

ISSUE DATE:

Aug. 6, 2010



PL100422

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:	Mary Cracchiolo
Subject:	Minor Variance
Variance from By-law No.:	6593 (Hamilton)
Property Address/Legal Description:	240 Summerhill Ave. S./Lot 114, plan 786
Municipality:	City of Hamilton
Municipal File No.:	A-57/10
OMB Case No.:	PL100422
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APPEARANCES:

Parties

Mary Cracchiolo

City of Hamilton

Counsel

B. Duxbury

J. Wice

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

1. INTRODUCTION

This variance dispute centres on the Cracchiolo family home, in the City of Hamilton (the City). In 1971, the father started producing and repairing jewellery in the basement – as allowed by the Zoning By-law (ZBL), under the name "Home Occupation", on the model of a home hairdresser or barber. Though the operation did not expand physically, it prospered to the point that it included his wife Mary Cracchiolo (handling business aspects), Sam Cracchiolo (the son – goldsmith/silversmith as of 1981), and after the father's death, his two daughters (parttime), plus (recently) a bookkeeper parttime.

A passer-by would not know the enterprise existed. The widow continues to live in the main part of the house, but the three children now have homes of their own (one daughter being next door). This led the City to issue a Zoning Violation Notice:

- Whereas the By-law's Home Occupation provisions allowed employees who were "members of a *family residing in the dwelling* unit as their principal place of residence", these family members were no longer residents;
- And whereas the By-law limited merchandise to items "produced on the premises", not *all* articles for sale had been created there by the family.

So the widow Mary Cracchiolo (the Applicant) applied to the Committee of Adjustment (COA) for variances to regularize the situation – one variance to allow non-resident employees (on Condition that three of the four were family members), and the other to allow a minority of offsite merchandise. City staff, however, was opposed, saying there was an undue "intensity of use", allegedly undermining residential zoning. The COA turned down the application, and the Applicant appealed to the Board.

At the hearing, each side was ably represented by Counsel and a Planner. There was also a sizeable audience of neighbours (including seven Participants), mostly in support of the Applicant.

The Board has carefully considered all the evidence, as well as the submissions of Counsel. Despite the eloquent arguments of the City's Counsel and Planner, the Board finds for the Applicant – but subject to certain further modifications.

The Board cannot reproach the City's vigilance about parking and, more importantly, the integrity of its zoning system. Those preoccupations were well-presented, and reasonable. The Board finds, however, that in this case – and under Conditions to be imposed (including *supplementary* terms) – those concerns are also manageable. The expected "intensity of use" would be no greater than at other Home Occupations (the By-law offers the example of barbers and hairdressers), and the prospect of setting a problematic precedent can be circumscribed. Actual visible impact is negligible. Subject to the Conditions herein, the Board finds that the proposal meets the four tests for a minor variance under Section 45(1) of the *Planning Act*. The details and reasons are set out below.

2. BACKGROUND AND CONTEXT

The neighbourhood has rear garages and long driveways – space for one car in the garage, and three in the driveway. Family members sometimes park in the daughter's driveway next door, which is similar.

The By-law cites the example of a Home Occupation involving one hairdresser or one barber (though not more than one). Here, this "Home Occupation" enterprise was "invisible from the street", operating by word-of-mouth with no signage – or ads, or even a telephone listing, though, as the business involved valuables, there was substantial lighting outside for security reasons. It attracted 6-8 people per day, with seasonal variations. The widow is the remaining onsite resident, and considered the principal of the Home Occupation enterprise. The four employees are the son (no exact figure for hours worked per week), the two daughters, and the bookkeeper (the last three are estimated to work about 17-18 hours per week).

The existing ZBL No. 6593, dating from 1950, lists a long series of conditions for Home Occupations, including restrictions on

- signage,
- display,
- storage,
- equipment,
- area,
- noise,
- vibration,
- fumes,
- odour,
- and dust.

Here, there was no dispute that this Home Occupation met the above requirements, but not two others: (a) although all family members used to live onsite, the three children now had their own homes; and (b) some goods had been produced offsite.

In short, though the Home Occupation was once entirely consistent with the By law (when there was no offsite merchandise, and when family members in the business all lived upstairs), the problem today is that they grew up.

Many neighbours expressed satisfaction with the arrangement, except for one neighbour several doors away, an amateur astronomer concerned about light shining toward his property. He also teaches business and professed concern about Home

Occupations enjoying an unfair advantage over other businesses. He said his complaint may have triggered the City’s Zoning Violation process, but that “I am not arguing that they should close their business. If we could find a way that it doesn’t change and it doesn’t grow, I’m perfectly content”.

The application was for two variances, which the Board labels as follows:

Variance No. 1: Family Employees	This was for a variance “not requiring family member employees to reside at (the) premises”.
Variance No. 2: Sale of Goods from Offsite	The second variance was about merchandise from offsite, which can be considered in two categories:
-	Items sold <i>in combination</i> with created items – e.g., a pendant might be produced onsite, but not the chain on which it was hanging;
-	And other items are stand-alone (e.g. watches).

The son estimated that items from offsite totalled some 20% of the business; so the second variance was to permit “merchandise not produced on the premises, provided such sale of goods and merchandise do not constitute the majority of the business”.

The City Traffic Engineering & Operations Division, which supervises parking, had no objection; but City planning staff’s report said the application did not meet the tests of the *Planning Act* (described later), but offered no rationale. On a split Decision, the COA turned down the application, repeating that it did not meet the tests of the Act (without significant explanation), but adding that “intensity of use... would not be appropriate”.

At the Board hearing, the Applicant's Counsel outlined four Conditions which the Applicant volunteered to attach to the variances:

- The Home Occupation would be restricted to the business of jewelry.
- The space for the Home Occupation would be limited to 25 square metres.

- The Home Occupation would engage no more than four employees, of which three would be immediate family members.
- Lighting would be put on timers.

In the original variance application, another Condition was that items produced offsite would “not constitute the majority of the business”.

There were allusions to other possible conditions, e.g. authorizing the variance only for so long as the Applicant occupied the house; that family members park next door at the daughter's house; and/or that the hours of business be restricted. However, there was less certainty about the feasibility and/or utility of these other prospective Conditions.

3. APPLICABLE CRITERIA

3.1 The Four Tests

The criteria (often called “the four tests”) are set out at Section 45(1) of the *Planning Act*, namely that a variance 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 Official Plan (OP) and the Zoning By-law (ZBL).

3.2 The Official Plan and Zoning By-Law

Consistency with the Provincial Policy Statement or the Growth Plan for the Greater Golden Horseshoe were never in dispute; but as for the OP and the ZBL, this is a transitional period in Hamilton. A new OP has been adopted by Council, but not approved by the Minister of Municipal Affairs and Housing yet. A new ZBL has also been adopted— for other parts of the City, with the expectation (undisputed by either side) that it will eventually extend to this neighbourhood. Both sides treated each new document as not legally binding – but reflective of the expected path of good planning.

The existing OP allows Home Occupations if:

The following provisions are, or will be, adequately met:

- i) A Home Occupation... only by an owner occupying the dwelling, and employing family members that also occupy the dwelling;
- ii) ... (to) occupy only a limited floor area... and
- iii) ... not detract from the residential character of the area.

The *new* draft OP replaces the phrase "Home Occupation" with "Home Business", but adds laudatory wording. It also adds that the number of employees, and floor area, shall be set out in the Zoning By-law, but without specifying how. It refers to no restrictions concerning either "families", or sale of items produced offsite.

Working at home is desirable from an environmental perspective... (and) may be considered in neighbourhoods where it can be integrated into the residential community.

Home business: means an occupation or business... conducted by a resident of the dwelling, and is clearly secondary to the predominant use of the dwelling for residential purposes.

A business shall be permitted accessory to a dwelling provided that all the following conditions and criteria are met:

- i) Limitations on the number of employees, the gross floor area and the types... shall be established in the Zoning By-law....

At the level of Zoning By-laws, the *existing* 1950 By-law said:

"Home Occupation" shall mean any incidental and secondary use... by members of a family residing in the dwelling unit as their principal place of residence, that does not change the character of the dwelling unit where

- a) no goods (are)... sold upon the premises except such goods... produced on the premises....

The By-law cited an example of a Home Occupation which is a permitted "incidental and secondary use", namely "one hairdresser or one barber (with) one comb out centre; and one hair styling sink". Though such provisions had been in force for fully 60 years, neither side in the current dispute pointed to any precedent where they had been further interpreted.

The *new* ZBL, now applicable elsewhere in the City, says a "Home Business" is "secondary to the use of the dwelling unit as a private residence". This time, instead of hairdressers, it cites the example of "Craftsperson Shops", i.e. "an establishment used for

the creation... of custom or hand-made commodities, together with the retailing of such commodities". Other Home Businesses include "studios" and "repair services". Permitted uses exclude "accessory retail", but no definition was offered. The document also allowed employees, so long as "no more than one non-resident employee shall be permitted".

4. OBSERVATIONS AND FINDINGS

4.1 Introduction

This dispute between the Applicant and the City focused on three questions:

- **Is the tail wagging the dog?** The City said the scale of this Home Occupation eclipsed the residential use, including whatever had been intended by the OP and ZBL; the Applicant disputed that contention.
- **Is this the slippery slope?** The City said authorization of these variances could open the floodgates to various commercial retail operations in residential buildings and neighbourhoods; the Applicant said this prospect was pre-empted by the Conditions which had been volunteered for these variances.
- **Impact?** According to Counsel for the Applicant, "There was not one concrete example of anything that would show adverse impact". The City was skeptical, saying the two factors above could undermine its very system.

4.2 Is this Use "Secondary" in terms of "Intensity"?

The family's proposal pertains to 25 square metres in the basement. There is no dispute that the rest of the building remains the dwelling of the Applicant. However, although Counsel for the City said the family represented "the kind of people we want operating these kinds of enterprises", the City maintained that if employees outnumbered the resident four to one, the building was manifestly beyond the tipping point of being primarily commercial, not residential; that commercial use could no longer be considered "secondary" or "incidental", as the old ZBL and new draft OP specified. The building had too high an "intensity", meaning – in the City's view – that the variances could not possibly be minor, desirable, or consistent with the intent of the OP or ZBL.

But by what benchmark does one identify the "intensity" that was intended?

The City had no ready suggestion – but the By-law did. The latter specifically offered the example of a barber or hairdresser. For that matter, the Board takes notice that Home Occupations are nothing new: business icons like Avon, Tupperware and Amway, to name a few, were built on those kinds of enterprises.

So would this business generate a scale of activity, visitation, parking and general bustle which significantly exceeded that of the typical barber, hairdresser, or any of the other well-known Home Occupations? If so, the Board was not shown. Indeed, the Board was shown no physical signs to distinguish this enterprise from what the Bylaw apparently treated as the classic Home Occupation.

Granted, the straight numbers – four employees – looked superficially like a cause for concern. However, it has long been established that the Board must be circumspect about purely numerical exercises: and in this case, most of those "employees" were only part-time, and one lives next door. In terms of coming-and-going, neighbours testified that it was not obvious that employees were even there; and that testimony was not rebutted. Matters might have been different, if there were some physical evidence of disruption in any planning intent, but no such physical evidence was offered – in 39 years.

Restrictions on Home Occupations can also be explained by a likely By-law concern about deliveries. Many businesses generate incoming deliveries of supplies and outgoing shipments of product. In this case, however, there was no evidence of any such concern – particularly if the Home Occupation was confined to jewellery, in which sizeable or numerous movements of goods are a non-issue.

The City also expressed concern that this had become an enterprise "run by non-residents". The Board, however, was shown no evidence that the resident Applicant (the mother) had relinquished control.

As for parking, there was no hard evidence of concern. Matters might have been different, if there had been an objection from the City's parking experts, or any pattern of parking violations; but such was not the case.

In short, there was no physical evidence to corroborate the City's apprehension about an undue intensity of use – at least one that would be outwardly reflected in visible goings-on at the property or on the street. The Board finds that this property is still primarily residential, in both appearance and fact.

4.3 Precedent

If these variances were approved, asked the astronomer neighbour, could they open the door to "Radio Shack" types of operations in basements (and elsewhere) in residential zones? The City expressed eloquent concern about such retail. A chain to support a custom pendant, said Counsel, was one thing, but sale of standalone merchandise (produced offsite) was another, whose permission could open the floodgates to any variety of commercial activities. The Applicant's Counsel replied that the proposed Conditions – notably limiting the Home Occupation to the jewellery business, operated by family members – precluded the prospect of any such floodgates, or any generalized undermining of the City's zoning system.

The Board understands the City's concern about protecting the integrity of its zoning system, and of avoiding any generalized blurring of the lines between residential and retail areas. Do those concerns apply to this fact situation, involving

- A specific kind of business,
- with a family dimension,
- plus other limitations on activities?

The Applicant countered that Conditions could be imposed in such a way as to preclude any replication or loss of integrity to the City's system.

In considering those arguments, the Board is mindful that it is in the very nature of Home Occupations for *some* business activity to be permitted, by By-law, in residential zones; and it is in the very nature of variances to allow some leeway, provided that the four tests of the *Planning Act* are met. How do these factors affect the four tests here?

The first factor is the nature of the business. Jewellery is not a "Radio Shack" type of retail business; here, a substantial inventory fits into a briefcase. That is not the case for a typical store, and makes this business a relatively good "fit" for a Home Occupation, in terms of being minor, desirable/appropriate, and consistent with the OP and ZBL.

The second factor, suggested by the Applicant, was the proposed Condition that most employees be family members. While consistent with the spirit of the *existing* 1950 By-law, the *new* By-law provisions for "Home Businesses" no longer refer to "family". That is presumably for a reason. As mentioned at the hearing, jurisprudence subsequent

to that 1950 By-law questioned “people zoning”, notably the Supreme Court of Canada’s decision in ***Bell v. The Queen, (1978) 98 D.L.R. (3d) 255***, where the Court struck down a by-law limiting dwelling occupants to family members. The Court agreed with a lower-court Judge who had said the By-law “was not regulating the use of the building but *who* used it”. The Supreme Court also agreed with the appellate Judge who said:

I do not think personal qualification of this type or other personal characteristics or qualities have ever been suggested here as a proper basis for control of density or any issue relevant to land use or land zoning.

Out of an abundance of caution, the Board therefore prefers its disposition not to involve requirements for employees to be family members.

A third factor is the question of restrictions on retail, focusing on items produced offsite by third parties. The son said this represented “20% of the business”. However, the Board heard no evidence that purely stand-alone merchandise, which has no direct relation to the Home Occupation, had ever formed part of the intent and purpose of either the OP or ZBL. There are, nonetheless, two exceptions:

- Items routinely *sold together* with items created onsite; the City expressed no particular objection, e.g., to sale of chains for custom pendants; the Board finds no objection either, in terms of the intent of the OP or ZBL.
- Merchandise to *replace* items which would otherwise be *repaired* onsite. For example, *if* the Home Occupation *repairs* watches (not discussed), it would be reasonable to have watches in inventory, e.g. if repair proves unfeasible; but the same rationale does not apply if such repairs are *not* part of the business.

In short, the Board finds that sale of offsite merchandise can fit the intent of the Home Occupation provisions about onsite production, under three Conditions: (a) an item is being sold with a *physical connection* to an item produced on-site (e.g. a chain for a pendant); or (b) the item is to *replace* one brought in for repair (in a line of products which the Home Occupation routinely repairs); and the whole is subject to (c), that total sales of (a) and (b) remain consistent with the existing pattern in this Home Occupation, namely that they do not represent more than 20% of the business.

4.4 Other Impacts

As for other impacts, the Board has not found any.

5. CONCLUSION

The Board was not persuaded that the proposal would be at odds with any of the four tests under Subsection 45(1) of the *Planning Act*. Although the Board finds the City's concerns about precedent and the integrity of its overall planning system reasonable, it also finds those concerns manageable. The Board is satisfied that the Conditions, as revised, can prevent the Home Occupation from being transformed into something contrary to the intent of the planning documents and other tests. The Board finds that the variance application, subject to the Conditions below, 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.

THE BOARD THEREFORE ORDERS:

1. Variance No. 1: Family Employees

One variance to By-law 6593 of the City of Hamilton is authorized as originally applied for, namely:

- Not requiring family member employees to reside at (the) premises.

2. Variance No. 2: Sale of Goods from Offsite

A second variance to By-law 6593 of the City of Hamilton is authorized as follows:

- To permit the sale of goods and merchandise not produced on the premises, provided:
 - a) Items sold have a physical connection to items produced on-site; or

- b) Items sold are to replace items brought in for repair, in a line of products which the Home Occupation routinely repairs; and
 - c) Total sales of (a) and (b) above do not represent more than 20% of the business.
3. The above authorizations are subject to the following further Conditions:
- a) The Home Occupation is restricted to the production, repair and sale of jewellery.
 - b) The space for the Home Occupation is limited to 25 square metres in the basement.
 - c) The Home Occupation will engage no more than one full-time employee and no more than three part-time employees each working a maximum of halftime.
 - d) Lighting will be put on timers, and to the extent possible, will not point directly into the property of neighbours.

It is so Ordered.

“M. C. Denhez”

M. C. DENHEZ
MEMBER