

ISSUE DATE:

**March 15, 2012**



PL110626

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: Abba Uno Corporation  
Subject: Minor Variance  
Variance from By-law No.: 6593 (City of Hamilton)  
Property Address/Description: 53 Gibson Ave.  
Municipality: City of Hamilton  
Municipal File No.: A-58/11  
OMB Case No.: PL110626  
OMB File No.: PL110626

**APPEARANCES:**

**Parties**

Abba Uno Corporation  
City of Hamilton

**Counsel\*/Agent**

Gideon Augier  
Michael Kovacevic\*

**DECISION DELIVERED BY J. de P. SEABORN AND ORDER OF THE BOARD**

**Introduction**

Pursuant to s. 45(12) of the *Planning Act* (Act), Abba Uno Corporation (Applicant) has appealed a decision of the Committee of Adjustment of the City of Hamilton (City) which did not authorize variances required to accommodate a second storey addition to an existing building. The City appeared, requesting that the appeal be dismissed. Four participants appeared. The Applicant was represented by its Executive Director, Mr. Augier, who did not call evidence but made submissions and cross-examined the planner called by the City and two participants who provided evidence in opposition to the variances.

In order to construct a second storey addition to an existing industrial building, the Applicant requires four (4) variances to the applicable zoning by-law. The fourth variance identified by City staff as required, but not considered by the Committee in its decision, is for a southerly side yard width of 0 metres instead of the 1.2 metres required under the By-law. The Board amends the original application to include the southerly side yard variance and finds pursuant to s. 45(18.1.1) of the Act that the amendment to the original application is minor and therefore no notice under s. 45(18.1) is required.

### **Issues**

The main issue before the Board is whether the requested variances, each of which seek a 0 metre set back from the lot lines, should be authorized applying the tests set out in s. 45(1) of the Act. The Applicant's existing one storey industrial building was constructed prior to the enactment in 1950 of the original zoning for the area. Accordingly, in its existing state the set back from each lot line does not conform with the zoning requirements. As a result no building permit can be issued to construct a new second storey on the existing footprint in the absence of authorization for minor variances from the By-law.

### **Evidence and Findings**

The Board may authorize a variance from a by-law if each of the four tests set out in s. 45(1) of the Act are satisfied. It was the opinion of Mr. Wellings, a qualified expert planner retained by the City, that the general intent and purpose of the official plan and by-law are not maintained, and the variances are neither desirable nor minor in impact. Accordingly, it was Mr. Wellings opinion that the appeal must be dismissed. No other planners testified. Mr. Augier had attempted to subpoena two planners with the City, however, the request for the subpoenas was made through the Provincial Court, not to the Board. The City argued the subpoenas were therefore invalid as neither was properly served or issued. On this matter, the Board ruled that regardless of the process employed by Mr. Augier, the two witnesses would not be required to testify. First, Mr. Belvins, the planner responsible for Mr. Augier's application for the minor variances, is no longer employed by the City and cannot therefore be compelled as a witness. Second, Mr. Chan was not involved in the minor variance application but did review the

site plan matter. There is no dispute that the site plan application was approved by the City, subject to the Applicant obtaining the requisite variances. Accordingly, the Board found that nothing further could be gained from delaying the hearing and requiring Mr. Chan to appear as a witness. His evidence would merely confirm what the parties agree are the facts as they relate to the site plan application.

In considering the requested variances the Board notes two matters. First, there is no variance required for the use proposed by the Applicant. The variances relate to set backs from lot lines, necessitated by the age of the building and its construction prior to implementation of any zoning for the area. Second, the Applicant received site plan approval from the City for its addition, subject to obtaining the necessary variances. Staff supported the variance application before the Committee. Nonetheless, the Committee (as it is entitled to do) rejected the Application. City Council subsequently authorized Legal Services to appear at the hearing and retain an independent planning expert. In light of these facts, the Board appreciates Mr. Augier's frustration with the process, having been told by staff that his proposal had merit, as evidenced by the site plan approval, albeit conditional on securing the variances. Nevertheless, the Board is required to consider the variances in the context of the four (4) tests set out in s. 45(1) of the Act. For the reasons set out below, the Board finds that the appeal must be dismissed.

Mr. Augier explained that Abba Uno offers counselling services and also operates as a place of worship. The renovation is restricted to the second floor of an existing building. Mr. Augier requires additional room on the second floor for office and storage space. It was his position that Abba Uno purchased the property with the intent of undertaking expansion and renovation. Accordingly, it sought site plan approval and was advised that the variances were required because the existing building does not comply with current zoning. The variances relate to set back and therefore will not change the footprint of the existing building. There is no variance required for use and the staff planner responsible for the file supported the variances, indicating that they met the test under the Act. Mr. Augier expressed frustration with the process and indicated his surprise at having to defend the variances before the Board. He also indicated that he had retained expert assistance at the Committee stage, however he was unable to retain witnesses to appear before the Board.

The only planning opinion offered in connection with the variances was provided by Mr. Wellings and the Board finds that his opinions are sound and are adopted by the Board. While Mr. Wellings opinions are not conclusive of the matter, they are persuasive and carry significant weight in considering the tests set out in s. 45(1) of the Act.

In addressing the four tests, Mr. Wellings testified that the main difficulty is the existing building, constructed long before the current zoning was put in place. The building has zero lot line set backs on all sides of the property. The rear lot backs onto a City owned lane. There is no maintenance access or easement where the property abuts 657 Wilson Street. It is, in short, a tight property and the addition of a second floor represents unacceptable intensification and over building for the site.

The surrounding land uses are residential. The neighbourhood is an older well established enclave. There is little, if any, on site parking and most residents rely on street parking. Mr. Wellings view was that the building is not representative of the character and scale of the immediate neighbourhood. It is a non-conforming former industrial building. The policies of the City's Official Plan designates the property Residential. The intention under the Official Plan is to re-develop the properties such as this in accordance with the Residential designation. While institutional uses may be situated in residential areas, they must do so as a focus for the neighbourhood. It was Mr. Wellings view that the Applicant's place of worship and counselling services is not intended to provide that focus. Similarly, small scale churches are permitted subject to sufficient off-street parking and loading and landscape and buffer treatment.

In reviewing the applicable zoning by-law, Mr. Wellings testified that the building is an anomaly and clearly does not conform the zoning standards, hence the need for the variances. It was his view that the over all intent and purpose of the zoning by-law is not achieved through the variances sought given the purpose of the by-law is to establish compatible land uses and reasonable development standards. The expansion fails to achieve these objectives.

For these reasons, Mr. Wellings concluded, and the Board accepts, that the variances are not desirable for the appropriate development of the land and they are not minor in impact. Therefore, they simply cannot be authorized.

**Decision and Order**

For all of the reasons given, the Board finds that the variances cannot be authorized as they fail to meet the four tests set out in s. 45(1) of the Act. The appeal is dismissed and the four (4) variances, as requested, are not authorized.

So Orders the Board.

“J. de P. Seaborn”

J. de P. SEABORN  
VICE CHAIR