

ISSUE DATE:

February 15, 2013



PL121088

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:	John Best
Applicant:	Jeffrey Kreps
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	99 Melrose Avenue South
Municipality:	City of Hamilton
Municipal File No.:	A-177/12
OMB Case No.:	PL121088
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APPEARANCES:

Parties

John Best

Jeffrey Kreps and
Doreen Mattatall

DECISION DELIVERED BY R. M. MAKUCH AND ORDER OF THE BOARD

[1] The Applicants, Jeffrey Kreps and Doreen Mattatall, purchased the subject property as an investment in June 2011 believing to be a lawful three unit multi-family dwelling. They were subsequently advised that the permitted use was as a single family dwelling with the potential to convert it to a duplex. In order to do so they required the authorization of certain variances, which were approved by the Committee of Adjustment ("Committee") on August 9, 2012. The variances related to a reduction to the northerly side yard to recognize an existing situation, to permit a portion of a living quarters to be in the cellar, to permit a reduction in the minimum clear height for the part of the unit located in the cellar, and a reduction in the minimum aisle width manoeuvring space for the two parking spaces located within an existing attached garage.

[2] John Best, who resides on the abutting property at 101 Melrose Avenue, appealed the Committee's decision on the grounds that the Provincial Policy Statement 2005 was designed "to curb urban sprawl by increasing density/condos and not speculative residential conversions by absentee landlords".

[3] While the Committee authorized these variances, the hearing before this Board is a hearing *de novo* and the onus remains on the Applicants to satisfy the Board that the application meets the four tests set out under s. 45(1) of the *Planning Act* ("Act"). The four tests require any applicant to satisfy the Board that the variances:

- 1) maintain the general intent and purpose of the Official Plan ("OP");
- 2) maintain the general intent and purpose of the zoning by-law;
- 3) are desirable for the appropriate development and use of the lands for the development of the lands; and
- 4) are minor.

[4] The evidence before the Board on this appeal is the viva voce testimony of Mr. Krels and Ms. Mattatall, ("the Applicants") and that of Mr. Best ("the appellant").

[5] The Applicants rely on the report dated August 9, 2012 prepared by the City of Hamilton ("City") Planning Department for the Committee in response to their application. This planning report supported the application for variances opining that the variances sought met the four tests set out above. The Board has carefully considered all of the evidence and finds that the appeal should be dismissed for the reasons that follow.

[6] The only planning evidence before the Board on this appeal is the planning report prepared by the City's Planning Department for the Committee as well as the Committee decision.

[7] The Board in making its decision on this appeal is bound by s. 2.1 of the Act, which provides as follows:

“When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to,

- (a) Any decision that is made under this Act by a municipal council, or by an approval authority, and relates to the same planning matter and
- (b) Any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a).”

[8] While this is a hearing *de novo*, the Board is nevertheless bound to have regard for the Committee’s decision when it authorized these variances.

[9] Furthermore, the planning report referred to above is information that the Committee as an approval authority considered when reaching its decision to authorize the subject variances and the Board is also bound to have regard to this report in making a decision on this matter.

[10] The report addresses the four tests under s. 45(1) of the Act relating to the variances sought. It addresses each of the variances specifically and is un-contradicted by any evidence from the Appellant.

Variance 1

[11] The general intent and purpose of the by-law is to provide adequate space for access, maintenance and drainage. The applicants are proposing a minimum northerly side yard width of 1.3 m, with further eave projection, for the open fire escape/ open stairways and roofed-over unenclosed porches at the first and second storeys whereas the by-law requires a minimum of 2.7 m. The proposed variance meets the general intent of the OP and zoning by-law since space for access, maintenance and drainage is provided from the staircase and porches. The Board finds that the variance is minor since the reduced side yard will not negatively impact the adjacent property and the variance is required to recognize an existing situation. It is appropriate for the use of the lands as conflicts have not arisen in the past for this setback. The requirement for the 2.7 m side yard setback is also the result of the existing dwelling having a three storey height instead of two and one half storey height.

Variance 2

[12] The general intent and purpose of the by-law is to provide an adequate standard of living. The Applicants are proposing to locate a portion of the living quarters for one dwelling unit in the cellar whereas the by-law does not permit dwelling units to be located within a cellar. The proposed variance meets the intent and purpose of the Official Plan and zoning by-law since the entire unit is not located within the cellar, and only a portion is, with liveable area on the main floor required as part of the unit. The Board finds that the variance is minor since the kitchen, living room and a bedroom will be located on the main floor allowing for living space outside of the cellar. The variance is also found to be appropriate for the use of the lands since the partial location of the unit within a cellar will not negatively impact the unit.

Variance 3

[13] The general intent and purpose of the by-law is to provide adequate living space. The Applicants are proposing a minimum clear height of 1.9 m for the portion of Unit 1 located in the cellar whereas the by-law requires a minimum 2.1 m. The proposed variance meets the intent of the Official Plan and zoning by-law since the ceiling height is above the minimum required height for a first storey, which is 1.8 m. The Board finds that the variance is minor since the reduction will be able to provide adequate space for the clearance. The variance is also appropriate for the use of the lands as the variance applies only to a portion of the dwelling unit.

Variance 4

[14] The general intent and purpose of the by-law is to ensure adequate manoeuvring space in order to avoid traffic conflicts. The Applicants are proposing a minimum aisle width manoeuvring space of 4.5 m to be provided for the two required parking spaces whereas the by-law requires a minimum 6.0 m. The Board finds that the proposed variance meets the intent of the Official Plan and zoning by-law since it is unlikely that two vehicles would need to use the driveway at the exact same time. The Board also finds that the reduction is minor since the reduction only applies to one parking space and parking is available on the street if required to facilitate parking areas. The variance is also appropriate for the use of the lands due to the constraints of the lot.

[15] The Board also finds that the proposed development supports the goals of the Provincial Policy Statement 2005, which is to promote efficient utilization of existing infrastructure in areas where municipal services are already available rather than on lands which require the installation/construction of new infrastructure. The proposed variances will have the effect of creating one much needed additional residential rental unit without the construction of expensive additional municipal infrastructure.

[16] Mr. Best's concerns with respect to issues that the Applicants might have under the Landlord and Tenant Act are simply not relevant to the Board's determination under the Act. Furthermore, Mr. Best has not demonstrated that he or his family would be subjected to any adverse impacts if these variances were to be authorized.

ORDER

[17] The Board orders that the appeal is dismissed and the variances sought are hereby authorized in accordance with the Committee's decision in this matter.

"R, M. Makuch"

R. M. MAKUCH
MEMBER