

ISSUE DATE:

Apr. 28, 2011



PL101464

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: Michael Demczur
Applicant: David Philpott
Subject: Minor Variance
Variance from By-law No.: 22-90
Property Address/Description: 22 Clarke Avenue
Municipality: Town of Orangeville
Municipal File No.: A14/10
OMB Case No.: PL101464
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APPEARANCES:

Parties

Counsel

Michael & Jacqueline Demczur

H. Elston

David Philpott

Town of Orangeville

J. Self

**MEMORANDUM OF ORAL DECISION DELIVERED BY C. HEFFERON ON
APRIL 13, 2011 AND ORDER OF THE BOARD**

Background

In 2010, David Philpott constructed a set of wooden stairs at the side of his house at 22 Clarke Avenue. Clarke Avenue is located in an approximately six to eight year old subdivision composed of single family detached homes on approximately 45 foot lots on the south side of Orangeville. As built, the stairs have zero setback from the interior side yard lot line with the home of Michael and Jacqueline Demczur.

Zoning By-law 22-90 ("By-law"), which applies to the subject subdivision (shown in crosshatched markings in Exhibit 6) requires a minimum side yard setback of 1.5 metres. However, it also allows an encroachment of up to 0.7 metres into the side yard

for stairs and other structures provided a setback of a minimum of 0.6 metres is maintained.

Mr. Philpott had already constructed the stairs before applying to the Orangeville municipal officials for a building permit. When he applied, he was informed that he required a minor variance from the provisions of the By-law. On December 1, 2010, the Committee of Adjustment of the Town of Orangeville ("Committee") granted the required minor variance.

Michael and Jacqueline Demczur, who live at 24 Clarke Avenue, appealed the decision of the Committee.

Evidence & Analysis

Mr. Elston, counsel for the Appellants, advised the Board that the fact that Mr. Philpott had constructed the stairs without first obtaining permission from the Town of Orangeville is not at issue. Nor is the fact that the stairs already exist in final finished form. The issue is, he contended, whether the minor variance to the provisions of the By-law required for issuance of a building permit passes the four tests under section 45 (1) of the *Planning Act*.

Ms T. Atkinson, RPP, was qualified by the Board to give opinion evidence on land use planning. Mr. Philpott was not represented either by counsel or by a land use planner. The third party to this matter, the Town of Orangeville, indicated that it did not intend to present any evidence. I therefore relied on Ms Atkinson as a qualified land use planner to present fair and objective opinion evidence that took into account the interests not only of the Parties to this dispute but also of the broader, long term interests of the public.

Ms Atkinson gave her opinion that while the requested minor variance complies with the general intent and purpose of the Town of Orangeville Official Plan, it fails to comply with the general intent and purpose of the By-law. In addition, she testified that the requested minor variance is not desirable for the appropriate development of the property and it is not minor.

I heard uncontested evidence that the subject property is set on a steep slope that falls an estimated 2.5 to 3 metres from the back of the house to the sidewalk (see photos in Exhibit 3) and that it is not unreasonable that a homeowner might need or simply want a set of exterior stairs in order to facilitate access to the rear yard.

The R4H zoning provisions of the By-law that apply to the subject neighbourhood require a minimum side yard setback of 1.5 metres. Ms Atkinson testified that this is intended to ensure adequate privacy, light and air as well as sufficient space for dealing with snow building up in winter and controlled storm water runoff the remainder of the time.

Subsection 5.22 of the By-law deals with “Yard Encroachments” and allows for exterior stairs (and other structures) provided that a minimum setback of 0.6 metres from any of the property lines is maintained. But, as the uncontested land use planning evidence showed and the photos in Exhibit 3 illustrate, the stairs as constructed provide zero setback from the interior side yard lot line, and this, Ms. Atkinson testified, is contrary to both the provisions and the general intent and purpose of the By-law.

As Mr. Philpott did not present any land use planning evidence, I adopt and rely on the land use planning evidence of Ms. Atkinson. Accordingly, I find that the requested minor variance does not comply with the general intent and purpose of the By-law.

After consideration of this and other land use planning opinion evidence of Ms Atkinson, I find that the requested minor variance also fails the remaining two tests under section 45(1) of the *Planning Act*, viz., it is not desirable for the appropriate development of the property and it is not “minor”. It is not desirable for the appropriate development of the property not just because it consumes the entire sideyard of the Philipott property but also because, as Ms. Atkinson’s evidence indicates and the photos in Exhibit 3 demonstrate, this has an adverse impact on the Demczur property.

I find it is not necessary to discuss the second set of evidence presented by Ms Atkinson in support of the appeal. This evidence suggests that portions of the offending staircase might also be considered to be a “ground oriented amenity area” as defined by subsection 2.59 of the By-law, and that if it is, it fails to satisfy the setback requirements as set down in subsection 5.2.2A of the By-law (Exhibit 6, page 19).

General Finding

After consideration of all the evidence and the submissions of both Mr. Philpott, who is the Applicant, and Mr. Elston, who is counsel for the Appellants, the Demczurs, I find that the requested minor variance fails three of the four tests required by section 45(1) of the *Planning Act*.

Disposition & Order of the Board

The Board Orders the Demczur appeal is allowed and the requested minor variance is not authorized.

So Orders the Board.

“C. Hefferon”

C.HEFFERON
MEMBER