Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: October 19, 2016 **CASE NO(S).:** PL160490

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

Applicant and Appellant:	Cristina and Kevin Cordeiro
Subject:	Minor Variance
Variance from By-law No.:	270-2004
Property Address/Description:	5 Black Diamond Crescent
Municipality:	City of Brampton
Municipal File No.:	A16-074
OMB Case No.:	PL160490
OMB File No.:	PL160490
OMB Case Name:	Cordeiro V. Brampton (City)

Board Rule 107 states:

> **107.** **Effective Date of Board Decision** A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

Heard: September 20, 2016 in Brampton, Ontario and September 28, 2016 by telephone conference call

APPEARANCES:

Parties	**Counsel**
Cristina and Kevin Cordeiro	John Richardson
City of Brampton	Nupur Kotecha

DECISION OF THE BOARD DELIVERED BY K.J. HUSSEY AND ORDER OF THE BOARD

[1] Cristina and Kevin Cordeiro (“Applicants”) are owners of the property known municipally as 5 Black Diamond Crescent (“subject property”) in the City of Brampton (“City”). The Applicants, wanting to take advantage of the second unit provision under the *Planning Act* (“Act”), constructed a below grade entrance to their home in the east interior side-yard. The structure was built without a permit.

[2] There is no access from the east side-yard to the rear yard of the subject property. There is a fence which secures a swimming pool in the rear yard and is the reason for the location of the below grade entrance. In order to legalize the structure and to achieve a second dwelling unit, the Applicants requested the following minor variance from the Committee of Adjustment (“COA”):

- To permit a below grade entrance in a required side yard having 0.0 m setback, whereas the bylaw requires a minimum side yard setback of 1.2 m.

[3] The COA denied the application and the Applicants appealed that decision to this Board.

The legislative tests

[4] In accordance with s. 45(1) of the Act, for a variance to be authorized there are four tests that must be met. In the opinion of the Board, the variance must:

1) maintain the general intent and purpose of the official plan;

2) maintain the general intent and purpose of the zoning by-law;

3) be desirable for the appropriate use of the land, building or structure; and

4) be minor.

[5] The City objects to the Application on the following grounds:

- The development would result in a drainage problem.

- Access for emergency services and maintenance would be impeded by the development.

[6] It is the City's position the variance ought to be refused because the intent and purpose of the Zoning By-law No. 270-2004 ("Zoning By-Law") is not met, the variance is not minor, and it is not desirable for the appropriate use of the land, building or structure.

Evidence, Argument and Findings

[7] The Board heard opinion evidence from two qualified land use planners: Dana Jenkins, a Development Planner with the City who authored the planning report to the COA that recommended refusal of the variance, and from Michael Manett, who has worked in the City extensively over the past 15 years. Mr. Manett was retained by the Applicants after the COA's decision.

[8] No one in the neighbourhood appeared in opposition to the variance and the information before the Board is that the adjoining neighbours as well as other residents have written letters in support of the application.

[9] In carrying out its responsibilities under the Act, the Board shall have regard to matters of Provincial interest. The Parties were in agreement that the Provincial interests are satisfied. The Board finds that there are no issues with respect to this application that is adverse to the Growth Plan for the Greater Golden Horseshoe or the Provincial Policy Statement 2014.

[10] Similarly, the Parties agreed, and the Board concurs, that the variance requested has no impact on the Official Plan and Secondary Plan (the subject property is designated "Residential" in the City's Official Plan and "Residential Low Density 1" in the Credit Valley Secondary Plan (Area 45)).

[11] The evidence led by the City is that the intent and purposes of the Zoning By-law with respect to the minimum side-yard setback requirement for below grade entrances, are the following:

1) to minimize negative impacts on the streetscape;

2) to ensure that there is adequate space to access the rear yard without entering the abutting property;

3) to provide sufficient space for amendments of the structure;

4) to provide access to the rear yard for safety reasons; and

5) to allow for adequate drainage.

[12] The City agreed with the Applicants that there are no concerns regarding the first item on this list. Having been presented with visual evidence which aptly demonstrates that to be the case, the Board is also satisfied that the proposal will have minimal impact, if any, on the streetscape.

[13] The City however, argued that the other items listed, 2, 3, 4, and 5 above, are not resolved and therefore the test with respect to the intent and purpose of the Zoning By-law, is not met.

[14] The City argued that the below grade entrance, built all the way to the property line, leaves insufficient space on the east side of the house for maintenance, for access to the rear yard, for emergency services, and for proper drainage. It is for those reasons that Ms. Jenkins' recommendation in the Planning Report to the COA, was to refuse the variance. That Planning Report was filed at this hearing. Ms. Jenkins relied on the same planning report for her opinion evidence at this hearing, and she reiterated her recommendation.

[15] The Applicants, however, responded to each of the City's concerns and thus satisfied the Board that the tests set out in the Act for the variance to be approved, are met.

[16] Mr. Manett presented visual evidence to demonstrate that access for emergency purposes and access to the rear yard amenity space is available from the west side-yard and from the interior of the dwelling. Mr. Manett also pointed out that there is no requirement in the Zoning By-law for access to be provided on both sides of the property, and noted that for semi-detached dwellings, there is only one side-yard access available to the rear of those dwellings, which meets the intention of the Zoning By-law.

[17] The Applicants' position is that, similarly, in this case the intent and purpose of the Zoning By-law is met: they demonstrated with visual evidence that there is adequate space in the west side-yard, without entering the abutting property, for access to the rear yard amenity space, and for emergency purposes. The Board is satisfied that the access provided meets the intent and purpose of the zoning By-law as set out above.

[18] With respect to item 3, the City's concern is that there is adequate space for maintaining the structure. The Applicants submitted that the affected area of the side yard for which the variance is required, represents 5.22 square metres or 14.5% of the length of the east side yard and therefore any maintenance to the remainder of the east wall of the dwelling can be accomplished without encroaching on the adjacent property. If maintenance is required above and adjacent to the stairwell, a ladder placed within the stairwell could be utilized for that purpose. On cross-examination the City's planner conceded that point.

[19] With respect to the question of drainage, the Applicants submitted that any problems with drainage that could result from the location of the stairwell is mitigated by the drain installed at the bottom of the stairs that connects to the internal drainage system of the dwelling, and there is no impact on the adjacent side yard at 3 Black

Diamond Crescent. In addition, there is an opening at grade between the south-end of the stairwell structure and the rear yard of the subject site for surface draining. The Applicants submitted that the structure has been in place for almost a year and there has been no drainage problem. There was no evidence to the contrary.

[20] Based on the foregoing, the Board concludes that the issues raised by the City, set out in the list above, are all satisfactorily addressed and therefore in the Board's opinion, the general intent and purpose of the Zoning By-law, is maintained. The Board having received no evidence of impact on the adjacent properties or on any other property in the neighbourhood, finds that the variance is minor and desirable for the appropriate use of the land, building or structure.

[21] During closing argument, Counsel for the City raised the issue that the Zoning By-law expressly prohibits below grade entrances to be located in a required side yard. The City led to no evidence on that issue nor did the Applicants address that provision of the Zoning By-law. The Board invited both Counsel for the Applicants and the City to make submissions on the issue raised in argument. Neither did.

[22] The Board informed the Parties at the close of the hearing that its decision would be reserved to allow for a closer look at the Zoning By-law.

[23] On closer examination of the excerpts of Zoning By-law provided in both the City's and the Applicants' document books, it became clear that there was no explicit reference to the provision of the Zoning By-law which the Applicants sought to vary, nor was it apparent from any of the following documents:

- COA hearing notice;
- The Planning Report authored by Ms. Jenkins;
- The Notice of the COA's decision;

- The Application for minor variance

[24] In all those documents, the variance was described as follows:

> To permit the below grade entrance in a required side yard having a 0.0 m set back whereas the bylaw requires a minimum side yard setback of 1.2 m (3.94 feet)

[25] The Applicants' planner in his evidence outline identified the section containing the provision as Residential Single Detached F-15.0 Section 1429 (R1F-15.0-1429). However, on reading the referenced section in the City's Document Book (Exhibit 7 page 81), the Board found no provision as described under paragraph 24 above.

[26] The Board needed clarification and directed Counsel to submit the exact excerpt of the Zoning By-law under consideration. The City confirmed that the Definitions section (Section 5) of the Zoning By-law, Section 10.23.1 located in the General Provisions for Residential Zones (Section 10.0) read together with Section 13.5.2(f)(2)(i) are the relevant sections.

[27] The Board needed confirmation that the variance which the Applicants sought and which the Board had considered, was in accordance with the Zoning By-law requirements and that a building permit would be issued based on the variance as worded.

[28] The Board convened a Telephone Conference call with Counsel for the Applicants and the City. Counsel for the City assured the Board that, as drafted, the variance reflected all the relevant sections of the Zoning By-law when read together, and that she had confirmed with the Building and Zoning department that the department would be content to issue a permit should the variance, as requested, be authorized.

[29] Accordingly, based on all the foregoing, and pursuant to s. 45(1) of the *Planning Act*, the Board finds that the variance requested is minor, is desirable for the appropriate

use and development of the land and that it maintains the general intent and purpose of the Zoning By-law and the Official Plan.

ORDER

[30] The Board orders that the appeal is allowed and the variance to Zoning By-law No. 270-2004 as requested is authorized.

"K. Hussey"

K. HUSSEY
VICE-CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.