Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: October 23, 2014 **CASE NO(S).:** PL130972

PROCEEDING COMMENCED UNDER subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Josephine Graci
Subject:	Minor Variance
Variance from By-law No.:	6593 (Hamilton)
Property Address/Description:	38 Holmes Avenue
Municipality:	City of Hamilton
Municipal File No.:	A-109/13
OMB Case No.:	PL130972
OMB File No.:	PL130972
Heard:	August 8, 2014 and October 9, 2014 in Hamilton, Ontario

APPEARANCES:

Parties	**Counsel**
Josephine and Calegerio Graci	S. Ilavsky
City of Hamilton	L. Magi

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

INTRODUCTION

[1] This variance dispute was about two adjoining properties owned by Josephine and Calegerio (Charles) Graci ("the applicants"), in the City of Hamilton ("the City"). The applicants proposed identical dwellings on those identical lots, with identical variances.

[2] The variances were authorized for one, but not the other.

[3] For each property, three variances had been proposed. One would allow each dwelling to have one on-site parking space, whereas the applicable zoning by-law usually calls for two. The next was to reduce the required vehicular maneuvering space. Neither of those variances was ultimately disputed at the hearing.

[4] The third variance, which was the focus of debate, was more complex:

- Although there was no zoning objection to the length, width, height, setbacks, lot coverage or amenity space for the proposed dwellings, the By-law (which the City calls its "Monster Home By-law") specified that the *proportion* of Gross Floor Area ("GFA") to total lot area should not exceed 45%. That proportion is often called the permitted “Floor Area Ratio” ("FAR").

[5] Here, each lot measured 25 feet by 100 feet. According to the By-law,

- one could build a house of only 1125 square feet of GFA on these lots (*including* basement), meaning, say, 600-700 square feet above ground.

- Each dwelling proposed by the applicants here would have 1512 square feet above ground, and 892 square feet underneath. This would translate into a FAR of 97%, whereas the By-law limited FAR to 45%. Accordingly, a variance was requested for FAR on each of the two properties.

[6] The applications otherwise complied with all zoning. However, City planning staff opined that, although some variance for FAR was in order, each of the proposed houses would constitute "overbuilding."

[7] The local Ward Councillor intervened:

- When the application for the first property went to the Committee of Adjustment ("COA"), it had his support. Those variances were authorized.

- When the application for the second property next door went to the COA – for an identical dwelling on the identical vacant lot next door – the Councillor was absent. The COA turned it down, saying the house would be too big.

There were no other relevant distinctions between the applications.

[8] The applicants appealed the latter decision to the Ontario Municipal Board ("the Board"). At the Board hearing, they were represented by counsel, with the support of planner Brenda Khes. The City defended the COA's latter decision. The City was represented by counsel, with the support of planner Daniel Barnett. The Board also heard from participants Kenneth Mitchell and Bill Frankum, who did not support the project.

[9] The Board has carefully considered all the evidence, as well as the submissions of counsel. Despite the exemplary eloquence of counsel for the City, the Board agrees with the COA's first decision, but not the second. The Board finds that the current project is a good "fit", in full compliance with all the statutory tests, notably the stated intent of the “Monster Home By-law”. The details and reasons are set out below.

PROJECT AND HISTORY

[10] The neighbourhood is eclectic. Most houses date from around 1950, though some appear older. There are a handful of more recent houses. There is no uniformity in height. The Board was told that 23% of the houses in the immediate area are one-storey, 45% are 1½ storeys, and 32% have two storeys. Although there was some dispute as to how storeys were counted, the Board is satisfied that the foregoing provides a sufficient overview of the neighbourhood's eclectic character.

[11] The City's By-law excludes porches and laundry rooms from its calculation of GFA – but includes basements and cellars.

[12] The subject property, in this appeal, is at 38 Holmes Avenue, in a residential

neighbourhood near McMaster University. The lots at 38 and 40 Holmes Avenue once belonged to a single household (the house was located at 40 Holmes Avenue, and its detached garage was at 38 Holmes Avenue); but the Board was assured that the lots have remained legally separate. The original house and garage had been demolished. Next door, at 40 Holmes Avenue, the applicants' other house is under construction, and is almost completed.

[13] As mentioned, the proposed houses both complied with all zoning other than GFA. The proposed lot coverage was actually lower than several other properties on the street.

[14] The lots, like those of many neighbours, measure 2500 square feet. With a zoning maximum of 45% FAR, this would allow maximum house construction of 1125 square feet of GFA (i.e. excluding porches and laundry room, but including basement/cellar). Whereas this might translate into a house of about 600 square feet above ground, the proposed houses would count 1512 square feet above ground. There was some inconsistency in how the FAR of the two houses was computed: some calculations put it at 97%, others said it was 103%; but either way, this would obviously require a variance.

[15] The history of this GFA limitation began twenty years ago. In 1994, the City proposed its "Monster Home By-law." Its rationale, in this neighbourhood, stemmed from City experience with 3500 square foot houses, as specified in a staff report at the time:

> Single detached dwellings are being built in excess of 320 metres^2 (3500 ft.^{2}). In two incidents, a building permit was denied by the Building Department because due to the number of rooms proposed, the proposed dwellings were considered to be lodging houses…. Lodging houses are not a permitted use….

[16] That report went on to say that, after that proponent had relabeled the rooms, the Building Department felt compelled to issue a permit. The report concluded:

> It is not the use that is creating problems but rather it is the size and mass of the "monster homes" that can have an adverse effect on the streetscape and adjacent properties. In order to regulate the size and mass, changes to the Zoning By-law are required with respect to the building height and building mass…. The Zoning By-law should be amended to permit the maximum GFA equal to .45 of lot area, i.e. on a 360 metres^2 lot, the maximum dwelling size, excluding the garage, would be 162 metres^2.

[17] The Board was also told that the City had no interest in actually limiting new houses to some 600 square feet above ground (or 1200 square feet in total). In the words of the City's planner at this hearing, the issue was streetscape:

> The streetscape is the primary concern…. There is no evidence that (city Council) wanted homes of 1200 or 1100 square feet.

[18] As alluded to in the 1994 staff report, a key aspect of the problem was lot size. The By-law anticipated a minimum lot size of 360 square metres (3875 square feet) which, with a FAR of 45%, would translate to a house with a maximum GFA of 162 square metres (1745 square feet – perhaps 1000 square feet above ground, and the rest below). If a house of identical dimensions were transposed to one of these 2500 square foot lots, it would represent a FAR of 70%. The City's planner said the City had an unwritten practice of looking favourably on variance applications to that effect, to increase permitted FAR to about "70-75%" – "the top end" of GFA that the City might countenance.

[19] However, with a FAR of 97% (or 103%), the applicants' two proposed houses were opposed by City planning staff. The City's planner acknowledged that overview and privacy were not significant issues: the issue was strictly GFA. He particularly wanted "a design that has less massing in the front."

[20] When the variance application for the first house was submitted to the COA, the Ward Councillor was in attendance, and supported the application, as recorded in the Minutes:

> We are trying to establish a new character for this area. We are trying to establish a new pattern…. 103% is a scary number, but we're trying to

> deal with what we've got. This is going to be owner occupied.… At some point we have to look at the Monster Home By-law. We still need to have some protection but we need room to maneuver. We want families in this neighbourhood. We don't want to have to keep working around the By-law.

[21] For that first house, at 40 Holmes, the COA apparently agreed. It decided:

> The relief granted is desirable for the appropriate development of the land and building and is not inconsistent with the general intent and purpose of the By-law and the Official Plan…. There will be no adverse impact on any of the neighbouring lands.

[22] There was no appeal by the City. Eight months later, on the application for the second house at 38 Holmes, the requested variances were identical, the lot was identical, and the houses would be essentially identical. However, the Councillor was absent. The COA decided:

> The relief requested is beyond that of a minor nature. The relief requested is undesirable for the appropriate development of the land and building and is inconsistent with the general intent and purpose of the By-law and of the Official Plan…. The Committee, having regard to the intensity of use of the subject parcel of land, is of the opinion that such development would not be appropriate for the lands.

[23] The applicants appealed the latter decision. At this Board hearing, the City said the first decision was arguably mistaken. The City's planner did not endorse the views expressed by the Councillor. The City added that, whether or not a single exception had been permitted next door at 40 Holmes, a further variance at 38 Holmes would also have a cumulative effect, which would digress from streetscape character, and essentially render the By-law unenforceable.

APPLICABLE CRITERIA

[24] For variances, the criteria (often called "the four tests") are set out at s. 45(1) of the *Planning Act* ("the Act"), namely that a variance from the applicable by-law may be authorized if it is minor, desirable for the appropriate development or use of the property, and maintains the general intent and purpose of both the zoning by-law and of

the official plan.

ANALYSIS

[25] The City’s planner said he had no objection to the proposed variance for vehicular maneuvering, or the one for the number of parking spaces. He added that both of those variances, in his professional opinion, met the four tests. Those variances being undisputed, the single issue in debate was the GFA.

[26] Parenthetically, the Board was also formally assured that this proposed building was not intended ever to become a lodging house.

[27] The Board takes the “overbuilding” argument seriously, but was unconvinced that it applied to the facts here. The City's case might have been more compelling if there had been evidence that the project would crowd its lot; but, on the contrary, its lot coverage would not only comply with all By-law standards, but would also be lower than many of its neighbours.

[28] The City's argument about streetscape being "the primary concern" would also have been more germane, if the visual presence of this proposal had been out of character with its neighbours. However, it was not only identical to its sister building at 40 Holmes, in one direction; in the other direction, the building at 36 Holmes may have been shaped differently, but had essentially the same width and roof height as the proposed house. One would be hard-pressed to suggest that the project would occupy more of one's field of vision than its two abutting neighbours do. On that basis, the Board finds that the project is not out of scale with its surroundings, notably the two buildings which would be its bookends.

[29] For the same reason, the Board was not persuaded of a cumulative impact which would be intrinsically different from the rest of the street, particularly in light of the eclectic character of the neighbourhood.

[30] Furthermore, if the City's primary concern was the visible streetscape, the Board was not shown why the City would be preoccupied by the square footage of underground basements and cellars. More importantly, the Board heard no significant evidence that a house measuring some 1500 square feet, above grade, would be out of scale with the visible (i.e. above-ground) measurements of other houses on the street.

[31] The Board now turns to the City's core argument. Counsel for the City argued, most eloquently, that if this variance were authorized, it would undermine the very spirit in which the City had adopted this GFA requirement in the first place. That GFA limit had not been imposed on a broad area: Council had adopted it with this immediate area in mind, and only this area. Authorizing this variance, she said, could be interpreted only as "effectively eliminating the GFA requirement", and "throwing out the area-specific zoning."

[32] The Board disagrees that it is throwing out anything. Indeed, the Board commends the City's vigilance, in wishing to prevent monster homes, which were the undisputed target of the By-law. The Board will go further. It was particularly impressed with the lucidity of counsel for the City, in describing the negative consequences of overbuilding.

[33] On that point, the Board has no difficulty agreeing in principle. It agrees that streetscapes do risk being compromised, when buildings crowd their lot, or are out of character with their surroundings, or are out of scale with neighbouring buildings. The Board is also mindful that, because of the property's location, owners of oversized dwellings may be tempted to convert them to lodging houses – whether permitted by the By-law or not. If there had been significant evidence indicating any of the above, the outcome in this case might have been different.

[34] The problem with the City's case here is simply that, aside from mathematical abstractions, there was essentially no planning evidence that the project offended any of those By-law purposes. It is not that the Board disagreed with the By-law; it is that the

stated intent of By-law did not fit the facts at hand.

[35] The Board adds that, in today's Ontario, one would usually be hard-pressed to apply the "monster home" label to a house measuring 1512 square feet above grade. The Board was not persuaded that those measurements constitute the kind of dwelling that the By-law intended to control, particularly when the City had specified that its apprehensions pertained to 3500 square foot houses. The dimensions of the current project are not even close. The Board finds no compromise here, on the stated underlying intent of the By-law

[36] The Board could also add that, if the City had apprehensions about overbuilding, the best planning approach would be to deal with the issue directly. In contrast, the solution is not to adopt:

- a formula calling for buildings smaller than the City actually wanted,
- and a formula which the City had little interest in applying,
- so that owners would be compelled to apply for variances – which, in turn, staff would assess, based on "unwritten practices."

[37] That is not “planning." Though the Act does not define the phrase "to plan", the Concise Oxford Dictionary does: it means "to arrange beforehand." Unfortunately, the City approach is not doing that. In this case, the Board has some sympathy for the approach recommended by the Ward Councillor, which it would commend to the City's attention.

ORDER

[38] The appeal is allowed. The Board authorizes the variances as requested.

[39] The Board expects that construction will be essentially in accordance with the

plans filed. The Board also notes the assertion, on behalf of the applicants, that the project will remain a single detached home, not to be used as a lodging house contrary to the By-law.

"M. C. Denhez"

M. C. DENHEZ
MEMBER