

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 25, 2017

CASE NO(S): PL170516

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

Appellant:	Brian Henry
Applicant:	David Peng
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	192 Bond St
Municipality:	City of Hamilton
Municipal File No.:	A-30/17
OMB Case No.:	PL170516
OMB File No.:	PL170516
OMB Case Name:	Henry v. Hamilton (City)

Heard: September 20, 2017 in Hamilton, Ontario

APPEARANCES:

Parties

Representative

David Peng

Self-represented

Brian Henry

Self-represented

DECISION OF THE BOARD DELIVERED BY PAULA BOUTIS AND ORDER OF THE BOARD

INTRODUCTION

[1] The Applicant David Peng sought various minor variances related to a property located at 192 Bond Street North in Hamilton, Ontario ("Subject Property"). The

Committee of Adjustment (“Committee”) approved the variances. Brian Henry, the Appellant and neighbour immediately to the north at 196 Bond Street North, appealed that decision.

[2] On behalf of Mr. Peng two architects provided opinion evidence. The Board qualified Philip Toms to provide expert opinion evidence in the area of architectural design. The Board qualified Graham McNally as an expert in architectural design with a focus on urban planning and design. Mr. McNally had, in the last three years, assisted clients with minor variance and consent applications at the Committee of Adjustment.

[3] Mr. Henry testified on his own behalf and called no other witnesses.

[4] In addition, three persons opposed to the application sought and were granted participant status: Laurie Nielsen, living at 234 Bond Street North, Florence Lewis-Calvert, living at 150 Bond Street North, and Stan Hoskin, living at 157 Longwood Road North. Mr. Hoskin had to leave prior to being able to provide his evidence. As a result, the Board permitted Mr. Henry to act as his agent and note his concerns on his behalf.

[5] After hearing all the evidence, the Board reserved its decision. It has carefully reviewed the evidence and concludes the appeal should be dismissed.

ANALYSIS AND EVIDENCE

Legal Framework

[6] All development proposals must conform to the Growth Plan for the Greater Golden Horseshoe, 2017 (“2017 Growth Plan”) and be consistent with the Provincial Policy Statement, 2014 (“PPS”). In addition, the Board must have regard to any applicable provincial interests found at s. 2 of the *Planning Act*.

[7] Specific to minor variance applications, the proposal must meet the following four-part test under s. 45(1) of the Act:

- a. maintain the general intent and purpose of the official plan;
- b. maintain the general intent and purpose of the zoning by-law;
- c. be desirable for the appropriate development and use of the land; and
- d. be minor.

[8] The Board confirms that the alleged illegal rental unit in the basement of the Subject Property is not a matter the Board can deal with. The Board has jurisdiction only over the variances sought and makes determinations regarding what constitutes good planning on the basis of the plans and evidence before it.

[9] Nonetheless, the basement plans before the Board clearly did not contemplate a rental unit in the basement. There was some confusion on the part of the Appellant on how to read the basement plan, which was clarified at the hearing. Mr. Henry believed the basement plan showed a door, but Mr. Toms clarified that it was an operable window and not a door (Exhibit 16). In any event, if the basement is used as a basement apartment either now or in future, and if this is an illegal use, that is a matter for the City's by-law enforcement.

[10] The Board also confirms the appeal is a hearing *de novo*, meaning the Board makes its determination on the evidence before it at the appeal and it is not bound to have more than regard to the Committee's ruling, which characterization in itself is a matter of some dispute. As a result the particular concerns Mr. Henry may have had about the Committee materials and hearing are not key to the Board's deliberations.

The Westdale Community

[11] The Subject Property is located at the north end of the Westdale neighbourhood. Highway 403 runs along its east boundary. It is bounded by Main Street West to the South, the Royal Botanical Gardens 600 hectare Cootes Paradise Sanctuary to the North and McMaster University Campus to the West. It is comprised mostly of single

detached homes organized around a commercial strip along King Street West which is made up of mostly small, local businesses (Exhibit 8, McNally Witness Statement).

[12] Mr. Toms testified that the Westdale community was the first planned community in Canada, in 1911. He indicated it was built out mostly in the 1920s and 1930s, though the Subject Property's home was built in 1954. Mr. Toms testified these were modest homes appropriate for the time they were built. Mr. Toms described the current home as a small, one-storey home, with a basement, consisting of 708 square feet on the ground floor. Mr. Toms estimated the actual living space was probably 25% smaller.

The Proposal

[13] Mr. Peng testified that he purchased the property in September 2014. He has four children. He hired Mr. Toms' firm to design a second storey and build a two-storey addition at the back of the home. The addition will provide new living and kitchen space on the ground floor while maintaining one of the existing ground floor bedrooms. On the second floor there will be three new bedrooms and a new backyard deck at the rear of the home (Exhibit 6, Tab B). Mr. Toms advised the total square footage will be 1,953 square feet on two floors.

[14] It was Mr. Tom's evidence, that due to the design of the home, it will appear from the streetscape as a one-and-a-half-storey home, even though it will be a two-storey home (Exhibit 6, Tab G, page 48 and Tab J).

[15] There is a specific zoning by-law that applies to this area, in addition to Hamilton Zoning By-law No. 6593 ("HZBL"). In the Westdale North Neighbourhood, Zoning By-law No. 96-125 ("WZBL") also applies to amend the requirements of the HZBL.

[16] The variances requested and authorized by the Committee were the following (Exhibit 6, Tab C):

- a. A maximum floor area ratio of 0.76 shall be permitted instead of the maximum 0.45 floor area ratio permitted;
- b. A minimum front yard depth of 4.3 metres ("m") shall be permitted instead of the minimum 6.0 m front yard depth required;
- c. A minimum northerly side yard width of 0.9 m shall be permitted instead of the minimum 1.2 m side yard width required;
- d. A minimum of two (2) parking spaces shall be permitted instead of the minimum three (3) parking spaces required;
- e. A parking space size having a minimum width of 2.1 m shall be permitted instead of the minimum 2.7 m width required;
- f. A roofed-over unenclosed front porch shall be permitted to be as close as 0.9 m to the southerly side lot line instead of the minimum 1.2 m setback required; and,
- g. The existing lot area of 325 square metres ("m²") shall be recognized instead of the minimum 360 m² lot area required.

[17] The proposal meets the required rear yard setback of 7.5 m.

[18] The Board understood from Mr. Toms that typically when dealing with the floor area ratio ("FAR"), the basement is not included in the calculation unless the basement is more than 50% above ground. Here, the WZBL requires that we include the basement, which he understood was driven by a desire to avoid the creation of student housing in the area.

The Appellant's and Participants' Concerns

[19] When making its decisions regarding variances, and whether they are minor, the Board considers the difference between impacts resulting from change that remain within the by-law permissions, and the adverse impact, if any, as it relates to the variances sought from zoning permissions.

[20] The Board notes that the Appellant is concerned about a 300% increase in volume by his calculation. He commented that the “square footage falls in line, but when you triple the size of your house in this neighbourhood it is an imposition on everyone.” The Board noted at the hearing, as it does here, there is no variance or even a standard related to volume increases. Further, the Applicant has remained within the back yard setback of 7.5 m, and as a result, the extension of the home to the back is as-of-right, whether or not there is a second-storey. In addition, two storeys are also permitted.

[21] The Appellant’s home immediately to the north was in 2011 granted a variance to the FAR of 0.74. It is a two-storey home. This is marginally different from what the Applicant seeks (0.76) today. A back-yard addition at Mr. Henry’s property, which the Board understood was existing at the time of Mr. Henry’s application, goes almost as far back as the addition that is proposed by the Applicant (Exhibit 19).

[22] The Board notes the existing addition at Mr. Henry’s home appears to be a little less than half the width of his home, based on the sketch provided by Mr. Henry (Exhibit 19), while the Applicant’s proposed addition is essentially for the entire width of his home (Exhibit 19). However, looking at the proposal holistically, there is not much difference between what the Applicant seeks and what the Appellant has in terms of size or built form, except that from the streetscape, the Appellant’s home clearly looks like a two-storey home, with a height of 28’ 4”, whereas the Applicant’s appears as a one-and-a-half-storey home, with a height of 25’ 7 ¼”.

[23] The adjacent one-storey property to the south of the Subject Property at 188 Bond Street North, with a height of 20’ 3”, also appears to go back some distance into the yard, though not quite as far as the proposed home at the Subject Property (Exhibit 18 and Exhibit 6, Tab J).

[24] Nonetheless, the Appellant indicated that his main concern seemed to be that the Applicant’s home was not only going up, but back, a point made by others, though not everyone was concerned about that. In light of the similar condition existing at the Appellant’s home, the Board is at a loss to understand how this proposal will have any

significant impact or result in any significant change to the neighbourhood as the Appellant perceives or experiences it, or what he would consider a suitable home for the area.

[25] Mr. Henry noted concerns by the back yard neighbours along Longwood Road North, who, other than Mr. Hoskin who sought participant status, did not appear at the hearing. However, they, and Mr. Hoskin, along with six others had signed a petition (undated) in opposition (Exhibit 12).

[26] The Board notes the comment made by the neighbour at 173 Longwood Road North was the following (to the best of the Board's ability to read the handwriting), "OK with addition, but was not shown glass in back of house looking into our back yards". This property is not immediately behind the Subject Property.

[27] The property at 173 Longwood Road is directly behind the Appellant's home and 200 Bond Street North, not the Subject Property. The Board does not understand how the proposal will adversely affect the residents at 173 Longwood Avenue, even if, as Mr. Henry noted, some of the trees and branches have to be cut for the purposes of an addition. The Board notes that generally, this neighbourhood appears to have many mature trees (Exhibits 1, 2, 3, 4, and 5).

[28] The Board makes the same observation regarding Mr. Hoskin, who lives at 157 Hosking Road North, in other words, he does not live behind the Subject Property. Mr. Hoskin commented on the petition, "Go up, not up and out".

[29] Two residents living at the property that *is* directly behind the Subject Property, being 169 Longwood Road North, each signed the petition and commented "too intrusive on my privacy and does not fit with Westdale North" and "plans are grandiose (sic) and excessive". Kim Banfield of that address also submitted an email, dated September 19, 2017, through Mr. Henry regarding her concerns (Exhibit 22). It will likely be a change for those neighbours and what they are used to, but as noted, the

extension into the backyard and the two-storey condition is within the zoning by-law standards.

[30] If there were concerns about privacy by neighbours in the backyard areas, Mr. Peng did not seem to know about them. Indeed, based on Mr. Peng's testimony and demeanor at the appeal hearing, he appeared to be quite shocked and distraught by the appeal. He advised the Board that none of the immediate neighbours, including the Appellant, appeared at Committee or submitted opposition letters. The petition itself appears to have been created in anticipation of the appeal, though it is undated. It was not referenced as in existence in the Committee minutes (Exhibit 20).

[31] The following attended and made comments at the Committee hearing in opposition to the application. Ms. Hoskin, also a participant at this hearing, commented, going up was okay, but the "bump out" was not; Ms. Lewis-Calvert, also a participant at this hearing, commented that the house will be "more than triple what is already there", among other concerns; Edward Early, who attended this hearing as an observer, commented that Upland Avenue residents sought to be a watchdog on the construction of houses in the Westdale area as they did not want it to turn into mammoth size houses which could turn into student housing, and noted parking concerns and changing the character of the neighbourhood (Exhibit 20).

[32] The Appellant testified he did not appear at Committee because of the delicate situation of a neighbour opposing a neighbour, and felt that the Committee would turn it down based on the planning report. Also, others were in attendance to oppose it. When he learned that the Committee approved it, he appealed. The Board notes that Mr. Peng testified he tried to work with the Appellant to resolve concerns and had even proposed to him a change in the plans. However, the Appellant did not respond.

[33] Along with reiterating concerns stated at the Committee hearing and reviewing the planning opinion provided by staff, Ms. Lewis-Calvert felt that a total of nine variances could not be considered minor. She expressed her frustration in that she failed to see why we had planning departments if their informed decisions "don't count

for anything". She also suggested at the appeal people in the neighbourhood felt that Mr. Peng could move to Ancaster where the houses are built that big to start with.

[34] At the appeal, Ms. Neilsen raised concerns about the area turning into a student ghetto, while at the same time acknowledging homes that were previously student houses had been converted back to family homes. She commented that people had put in second floors, but had not "built out" and commented "that really has an impact". She commented that basements could be refinished to be completely habitable for a family, and did not see why that could not be done for Mr. Peng's purposes.

[35] At this juncture, the Board takes a moment to discuss the WZBL, which was referred to as an "anti-monster home" by-law at the hearing and that the Applicant should not be authorized to build such a home. The Board understood that concerns arose around the creation of student housing and that the WZBL was a response to that.

[36] Whatever it was that drove the WZBL by-law forward, it is clear that the lots in the area are smaller lots and that the FAR imposed under the WZBL (particularly since it includes the basement in the calculation), will often mean a variance for development applications. It does not mean a variance or development authorized results in monster homes. The Board does not understand Mr. Henry, for example, to be saying his home is a monster home. He acknowledged in the context of Mr. Peng's application that the square footage did not seem out of line.

[37] When this type of restrictive zoning standard is in place, it is typically done where the City wants to maintain an oversight role on a particular area, i.e. applications will generally need to go through the Committee.

[38] The City planning department for Mr. Henry's application opposed his application on the basis that the construction proposed did not reflect the character of the neighbourhood, commenting in the staff report that the "overall design of the addition is not sympathetic to the architecture of the existing home".

[39] City planning also opposed the increase in the FAR, a 28% increase to 73.86%, commenting the majority of the housing on the street and surrounding neighbourhood is one-storey and to one-and-a-half-storeys, with a few homes having second storey additions (Exhibit 8, Tab P).

[40] Several neighbours appeared at Mr. Henry's Committee hearing and stated that the proposal was appropriate, as homes in the neighbourhood are bungalows and families moving in need extra space. The minutes noted comments from one resident that "many homes that have already done what the applicant is proposing are striking and know that many more similar applications will come forward." (Exhibit 8, Tab P)

[41] Mr. Henry made the point in support of his application, which was noted in the minutes, as the following: "his goal is to keep this as a single family home but extra space is needed for his growing family" (Exhibit 8, Tab P). The Board notes this is exactly the same rationale raised by Mr. Peng at Committee and the Board.

[42] The Board does not note the foregoing point about needing space to accommodate a growing family to reflect how planning decisions are made. The Board makes its determinations on what constitutes good planning, and considers the tests in the Act and the applicable policies of the City, as previously outlined. Need, *per se*, is not a factor in this. The Board notes this issue simply to further underscore its confusion over the Appellant's position regarding Mr. Peng's application.

Planning Staff Comments

[43] The staff report in the within application commented that the intent and purpose of the FAR standard was to prevent overbuilding of lots and maintain a consistent character for the area. Staff opposed to the increase in the FAR, concluding that the development would constitute overbuilding. Staff was also concerned with the parking variance, for two spots rather than the required three. Staff did not otherwise express concerns with the application and concluded it complies with the PPS (Exhibit 8, Tab D).

The Committee took a different view on the overbuilding question and authorized the application.

Planning Tests

[44] Prior to turning to the minor variance test itself, the Board deals with matters of provincial interest. The Board concludes that the proposal, being one of a modest residential intensification, is consistent with the PPS and conforms to the 2017 Growth Plan, which as a general thrust seeks to have development occur in the built-up areas, which are already established and well-serviced. The proposal has sufficient regard to the provincial interests noted at s. 2 of the Act.

[45] The Board now turns to the four-part test for minor variances.

[46] First, the Board must find that the proposal maintains the general intent and purpose of the official plan, and does so find. The general test under the Ainslie Wood Westdale Secondary Plan (“WSP”), being in Volume 2, Chapter B-6 – Hamilton Secondary Plans, 6.2 of the Urban Hamilton Official Plan (“UHOP”), is that of *compatibility* of the development.

[47] Under the UHOP, Policy 3.2.4 in Chapter E, the policy requires that the

[E]xisting character of established Neighbourhoods designated areas shall be maintained and that residential intensification within these areas shall enhance and be *compatible* with the scale and character of the existing residential neighbourhood in accordance with Section B.2.4. – Residential Intensification and other applicable policies of this Plan

[48] Under UHOP Policy 2.6.7, Chapter E – Urban Systems and Designations – states, “Neighbourhoods shall be generally regarded as physically stable areas with each neighbourhood having its unique scale and character. Changes *compatible* with the existing character or function of the neighbourhood shall be permitted.”

[49] Renovations are to be *compatible* with existing development (WSP Policy 6.2.4.c). The community is to remain as a primarily residential area (Policy 6.2.5) and low density (WSP Policy 6.2.5.1). The residential policies are intended to help achieve a wide variety of housing forms for many types of households, including households of various sizes and age groups (WSP Policy 6.2.5.2).

[50] WSP Policy 6.2.5.3.c states the following:

Changes to existing housing stock, such as new infill and renovations, shall be comparable to existing housing styles on the same block and street and new construction shall be encouraged to reflect similar housing styles, massing, height, setback and other elements of style as the adjacent homes on the same block and street. The City shall discourage the building-out of rooflines to convert dormers into a full storey. The City shall limit overbuilding on properties, to maintain *compatibility* within the neighbourhood.

[51] The General Residential Intensification Policies under the UHOP found at Policy 2.4.1 in Chapter B require the following:

- a. A balanced evaluation of the criteria in b) through g) as follows:
- b. The relationship of the proposal to existing neighbourhood character so that it maintains, and where possible, enhances and builds upon desirable established patterns and built form;
- c. The development's contribution to maintaining and achieving a range of dwelling types and tenures;
- d. The *compatible* integration of the development with the surrounding area in terms of use, scale, form and character. In this regard, the City encourages the use of innovative and creative urban design techniques;
- e. The development's contribution to achieving the planned urban structure as described in Section E.2.0. – Urban Structure;
- f. Infrastructure and transportation capacity; and
- g. The ability of the development to comply with all applicable policies.

[52] Compatibility and compatible are defined terms in the UHOP, as follows:

Compatibility/compatible: means land uses and building forms that are mutually tolerant and capable of existing together in harmony within an area. Compatibility or compatible should not be narrowly interpreted to mean “the same as” or even as “being similar to”.

[53] It was Mr. McNally's evidence that the area is undergoing renewal of the existing housing stock and new investment is coming into the community. We also see the area

is characterized by mostly one-storey and one-and-a-half-storey homes, with a few two-storey homes (Exhibit 8, Tab K).

[54] Nineteen applications have been approved by the Committee for minor variances regarding FAR, with an average FAR of 0.712 (Exhibit 8, Tab M). The FAR sought here is similar to the Appellant's. Another home at 45 Bond Street North which had an existing FAR of 0.714 was granted a variance up to 0.92.

[55] Mr. McNally confirmed that it met the requirements of 6.2.5.3.c, as the project was comparable to houses on the same street as well as many houses on the adjacent blocks; it does not build out the dormers to create a full storey – the second storey is a new second storey with a gable end facing the street to create a visual similarity with one-and-one-half-storey houses (Exhibit 8, Tabs K, B and Q). The proposal makes good use of innovative design to achieve this end.

[56] Mr. Toms' opinion was that the design of the proposed home was compatible with the character of the existing neighbourhood, a proposition with which the Board agrees. A great deal of time and effort went into the plans to ensure that the proposal would be sensitive to the character of the existing neighbourhood.

[57] The Board concludes the proposal maintains the general intent and purpose of the applicable official plan policies.

[58] Second, in light of these findings, the Board also concludes that the variances maintain the general intent and purpose of the zoning by-laws and does not constitute overbuilding for the area. Two-storey homes are permitted and the back yard setback is in compliance with the zoning by-law.

[59] Regarding the whether the variances are minor, the Board concludes they are collectively and individually minor variances. The particular number of variances is not as germane as their overall impacts and whether the intent of the zoning by-laws is

maintained. The Board finds there is no evidence of adverse impacts as a result of the variances sought.

[60] On the question of whether the proposal is desirable for the appropriate development and use of the land, this is to be considered in the context of the public interest. It is not what is desirable for the Applicant's development and use of the land. Provincial policies and plans seek redevelopment in the existing settlement areas. The community is experiencing reinvestment. This proposal will contribute to that reinvestment in a manner that is compatible with the neighbourhood.

[61] In sum, the Board concludes that the proposal constitutes good planning.

ORDER

[62] For the foregoing reasons, the Board dismisses the appeal.

"Paula Boutis"

PAULA BOUTIS
MEMBER

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

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elfto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248