

ISSUE DATE:

**February 7, 2012**



PL111113

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: Morgan Louden  
Appellant: Rose Marie Muli  
Subject: Minor Variance  
Property Address/Description: 18 Franklin Avenue  
Variance from By-law: 6593  
Municipality: City of Hamilton  
Municipal File No.: A-195/11  
OMB Case No.: PL111113  
OMB File No.: PL111113

**APPEARANCES:**

**Parties**

Morgan Louden

Rose Marie Muli

**Counsel\*/Agent**

Robert Findlay\*

Elena Trkulja

**MEMORANDUM OF ORAL DECISION DELIVERED BY R. ROSSI  
ON JANUARY 30, 2012 AND ORDER OF THE BOARD**

Morgan Louden (Applicant) has requested five variances to permit the construction of a 1-storey, 9.3 metre front addition to the existing residential dwelling, a 64.6 metre, 2-storey rear addition and a roofed over unenclosed porch at the front. The property address is 18 Franklin Avenue in the Westdale area of the City of Hamilton. While the Committee of Adjustment approved the variances, area resident Rose Marie Muli (Appellant), appealed the Committee's decision to the Ontario Municipal Board.

**The Adjournment Request**

All of the Appellant's communications with the Board, in advance of today's hearing, were dutifully recorded by the Board planner and a record of these matters appears on file. The paralegal employee (Sara Jones) who works in the office of the Applicant's Counsel, Mr. Findlay, appeared at today's hearing and she confirmed for the Board that the

Appellant had met with them to discuss the proposed variances. No compromise was reached and the Appellant advised those present at that meeting that she had a lawyer who would represent her at today's hearing. The Board planner telephoned the lawyer whom the Appellant identified and his officer confirmed for the Board that he was not representing the Appellant. Next, the Appellant obtained a doctor's letter dated January 25, 2012 from one Dr. Joan Nagy of the Public Health Department, Community Mental Health Program and took it to the Committee of Adjustment of the City of Hamilton, requesting that the Board hearing be postponed. A City employee faxed a copy of the doctor's letter at midday on Friday, January 27, 2012. The Appellant then called the Board and the Board planner advised her that the hearing was proceeding and that she would have to attend the hearing or send a representative to the hearing to seek the requested adjournment.

Today, Elena Trkulja, a friend of the Appellant, attended the hearing on behalf of the Appellant and furnished the Board with a photocopy of the doctor's letter that the Appellant had given to the Committee of Adjustment. Ms. Trkulja explained that the Appellant has a number of mental health issues and these can be aggravated from time to time but she could not say what triggers the issues. Ms. Trkulja added that the Appellant would like more time to prepare for the hearing.

Speaking for the Applicant, Mr. Findlay noted that his client was present today along with a planning witness and his builder and the Applicant was ready to proceed. He submitted that it would be prejudicial to the Applicant were the Board to grant an adjournment on the basis of the letter.

The Board considered carefully the circumstances surrounding the Appellant's behavior, the provision of the doctor's letter and the attendance of the friend on her behalf. The Board determined that the Appellant offered no good or persuasive reasons to delay these proceedings.

The procedures for seeking an adjournment of a hearing are documented in detail on the Government of Ontario website that is dedicated to the affairs of this tribunal. This information is publicly available to all appearing before the Board and Parties are to be aware of their responsibilities in these matters; they are obligated to know the process and to comply with the practices and procedures. The Appellant had several communications with the Board planner and as late as last Friday, January 27, the planner e-mailed to the

Appellant electronic copies of “OMB Information Sheet 3”, which describes the steps involved in asking for a review of a decision and “OMB Information Sheet 1”, which describes the steps to be followed when seeking to postpone (adjourn) a hearing. The Board noted that the Appellant followed none of the requisite procedures in requesting this adjournment.

Second, the photocopied doctor’s letter (on file) states in part: “Due to a medical condition, Rose will not be able to attend....” The letter goes on to ask for a postponement of “approximately two months.” There is no detail of the nature of the Appellant’s alleged medical condition to be found in the letter. The only information the Board had was that furnished by her friend who appeared on her behalf, stating that the Appellant has mental health issues but she does not know what they are. In the Board’s determination, this is scant and insufficient information to postpone a hearing for several months, and the Board is obligated to balance whether a delay is required to have a fair hearing against the costs incurred by delaying the process. In this regard, the Board enjoys final discretion on whether to grant a postponement in any circumstances.

The Applicant has incurred considerable time and resources to prepare for the hearing, obtaining Counsel and two witnesses, one of whom is an expert. The only evidence the Board had of the Appellant’s intention to obtain Counsel is on file, along with the confirmation to the Board from the Counsel’s office that he declined to represent the Appellant. No materials or witness statements or evidence of any kind was brought to the hearing and no indication that such evidence was likely to be produced.

The Board determines that the Appellant has failed to discharge her responsibilities in respect of seeking to postpone this hearing. Further, had the Board granted the adjournment of today’s matter, it would have been prejudicial to the Applicant in that the costs he already incurred and would subsequently incur while waiting for several months, would create an imbalance in fairness that the Board would not permit. Having considered the Appellant’s behavior, her lack of due diligence, the vagueness of the photocopied letter, the lack of evidence of any professional representation or planning evidence and the earnest submission of the Applicant’s Counsel, the Board denied the Appellant’s imperfect request for a postponement of the hearing.

### **The Hearing**

Planner Kristen West was qualified to provide her expert opinion and professional land use planning evidence in support of the requested variances. If authorized, the variances would permit the addition of 675 square feet to this modest 1.5-storey dwelling. The following five variances are sought:

1. A 20% increase to the maximum permitted floor area;
2. A 2.5 metre front yard setback instead of the required 6.0 metre front yard setback;
3. A 0.1 metres reduction to the side yard depth and eaves encroachment of the unenclosed porch;
4. A minimum front yard setback to the unenclosed porch of 1.6 metres instead of the required 3.0 metres; and
5. A reduced driveway width of 2.3 metres instead of the required 2.7 metre width.

A sixth variance, reducing the required number of onsite parking spaces from 3 (three) to 2 (two) was removed in that the Applicant is not building the number of rooms originally envisioned for this small 1.5-storey house that would entail the provision of three parking spaces. Pursuant to subsection 45(18.1.1) of the *Planning Act*, the Board finds persuasive the Planner's evidence that the modification of the application on this point was minor and accordingly, no further notice was required.

Ms. West referenced the various designations of the subject property in a variety of planning instruments: Settlement Area in both the Provincial Policy Statement and the Hamilton Wentworth Regional Plan; Residential in the Official Plan; Low Density Residential in the Ainslie Wood Westdale Secondary Plan; and Urban Protected Residential "C/S01364" in the Hamilton Wentworth Zoning By-law.

The Applicant seeks to build two additions (Exhibit 1, Appendix G) to better accommodate their professional life and family needs. Including the basement, the house is 1,560 square feet in size. There is no front entrance space or office space; there is only one small bathroom; and one of the children's bedrooms is located on the main floor, away from the Applicant's master bedroom. The variances will assist in the creation of habitable space that lends itself to their lifestyle (the Applicant's wife wants to have an office that will afford her more room to work at home) as well as formalize already existing conditions of

the residential dwelling. The addition of a front foyer and a 2-storey addition at the rear will result in an increased size of 2,265 square feet.

Ms. West noted that the City enacted its “Overbuilding By-law” in 1995 in the Ainslie Wood Westdale community to curb the trend of residential homes being renovated into large student rentals to meet housing demands of McMaster University students. The By-law requires most Westdale homeowners to seek approval of a minor variance application for any increase in house size because as Ms. West explained, all floors of the house, regardless of use (except for the furnace and laundry areas) are included in the gross floor area calculation. The planner noted that the Applicant and his small family are the principal residents of their 1.5-storey house and they continue to be the only persons who will occupy the house.

Ms. West reviewed the five variances in the context of the four tests for a minor variance as identified in subsection 45(1) of the *Planning Act*. She cited the various Hamilton Official Plan policies and reviewed with the Board relevant excerpts of Subsection A.2.1 – Residential Uses, and opined that all of the applicable Subsection 2 policies are maintained by the proposed variances. Additionally, the Section 3, General Policies of the Neighbourhoods Designation, is maintained as neighbourhoods are to be planned and designated for a range of housing types and densities (3.1.3). The Applicant has also offered a design that enhances and respects the character of the existing neighbourhood while allowing for its ongoing evolution (3.1.4). The variances will promote a type of residential intensification of appropriate scale and in an appropriate location of the neighbourhood (3.1.5). The remainder of these policies voice the same objectives and are broad in nature and in the planner’s opinion the proposed variances are supportive of these policies. In her opinion, the variances maintain the general intent and purpose of the Official Plan.

As for the Zoning By-law, Ms. West noted that within the Secondary Plan, there is a maximum gross floor area ratio of 45% but like so many of the houses on the street and in the surrounding community, the existing house is already at 45%, rising to 65%. It was the planner’s uncontradicted evidence that the variance does not result in any change to the character of the street. She added that this block of Franklin Avenue has fifteen houses on the Applicant’s side of the street and four houses on the opposite side of the street (which do not front onto Franklin Avenue). Of the nineteen houses on the block, four houses have two full storeys; seven have 1.5 storeys and eight houses have one-storey. While the

house is to be two-storeys in height, only the rear portion will present as two-storeys; the front will continue to present as a 1.5-storey dwelling.

In terms of the increase in gross floor area, Ms. West opined that a 20% increase is reasonable given the small size and design of the existing house. It is a long and narrow structure, so more floor area is needed to create functional rooms within the dwelling. The planner wrote that the Overbuilding By-law was meant to restrict real estate investors from turning family homes into student rentals; not to restrict families from staying in Westdale. She noted that City staff had no concerns with the rear addition where the majority of the floor area is to be added.

Ms. West opined that Variance 1 meets the general intent and purpose of the By-law as the proposal is in keeping with the mix of housing heights and styles on the same block and street and the character is maintained even with the addition of additional floor space.

The second variance, reducing the front yard setbacks, also meets this test as the existing house encroaches into the required front yard by 1.5 metres. The additional encroachment will facilitate a covered porch and the front foyer addition. Ms. West referenced several other houses in the immediate area that have uncovered front porches that also encroach approximately 3.5 metres into the required front yard. The side yard variances meet this test and are necessary for the westerly side of the house and the proposed enclosed porch. In fact, the westerly addition and the porch addition will not encroach any farther into the required side yard than the existing house. As for the reduction in the parking space width, this variance merely addresses a currently existing situation and the proposed additions do not affect this variance in any way.

Ms. West opined that the proposed variances are desirable for the appropriate development of the land as they increase the square footage of a single detached dwelling on a residential street, resulting in an attractive design that provides a modestly sized front addition and porch that will complement the streetscape. She added that the proposal to modify and increase the dwelling in order to increase its functionality to retain young families such as this is appropriate and desirable for this neighbourhood.

Lastly, she opined that whether considered individually or cumulatively, the variances are minor in nature. The change from a 1.5-storey house to a two-storey house

on a street with mixed house styles is a minor one, as is the addition of 675 square feet. Builder Shane Vanbarneveld explained that the house's existing main floor is only 680 square feet with 330 square feet on the second floor for the master bedroom. The balance of the square footage is basement space.

No person appeared in opposition to these proceedings. The Board finds persuasive the planner's expert opinion and professional planning evidence that the requested variances represent good planning and should be considered favorably by the Board.

Having considered all of the evidence, the Board determines that the variances are minor and meet the four tests for a minor variance as set out in subsection 45(1) of the *Planning Act*. The Board dismisses the appeal and authorizes the minor variances.

So orders the Board.

"R. Rossi"

R. ROSSI  
MEMBER