

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: June 02, 2017

CASE NO(S): PL151258

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

Appellants:	Dr. David Jones and Dr. Kathryn Murphy
Applicant:	Barry and Sandra Smith
Subject:	Minor Variance
Variance from By-law No.:	3581-86
Property Address/Description:	22 Parkview Row
Municipality:	City of Hamilton
Municipal File No.:	A-197/15
OMB Case No.:	PL151258
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OMB Case Name:	Jones v. Hamilton (City)

Heard: June 27, 2016 in Hamilton, Ontario

APPEARANCES:

Parties

Counsel

Barry and Sandra Smith

S. Loiacono
R. Hines, student-at-law

David Jones and Kathryn Murphy

S. Snider
A. Toumanians

**DECISION DELIVERED BY ANNE MILCHBERG AND PARTIAL ORDER OF THE
BOARD**

[1] Dr. David Jones and Dr. Kathryn Murphy (“Appellants”) have appealed the decision of the Committee of Adjustment (“CoA”) of the City of Hamilton (“City”) to approve nine variances to (former) Town of Dundas Zoning By-law No. 3581-86 (the “ZBL”) at 22 Parkview Row (“the subject property”; “No. 22”). The variances, applied for by Barry and Sandra Smith (“Applicants”) would permit the construction of an addition, including a carport at grade and an elevated deck, to an existing 1 ½ storey single detached dwelling on the subject property. The Applicants own the property at No. 22, and their daughter and son-in-law, Jennifer Smith and Dean Montgomery live in the existing single detached dwelling on the lands. The Appellants live next door, at No. 20 Parkview Row (“No. 20”).

[2] The proposed additions are to the ground and second floor of the dwelling on No. 22 within 1.5 metre (“m”) of the side lot line that the subject property shares with No. 20. Proposed are a carport, mudroom, storage room, and raised deck on the ground floor, a bedroom and washroom on the second floor, and stairs connecting the two levels. The existing dwelling is 166.76 square metres (“sq m”) in area; 72.74 sq m are proposed to be added. The quantum of additional gross floor area is not at issue and is not at variance from the ZBL; it is the location of the addition that the Appellants take exception to.

[3] Professional land use planning opinion evidence on this matter was provided by John Ariens (for the Applicant) and Stephen Fraser (for the Appellant). The Applicant’s architectural designer, Darren Sanger-Smith, provided opinion evidence on the design of the proposal. Peter Turner, an architect and planner, provided professional opinion evidence in architecture and urban design for the Appellant.

[4] In addition, Mr. Montgomery testified in support of the application, and Dr. Jones against it.

[5] City staff supported the proposal but did not attend the hearing. The Parties provided staff emails and a staff report to the CoA to elucidate the City’s position.

SITE DESCRIPTION AND CONTEXT

[6] The subject property is located in the Dundas Driving Park ("Park") neighbourhood. The Park is a large, historic green space established in 1887 on a former horse-race track. The green space is bounded by an oval circuit road which runs one-way around its perimeter. The western part of the circuit road, from Alma Street to Cayley Street, facing the west side of the Park, is called Parkview Row. Parkview Row is not a dedicated right-of-way but a thoroughfare through the Park, zoned as part of the parkland, though Mr. Ariens testified that it had all the characteristics of a regular street, with a 20.12 metre ("m") width, a sidewalk, street lights, garbage pickup, mail delivery, City snow plowing and City maintenance. Cars and trucks cannot turn the corner from Parkview Row onto Cayley Street because Cayley Street is discontinuous, turning into a pedestrian pathway south of the entry door to No. 22.

[7] Ten single detached dwellings are on the west side of Parkview Row, adjacent to the Park. Most of the dwellings on the street, including those at No. 22 and No. 20, were constructed in the 1930s and 1940s.

[8] All of these dwellings have vehicular and garage access from a public laneway that runs parallel to Parkview Row from Alma and Cayley Streets. The subject property is the northernmost of these, at the corner of Parkview Row and Cayley Street.

[9] The entry doors to eight out of ten dwellings face Parkview Row. The only exceptions are the dwelling at the corner of Parkview Row and Alma Street (which faces Alma Street, and has an Alma Street address), and the dwelling on the subject property at the corner of Parkview Row and Cayley Street, whose entry door faces Cayley Street.

[10] The existing 1 ½ storey dwelling on the subject property has a Parkview Row address and a large ground-floor level deck facing Parkview Row and the Park, but in other respects, it is mostly oriented towards Cayley Street.

[11] The lands are slightly irregular in shape, with dimensions of 18.9 m along Parkview Row to the east, 17.69 m along the City lane to west, and 32.3 m along Cayley Street to the north. Although the lot shape and size are very similar to most of the neighbouring properties on Parkview Row, the situation of the existing dwelling on the subject lands does not follow the pattern set by its neighbours. At 17.6 m, the dwelling is set much further back from Parkview Row than the other dwellings on the street (whose setbacks range from approximately 6.34 m to 8.73 m). In addition, the house is set back only 2.90 m from the rear lane, while the neighbouring homes on Parkview Row have setbacks ranging from 6.10 m to 16.35 m [Exhibit 7].

[12] There is marked variation in the side yard and rear yard configurations in each of the lots on the block. Some properties, like No. 20 and No. 22, have generous side yards, while others do not. Dr. Jones entered a drone “flyover” video of the entire block into evidence, providing details on the outdoor amenity space of his own property and the current configuration of the dwelling on No. 22 [Exhibit 10].

[13] The subject property and others on Parkview Row are located within the Residential “R2” zone (the Singled Detached Residential Zone) specified by the ZBL. The existing dwelling’s construction and setbacks on the subject lands predate the ZBL controls.

VARIANCES SOUGHT

[14] The variances sought from the ZBL are as follows:

1. The easterly lot line shall be deemed the front lot line notwithstanding the easterly lot line does not abut a street; (“Variance 1”).
2. The lot shall be considered a corner lot notwithstanding only one lot line abuts a street; (“Variance 2”).

3. A minimum northerly (flankage) side yard of 1.1 m shall be provided instead of the minimum required side yard of 3.5 m abutting a flankage street; (“Variance 3”).
4. A minimum rear yard of 3.2 m shall be provided instead of the minimum required rear yard of 7.5 m; (“Variance 4”).
5. The frame shed shall be located within the required southerly side yard notwithstanding an accessory structure with a floor area of less than 10 square metres (“sq m”) is only permitted to be located within the rear yard or non-required side yard; (“Variance 5”).
6. The frame shed shall be zero metres from the southerly side lot line instead of the minimum required distance of 1 m from a side lot line; (“Variance 6”).
7. The overhang shall encroach 0.65 m into the required northerly side yard instead of the maximum permitted encroachment of 0.55 m (one half the width of the required side yard); (“Variance 7”).
8. An access driveway width of 2.4 m shall be provided instead of the minimum required access driveway width of 2.8 m; (“Variance 8”).

and

9. A maneuvering space width of 3.2 m shall be provided instead of the minimum required maneuvering space width of 6 m. (“Variance 9”).

[15] Variances 3–8 were identified after City staff clarified to the Applicant that Parkview Row ought to be treated as the front lot line [Exhibit 1, Tab 7].

ISSUES

[16] The first issue is the location and massing of the proposed two storey addition on the subject lands in relation to its neighbour, No. 20. The addition would be situated within 1.5 m of the property line shared with No. 20, and it includes a deck that partially faces No. 22, and one second floor window that looks down at No 22's amenity space. The land at No. 22 is at a higher elevation than the land at No. 20. The Appellants claimed that the proposed addition would create an undesirable overlook over their side yard, which was their only viable outdoor amenity space because of the location of the dwelling and garage on their own property. In addition, they were concerned about the continued health of a 30.5 m high spruce tree in their amenity area, fearing that any construction close to the tree's roots would imperil the tree.

[17] The second issue, which is intertwined with massing and overlook, has to do with lot orientation. The Appellants asserted that the true frontage of the subject property is on Cayley Street, not on Parkview Row, and much of the construction that they considered offensive and impactful would occur in the area which they characterized as the rear yard of No. 22.

[18] However, treating Parkside Row as the property's frontage, the City considered the area of the addition to be a side yard, not a rear yard.

ANALYSIS AND DISPOSITION

[19] Under s. 45(1) of the *Planning Act*, there are four tests a minor variance must meet:

- Does the variance conform to the general intent of the Official Plan ("OP")?
- Does the variance conform to the general intent of the ZBL?
- Is the variance minor?

- Is the variance desirable for the appropriate development of the land in question?

Variance requests not related to lot orientation (Variances 5, 6, 8, and 9)

[20] The Appellants clarified that they had no issue with Variances 5, 6, 8 and 9, and did not identify any adverse impacts relating to any of them. Variances 5 and 6 would legalize the existing wood-frame shed located right against the Appellants' side of the property line separating Nos. 20 and 22 Parkview Row. Variance 8 is intended to allow a substandard width access driveway, and Variance 9 is intended to allow a narrower maneuvering space for a vehicle entering the subject property from the City lane.

[21] Mr. Ariens' evidence that Variances 5, 6, 8 and 9 meet all four Planning Act tests for a minor variance was uncontroverted, and the Ontario Municipal Board ("Board") concurs with his analysis. Accordingly, the Board finds in favour of granting these variances, subject to the single condition by the CoA dealing with archaeological monitoring and notification of authorities in the event that significant archaeological resources are found on the subject lands [Condition No. 1 set out under "Notes" in Exhibit 3, Tab 9, page 119],

Variances related to lot orientation (Variances 1, 2, 3, 4 and 7)

[22] In order to analyze Variances 1, 2, 3, 4 and 7 against the four tests of the *Planning Act*, the Board will first make findings on the following questions:

- What, if any, are the impacts of the proposal on the Appellants?
- Where is the front lot line of the subject property?
- Can this property be considered a corner lot?

Impacts of proposal

[23] Both Mr. Sanger-Smith and Mr. Turner gave copious evidence on the proposed floor plans, elevations and massing of the proposal. From this evidence, the Board finds that the proposal, if approved as applied for, would have some unwanted overlook into the Appellants' side and rear yards, resulting in a potential loss of privacy.

[24] Shadowing is not an issue. Notably, the evidence showed that the placement of the bulk of the addition to the north-west of the Appellant's outdoor amenity space (set back at approximately 1.55 m from the property line) would not cause shadow impacts over that amenity space. As for the scale of the proposed addition, the neighbourhood photos in Exhibit 4, the site photos in Exhibit 1, Tab 4, and the design drawings in Exhibit 1, Tab 12 demonstrated to the Board that the massing and height of the addition were not over-scaled or overwhelming, even though the Appellants asserted otherwise. In particular, the south wall of the addition has a small setback at the second storey to break up its massing.

[25] The Appellants also expressed concern that the roots of the 30.5 m high spruce tree in their outdoor amenity area would be harmed by nearby construction at No. 22. Evidence was provided that, as a mitigating measure, tree preservation and protection measures would be undertaken as part of the building permit process.

[26] The Board finds that the adverse impact of the addition is limited to overlook and diminished privacy. The problematic overlook would come from two places: (1) from a second storey, south-facing bedroom window in the proposed addition; and (2) from the large proposed extension to the existing deck that faces Parkview Row. Though there is some mature tree and shrub cover in the vicinity, it appeared to be insufficient to block the overlook, and in the case of the deck, there was also a concern about possible noise.

[27] Under cross-examination, Mr. Ariens conceded that the proposed design of the raised deck, with an open lattice screen facing the Appellants' yards, would not be sufficient to prevent overlook and to contain noise emanating from the deck.

[28] Mr. Turner provided a number of options to the Board showing that the second storey window opening at issue could be relocated, and that the deck could be redesigned, both to limit overlook [Exhibits 9 and 13]. Dr. Jones testified that he and Dr. Murphy had been willing to compromise with the Applicants on the basis of moving the window and adjusting the deck, but that they and the Applicants could not arrive at any agreement.

[29] Mr. Montgomery also testified that he and the Appellants had met to discuss the issue of overlook in the design with the view to making modifications, but that no agreement was arrived at.

[30] It was clear to the Board, from Mr. Turner's design studies, that the impacts related to the overlook could be resolved with a little give and take from both sides.

Front Lot Line (Variance 1)

[31] Eight out of ten dwellings on the west side of Parkview Row have front doors oriented towards Parkview Row. The only exceptions are the dwelling at the corner of Parkview Row and Alma Street (which faces Alma Street, and has an Alma Street address), and the dwelling on the subject property at the corner of Parkview Row and Cayley Street (whose entry door faces Cayley Street).

[32] The ZBL defines *Front Lot Line* as follows:

3.2.56 LOT LINE, FRONT

Means **the lot line that divides a lot from the street**, provided that, in the case of a corner lot, the shorter lot line that abuts a street shall be deemed to be the front lot line and the longer lot line that abuts a street shall be deemed to be a side lot line, except that where a corner lot has

the same dimensions on two streets which it abuts, the lot line abutting the street upon which the building erected or to be erected has its principal access shall be deemed to be the front lot line; where the lot is a through lot, the lot line where the principal access is provided shall be deemed to be the front lot line. [Exhibit 2, Tab2, emphasis added]

[33] Mr. Ariens testified that Parkview Row is not designated as a street by the City; its status is a Public Thoroughfare within the Dundas Driving Park, and it is zoned as parkland along with the Park.

[34] City staff initially took the position that Cayley Street should be considered the frontage because Parkview Row has a non-street status; accordingly, the Applicant submitted a CoA application to reflect this, identifying the setback variances relative to a Cayley Street frontage.

[35] The City later changed its position, and interpreted Parkview Row as the frontage, even though it was not technically a street. This resulted in the Applicant revising their CoA application to include the request for Variance 1 listed earlier in this decision, namely:

The easterly lot line shall be deemed the front lot line notwithstanding the easterly lot line does not abut a street.

[36] Notwithstanding the functional orientation of the subject property to Cayley Street (with the front door facing Cayley, and mail delivered at that door), the Board finds that there are a number of compelling reasons to consider the easterly lot line facing Parkview Row as the front of the subject property:

- Aside from the technicality of being a thoroughfare zoned as parkland, Parkview Row has the characteristics of a regular City street, as Mr. Ariens testified, with a standard width, a sidewalk, street lights, garbage pickup, mail delivery, City snow plowing and City maintenance. Treating Parkview Row as a frontage would meet the spirit and intent of the ZBL. In front of the subject

property, only part of Cayley Street has the characteristics of a regular City street; half of it is closed off and serves as a pedestrian path.

- Every other property on Parkview Row, between Cayley and Alma Streets, has its smaller lot line facing onto Parkview Row – except for the one at the corner of Parkview Row and Alma Street, where the smaller lot line faces Alma. If any of these Parkview Row properties were to apply for by-law variances or other planning approvals, and if a need to define the front lot line arose, it would be hard to imagine deeming anything other than the Parkview Row-facing lot line as the front lot line. Just because the subject property has a front door facing Cayley Street is not sufficient reason to label Cayley Street as the front lot line.
- The visual evidence, particularly the 3D flyover prepared by Dr. Jones, shows that Parkview Row is the visually dominant streetscape in relation to Dundas Driving Park (rather than Cayley Street). For this reason, the front lot lines should all be oriented towards Parkview Road, except in the case of the corner property at Alma Street, where the shorter lot line faces Alma and relates to the Alma streetscape.
- Planning controls such as front, side and rear lot lines offer consistency and predictability to built form in neighbourhoods. Though the Appellants say that the subject property fronts onto Cayley Street and its back yard faces their own property, this is not a neighbour's decision to make. By-laws determine lot orientation for a reason. Allowing the basic rules of front/side/rear yard orientation to be altered by property owners or neighbours to suit their own interests is not advisable.

[37] The subject property is designated “Neighbourhoods” within the City’s Urban Hamilton Official Plan (“UHOP”). Chapter B, s. 2.4.2.2 of the UHOP states that:

[w]hen considering an application for a residential intensification within the Neighbourhoods designation, the following matters shall be evaluated:

- b) Compatibility with adjacent land uses, including matters such as shadowing, overlook, noise, lighting, traffic and other nuisance effects;
- c) The relationship of the proposed buildings with the height, massing and scale of nearby residential buildings;
- d) The consideration of transitions in height and density to adjacent residential buildings;
- f) The provision of amenity space and the relationship to existing patterns of private and public amenity space; and
- g) The ability to respect and maintain or enhance the streetscape patterns, including block length, setbacks and building separations. [Exhibit 1, p. 10]

[38] The Board finds that deeming Parkview Row as the Front Lot Line would not be inconsistent with sections c), d), f), and g) above. However, as identified earlier in this decision, there are impacts of overlook and potential noise.

[39] Though there are solid reasons to deem Parkview Row as the Front Lot Line by approving Variance 1, the Board will hold off doing so at this time. If Variance 1 were allowed now, the Applicant would have the ability, as-of-right, to construct the entire addition and deck without having to address and mitigate the issues of overlook that the Board has already identified. The proposed variance cannot be considered to be minor in nature or consistent with Chapter B, s.2.4.2.2 b) if the identified impacts are not satisfactorily addressed, and the variance request will fail if the impacts are not mitigated through redesign, however minor.

[40] The Board will withhold its order approving Variance 1 until the Applicants (1) amend their building design to eliminate the second storey south-facing window overlooking the Appellants' outdoor amenity space, and (2) redesign their first floor deck to eliminate overlook over the Appellants' amenity space.

Corner Lot (Variance 2)

[41] The ZBL defines *Corner Lot* as follows:

3.2.53 LOT, CORNER

Means: i) **a lot situated at the intersection of and abutting on two or more streets**; or ii) a lot abutting on two streets or two parts of the same street, the adjacent sides of which street or streets contain an angle of not more than one hundred and thirty-five (135) degrees, and in the case of a curved street such angles shall be formed by their tangents drawn from the points where the side lot lines meet the street line, provided that in the latter case the corner of the lot shall be deemed to be that point on the street line nearest to the point of intersection of the said tangent.

[42] As the subject property abuts one street, Cayley Street, and one thoroughfare, Parkview Row, the requested Variance 2 is to have the subject property considered a corner lot notwithstanding that only one lot line abuts a street.

[43] Allowance of Variance 2 would be contingent upon Variance 1 being allowed, which is not yet the case. Once Variance 1 is allowed, there is no compelling planning reason not to allow Variance 2. No planning evidence was provided against the idea of the subject property being treated as a corner lot.

Setback along Cayley Street (Variance 3)

[44] If Parkview Row is to be deemed the frontage ("Variance 1") and the subject property is to be deemed a corner lot ("Variance 2"), the entrance to the dwelling, which will not be altered, will be non-compliant with the ZBL. The entrance juts into the side yard, and a variance would be required such that "a minimum northerly (flankage) side yard of 1.1 m shall be provided instead of the minimum required side yard of 3.5 m abutting a flankage street".

[45] This is an existing condition, and the Board finds that recognizing it would have no negative planning impact, is minor in nature, is not inconsistent with the UHOP, does not run counter to the purpose and intent of the ZBL, and is desirable.

Setback in rear yard facing the lane (Variance 4)

[46] The existing dwelling at No. 22 is set back 2.90 m from the rear laneway, while the proposed carport would be set back 3.2 m. If Parkview Row is deemed to be the Front Lot Line, the area adjacent to the rear laneway would be deemed a rear yard, requiring a minimum setback of 7.5 m.

[47] The proposed 3.2 m setback is similar to the existing setback at the rear of the property. The Board finds that it would have no negative planning impact, is minor in nature, is not inconsistent with the UHOP, does not run counter to the intent and purpose of the ZBL, and is desirable.

Encroachment into northern side yard (Variance 7)

[48] City staff determined that the overhang of the existing entry door facing Cayley Street encroaches 0.10 m further into the northerly side yard than is allowed by the ZBL. A dimension of 0.55 m is permitted, while the overhang encroaches by 0.65 m.

[49] Similar to the conditions captured by Variances 3 and 4, this is an existing condition. There would be no negative planning impact from legalizing the overhang. It is minor in nature, consistent with the UHOP, consistent with the intent and purpose of the ZBL, and desirable.

PROVINCIAL POLICY STATEMENT (2014) (“PPS”)

[50] The Board finds that the proposal conforms generally to the PPS, particularly with regards to intensification. The proposal represents a mild form of intensification as

contemplated by Sections 1.1 “Managing and Directing Land Use to Achieve Efficient and Resilient Development and Land Use Patterns” and 1.1.3 “Settlement Areas”.

CONCLUSIONS AND ORDER

[51] The body of evidence presented at the hearing demonstrated to the Board that certain variances (Nos. 5, 6, 8 and 9) were not contentious, met the four tests of the Act, and should be allowed. The other variances (Nos. 1, 2, 3, 4 and 7) related to lot orientation, of these, Nos. 3, 4, and 7 were existing conditions that had no negative planning impact. Variance 1 should be allowed on condition that the design of the dwelling is modified to eliminate identified impacts, and Variance 2 flows from Variance 1.

[52] Accordingly, the Board orders that the appeal is allowed in part, such that:

(a) Variances 5, 6, 8 and 9 are authorized, subject to Condition No. 1 of the Hamilton CoA, dealing with archaeology, set out under “Notes” in Exhibit 3, Tab 9, page 119.

(b) Variances 1, 2, 3, 4 and 7 are authorized subject to the following conditions:

- that the Applicant redesigns the south-facing elevation to remove the identified condition of overlook (i.e. the second floor window that faces south) and redesigns the main floor deck to eliminate overlook with respect to the outdoor amenity area of No. 20;
- Condition No. 1 set out under “Notes” in Exhibit 3, Tab 9, page 119
- The Board will withhold its order approving Variances 1, 2, 3, 4 and 7, until the Parties agree upon a redesign, acting reasonably, and the redesign is filed with the Board.

[53] If there are any difficulties arising in the redesign process specified above, the Board may be spoken to.

“Anne Milchberg”

ANNE MILCHBERG
MEMBER

If there is an attachment referred to in this document,
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Ontario Municipal Board

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