

ISSUE DATE:

April 01, 2014



PL131228

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:	Lubomir Hac
Subject:	Minor Variance
Variance from By-law No.:	0225-2007
Property Address/Description:	3964 Chicory Court
Municipality:	City of Mississauga
Municipal File No.:	A362/13
OMB Case No.:	PL131228
OMB File No.:	PL131228

APPEARANCES:

Parties

Counsel

Lubomir Hac

City of Mississauga (the "City")

M. Taggart

DECISION DELIVERED BY BLAIR S. TAYLOR AND ORDER OF THE BOARD

INTRODUCTION

[1] Lubomir Hac and Monika Gozdzik (the "Owners") purchased a detached home in Mississauga on property known municipally as 3964 Chicory Court (the "Subject Lands") in 2011. The Owners built a deck at the rear of the Subject Lands. A complaint was made to the City, and the City required the Owners to file a minor variance application seeking relief for a side yard setback of 0.00 m whereas 0.61 m is required, and a rear yard of 0.35 m whereas a minimum of 2.50 m is required. The application was denied by the Committee and the Owners appealed.

DECISION

[2] Based on the new evidence provided by the City during the course of the hearing, the Board will allow the appeal in part and authorize the amended variance for the rear yard setback, but otherwise dismisses the appeal.

BACKGROUND AND CONTEXT

[3] The Subject Lands are located on a small cul de sac. The Subject Lands are designated Residential Low Density II in the Official Plan, which allows detached homes as a permitted use. The Subject Lands are zoned RM1-3, which permits both semi-detached and detached homes.

[4] The Subject Lands back onto the rear yards of semi-detached dwellings on Fuchsia Place, a very small cul de sac.

[5] The existing deck has two levels: the first abuts the existing home and is about 6.0 m by 3.5 m and the second level is 6.0 m by 3.72 m. As depicted in the photographs provided by the Owners and the City, both levels of the deck are built right to the easterly property line. External access to the deck is provided by stairs that are actually in the side yard and are built to the property line. The deck is raised (0.53 m at the house, and 0.34 m for the lower level) and extends to 0.35m of the rear yard property line. In addition to the deck, the photographs show a rudimentary pergola on the deck about eight feet high, a portion of which would appear to encroach on the easterly abutting neighbour's property.

[6] From the photographs provided, the rear yard interface appears to be well vegetated.

STAFF REPORT

[7] The City's staff report to the Committee of Adjustment noted that due to the presence of the stairs in the side yard, that the application should be amended to include relief of 0.00m whereas a minimum of 1.2 m is required.

[8] Staff indicated that the intent of the Zoning By-law for the side yard and rear yard was to ensure access for maintenance purposes, and to provide adequate privacy and separation distances between properties.

[9] Staff thus recommended to the Committee that the variances be denied as staff were of the opinion that the separation distances were not sufficient to meet the intent of the by-law.

HEARING

[10] At the hearing, the Owners explained that prior to building the deck, they had cooperatively rebuilt the side yard fence with their neighbour to the east. Thereafter they had spoken with this same neighbour about the proposed deck and he had had no objection. In support of this the Owners filed a letter of support from that neighbour for the variance.

[11] With regard to the rear yard setback, the Owners were under the belief that decks of a certain height required no building permit and were permissible.

[12] The evidence for the City came from its land use planner Jordan Lee who was qualified to give opinion evidence. Mr. Lee was the author of the original report to the Committee of Adjustment.

[13] Mr. Lee noted that the Official Plan designated the Subject Lands as Residential Low Density II which permitted detached dwellings. He noted that the Subject Lands were within an area not identified for intensification and as such was to be considered stable and for which the existing character was to be preserved.

[14] With regard to the Zoning By-law he reiterated comments from his staff report to the Committee of Adjustment wherein it was noted that the intent of the required side yard was to ensure access for maintenance purposes and to ensure that there is adequate privacy and adequate separation distances between residences.

[15] In the lead up to the hearing, Mr. Lee had done some additional investigation of which he advised the Board.

[16] First he confirmed that the Zoning By-law in s. 4.1.5.8.1 requires a minimum setback to the interior side lot line of 1.2 m. The stairs in this case occupied the entire side yard of 1.8 m.

[17] Secondly, he noted that for the deck itself s. 4.1.5.2 required a minimum setback of 0.61 m to the interior side lot line, and that generally the RM1 zone required a rear yard of 7.5 m, but that s. 4.1.5.2 allowed a deck or porch to encroach 5.0 m into a required rear yard. (Hence the original requirement for a 2.5 m rear yard setback).

[18] Thirdly he noted an additional provision that he had not reported on previously. He stated that there was also a special exception for decks in rear yard that were less than 0.3 m in height. Section 4.1.5.7 states that:

Notwithstanding the provisions of Article 4.1.5.2, any portion of a porch or deck that is located in a rear yard, does not **exceed 0.3 m in height** above grade at any point and is uncovered, **is permitted an unlimited encroachment into the required rear yard.** (Emphasis added).

[19] Referring to the drawings attached to the minor variance application, Mr. Lee pointed out that the lower level of the deck (6.0 m wide and 3.72 m deep) had a height of 0.34 m. In light of the fact that the lower deck was only 4 centimeters over the limit in the Zoning By-law, Mr. Lee was of the opinion that the variance request for the deck in the rear yard did meet the general intent and purpose of the by-law.

[20] With regard to the variance request for the 0.00 m side yard for the deck and the 0.00 m side yard for the stairs, Mr. Lee confirmed his opinion that for reasons of access, privacy, and prevention of overlook, that this variance should be denied.

[21] The Board then heard from an abutting neighbour at the rear, who arrived midway into the hearing: Mr. Mamchure. He testified that he had resided at 4052 Fuchsia Place for over 30 years, and that the purpose of setbacks was to ensure privacy and a buffer zone between properties. He told the Board he definitely disagreed with the testimony of the City's land use planner that he had heard, and that the density in this neighbourhood was the "highest in the City" and that he faces 12 houses. He questioned the need for the deck which he characterized as so large it could be used as a "dance floor or a religious shrine". He said that the posts at the rear were "19 feet

high and had a visual impact on his property.” He presented the Board with letters of objection from other of his neighbours on Fuchsia Place.

[22] In reply, the Owners indicated that they wanted to be able to enjoy their existing deck, that they did not want to invade anyone’s privacy, that the posts were about eight feet high, and that they would remove the posts.

COMMENTARY

[23] This is an existing situation. In such circumstances the Board as a matter of practice approaches the application as if the construction did not exist. The objective is good land use planning and s. 45(1) sets out the four tests as the framework for the consideration of the variances.

[24] The Board appreciates the further research conducted by the City’s land use planner. Such action conforms to the Board’s expectations of an expert who appears before it, and the Board wishes to acknowledge the positive contribution of the planner to the hearing.

[25] Arising out of that research, the City took no position with regard to the variance request for the rear yard deck.

[26] Since the evidence of the City confirmed the belief of the Owners that a deck of a certain height was permissible, the Board pursuant to s. 45(18.1) has deemed the variance request to have been amended to allow for a rear yard deck of 0.34 m in height, and has found the amendment to be minor in nature and required no further notice.

[27] With regard to the height of the rear deck, the Board finds that the Zoning By-law allows unlimited encroachment into a required rear yard for a deck or porch that is 0.3 m high (or less). The evidence is that the existing deck is 0.34 m or 4 centimeters over the by-law requirement. The Board finds that the amended variance conforms to the general intent and purpose of the Official Plan as contributing to the residential character of the area. With regard to the general intent and purpose of the Zoning By-law, the Board finds that the deck at a height of 0.34 m exceeds the by-law standard marginally, but meets the general intent and purpose of the by-law. The Board finds

that such a variance is desirable for the use or enjoyment of the Subject Lands and that in the circumstances the variance is minor in nature. The Board prefers the evidence of the City's land use planner to that of the neighbour. Thus the Board will authorize the amended variance for the rear yard deck at a height of 0.34 m.

[28] With regard to the variance for the side yard setback and the stairs, the Board finds that a 0.00 m setback is not appropriate, and will lead to issues of overlook and concerns of lack of privacy. The general intent and purpose of the Official Plan, and Zoning By-law is to provide for adequate separations (for access and privacy), and this is not met when the stairs occupy the whole of the interior side yard, and the deck is built right to the rear side yard property line, (and part of the pergola appears to encroach on the adjoining lands). While the Board appreciates that the now existing next door neighbour may have no concerns, we live in a temporal world. Due to job transfers, or a change in family circumstances, tomorrow there may be a new neighbour, and the Board has to consider not only present owners, but also future owners. Thus the Board finds that the side yard variance request for the stairs and the deck in the rear yard does not meet the general intent and purpose of the Zoning By-law, is not desirable due to its potential for overview, is not minor and therefore is not authorized.

[29] The Board appreciates the offer of the Owners to remove the posts and notes such removal would resolve the apparent encroachment of a portion of the pergola.

[30] Thus the Board will allow the appeal in part, and authorize an amended variance for a rear yard deck to a height of 0.34 m whereas the By-law requires 0.3 m. but otherwise dismisses the appeal.

ORDER

[31] This is the Order of the Board.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER