

ISSUE DATE:

April 11, 2014



PL131102

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/Appellant:	Mark Mintzer
Subject:	Minor Variance
Variance from By-law No.:	0225-2007
Property Address/Description:	1860 Pagehurst Avenue
Municipality:	City of Mississauga
Municipal File No.:	A 286/13
OMB Case No.:	PL131102
OMB File No.:	PL131102

APPEARANCES:

Parties

Counsel

Mark Mintzer

City of Mississauga

M. Taggart

DECISION DELIVERED BY R. ROSSI AND ORDER OF THE BOARD

[1] Mark Mintzer ("Applicant") has appealed to the Ontario Municipal Board ("Board") the decision of the Committee of Adjustment ("Committee") of the City of Mississauga ("City") that refused his application to permit the construction of a deck. Two variances are requested:

1. An area of 13.29 square metres (143.05 square feet) for the proposed balcony whereas By-law No. 0225-2007 ("By-law") as amended permits a maximum area of 6.20 square metres (66.74 square feet) for the proposed balcony in this instances; and
2. A projection of 3.96 metres (12.99 feet) beyond the rear wall of the existing dwelling whereas By-law No. 0225-2007 as amended permits a maximum projection of 1.83 metres (6.00 feet) in this instance.

[2] For context, the subject property is known municipally as 1860 Pagehurst Avenue, part of the City's Applewood neighbourhood. Situated on the south side of the street, its rear yard abuts a rear yard of the property at 1822 Stonepath Crescent and is situated diagonally from the rear yard of 1816 Stonepath Crescent.

[3] The subject property, the adjacent west-lying properties along Pagehurst Avenue and a townhouse development to the northwest of the property were approved through a previous Board decision. Following the Board's approval of that development, above-grade decks began to appear in the rear yards of the detached homes located on the south side of Pagehurst Avenue. Adjacent properties owners complained to the City about the creation of unacceptable overlook and loss of privacy conditions on their properties from design elements that were not part of the original Board approval. In response, the City and the developer reached an agreement in 2010 whereby the developer agreed to instead construct small landings limited to 6 x 7 feet in size (see Councillor's Letter of June 18, 2010 in Exhibit 1, Tab 22). The City took further steps to ensure that the owners of the Board-approved new homes cannot construct a larger deck as-of-right by amending the By-law that now restricts both the size and setback of these decks and balconies. Zoning By-law No. 196-2010 ("Amending By-law") gives effect to these restrictions through the following regulations:

- 4.2.5.60.8 Maximum projection of a porch, deck or a balcony, exceeding 0.61 m in height above grade at any point, from the rear wall of a dwelling – 1.83 m
- 4.2.5.60.9 Maximum area of a porch, deck or a balcony, excluding stairs, identified in Sentence 4.2.5.60.8 of this Exception – 6.2 m²

[4] These dimensions are restated in the By-law excerpts as they relate to 4.2.5.60 and the R4-60 Exception (see Exhibit 1, Tab 19, p. 88). It is noteworthy that these figures represent the maximum permitted distances and sizes.

[5] City Planner, Jordan Lee, was qualified to provide his professional land use evidence and expert opinion in this case. He was the only person to provide planning evidence in this case. Mr. Lee's evidence was that the variances do not meet the four tests for a minor variance as enunciated in s. 45(1) of the *Planning Act* ("Act"). He also provided comments from the Planning and Building Department for this specific application. He noted that the Applicant's rear balcony, built above the permitted

standards sometime in 2012, creates unacceptable and adverse impacts on the immediate neighbourhood.

[6] Mr. Lee referenced the policies of both Mississauga Official Plan and Mississauga Plan. He advised that the proposed variances do not conform to several of the current Official Plan's Non-Intensification Areas policies. Policy 9.2.2.3 c, requiring new development in *Neighbourhoods* to "respect the scale and character of the surrounding areas"; policy 0.2.2.3 d, to "minimize overshadowing and overlook on adjacent neighbours"; and g, "be designed to respect the existing scale, massing, character and grades of the surrounding area." In every respect, the existing oversized balcony fails to meet these policies. The subject balcony does not reflect what exists on other houses nearby and thus undermines the established character and is, in the Board's determination, in no way sensitive to the issue of the loss of privacy it creates for south-lying residents. What is especially important for the area context in this case is the importance that residents and the City have placed on the protection of rear yards from overlook and loss of privacy – particularly with the introduction of higher built forms in a stable, lower-density residential neighbourhood, all of which resulted in a Zoning By-law Amendment to protect from that which the Applicant has created.

[7] The Official Plan's Context policies provide further direction. In policy 9.5.1.2, "Developments should be compatible and provide appropriate transition to existing and planned development by having regard for...privacy and overlook". It is evident from the planner's evidence that the Applicant's balcony does not preserve the stable character of the neighbourhood nor minimize privacy and overlook impacts. The previous Mississauga Plan also provided expressed direction under the "Urban Form and Community Identity" Objectives to "maintain a distinct identity for each local community by encouraging common design themes and compatibility in scale and character of the built environment." Based on the policy regime of the City's Official Plan, the Board finds that the variances do not maintain the general intent and purpose of the Official plan.

[8] Mr. Lee referenced the By-law and the Amending By-law's provisions regarding the construction of rear decks. The intent of the site-specific zoning provisions to limit the maximum projection and area of a raised porch, deck and balcony in this area is to minimize overlook conditions onto the neighbouring R3 properties. The subject

property's dwelling and those to the west are zoned R4-60, which enjoy a greater height than the R3-zoned houses to the south and east. Mr. Lee opined that the Applicant's deck creates a greater potential impact on adjacent properties by creating unacceptable overlook conditions. By the Applicant's own admission, the purpose of the larger deck is to barbecue and watch his children play in the rear yard – activities that Mr. Lee explained could be achieved on a balcony whose dimensions are thoroughly covered in the Amending By-law at 6.2 square metres. At double the size of the other balconies, this encourages use of the balcony for social gatherings and contributes to additional time that people can spend overlooking the adjacent neighbours' properties. Mr. Lee offered that, had the Applicant constructed his large outdoor amenity space at grade in the form of a deck or a patio, it is likely that this would have caused his neighbours no concern. In terms of the zoning standards for the subject property, the proposed variances do not maintain the general intent and purpose of either the By-law or the Amending By-law.

[9] The planner opined that, while the subject property's dwelling is sited farther from its rear yard boundary than its westerly neighbours, overlook conditions are still created. He cautioned that if approved, this oversized balcony would set an undesirable precedent for the other houses that comply with the By-law and the Amending By-law. *Neighbourhood* concerns were in fact the impetus for the provisions. Mr. Lee noted that the residents of 1830, 1826, 1822 and 1816 Stonepath Crescent all have rear yard pools with expectations that their neighbours cannot overlook them. He opined that the resulting overlook negatively impacts the ability of these residents to enjoy the rear yards. Mr. Lee explained that the houses at 1822 Stonepath Crescent (whose rear yard abuts the subject property) and both 1864 and 1854 Pagehurst Avenue (on either side of the subject property) are most affected by the oversized balcony. However, the Applicant tendered letters of support from the two residents who live on either side of him as well as a letter of support from the resident of 1830 Pagehurst Avenue farther west. The Board accepts that these neighbours do not object to the existing balcony.

[10] What is important to consider is whether adverse impacts are created by the existing balcony condition. The Board is unwilling to assign significant weight to pool-owning residents' concerns that the Applicant and his guests might be able to see them in their rear yards. Development in a compact urban condition such as this established neighbourhood cannot be entirely safeguarded from overlook conditions from next-door

neighbours. Indeed, the Amending By-law permits balconies of limited size on the new Pagehurst Avenue houses. It is also evident that large coniferous trees exist in the rear yards and this condition by the Applicant's admission actually prevents him from seeing into those residents' yards. However, the zoning standards are very clear as to what size of balconies is permitted. Moreover, the Applicant is not a stranger to the history of the residential development that the Board approved. He professed a professional association with the developer for the past "15 to 20 years" and he made a strategic decision to purchase the 1860 Pagehurst Avenue property in August 2010 – a property whose rear yard sits farther distant from the rear yards of the Stonepath properties than do the west-lying new houses. In this vein, the Applicant did not consult with the City as to the above-mentioned site-specific zoning standards for this property before building the large balcony, which has resulted in an structure that is more than double the protrusion from the rear wall of the west-lying houses and more than double their size. If approved, the size of the existing deck is such that additional use of the structure by greater numbers of people and for ancillary amenity uses is realized and this ultimately changes the propensity for increased activity of a type that can impact adjacent neighbours. On this point alone, the Board determines the variances to be undesirable for the appropriate development of the subject property.

[11] Tied to this finding is the Board's assessment of whether the variances are minor. Mr. Lee opined that the variances are not minor as the balcony's size is too large for the area and built at a height that creates overlook on surrounding properties. Indeed, in the Board's view, doubling of the size and protrusion of the structure above what is permitted is not minor in numeric terms. Both the pictures from the City's document book and the Applicant's photographs (Exhibit 3) confirm the expansive views afforded from the balcony. Even with the presence of trees in some parts of the yard, unimpeded views are possible.

[12] In this regard, the Board turned to the evidence of Interested Participant, Gail Middleton, whose rear yard is located diagonally southeast from the subject property's rear yard. Mrs. Middleton expressed two specific concerns: the loss of visual privacy and the increase in noise to be generated by the activity on the large balcony. She acknowledged that the trees in the Applicant's rear yard afford "good visual privacy" but there is no guarantee that these trees will remain. She noted that the Applicant has had

his property for sale and she wondered whether a new owner would maintain those trees.

[13] This evidence was highly relevant to the Board in its assessment of the variances and in particular whether adverse impacts have been created on adjacent residents. This was confirmed through the evidence of Mrs. Middleton who reminded the Applicant that while he enjoys a rear balcony deck extending from his main floor area, the topography is such that his large balcony is at the height of her second-floor windows and it provides views directly into her bedroom. In her opinion, such sight lines are troubling and unpleasant and made all the more impactful by the deck's size, which contributes to its potential use as additional amenity space for more numbers of persons than would be permitted on a 6 x 7 foot rear balcony. The second component of her concern is the sound that such outdoor spaces create and specifically at this height level above and across the property line.

[14] In the Board's view, these are not minor concerns and they are adverse impacts that only a large balcony of this type can create – not only in this area-specific context but for other rear yard to rear yard urban conditions. In concert with the uncontroverted evidence of the planner and the highly persuasive evidence of the Interested Participant, the Board determines that both variances fail all of the tests for a minor variance. A balcony of this size and configuration should not be permitted in a neighbourhood in which the City has taken significant steps to ensure that the privacy of R3 residents and freedom from unacceptable overlook conditions are safeguarded through the zoning. The concerns outlined by the Interested Participant are precisely the types of impacts that should not be permitted.

ORDER

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

"R. Rossi"

R. ROSSI
MEMBER