

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: April 21, 2016

CASE NO(S): PL150409

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

| | |
|-------------------------------|---------------------------|
| Applicant and Appellant: | Annalyla Irevan |
| Subject: | Minor Variance |
| Variance from By-law No.: | 6593, City of Hamilton |
| Property Address/Description: | 111 Winston Ave |
| Municipality: | City of Hamilton |
| Municipal File No.: | HM/A-15:41 |
| OMB Case No.: | PL150409 |
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| OMB Case Name: | Irevan v. Hamilton (City) |

Heard: March 2, 2016 in Hamilton, Ontario

APPEARANCES:

| <u>Parties</u> | <u>Counsel*/Representative</u> |
|------------------|--------------------------------|
| Annalyla Irevan | Self-represented |
| City of Hamilton | P. MacDonald* |

DECISION OF THE BOARD DELIVERED BY ANNE MILCHBERG

[1] Annalyla Irevan (“Applicant” and “Appellant”) has appealed the decision of the Committee of Adjustment (“CoA”) of the City of Hamilton (“City”) to refuse her variance application (“Application”) to make interior changes to an existing detached dwelling at 111 Winston Avenue, Hamilton (the “Subject Property”).

[2] The Subject Property is a four-level side split single-detached dwelling located on a quiet residential street in Ainslie Woods, an older established neighbourhood just south of the McMaster University (“McMaster”) campus. Winston Avenue has a mix of one and two-storey single detached dwellings. The Appellant, who co-owns the dwelling with her father, is currently a student at McMaster. Her amended proposal is to add two *habitable rooms* to the interior of the dwelling, which currently has nine *habitable rooms*.

[3] The City, which was in support of the CoA decision refusing the variances, was granted Party status.

[4] The Board heard professional planning opinion evidence on this matter from N. Edward Davidson, who was retained by the City. Steven Boich, a planning technician with the City, appeared under summons.

[5] The Appellant, who was self-represented, provided evidence in support of her proposal.

[6] Five area residents participated in the hearing. Of these residents, Stan Katz and Bill Gizyn testified as to their concerns.

VARIANCES SOUGHT

[7] The Applicant seeks the following relief from the City’s Zoning By-law No. 6593 (the “ZBL”):

1. a maximum Gross Floor Area (“GFA”) of 51.48 % shall be maintained instead of the maximum permitted Floor Area Ratio Factor of 45 % [Variance 1];
2. a minimum parking size width of 2.5 m shall be provided for parking (B) and (C) instead of the minimum parking size width required of 2.7 m [Variance 2];

3. a 0.0 m aisle width maneuvering space shall be provided for parking space (B) and (C) in the front yard instead of the minimum required aisle width maneuvering space of 6.0 m [Variance 3];
4. the maneuvering space for the parking space (B) and (C) shall be provided off-site and on the Winston Avenue road allowance instead of the regulation that the required maneuvering space is required to be provided and maintained only on the lot on which the principal use and/or building is located [Variance 4]; and
5. two (2) required parking spaces shall be provided in the required front yard whereas the Zoning By-law restricts the amount of required parking to be located in the front yard to a maximum of one (1) parking space [Variance 5].

[8] Variance 1 is intended to legalize the GFA of the existing house, which was built before the current zoning standards came into force and effect. No addition to the existing massing is proposed. The Appellant testified that she undertook the GFA calculations herself.

[9] Variances 2 through 5 deal with parking space setup on the Subject Property. These variances are proxies for the proposed increase in the number of *habitable rooms* in the existing dwelling.

[10] Based on the number of rooms proposed, three parking spaces are needed. In order to fit the three required parking spaces onto the site, the sizes of these spaces, their location and their maneuvering room would have to vary from the ZBL.

[11] These variances were determined by the Applicant without a formal review by or a Zoning Certificate from the City's Building Department. Mr. Davidson, the City's expert planning witness, expressed concern about the precision of the variances, and he opined that none of them was correct.

HABITABLE ROOMS

[12] The term *habitable room* appears throughout in this decision. The ZBL defines *habitable room* as follows:

2. (2) J. (viii) "Habitable Room" means any room of a residential building or an institutional building, used or capable of being used by one or more persons for living, eating or sleeping, or as a kitchen serving a dwelling unit; but does not include a bathroom, water-closet compartment, laundry, serving or storage pantry, corridor or other space not for use frequently or during extended periods. [Exhibit 2, Tab 18]

[13] When the Appellant bought the Subject Property in 2014, it had nine *habitable rooms*.

[14] Ms. Irevan testified that, after taking possession of the dwelling in July 2014, she began construction of six more *habitable rooms* (to be used as bedrooms) within in the dwelling without a building permit – making for a new total of 15 *habitable rooms*. In August 2014, this ongoing construction was halted by an Order to Comply pursuant to the *Building Code Act, 1992*, issued by the City's Building Services Division.

[15] A building permit was needed, and the Appellant learned that variances from the ZBL were a necessary precursor to the building permit.

[16] Ms. Irevan applied to the CoA for GFA and parking variances in relation to 15 *habitable rooms*. The CoA refused the application.

AMENDMENT TO THE APPLICATION

[17] The Board was advised at the commencement of the hearing that the Appellant wished to amend the proposal by reducing the number of proposed additional *habitable rooms* by 4 (dropping the total to 11 from 15) and by deleting a variance for the number of parking spaces. The list set out under "Variances Sought" has been amended accordingly, shrinking the number of variances from six to five.

[18] Pursuant to s. 45(18.1) and 45(18.1.1) of the *Planning Act* ("Act"), and with the consent of the Parties, it was the Board's determination that the amendment to the original application was minor in nature, and that no further notice was required.

ISSUES, ANALYSIS AND DISPOSITION

1. Does the proposal maintain the general intent and purpose of the ZBL?

[19] The Applicant testified that she provided lodging for remuneration at the Subject Property to six unrelated individuals during the 2014 – 15 university session. During the current (2015 – 2016) session, she is renting rooms in her dwelling to five unrelated individuals. The proposal to add more internal rooms, if allowed by the Board, would result in permission for as many as eight lodgers in the dwelling on a permanent basis (or seven lodgers if she continues to live in the dwelling).

[20] In their respective testimonies, both the Appellant and the City's planning witness repeatedly referred to the proposal as a *single detached dwelling* modified by additional internal rooms and with adjusted parking arrangements. During the course of the hearing, the Board questioned this characterization, and determined, by having Mr. Boich reference the ZBL excerpts in Exhibit 2, Tab 18, that the application is not for a *single detached dwelling* with changes. The proposal is actually for a *Lodging House*.

[21] In the ZBL, the Subject Property is zoned "*C*" District – *Urban Protected Residential*. Single family dwellings are permitted "together with the accommodation of lodgers to the number of not more than three":

9. (1) Subject to the provisions of Sections 3, 18, 18A, and 19, in a "C" District, no building or structure shall be erected, altered, extended, or enlarged, nor shall any building or structure or part thereof be used, nor shall any land be used, for other than one or more of the following uses, namely: RESIDENTIAL USES (i) A single family dwelling, together with the accommodation of lodgers to the number of not more than three... [Exhibit 2, Tab 18]

[22] The Board finds that ZBL s. 9.(1) **prohibits** more than three lodgers in *single family dwellings* in "*C*" Districts.

[23] If any more than three persons are provided lodging for remuneration in a dwelling, the ZBL designates the dwelling as a *Lodging House*. It is no longer a *single family dwelling*:

2. (2) A. (xii) "Lodging House" shall mean a dwelling or building or portion thereof **in which lodging is provided for more than 3 persons for remuneration**, or the provision of services or both, and the lodging rooms do not have bathrooms and/or kitchen facilities for the exclusive use of individual occupants, but shall not include the following: (i) a hostel; (ii) a hotel; (iii) a public or private hospital; (iv) a nursing home; (v) a home for the aged or a home for elderly persons; (vi) a tourist home; (vii) a residential care facility; and, (viii) a short-term care facility, where such facilities are licensed, approved or supervised under a general or special Act other than the Municipal Act. [Exhibit 2, Tab 18]

[24] A *Lodging House* is not a permitted use in a "C" District.

[25] Mr. Boich's planning opinion was that the proposed variances meet the intent and purpose of the Zoning By-law because the proposed new rooms would fit within the existing volume of the dwelling, and the proposed parking spaces would fit on the property. The Board does not agree with this opinion as it ignores the underlying, fundamental change of use that is proposed.

[26] The Board considers the five requested variances, for GFA and for parking modifications, to be proxies for a use that is quite simply not permitted in a "C" District. On this basis, the Board finds that none of the five variances maintain the general intent and purpose of the Zoning By-law.

2. Does the proposal maintain the general intent and purpose of the Urban Hamilton Official Plan ("UHOP")?

[27] Mr. Davidson testified that the Subject Property and its surrounding neighbourhood are designated as "Neighbourhoods" in the UHOP. The UHOP stresses stability of these areas, and, at the same time, the creation of "places that are adaptable

and flexible to accommodate further demographic and environmental changes” [Exhibit 2, Tab 5]. *Lodging houses* do not appear to be part of that vision, however.

[28] The Ainslie Wood Westdale Secondary Plan, part of the UHOP, designates the Subject Property and its surroundings “Low Density Residential 2”. *Lodging house* is not shown to be a permitted use in these areas:

6.2.5.4 a) 8. iv) Low Density Residential 2 areas permit single detached dwellings, semi-detached dwellings, duplexes and street townhouses. These uses shall include dwellings with accessory apartments/second dwelling units. Single detached housing shall be the primary form of housing in most of these areas, especially in the interior of neighbourhoods... where single detached housing presently exists in the interior of the neighbourhood. [Exhibit 2, Tab 5]

[29] Accordingly, the Board finds that the proposal does not maintain the general intent and purpose of the UHOP.

3. Is the proposal desirable for the appropriate development of the land?

[30] Ms. Irevan freely testified that her plan for additional habitable rooms, resulting in as many as eight lodgers, is driven by economic interests. She wants to create sufficient cash flow from rent to carry the mortgage and to fully subsidize her own accommodations.

[31] Mr. Katz and Mr. Gizyn, nearby neighbours to the Subject Property, each testified that they have observed the marked deterioration and decline of a stable, desirable family neighbourhood due to several conversions of *single family dwellings* to *lodging houses*. These witnesses were measured and thoughtful in their testimonies. Mr. Katz testified that construction of interior walls without the necessary permissions has taken place in four houses on Winston Avenue. Mr. Gizyn referred to the resulting accommodations as “rabbit warrens”.

[32] A large sheaf of individual communications to the CoA from dozens of neighbours [Exhibit 2, Tab 6] recount, in detail, the many undesirable land use conflicts arising from the *lodging houses* already established in the neighbourhood: loud parties, trash, public drunkenness, public urination, car racing, and a stabbing. The communications suggest that the stability of the neighbourhood now hangs in the balance.

[33] In contrast, Ms. Irevan testified that she and her lodgers were responsible, quiet and respectful of the neighbourhood. Mr. Katz corroborated this, and spoke very well of the Appellant and her lodgers. However, he noted that once a rooming house is approved, it is approved permanently with all the attendant land use compatibility issues and risks, whether Ms. Irevan continues to own the property or not.

[34] Mr. Davidson provided evidence that the City has grappled with “Town and Gown” planning issues involving student housing and land use conflicts in the neighbourhoods close to McMaster for quite some time. [Ainslie Wood Westdale Community Strategy, 2005 – Exhibit 2, Tab 17]

[35] In light of all the evidence put before the Board, the issues and conflicts appear to be alive, and the Board will not find the proposal to be desirable for the appropriate development of the land.

[36] The Board notes that the existing ZBL is not anti-student. Under the ZBL, the Appellant can, as of right, rent to three lodgers at the Subject Property. Three lodgers will not have the same permanent impact as the seven or eight lodgers proposed by the Appellant.

4. Are the variances minor?

[37] The Board finds that the proposed variances are not minor in that they are proxies for a *Lodging House*, which is not a permitted use.

PROVINCIAL POLICY STATEMENT (“PPS”)

[38] None of the parties provided testimony on whether the proposed variances conform to the PPS. However, the Act requires that decisions affecting planning matters shall be consistent with policy statements issued under the Act. The Board’s decision on the variances sought will be consistent with the PPS.

DECISION AND ORDER

[39] The Board finds that the application fails on all four test for minor variance, pursuant to s. 45(1) of the Act.

[40] Accordingly, the Board orders that the appeal is dismissed and the requested variances from Zoning By-law No. 6593 are not authorized.

“Anne Milchberg”

ANNE MILCHBERG
MEMBER

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Ontario Municipal Board

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