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PL100754

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Tolmino Di Martino
Subject:	Consent
Property Address/Description:	246 Gray Road
Municipality:	City of Hamilton
Municipal File No.:	B-50/10
OMB Case No.:	PL100754
OMB File No.:	PL100754

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Tolmino Di Martino
Subject:	Minor Variance
Variance from By-law No.:	3692-92
Property Address/Description:	246 Gray Road
Municipality:	City of Hamilton
Municipal File No.:	A-112/10
OMB Case No.:	PL100754
OMB File No.:	PL100763

APPEARANCES:

Parties

Tolmino DiMartino

Counsel

B. Duxbury

**MEMORANDUM OF ORAL DECISION DELIVERED BY M. C. DENHEZ
ON DECEMBER 13, 2010 AND ORDER OF THE BOARD**

1. INTRODUCTION

Tolmino DiMartino (the Applicant) applied for consent to sever a property at the corner of Gray Road and Roxborough Avenue in the City of Hamilton (the City). His proposal was to demolish the existing bungalow, split the lot, and build two new dwellings with the help of nine variances (for lot size, front and rear setbacks at each of

the two parcels, plus setback from a "daylight triangle". The project was supported by City planning staff, but not by neighbours, and it was turned down by the Committee of Adjustment (COA). The Applicant appealed to the Board.

At the hearing, the Applicant was represented by Counsel, supported by an expert Planner. Two participants (the Neighbours) opposed the project. The City's Planner on the file testified under summons, in support of the project, but the City was not otherwise represented.

The Board has carefully considered all the evidence, as well as the submissions of both sides. The Board concludes, as City staff did, that the project corresponds to the policy priorities of the Province and the Official Plan (OP), and meets the statutory requirements. The Neighbours have reasonable concerns, notably pertaining to drainage and trees; but those concerns are manageable, in the sense that the legal system already addresses them. The severance and variances are approved. The details and reasons are set out below.

2. PROJECT AND HISTORY

Gray Road is a north-south suburban arterial road in the former City of Stoney Creek. Many front yards are substantial, though a recent development – diagonally across the intersection – has less spacing than many other properties in the area.

The subject property is mostly rectangular, except for a "daylight triangle" for traffic at the corner of Gray Road and the east-west side street, Roxborough Avenue. This triangle of land near the corner was intended to safeguard views of oncoming traffic at the intersection; it became City property under a previous transaction. Between the triangle and the intersection is another parcel of land, which serves as an extension to the City road allowance.

The existing bungalow at the corner now faces Gray Road. Under the proposal, after its lot was split in two (Parcels "A" and "B"), it would be replaced by two dwellings facing Roxborough Avenue. The dimension and shape of the proposed lots would be virtually *identical* to two recently-created (and approved) lots to the immediate east of

the subject property. This would involve nine variances to Zoning By-law 3692-92 of the former City of Stoney Creek, as follows:

Parcel “A” Front Yard (2 variances): Whereas the By-law provided for a minimum front yard setback of 6.0 metres, this proposal was for 4.5 metres to the dwelling, and 5.8 metres to the garage;

Parcel “A” Rear Yard: Whereas the By-law provided for a minimum rear yard setback of 7.5 metres, this rear yard would have 7.0 square metres;

Parcel “A” Area: Whereas the By-law provided for a minimum lot area of 400.0 square metres, this lot area would be 317.0 square metres;

Parcel “A” Setback from Daylight Triangle Whereas the By-law provided for a minimum setback of 3.0 metres from the hypotenuse of the “daylight triangle”, this would have 2.0 metres;

Parcel “B” Front Yard (2 variances): Whereas the By-law provided for a minimum front yard setback of 6.0 metres, this proposal was for 4.5 metres to the dwelling, and 5.8 metres to the garage;

Parcel “B” Rear Yard: Whereas the By-law provided for a minimum rear yard setback of 7.5 metres, this rear yard would have 7.0 square metres;

Parcel “B” Area: Whereas the By-law provided for a minimum lot area of 400.0 square metres, this lot area would be 304.0 square metres.

The City planning staff report (Exhibit 1, page 17) addressed the severance and each of the nine variances. It concluded that individually and collectively, they met the requirements of the *Planning Act* (see below); in the words of the report,

“Staff supported the severance application”. It recommended that the whole be approved, subject to a Condition pertaining to Noise concerning noise levels along Gray Road.

The COA, however, expressed some concern about neighbourhood character, and particular concern about drainage. It turned down the applications, and the Applicant appealed to the Board.

3. APPLICABLE CRITERIA

The applicable criteria for approving consents for severances are outlined in separate sections of the *Planning Act*. The relevant provision for consents, Section 53(12), refers to the criteria in Section 51(24):

...Regard shall be had, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the municipality and to,

- (a) The effect of development... on matters of provincial interest...;
- (b) Whether the (proposal) is premature or in the public interest;
- (c) Whether the plan conforms to the Official Plan...;
- (d) The suitability of the land for the purposes...;
- (e) (Highways)
- (f) The dimensions and shapes of the proposed lots;
- (g) The restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on the adjoining land....
- (h)-(l) (Natural resources, floods, services, schools, land dedications, energy)

Consent for the severance, however, presupposes that the variances are approved. For variances, the criteria (often called “the four tests”) are set out at Section 45(1) of the *Act*, namely that a variance must be minor, desirable for the appropriate development or use of the property and maintain the general intent and purpose of both the Zoning By-law and of the OP.

4. OBSERVATIONS AND FINDINGS

The Applicant's Planner, Mr. Fraser, submitted a 26-page written Witness Statement (Exhibit 3, Tab 1). It detailed the rationale for the project in terms of each of the criteria of Sections 51(24) and 45(1). In particular, Mr. Fraser noted that this kind of intensification in use of the property was a priority of Provincial policy, under the Provincial Policy Statement (PPS) and the Growth Plan for the Greater Golden Horseshoe (GPGGH), as well as of the OP itself.

The City's Planner on the file, Mr. Blevins, agreed that the severance and the nine variances met all statutory tests, corresponded to Provincial planning priorities, and represented good planning.

Two Neighbours, however, came forward as participants. Ms Kobylarz and Mr. Turnevicius respectively own the first and second dwellings north of the subject property, and they expressed concerns about (1) drainage and grading, (2) tree protection, (3) economic motivation, (4) safety and sight lines, and (5) symmetry and appearance. The Board addresses these concerns in turn.

First, on the subject of drainage and grading, the Board observes that it would be contrary to the Common Law to discharge water from the subject property onto Neighbours' property. It would also be contrary to the *Ontario Building Code*. If the drainage problem cannot be solved in accordance with normal professional standards, then at law, the project cannot proceed – quite independently of these proceedings. Both the Neighbours and the COA can take comfort that nothing in these proceedings gives the Applicant the right to discharge water onto their land.

Next, the focus of debate about tree protection concerned an oak which was not on the subject property, but to the north, in front of the house of Ms Kobylarz. It was unclear whether it was on her own property, or in the City road allowance. Regardless, the Applicant has no legal right to do significant damage to a tree not on his property, and the Board would expect that subject to be handled professionally.

On the subject of Mr. Turnevicius' argument about economic motivation, the question of people's thoughts or motives is not usually a matter of Board jurisdiction.

The questions of safety, sight lines, symmetry and appearance were all related. At present, Gray Road is often characterized by substantial lawns. The project would locate the side wall of one of the new dwellings closer to Gray Road than the front wall of either of the Neighbours' houses. This "out of line" positioning, said the Neighbours, would not only distort any visual symmetry to the street, but also (in the opinion of Mr. Turnevicius) interfere with sight lines to his driveway, causing a safety hazard accordingly. Ms Kobylarz added that it would cut off the diagonal southwest view toward the corner, from her front window. Counsel for the Applicant countered that any new dwelling would be further away from her side wall than the existing bungalow is; but in her opinion, that did not compensate for the loss of openness nearer Gray Road.

The Board understands the concern about openness and symmetry. However, the Neighbours' case would have been more compelling, if there were not houses diagonally across the intersection even *closer* to Gray Road (by some seven feet) than what is proposed here.

There was no suggestion that the positioning of *those* houses created a traffic safety problem; nor did the City's traffic engineers, who received a copy of the proposal and who are usually expert in such matters, identify any such problem with the current proposal.

As for openness, the Board sympathizes with the Neighbours, but must be mindful of three factors. First, Provincial policy and the OP emphasize intensification; second, the pattern of the area was already affected by what had been approved across the street; third, under the status quo, the Applicant would already have been legally allowed to build a fence at any time along the property line there *anyway*, cutting off those views. In short, the proposal did not digress significantly from what had already been approved for the area.

5. CONCLUSION

The Board finds that this is an intensification proposal, consistent with the direction of the PPS, GPGGH, and OP. The Board finds no digression from the statutory criteria for severances at Section 51 (24) of the *Planning Act*, or the criteria for

minor variances at Section 45(1). Although it does encroach on openness, it does so less than what has already been approved in the immediate area.

The Board does not, however, leave the Neighbours empty-handed. The Board expects the Applicant to fully comply with legal requirements for drainage and trees.

THE BOARD ORDERS that:

1. The appeal is allowed;
2. Provisional consent is to be given, as applied for; and
3. The nine variances to Zoning By-law 3692-92, of the former City of Stoney Creek, are authorized as applied for, subject to the Condition recommended by City staff at Exhibit 1, page 17, concerning Notice of noise levels along Gray Road.

It is so Ordered.

“M.C. Denhez”

M. C. DENHEZ
MEMBER