

ISSUE DATE:

February 05, 2014



PL121418

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:	Vitaly Chouminov
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	130 West 34 th Street
Municipality:	City of Hamilton
Municipal File No.:	A-202/12
OMB Case No.:	PL121418
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APPEARANCES:

Parties

Counsel*/Agent

Vitaly Chouminov

Igor Chouminov

City of Hamilton

Lia Maji*

DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD

[1] Vitaly Chouminov, the Applicant/Appellant ("Applicant") has appealed to the Ontario Municipal Board ("Board") the decision of the Committee of Adjustment ("Committee") of the City of Hamilton ("City") that refused his request for relief from Zoning By-law 6593 to permit the conversion of the existing single-family dwelling located at 130 West 34th Street ("subject property") to contain a total of two dwelling units. The Applicant seeks permission for a dwelling unit in a cellar where one is not permitted; a reduced ceiling height of 1.9 metres instead of the minimum required height of 2.1 metres; and a tandem parking space in the front yard instead of the requirement that no parking space shall be obstructed.

[2] The Applicant's brother, Igor Chouminov, acted as his agent and no supporting witness was called. Counsel Lia Maji represented the City and City Planner Daniel Barnett was qualified to provide professional land use planning evidence and expert opinion in this case in opposition to the requested variances.

[3] The subject property contains an existing bungalow and is situated on a generously-sized corner lot on West Mountain in a stable residential neighbourhood. The neighbourhood is characterized by single detached houses of 1950s and 1960s vintages. The Applicant rents out the main floor of the bungalow to a single family. He has extensively renovated the cellar area to serve as a separate rental suite for two sister renters who have lived in the suite for the past two years. The Applicant's agent manages the rental property.

[4] The former City of Hamilton Official Plan, which applied at the time of the application, designates the property as "Residential" (now designated as "Neighbourhoods" in the new Urban Hamilton Official Plan). The subject property is zoned Suburban Residential "B-2" in the Zoning By-law.

[5] Mr. Chouminov explained that the reduced ceiling height is only where the ducts run in the ceiling. The height is roughly six feet three inches where the ducts run; otherwise the balance of the ceiling height is seven feet one inch. Mr. Barnett explained that, despite the reduced height in some areas of the cellar unit, the area is centrally located, meaning that it requires traveling under the reduced height to get to any of the unit's rooms.

[6] Mr. Barnett's witness statement (Exhibit 2) was comprehensive in its assessment of the requested variances against the four tests for a minor variance as contained in s. 45(1) of the *Planning Act* ("Act"). His opinions were unchallenged and Mr. Chouminov only asked several questions of the planner. Accordingly, the only planning evidence on which the Board could base its decision was that of the City's planner.

[7] The central issue for the Board was the safety factor surrounding the functionality of the cellar suite. Although contemporary and constructed with quality materials, the unit's existence raises important issues of safety that could not be set aside by the Board. As explained by Mr. Barnett, the location of a cellar suite that is predominately below grade raises a safety issue in respect of the reduced ceiling heights and the

limited options for escape in an emergency. Moreover, the window wells are at an insufficient height or size to provide for quick and easy escape during a fire for example. The only two windows of the suite that are at grade are in fact located adjacent to the door entrance. Were a fire to occur in this area of the house and/or suite, these two windows could be as inaccessible as a door that is blocked by fire and trap the residents. The other small windows do not offer ease of egress from the cellar suite as stated.

[8] In terms of safety factors then, the requested variances do not maintain the general intent and purpose of several of the planning documents. They offend Policy B-11 of the former regional Hamilton-Wentworth Official Plan, which states:

Elements of public safety, including design features and police and fire protection have impacts on land use, social well-being and the quality of life of the residents of the Region. The current level of service and safety will be maintained and where possible enhanced.

[9] Specifically, the proposed variance to establish a new dwelling unit does not maintain or enhance the safety of residents. The Zoning By-law's provisions mandate a minimum ceiling height of 2.1 metres or approximately 6 feet 11 inches. Dropping the ceiling to 6 feet 2.7 inches because of existing duct work and doing so in the main high-traffic areas of the cellar suite is not good planning and unsafe. The Board heard that the reduced height also has the potential to impact alternative means of egress in an emergency.

[10] The variance for a new dwelling unit also offends Policies C.7.3 viii and xiii of the City of Hamilton Official Plan: "Council will support the concept of accessory apartments as-of-right in all areas of the City as regulated by the Zoning By-law" and "support residential and neighbourhood development that respects safety concerns." So, while the application would be permitted for a unit that is 50% or greater above grade (which this unit does not offer) and seeks to establish a dwelling unit in a residential area, the safety concerns raised causes the variance not to maintain the general intent and purpose of this Official Plan. As for the new Urban Hamilton Official Plan, the Board has made the same findings as second dwelling units will be permitted but "...shall be subject to zoning regulations." The Board noted that the Applicant failed to make the appropriate inquiries with the City before commencing his renovation of the cellar unit several years ago.

[11] The zoning standards have been consulted in the context of the requested variances. The reduced ceiling height raises a safety concern for the same reasons as those considered in the context of the Official Plans. The variances for a new cellar unit and reduced ceiling height do not maintain the general intent and purpose of the Zoning By-law.

[12] The variance for the second dwelling unit is not desirable for the appropriate development of the subject property as such a unit within a cellar must ensure it is of an appropriate size and height to function as a suitable and safe dwelling. The current tenants have made it their home for several years but the City planner has raised serious safety concerns with the suite such that it should not be used for a second dwelling unit. A suite that does not meet the requisite zoning standards for safety reasons is undesirable.

[13] Lastly, the variances for a second dwelling unit and reduced ceiling height cannot be seen to be minor. It is unreasonable to expect people of certain heights – whether tenants or taller guests – to be expected to navigate under ceiling areas of reduced heights. As Mr. Barnett clarified for the Board, the City might have had lesser concerns were the reduced heights contained in closets but where they are located in the main traffic areas, the variance should not be supported. He added in his statement: “In an emergency, a person may not be paying attention or be able to see the lower ceiling height, which increases the risk and degree of personal injury.” These are not minor considerations; rather, they are significant and the variances as proffered cannot be seen as minor.

[14] The Board was unconcerned with the aspect of lighting as it might affect the overall habitability of the suite generally. The primary concern is safety in this case. The Board was also unconcerned with the parking variance as both parties agreed that the driveway is conveniently long by residential standards and, as the subject property is rather large, the driveway could be widened if necessary to accommodate a second vehicle to avoid the tandem condition.

[15] The Board recognizes the inconvenience these findings might cause to the Applicant as he has been renting out the cellar unit for several years now. His unit is of a high quality as stated and no doubt his tenants enjoy the suite. However, brought to

the Board's attention through the Applicant's appeal and reviewing the valid safety concerns that the City planner has raised, the Board cannot support two of the three variances for a second dwelling unit and reduced ceiling height (in the manner currently constructed) as they fail all four tests for a minor variance and they do not constitute good planning.

ORDER

[16] The Board orders that the appeal is dismissed and the minor variances are not authorized.

"R. Rossi"

R. ROSSI
MEMBER