory structure with a floor area greatly in excess of that permitted.

In addition to these matters, through the authorities Ms Wilson-Peebles also noted that legal non-conforming status has not been suggested for the Applicant's two accessory buildings.

In making its decision the Board recognizes that the Applicant's accessory structures have been in use for a number of years. The Board also recognizes that there may be underlying issues between the Applicant and Appellant which have precipitated this appeal.

However, the Board must make its decision based upon the evidence regarding the ability of the proposed variances to meet the four tests under subsection 45 (1) of the *Planning Act*. The expert opinion evidence of Ms Collins is uncontested and it is the only evidence which addresses the four tests in detail. Therefore, the Board accepts and relies upon the evidence provided by Ms Collins on behalf of the City of Mississauga.

With regard to Variances #1 and #3 above, for allowing two accessory structures and for the height of the fireplace/smoker, the Board finds that they do not maintain the general purpose and intent of the Official Plan. The proposed variances would provide for a built form which is not compatible with the built form of the area. The variances would not permit for the maintenance of appropriate visual and functional relationships in the neighbourhood as required in the Official Plan.

Regarding Variances #1 and #3, the Board finds that they do not maintain the general purpose and intent of Zoning By-law 0225-2007, as amended. Variance #3 substantially contravenes the height requirement in the By-law for accessory structures. Variance #1 would allow two accessory structures to continue to be located in the backyard which will contravene the By-law's intent to maintain rear yard open space.

The Board finds that Variances #1 and #3 are not minor. The fireplace/smoker exceeds the height requirement for accessory structures by approximately 22%. Furthermore, by allowing Variance #1 in combination with possible other accessory structures permitted through the By-law the open space amenity area in the rear yard could be severely compromised. In addition, Variances #1 and #3 could create a significant negative impact.

For the above-noted reasons, the Board also finds that Variances #1 and #3 are not desirable for the use of the lands.

With regard to Variance # 2 regarding the floor area of the shed, the Board finds that it does maintain the purpose and intent of the Official Plan. The increased area of the shed is compatible with the built form of the area and does not disrupt the existing visual and functional relationships.

The Board finds that Variance #2 also maintains the general purpose and intent of Zoning By-law 0225-2007. The shed on its own will not detract from the By-law's objective of maintaining private amenity space in rear yards. In combination with other permitted accessory structures it will maintain the appropriate open space to built space relationship.

The Board finds that Variance #2 is minor in that the additional floor area, while above the By-law's requirements, represents an existing condition and it will not have any negative impact.

Furthermore, for the above-noted reasons the Board finds that Variance #2 is desirable.

In view of these findings, the Board allows the appeal with regard to Variances #1 and #3 and these variances are not authorized.

The Board dismisses the appeal with regard to Variance #2.

Order

THE BOARD ORDERS that the appeal is allowed with regard to variances to City of Mississauga By-law 0225-2007, as amended, regarding the proposal to retain two accessory structures in the rear yard and regarding the height of the fireplace/smoker and these variances are not authorized;

AND FURTHER the appeal is dismissed with regard to the following variance to City of Mississauga By-law 0225-2007, as amended and this variance is authorized;

The shed in the rear yard of the subject property has an area of 13.94 sq. m. (149.99 sq. ft.) whereas the By-law permits a maximum floor area of accessory structures of 10.00 sq. m. (107.60 sq. ft.).

So Orders the Board.

"C. Conti"

C. CONTI
MEMBER