

ISSUE DATE:

February 07, 2013



PL121162

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

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|-------------------------------|---------------------|
| Appellant: | Todd & Dina Miller |
| Applicant: | James Gurowka |
| Subject: | Minor Variance |
| Variance from By-law No.: | 0225-2007 |
| Property Address/Description: | 1422 Wateska Blvd |
| Municipality: | City of Mississauga |
| Municipal File No.: | A 387/12 |
| OMB Case No.: | PL121162 |
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APPEARANCES:

Parties

Todd Miller and
Dina Miller
Bella Dolgin
Elizabeth Gurowka and
James Gurowka
David Dunnet

City of Mississauga

Counsel

K. Yerxa

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

[1] The Applicants, James and Elizabeth Gurowka, applied for and received authorization from the City of Mississauga ("City"), Committee of Adjustment ("Committee") of the following variances to permit three accessory structures to remain on their property at 1422 Wateska Boulevard:

1. An accessory structure (Shed A), with dimensions of 2.95 m x 3.90 m (9.67 ft. x 12.79 ft.) having an area of 11.50 m² (123.78 ft²) and a side yard of 0.43 m (1.41 ft.); whereas the By-law 0225-2007, as amended permits only one accessory structure per lot with maximum floor area of 10.00 m² (107.64 ft²) and requires a minimum side yard setback of 1.20 m. (3.93 ft.) in this instance and,
2. An accessory structure (Shed B), with dimensions of 2.86 m x 2.86 m (9.38 ft. x 9.38 ft.) having a height of 3.23 m (10.59 ft.) and a side yard of 0.98 m (3.21 ft.); whereas the By-law 0225-2007, as amended permits only one accessory structure per lot with maximum height of 3.00 m (9.84 ft.) and requires a minimum side yard of 1.20 m. (3.93 ft.) in this instance and,
3. An accessory structure (Play Equipment Structure C), with dimensions of 3.04 m x 2.2.13 m (9.97 ft. x 6.98 ft.) having a height of 2.13 m (6.98 ft.) to the peak of roof, having an above grade height of 2.43 m (7.97 ft.), a total height of 5.46 m (17.91 ft.), and having a side yard of 0.00 m; whereas the By-law 0225-2007, as amended permits only one accessory structure per lot with maximum height of 3.00 m (9.84 ft.), an area of 10.00 m² (107.64 ft²) and requires a minimum side yard of 1.20 m. (3.93 ft.) in this instance.

[2] This authorization was appealed to this Board by Todd and Dina Miller on the grounds that the variances did not meet the four tests set out under s. 45 (1) of the *Planning Act* and more particularly, that Play Equipment Structure C (tree house) was an eye sore and is an infringement on their privacy and as such interferes with the quiet enjoyment of their home.

[3] It must be noted that an appeal to this Board pursuant to s. 45 of the Act is a hearing *de novo* and the onus of establishing that the four tests under s. 45 (1) of the Act have been met remains on the applicants notwithstanding that the Committee

approved the application. The four tests under s. 45 (1) of the Act, require the applicants to satisfy the Board that the variances:

- 1) maintain the general intent and purpose of the Official Plan
- 2) maintain the general intent and purpose of the zoning bylaw
- 3) are desirable for the appropriate development or use of the land building or structure and
- 4) are minor

[4] The evidence before the Board consists of the *viva voce* testimony of Ms. Gurowka (“Applicant”) and David Dunnet both in support of the application as well as Bella Dolgin and Dina Miller (“Appellant”), both of whom support the appeal.

[5] The Board has carefully considered all of the evidence and finds that the appeal should be allowed in part for the reasons that follow.

[6] The subject property at 1422 Wateska Boulevard was acquired by the Applicants from the parents of James Gurowka in 2002, who had initially acquired it in 1959. A 33.12 m x 14.63 m parcel was added to the rear of the property in 1992. In 1993-94, two sheds (“A” and “B”) were erected on the newly acquired parcel. In 2010 the Applicants removed the two sheds and built new sheds on the original cement slab.

[7] In the summer of 2012, the Applicants erected a tree house on a large willow tree having a large circumference. The tree house was built to take advantage of the forks of the branches and the tree trunk for better support. This attracted the attention of City officials, who advised the Applicants that only one accessory structure was permitted on the lands and that they would have to get authorization for the variances set out above as well as obtain a building permit for “Shed A”.

[8] Although the appeal is against all three accessory structures, Ms. Miller indicated that her main concern was with Play Equipment Structure C (tree house) given its location and height.

[9] 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's decision.

[10] 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).”

[11] The report although it refers to the four tests under s. 45 is not very useful to the Board in making its decision as it does not contain any meaningful planning analysis of the issues. The Committee's decision is also not very useful in that it does not refer to the written submission filed by the Appellants setting out their concerns with the variances sought. The Appellants were not able to attend the Committee meeting when this application was heard due to a previously planned family vacation but did make a written submission to the Committee setting out their concerns.

[12] Ms. Miller indicated during her testimony that she had consulted with a professional land use planner and wanted to file his report as evidence in support of her appeal without having this planner appear at the hearing. The Board did not allow her to do so because it would be unfair to the Applicants to allow this as evidence without them having an opportunity to cross-examine the author of the report.

[13] The Board is satisfied that Sheds A and B meet the four tests under s. 45 of the Act. The property is quite large and can accommodate these structures with little or no

adverse negative impacts on either the immediate neighbours or the neighbourhood in general. The subject is located in a Residential Low Density 1 designation in the City Official Plan and is zoned "R2-4" Residential. Given the size of the property, the Board is satisfied that the variances related to these two sheds maintain the general intent and purpose of the OP and zoning by-law. The variances are also desirable for the appropriate use of the lands as these are well screened from the neighbours. The Board is also satisfied that the variances are minor as no evidence of unacceptable adverse impacts has been adduced respecting the variances relating to these two structures.

[14] With respect to Variance 3 relating to what is referred to as Play Equipment Structure C (tree house), the Board is not prepared to authorize this variance as it cannot be considered to maintain the general intent and purpose of the zoning by-law, it is not desirable for the appropriate use of the lands and is not minor given the unacceptable negative adverse impacts it causes on the Appellants. The tree house by virtue of its size, height and location overlooks the Appellants' rear yard and creates unacceptable impacts on their enjoyment and use of their yard and home. The photos submitted into evidence suggest that this tree house is on or near the property line, is quite large, has window openings onto the Appellants' yard and home and offers quite a bird's eye view of their property. The zoning by-law provisions respecting size, setback and height are intended to protect abutting neighbours from such intrusions.

[15] B. Dolgin resides in the residence immediately abutting to the rear of the subject lands and is opposed to the tree house because of its unsightly appearance and the intrusion that it represents into her yard causing her and her family a loss of privacy. She was also very concerned about the visual impact of metal junk stored at the rear of the subject property.

[16] The evidence of Mr. Dunnet who supported the application was also not particularly useful in that he lives across the street from the Applicants and is not affected by the sheds or tree house. He referred to the existence of a number of tree

houses in the neighbourhood and that these were a fact of life in the area. Each case must be looked at individually to measure any unacceptable negative impacts on neighbouring properties. In this case the negative adverse impacts on the Miller family outweigh any enjoyment that the Gurowka family may derive from the tree house.

[17] The appeal is therefore allowed in part and Variance No. 3 (Play Equipment Structure C, relating to the tree house) is not authorized. The appeal is otherwise dismissed and Variances 1 and 2 (relating to Shed A and Shed B respectively) are authorized in accordance with the Committee's Decision.

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER