

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: August 29, 2017

CASE NO(S): PL161208

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

Applicant and Appellant:	Harman Investments Ltd.
Subject:	Minor Variance
Variance from By-law No.:	0225-2007
Property Address/Description:	651 Beach Street
Municipality:	City of Mississauga
Municipal File No.:	A 399/16
OMB Case No.:	PL161208
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OMB Case Name:	Harman Investments Ltd v. Mississauga (City)

Heard: April 6 and May 12, 2017 in Mississauga, Ontario

APPEARANCES:

Parties

Harman Investments Ltd.

City of Mississauga

Counsel

Bruce Ketcheson

Brendan Ruddick

DECISION DELIVERED BY IAN ROWE ON MAY 12, 2017 AND ORDER OF THE BOARD

Introduction

[1] Harman Investments Ltd. (“the Appellant”) appeals a decision of the Committee of Adjustment (“C of A”) for the City of Mississauga (“the City”) denying an application for minor variances with respect to its property addressed as 651 Beach Street (“subject property”). The City appeared to support the decision of the C of A. The Variances were requested to permit the redevelopment of the subject property to construct a three storey detached dwelling. The variances are set out in Exhibit 2 and are appended to this Decision as Attachment 1.

Preliminary Matter

[2] Mr. Ketcheson, advised that the Appellant had revised the building plans for the proposed development and as a result a number of the Variances were different from those requested before the C of A and requested that the application be amended accordingly. For the most part, the magnitude of the Variances had been reduced as a result of the revised plans. The City agreed that the amendments to the Variances requested were minor. The Board determined that the amendments were minor and pursuant to s. 45(18.1.1) of the *Planning Act* R.S.O. 1990, c.P.13 (“Act”) ordered that no further notice would be required.

The Hearing

[3] The Board heard this appeal over the course of two days, commencing on April 6, 2017 and completed on May 12, 2017.

[4] The Board heard from two qualified land use planning consultants, Franco Romano on behalf of the Appellant and Allan Ramsay on behalf of the City.

[5] James Hilton was a participant who testified on behalf of his father-in-law, Tom Pettingill, the owner of the property abutting the subject property to the east.

Decision

[6] For the reasons set out below, the Board allows the appeal in part and approves the variances 1 to 5 set out in Attachment 1 and dismisses the appeal with respect to the requested variance relating to the maximum height of the proposed building and the maximum height at the eaves.

History

[7] When the application was first made only the first five Variances (as originally requested) were required and the proposed structure was otherwise compliant with the Zoning By-law ("ZBL"). The City's Planning Staff advised the C of A that it had no objection to those Variances. However, things became more complicated. At the time of processing the minor variance application, the City was considering an amendment to the parent ZBL to introduce a reduced maximum height standard and to introduce a new standard for maximum eaves height for Ward 1 in which the subject property is located. Planning Staff recommended to the Appellant that it request a deferral of the hearing as the introduction of the new standards would trigger the need for further Variances.

[8] By-law No. 0193-2016 was enacted on September 28, 2016 introducing the new standards. The minor variance application was first heard by the C of A on September 29, 2016. The Appellant took the Planning Staff's advice and the matter was adjourned to November 3, 2016.

[9] The Board was advised that By-law No. 0193-2016 was currently under appeal with respect to the specific standards in play with respect to height. In the event appeals against those provisions were successful, the Appellant would not require

Variations with respect to height of the building or eaves.

[10] Section 34(30) of the Act provides that a ZBL that survives an appeal intact is deemed to have come into force on the day it was passed. On that basis, the City has taken the position that in order to obtain a building permit in the interim, while the appeal(s) remain(s) outstanding, one must satisfy the more stringent terms of either the parent by-law or By-law No. 0193-2016.

[11] When the matter came back before the C of A, Planning Staff continued to have no objection to the first five variations but objected to the newly requested Variations for maximum building height and maximum eaves height. The C of A denied the application in its entirety (thereby refusing the first five Variations found acceptable to the Planning Staff). In defending the decision of the C of A, the City objects to all the requested Variations.

Timing

[12] Although the timing was unfortunate for the Appellant, it can claim no protection from the imposition of the new standards established in By-law No. 0193-2016 ("new zoning by-law"). Section 34(9) of the Act provides an exemption from the provisions of a new zoning by-law only where the use lawfully predated the passage of the by-law, or if a building permit has been issued. Neither of those scenarios exist with respect to the subject property. Nor is any lesser standard of review appropriate due to the unfortunate timing, the application must satisfy all four tests for a minor variance in order to be successful. On the other hand, the fact that By-law No. 0193-2016 is a recent expression of Council's intentions does not preclude an appropriate application for a variance from the by-law's provisions from being successful.

Context

[13] The subject property is located in a neighbourhood generally bound by Lake Ontario to the south, Lakeshore Road to the north, Cooksville Creek to the west and the Lakeview Water Treatment Plan/Waterworks Park lands to the east.

[14] The subject property is on the north side of Beach Street and has a frontage of 14.2 metres (“m”) and a depth of approximately 38 m. Beach Street is a single-loaded road and the subject property enjoys an uninterrupted view of Lake Ontario.

[15] It is a neighbourhood of single and semi-detached housing made up of subdivision plans that were approved in the early to late 1950s. The original homes were single detached dwellings of generally modest size. Most are one or one and half storey homes. Over the last 20 years, as the original housing stock has aged, a number of homes have been replaced by newer dwellings which are larger and mostly two storeys in height. The proposed development is three storeys in height.

Provincial Policy Statement (“PPS”), Growth Plan for the Greater Golden Horseshoe (“GP”) and Regional Official Plan

[16] As is often the case with these types of minor Variances, the application is of only local interest and no provincial interests set out in either the PPS, the GP or the Regional Official Plan are engaged (and certainly none offended).

The Height Related Variances

[17] As stated in the Staff Report of February 2, 2016 with respect to the new zoning by-law, the review of heights and building depths of new development was instigated by the Ward Councillor over concerns with respect to the height of sloped roofs and eaves and the depth of new homes and additions.

[18] The rationale for the new standards was expressed in the “Background” section of the Staff Report:

Ward 1 is currently experiencing increased residential infill housing development. In certain instances, being constructed to the maximum allowable height under the zoning by-law and with excessive depths, imposing negative impacts with respect to height, overlook, shadowing and massing on existing houses that are generally 1 to 2-storeys in height. This issue is especially prevalent within the areas of Ward 1 that are not subject to Site Plan Control.

As a result of concerns raised about the height of new homes with flat roofs, Council recently enacted a zoning by-law amendment that reduce the height of flat roofs for new homes within certain residential zones in Ward 1, under By-law No. 0171-2015.

[19] Staff concluded in the Report:

To address immediate concerns in parts of Ward 1 regarding height, overlook, shadowing and massing impacts of new houses and additions, amendments to the Zoning By-law are proposed to limit the height of sloped roof houses and eaves and add a maximum house depth regulation for residential areas of Ward 1 not subject to infill housing regulations.

[20] The variances related to the height of the roof and eaves were not supported by the Planning Staff (“Staff”). Staff considered the heights to be excessive and not keeping with the intent of the new zoning by-law.

[21] Staff considered the intent to be the limitation of the height of large walls adjacent to neighbours in infill development settings and the overall massing of dwellings, to better maintain the character of the neighbourhood.

[22] The questions the Board must resolve can be distilled into two related issues: would the proposed development maintain the intent of the Official Plan (“OP”) and zoning by-laws with respect to protection of character of the neighbourhood and would there be unacceptable adverse impacts on the immediate surroundings of the Subject property?

Official Plan

[23] The first test of a minor variance is to determine whether the general intent and purpose of the OP and ZBL is maintained. This was the greatest source of disagreement between the parties and constituted the bulk of the evidence at the hearing. Essentially, the hearing comes down to whether the proposed development is in keeping with the character of the neighbourhood. The OP provides guidance in how to determine that issue.

[24] The Subject property is designated “Neighbourhood”. Under the provisions of the OP, neighbourhoods are characterized as physically stable areas with character to be protected. This does not mean that they will remain static or that new development must emit the previous development patterns, but rather that when development does occur and should be sensitive to the neighbourhoods existing and planned character:

5.3.5.1 Neighbourhoods will not be the focus for intensification and should be regarded as stable residential areas with the existing character is to be preserved.

5.3.5.5 Intensification within neighbourhoods may be considered where the proposed development is compatible and built form and scale to surrounding development, enhances the existing or planned development and is consistent with the policies of the plan.

5.3.5.6 development will be sensitive to the existing and planned contexts among clued appropriate transitions in use, of built form, density and scale.

[25] The term “compatible” is defined in the OP to mean: “development, which may not necessarily be the same as, or similar to, the existing or desired development, but nonetheless enhances an established community and coexists with existing development without unacceptable adverse impact on the surrounding area”.

[26] In considering desirable urban form, the OP states that appropriate infill will help revitalize existing communities by replacing aged buildings, developing underutilized lots and by adding to the variety of building forms. It is important that infill “fit” within the existing urban context and minimize undue impacts on adjacent properties. Infill and re-development within neighbourhoods will respect the existing and planned character.

[27] The subject property is located in a Non-Intensification Area. Neighbourhoods are stable areas where limited growth is anticipated. Development in neighbourhoods will be required to be context sensitive and respect the existing or planned character and scale of development. Criteria for new development within such areas as set out in s. 9.2.2.3 which reads, in part, as follows:

9.2.2.3 while new development need not mirror existing development, new development in neighbourhoods will:

- a. respect the existing lotting patterns; ...
- c. respect the scale and character of the surrounding area;
- d. minimize overshadowing an overlooked on adjacent neighbors; ...
- g. Be designed to respect the existing scale, massing, character in grades of the surrounding area.

[28] The OP provides for a maximum height in Neighbourhoods of four storeys.

Lakeview Local Plan Area (“LLP”)

[29] The Subject property is located within the Lakeview Local Plan Area, a secondary plan within the OP. As noted in section 3.0 “Current Context”, Lakeview is made up of stable residential neighbourhoods characterized by detached and semi-detached housing. Many homes built in the 1950s and 1960s are being renovated today or replaced largely with new detached housing. The new housing is generally larger and higher than the original homes being replaced. Section 5 “Vision” recognizes that some change will occur, and that development should provide appropriate transition to the existing stable areas, and protect the existing character.

Section 5.2.3 provides that redevelopment in neighbourhoods will be facilitated and encouraged in a manner consistent with the existing land uses in the surrounding area. The area contains a mix of different forms of housing including detached and semi-detached houses.

Section 6.2 Neighbourhood Character Areas provides that Neighbourhoods are encouraged to provide a variety of housing forms to meet the needs of a range of household types.

Section 10.0 “Desirable Urban Form” provides that development is to be guided by the Lakeview Built Form Standards (“LBFS”) which is an appendix to the LLP (It is noted that the appendix does not constitute part of the LLP and is a guideline only). Map 3 of the LLP provides a maximum building height of three storeys.

Section 10.1 “Neighbourhoods” provides that development within the Neighbourhood should be sensitive to the existing Low-Rise context and reinforce the planned character of the area. Although the LLP indicates development to reflect one of two-storey residential building sites, it provides for the development of three-storey structures.

Section 10.5 “Built Form Types” provides that new housing within Lakeview should maintain the existing character and fit the scale of the surrounding area while taking advantage of the features of a particular site.

Lakeview Built Form Standards (“LBFS”)

[30] The LBFS are to be read in conjunction with the OP and LLP but are not part of either OP instrument.

[31] Section 1.3 “Expectation of the Standards” indicates that exceptions to the standards may be considered when there are extenuating circumstances and/or where proposals are able to demonstrate urban design excellence.

[32] Section 2.1 “Neighbourhood and Employment Character Areas” states that lands identified as Neighbourhood Areas or considered to be generally stable residential areas where the existing character is to be preserved and enhanced these areas will be maintained while allowing for infill which is compatible with and enhances the character of the area.

[33] Specific criteria are established in s. 2.2.1 which include:

- a. Maximum height of 10.7 m. The design of the building will de-emphasize the height of the house and be designed as a composition of small architectural elements...
- b. New development will preserve and enhance the generous front, rear and side yard setbacks;
- d. New development will affect the scale and character of the surrounding area, and take advantage of the features of a particular site;
- e. Garages will be recessed and located behind the main face of the house.
- f. New development will have minimal impact on its adjacent neighbors with respect to overshadowing and overlook;

- i. New house designs will fit with the scale and character of the local area, and taking advantage of that particular site features are encouraged.
- k. The building mass, side yards and rear yards will respect and relate to those of adjacent lots.

Zoning By-law

[34] The Subject property is governed by Zoning By-law No. 0225-2007 (the “parent by-law”). As referenced above, the City enacted Zoning By-law No. 0193-2016 (the “height by-law”) on September 28, 2016. That by-law is currently under appeal.

[35] The Ward Councillor had requested that Planning Staff review the zoning regulations for residential areas in part of Ward 1 to address concerns with respect to the height of sloped roofs and eaves *inter alia*. Council had recently enacted By-law No. 0171-2015 which addressed some of these issues with respect to the height of flat roof houses.

[36] The previous height permission for sloped roof houses in the area was 10.7 m measured to the midpoint of the roof with no regulation for maximum eaves height. The new height provisions of the height by-law establish a maximum height of 9.5 m measured from the average grade to the highest point. To supplement the proposed reduction in sloped roof height and in order to prevent possible roof pitch manipulations, the height by-law introduced a new provision establishing maximum eaves height of 6.4 m from average grade.

Planning Staff Reports

[37] The Staff supported the original five Variances requested:

Variances 3, #4, and #5 are all related to front yard setbacks from various parts of the dwelling. The decrease in front yard setback is consistent with the recently

built home to the west as well as other existing dwellings on the street. The requested variances for front yard setback reductions maintain the intent of the Zoning By-law in keeping a consist line of built form along the street. There is a generous city boulevard section along Beach Street which helps to provide further separation distance from which helps to new provide further separation distance from the street as well. The reduced front yard to provide required parking for the dwellings as two spaces can be accommodated within the garage.

The request for an increase in low lot coverage of 4.76% in variance 1 is relatively minor in nature.

The dwelling is designed in a way that minimizes the massing on certain parts of the lot. The broken up structure and the limited heights on certain parts of the dwelling help to minimize the potential impacts that could be felt from the increase for a 0.76% in lot coverage. The Department is of the opinion that the general intent of the zoning by-law is maintained in ensuring that a dwelling is proportional to the lot.

The second requested variance seeks to permit additional balconies space above the garage. The applicant is proposing a tiered balcony arrangement that the front of the dwelling above the garage structure. Although the increase in permitted Gross Floor Area ("GFA") of the balconies appears to be significant at 25.85 square metres beyond what the ZBL permits, there is no significant overlook or privacy issues that are apparent and there are no dwellings across the street....

The Planning and Building Department has no objection to the requested variances....

[38] Subsequent to the passage of the height by-law, and the amendment of the application to include variances with respect to height of roof and eaves, the Staff opined on these variances:

The additional height requests of 1.00 m to the peak of the roof and 2.83 m to the height of the eaves are excessive and not keeping with the intent of the new ZBL. The height reductions are consistent with the Infill Zoning Regulations across other parts of Ward 1 and the City of Mississauga as a whole. The intent of the By-law is to limit the height of large walls adjacent and neighbors in infill development settings and the overall massing of dwellings, to better maintain the character of the neighbourhood.

Participant

[39] Mr. Hilton testified on behalf of his father-in-law who owns the property abutting to the east. His main concern was the height of the proposed building. He felt that the Variances requested were numerically excessive. Given that the City had only recently amended the ZBL to provide for a lower height standard, to him it was clear that the general intent and purpose of the ZBL precluded the relief claimed. He supported the rationale for the amendment to the ZBL and indicated that the proposed development would not reflect the character of the community.

[40] He was concerned about the impact of height having a shadow effect on his father-in-law's property. The Appellant provided a shadow study which indicated that there was very little difference in impact from the proposed development and a building which could be constructed as of right with respect to the new height provision in the ZBL. From a review of the shadow study, any impact appears to be limited to the side yard of the neighboring property and would be minor in nature.

[41] Mr. Hilton expressed concern with overview and privacy impacts arising from the proposed balconies. The variances required with respect to the balconies relate to the

portion of the balconies over the proposed garage. Those portions of the balconies which abut Mr. Pettingill's property require no variance and may be constructed as of right at the height indicated on the elevations.

[42] The Board will deal with the issue of community character later in the decision. The shadow study indicates that any shadow impacts will be modest and acceptable. With respect to the issue of shadow impacts, the Board is satisfied that the shadow study indicates that any impacts will be modest and not unacceptable. With respect to the issues with overlooking and privacy, the standards of the ZBL permit the construction of balconies in the location which would most impact Mr. Pettingill's property, this location is not a function of the variances requested.

The First Five Variances

[43] With respect to the first five variances, the Board accepts the evidence of Mr. Romano and the opinion expressed by Staff in their Report to the C of A that those Variances are minor, desirable and maintain the intent and purpose of the OP and parent ZBL.

[44] The lot coverage variance is relatively minor and the architectural design minimizes any impact from a larger mass of structure.

[45] The provision in the parent ZBL with respect to balcony space over garages is to prevent large "party" balconies from being created, where potential negative impacts from noise and light could arise. The proposed balconies on the subject property are technically over the garage but are not of the type intended to be precluded by the parent ZBL. They are individually of modest size and are clearly intended to take advantage of the amenity of the lakeside view. As indicated above, the portions of the balconies which abut Mr. Pettingill's property require no variance and may be constructed as of right at the height indicated on the elevations.

[46] The three Variances relating to front yard setbacks, for the reasons stated in the Staff Report, are consistent with existing abutting development and impose no negative impact on neighbouring properties.

[47] The Board finds that the first five variances satisfy all four tests.

The Height Related Variances

[48] A ZBL is both a regulatory and policy document, hence the necessity to maintain the general intent and purpose of the by-law for a variance application to be successful. The City has observed the introduction of three-storey houses, and taller houses generally, in the neighbourhood and is concerned for the maintenance of the existing character of that neighbourhood which was developed, for the most part, with one and one and a half storey dwellings. Zoning By-law No. 0193-2016 is a very recent expression of the City's intent to eliminate the further introduction of houses at the height of the proposed development. Both parties proceeded on the basis that should the Board allow the appeal with respect to the height related Variances, such relief would be conditional on the By-law standard coming into effect following the determination of the appeal(s) of that By-law. Given that a ZBL must conform to the OP and is intended to implement the policies of the OP, the passage of Zoning By-law No. 0193-2016 is a clear indication by the City that it considers the introduction of further development in the area at the height of the proposed development to offend the character preservation policies of the OP and the LLP. Whether the height standards of the By-law are appropriate, conform to the OP and LLP and represents good planning is to be determined by another panel of the Board and this Member makes no finding in that regard. However, taking the By-law as it currently reads, the Board concludes that the general intent of the By-law, and its purpose is to restrict the height of new development to a height less than the requested variances. The Board finds that the general intent and purpose of the By-law is not maintained and therefore those requested Variances must fail. Given that all tests must be satisfied, the Board is not

required to determine compliance with the remaining three tests.

Conclusion

[49] The Board orders that the appeal is allowed, in part, and that variances 1-5 to By-law No. 0225-2007 set out in Attachment 1 are authorized subject to the development proceeding in substantial compliance with the plans set out in Exhibit 3. Variances 6 and 7 are not authorized.

“Ian Rowe”

Ian ROWE
MEMBER

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

Ontario Municipal Board

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651 Beach Street – List of Variances

1. a total lot coverage of 38.78% of the lot area; whereas By-law 0225-2007, as amended, permits a maximum lot coverage of 35.00% of the lot area in this instance;
2. two floors of balconies over the proposed garage having a floor area of 22.41m²; whereas By-law 0225-2007, as amended, permits a maximum floor area for a balcony above a garage of 10.00m² in this instance;
3. a front yard to the dwelling of 4.7m; whereas By-law 0225-2007, as amended, requires a minimum front yard of 7.50m in this instance;
4. a front yard to the stairs of 4.34m; whereas By-law 0225-2007, as amended, requires a minimum front yard of 5.90m in this instance;
5. a front yard to the front face of the garage of 5.66m; whereas By-law 0225-2007, as amended, requires a minimum front yard of 7.50m to the front garage face in this instance;
6. a dwelling height of 10.50m; whereas By-law 0225-2007, as amended, permits a maximum dwelling height of 9.50m in this instance; and,
7. a height to the underside of eaves of right/easterly 7.06m and left/westerly 8.66m; whereas By-law 0225-2007, as amended, permits a maximum height to the underside of eaves of 6.40m in this instance.