ISSUE DATE:
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PL100661

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:	Penelope McIvor
Applicants:	Joyce Kite and Rob Smith
Subject:	Minor Variance
Variance from by-law number:	Etobicoke Zoning Code
Property Address/Description:	7 Ashwood Crescent
Municipality:	City of Toronto
Municipal File No.:	A146/10EYK
OMB Case No.:	PL100661
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A P P E A R A N C E S :

Parties	**Counsel**
Joyce Kite and Rob Smith	Adam Brown
Penny McIvor	

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

1. INTRODUCTION

In this variance dispute in the City of Toronto (the City), Joyce Kite and Rob Smith (the Applicants) sought to expand their suburban bungalow upward in 2009. Its new height would double that of any other house in sight – with a three-storey tower extending even higher.

The roofline and tower would both exceed the Zoning By-law maximum; so would the new Floor Space Index (FSI); and since the house's footprint predated current By-law provisions, it would also encroach on sideyards. The Applicants therefore sought three variances – for height, FSI and sideyards – for what was called "a second storey addition, a third floor mezzanine and rear enclosed porch".

City planning staff expressed concerns, but the Committee of Adjustment (COA) authorized the variances. No appeal was filed. Then the Applicants had a new idea – to demolish the existing dwelling completely, and start over with new materials/techniques: “This project”, said their architect, “is to be LEED certified… and must maintain its ‘green’ features to be able to use this internationally recognized label”.

However, the City treated this as a *new* project – “a new two-storey dwelling” rather than an “addition”. So in 2010, the Applicants re-applied to the COA, with similar dimensions. The COA responded as before; but this time, the owner of the neighbouring bungalow, Penny McIvor (the Neighbour) appealed to the Board. Her Notice of Appeal did not mention sideyards, but did mention FSI and height.

The Board has carefully considered all the evidence, as well as the submissions of both sides. The Board shares the concerns of City planning staff: the proposed visual impact of height and FSI is not minor, and those aspects do not maintain the stated purpose of the Official Plan (OP) to “respect and reinforce the existing physical character”. Despite eloquent arguments about extenuating circumstances, notably the project’s Modernist design and LEED, the Board found no authority to give any one style or “green brand” a bye around the *Planning Act*. The appeal concerning height and FSI is allowed. The details and reasons are set out below.

2. BACKGROUND AND SETTING

The site, on Ashwood Crescent in a 1950’s suburban area of the former City of Etobicoke, has no two-storey buildings in sight. The streetscape (Exhibit 5) is uniformly composed of bungalows, with some split-levels around the corner. Occasional two-storey replacement houses (with larger FSI) are some blocks away – what the Applicants’ Counsel and Planner praised as "reinvestment in single-detached houses of a more Modern nature", a "dynamic which is taking place in this old suburban area" (which, in any event, was said to be "vernacular", i.e. not signed by an architect).

The proposal is to demolish the existing bungalow, replacing it with a 2-3 storey dwelling 2½ times its floor area (4248 square feet with six bedrooms, versus 1746 square feet with three). The LEED certification, the Applicants' Planner added, meant that the project would complement the Official Plan (OP) provision that “environmental

sustainability will be promoted….” As a further gesture of “sustainability”, some demolition materials would be donated to charity, instead of being sent with other debris to landfill in Michigan.

The new foundations would follow the existing footprint. The proposed two-storey structure would now extend upward to a shed roof – “a Modernist design with a palette of materiality”. With a slope of only 12 degrees, it would *look* much like a flat roof, and was treated as such by City planning staff. Whereas height in the existing Etobicoke By-law is limited to 6.5 metres, this roof would reach 7.4 metres.

The architectural flourish, a flat-roofed tower 19 x 20 ft., was originally proposed at 9.22 metres, then 8.87 metres, with glass on four sides, like a small aircraft control tower. This tower, projecting an additional storey above the master bedroom, was said to serve two functions: its internal balcony ("mezzanine"), overlooking the bedroom, was called a place of "respite"; it would also have a door to an exterior second-storey landscaped rooftop deck (“green roof”), with a view down to and over the surrounding bungalows.

City planning staff’s first report expressed unambiguous concerns about OP conformity, “character”, massing and privacy:

> The initial submission requested a flat roof height of 9.22 m. Upon consultation with the Applicant, the flat roof height was reduced to 8.7 m.
>
> The Toronto Official Plan states that development in Neighbourhoods shall "respect and reinforce the existing physical character of buildings, streetscapes...". The prevailing building types on Ashwood Crescent are bungalows and side-splits both with traditional sloped roofs. The Applicant is proposing a "modernist" style dwelling with a flat roof and third floor mezzanine. No flat roofed dwellings are located on Ashwood Crescent.
>
> In addition, the zoning by-law introduces a reduced maximum permitted flat roof height in comparison to a sloped roof dwelling. This restriction on flat roofed dwellings is to minimize massing and shadowing and to protect privacy. The Applicant is requesting an additional 2.2 m in height beyond the provisions of the zoning by-law for a flat roofed dwelling. A history search of recent applications before the Committee of Adjustment finds no variance requests per height on Ashwood Crescent.
>
> The additional floor space and windows proposed on the third floor mezzanine are to be constructed at a height that would traditionally be covered in an attic on a sloped roof dwelling. This third floor mezzanine circumvents the intent of the zoning By-law in respect to privacy

The project architect responded. As for privacy, he offered to frost most of the tower's windows (the COA agreed). As for the rest, he countered with LEED:

> This project is to be LEED certified, so will be certified by a third party, and must maintain its "green" features to be able to use this internationally recognized label. This is probably the best guarantee with regard to the quality of the project.

The COA appeared satisfied, and authorized the variances at 8.70 metres. When the new application was submitted in 2010 for a "new" dwelling, the Applicants increased the proposed tower height by 6.7 inches above the COA figure, to 8.87 metres. City planning staff maintained its position concerning inconsistency with the OP, replying as follows:

> As noted in our previous comments (June 4, 2009), the proposed building height is *not consistent* with the character of the surrounding neighbourhood.
>
> Staff therefore recommend that *should* the Committee approve the application, the maximum height of the flat roof be limited to 8.7 metres as previously recommended [Emphasis added].

Staff did not explain why a difference in tower height of 6.7 inches might make a significant difference to its finding about inconsistency with neighbourhood character; nor did it further address the question of neighbours' privacy, related to views from the rooftop deck.

The COA again authorized the variances, reiterating its previously authorized figure of 8.70 metres. Aside from referencing the four tests at Section 45(1) of the *Planning Act* (see below), it gave no written reasons.

3. APPLICABLE CRITERIA

For variances, 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 Zoning By-law and the Official Plan.

4. OBSERVATIONS AND FINDINGS

4.1 Scope of Appeal

The Board finds that the variance concerning sideyards and footprint was not appealed. That variance may therefore be considered to have been authorized by the COA, and is not before the Board. The following observations are therefore confined to the variances for height and FSI.

4.2. Visual Impact, Massing and "Character"

Most of the debate focused on the Neighbour's stated concerns about "excessive size, scale or mass". Counsel for the Applicants tried vigorously, on cross-examination, to narrow those concerns to a single issue: architectural aesthetics (or, to use his phrase at the hearing, "good taste"). The Neighbour preferred to say the project did not fit the neighbourhood character – "a monster house of entirely conflicting design".

"Character" has often been raised in Board hearings, but has long been treated as a difficult topic, particularly because it is often amorphous, and potentially fraught with subjectivity. However, the theme of "character" is repeatedly addressed in the City's OP, where it is called a "cornerstone". Indeed, Toronto, unlike some other centres, has also gone to the trouble of addressing the components of "character" in its OP with more specificity (Exhibit 1, Tab 2), including the following at Policy 4.1.5:

> Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular…
>
> c) Heights, massing, scale and dwelling type of nearby residential properties…
>
> No change will be made through rezoning, minor variance, consent or other public action that are out of keeping with the physical character of the neighbourhood.

Was the City staff report, about the project not being "consistent with the character of the surrounding neighbourhood", incorrect, in terms of the component "heights, massing (and) scale"?

- Its "heights" are two to three times those of any visible neighbour;

- Its "scale" is similarly twice that of any such neighbour;

- And its "massing", in terms of its "faceprint" on the street, would also be two to three times that of any such neighbour.

On that cumulative basis, the Board sees no reason to be less concerned about OP compliance than the above staff report was. The Board reaches that conclusion independently of the impact of views from the rooftop deck on the neighbours' privacy, which would itself be of potential concern.

Staff also noted that such a digression was unprecedented on the street.

As difficult as the concept of "character" may be, it cannot be written out of existence -- particularly when the approved OP has gone to such pains to repeat its importance over and over, and to spell out its components. This "cornerstone" of the approved Toronto OP cannot be ignored altogether. As for its components, the Board agrees with staff that the substantial digressions from the surrounding "heights, scale and massing" are cumulatively troubling. That concern was addressed at length by the Applicants at the hearing – but not, in the Board's finding, convincingly. At that level, the Board was not persuaded that the application met the four tests of Section 45(1), notably in terms of visual impact, and maintaining the intent and purpose of the OP.

4.2 Supposed Extenuating Circumstances

There were, however, vigorous and eloquent arguments for the project. The first and most obvious was that the professionals at the hearing were all on the side of the Applicants, and none (in law or planning) on the other side.

That certainly influenced the evidence and interpretations thereof. However, it is long-established that the Board has its own residual responsibilities concerning the integrity of the statutory framework. Furthermore, the evidence of the "lay" public is not to be discounted altogether – particularly when there is a complementary paper trail in City staff reports, and clear photographic evidence. Parenthetically, the most illustrative photos of the streetscape within sight of the subject property (Photos 1 and 2 of Exhibit

5) were from the Applicants' own exhibit. There was nothing in that photographic evidence to relieve the concerns.

Counsel for the Applicants argued, however, that those concerns were mitigated because the view of the subject property would be obstructed by foliage: "You can't even see it (the tower) if you tried".

From *some* vantage points down the street, deciduous trees indeed obstruct views, as other photo exhibits indicated. However, (a) those views are different when trees are not in leaf; and (b), even with the benefit of full foliage, Photo 1 of the Applicants' Exhibit 5 indicates that the site is plainly visible. Visual impact here cannot be ignored on the incorrect assumption that the project would be hidden.

Another supposed extenuating circumstance, argued more subtly, was that the project was a "Modernist" symbol of "reinvestment". This was contrasted with the existing "old suburban" example of "vernacular". The Board must assume that these loaded expressions were used (several times) for a reason, namely that they might advance the Applicants' case. Perhaps they did so at the COA; that is a matter of conjecture, but the language is certainly consistent with what one hears in some architectural circles.

It is not, however, the language of either the *Planning Act* or the OP. *Any* form of development in an existing neighbourhood is "reinvestment"; if that automatically made it desirable, the OP would not have specified the limitations that it did. Furthermore, the Board was told of no OP provision that specified any preference for the Modernist style over any other style, including "vernacular". On the contrary, the Board takes notice that vast areas of Toronto's lowrise residential neighbourhoods are "vernacular" (far more than architects' customized Modern); if the OP had intended their generalized replacement with a different style, it would not have referred repeatedly to maintaining their stable character.

4.4 The "Sustainability" Dimension

The Applicants' case opened with emphasis on LEED. The architect's letter called LEED "the best guarantee with regard to the quality"; and the Applicants' Planner

told the Board that "environmental sustainability will be promoted". Those words demand consideration: history is riddled with instances where innovation was hamstrung by overly literal adherence to rules, and where environmentalism was poorly served by hidebound regulation.

The Board must be cautious, however, concerning "sustainability" and various trademarks for "green building" – not for fear of overextending the cause of environmental innovation but, on the contrary, of trivializing it. The Board takes notice that, with so many reported attempts by all and sundry to oversell environmental benefits (notably to expedite approvals), a new word was coined in North America – "greenwashing". It also applies to construction.

There are several brands of "green building" in Canada (LEED, R-2000, Built Green, EnviroHome etc.), some developed in Canada, some elsewhere; but not even the Canadian systems – developed with Canadian expertise for Canada's climate – represent a shortcut around the *Planning Act*. That is not a matter of the planning system being Luddite or anti-green: there is simply no statutory authority for such brands to sidestep land-use planning requirements, and no policy reason why any one given trademark-holder (non-governmental), among several, should be so empowered. "Certification by a (private) third party" is no substitute for a transparent and legally-mandated public process, and no guarantee of good planning (nor does it usually purport to be).

The Board must also be circumspect about "sustainability" arguments, again because of concerns about "greenwashing". The word has been used in so many ways (often contradictory) as to dilute its significance. For example, though the word appears in the City's OP, the supposed explanation refers to "focusing on long-term horizons" – which could mean almost anything.

Does this project nonetheless deserve favourable treatment for "promoting environmental sustainability"? In a province where sending a plastic bag to landfill is considered environmentally problematic, the notion of turning entire buildings into landfill – in the name of environmental sustainability – would surprise at least some observers. For present purposes, it is sufficient to note that such claims are no shortcut around the *Planning Act*.

5. CONCLUSION

This case is not about freezing suburban neighbourhoods in a 1950's time warp. The OP and this Board anticipate that many options exist, to improve the Applicants' property – within the framework of the *Planning Act*. In particular, it is fully expected that many of those options can be both innovative and "green".

However, that does not constitute authority to sidestep the four tests of Section 45(1) of the *Act*.

THE BOARD ORDERS that since the variance for sideyards/setback/footprint, as authorized by the COA, was not referred to in the appeal, it may therefore be considered authorized.

However, as for the variances for height and FSI, the Board was not persuaded that the visual impact of inserting this 2-3 storey six-bedroom structure (in this one-storey area) was minor, or that it would maintain the intent of the OP (as defined); nor was the Board persuaded that the proposal was saved by the supposed extenuating circumstances.

THE BOARD THEREFORE ORDERS that the appeal pertaining to those variances is allowed, and the variances for height and Floor Space Index are not authorized.

It is so Ordered.

"M.C. Denhez"

M. C. DENHEZ
MEMBER