

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 21, 2017

CASE NO(S): PL170708

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

Applicant and Appellant:	Sara Yassir and Luay Al-Kazely
Subject:	Minor Variance
Variance from By-law No.:	87-57
Property Address/Description:	142 Orchard Drive
Municipality:	City of Hamilton
Municipal File No.:	A-80/17
OMB Case No.:	PL170708
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OMB Case Name:	Al-Kazely v. Hamilton (City)

Heard: September 18, 2017 in Hamilton, Ontario

APPEARANCES:

<u>Parties</u>	<u>Council*/Representative</u>
Luay Al-Kazely	Self-represented
City of Hamilton	P. MacDonald*

DECISION DELIVERED BY L. M. BRUCE AND ORDER OF THE BOARD

INTRODUCTION

[1] The matter before the Ontario Municipal Board (“Board”) was an appeal of a Committee of Adjustment (“Committee”) decision of November which refused the

variance applications of Luay Al-Kazely and Sara Yassir to permit the construction of an accessory building (cabana) in the rear yard of a newly constructed single-family dwelling located at 142 Orchard Drive (“the subject property”) in the City of Hamilton (the “City”). The Zoning By-law requires that the maximum height of an accessory building is 4.5 metre (“m”). The requested height is 6.8 m.

[2] The Board qualified land use planner Alicia West who provided expert land use planning opinion evidence in opposition to the application on behalf of the City. Mr. Al-Kazely did not call any witnesses.

BACKGROUND

[3] The subject property is located in an existing residential area of Ancaster on lands identified as “Neighbourhoods” in the Urban Hamilton Official Plan (UHOP). Under the Ancaster Zoning By-law No. 87-57 (the “ZBL”), the subject property is zoned Existing Residential (“ER”). Single detached dwellings and accessory structures are a permitted use. The subject property has frontage on Orchard Drive of 22.42 m and depth of 62.03 m.

[4] The accessory structure had been the subject of a previous variance application. The need for the application followed an Order to Comply issued by the City on October 6, 2016 and a Stop Work Order on November 2, 2016 since construction on the cabana had been initiated without a building permit and despite the Order to Comply, was still under construction.

[5] The Applicant indicated the foundation of the cabana was poured before the house was constructed to facilitate access of the cement truck to the rear yard. Exhibit 1, Tab 12 shows the October 7, 2016, application signed by both Applicants, requesting variances to permit the construction of an accessory structure with a gross floor area of 52 square metres (“sq m”) and a rear yard setback of 2.1 m. The ZBL permits a maximum gross floor area of 40 sq m and a minimum rear yard setback of 7.5 m. The Committee heard the application on November 17, 2016. A variance for height was not

requested on the application. Mr. Al-Kazely stated that the Committee should have known that a variance for height was also required since the site plans were available to them and this error led to him having to apply for another variance after the cabana was constructed. The Board notes that the decision of the Committee states that if the height of the accessory structure was greater than 4.5 m that an additional variance would be required.

[6] On March 1, 2017 Mr. Al-Kazely applied for a variance for the height of the cabana. The application was heard by the Committee on April 27, 2017. The summary of the Committee meeting was provided to the Board (Exhibit 1, page 26). The summary states, and Mr. Al-Kazely confirmed before the Board, that he built before the approval since he felt it was “easier to ask for forgiveness than permission”. The appeal of the Committee’s April 27, 2017 decision refusing a variance for the height of the cabana is now before the Board.

EVIDENCE

[7] This is a hearing *de novo* and the Board’s decision on whether the height variance should be granted is based on the evidence presented during the Board hearing, it is not an adjudication of whether or not the height variance should have been considered in the initial application. The Board made this clear to the Applicant several times during the hearing. It is the Applicant’s responsibility to provide evidence on how the requested variance meets the four-part test set out in s. 45(1) of the *Planning Act* (“Act”):

- a) Does the variance maintain the general intent and purpose of the Official Plan (“OP”)?
- b) Does the variance maintain the general intent and purpose of the zoning by-law?

- c) Is the variance desirable for the appropriate development or use of the land?

- d) Is the variance minor?

[8] The Board must also determine whether a minor variance is consistent with the Provincial Policy Statement, 2014 (“PPS”) and conforms to the Growth Plan for the Greater Golden Horseshoe (“Growth Plan”).

Applicant

[9] Mr. Al-Kazely stated that he began construction on his 5,000-square foot house in May 2016 and on his cabana October 2016. He indicated that he designed his cabana to be consistent with the lines of his house and despite the size, there will not be livable space in the cabana.

[10] He further indicated that for the original variance application there were two people that objected to the original application for the size and setback variance but no one attended the Committee meeting to object to the requested height variance. It was his opinion that there were no undue impacts with the additional requested height.

[11] Mr. Al-Kazely stated that there are other examples in Ancaster of accessory structures that don't meet the requirements of the ZBL. He specifically referenced two accessory structures that were under construction. The first was at 219 Lover's Lane (photograph provided as Exhibit 4) and the second was at 136 Orchard Drive. He did not provide any evidence indicating whether variances had been sought or granted and if so what the approved height of the structures were.

[12] On questioning from Mr. MacDonald, Mr. Al-Kazely stated that the roof on his cabana was 9 to 10 feet and that if it was not for the roof, it would meet the zoning requirements. When asked about reconstructing the roof, Mr. Al-Kazely stated that it

would have to be a flat roof which he expressed concern with since stating it would collect more snow and thus would not be a feasible option.

City

[13] Alicia West indicated that she had attended the site and taken photographs which were provided to the Board in Tab 23 in Exhibit 1. She spoke to the four-part test set out in s. 45(1) of the Act noting that the requested variances meet the general intent and purpose of the OP.

[14] Ms. West provided her opinion with respect to the general intent and purpose of the ZBL. She took the Board to the definition of accessory building in the ZBL:

Accessory Building” means a building or structures not used for human habitation the use of which is naturally and normally incidental and subordinate to a permitted principal use on the same lot and shall include an inground or above-ground outdoor swimming pool...

[15] Next, Ms. West took the Board to Exhibit 1, page 80 stating that s. 7.18 b (v) of the ZBL limits the height of an accessory structure to 4.5 m. She noted that the maximum height of dwellings in the ER zone, which the subject property is in, is 10.5 m. It was her evidence that to have an accessory structure that is 6.8 m tall represents two-thirds of the permitted height of a single detached dwelling in the ER zone (s. 10.2 (g) of the ZBL). It was her opinion that the proposed accessory building is the equivalent of a 1.5 m storey dwelling and therefore is not incidental and subordinate to the existing residence and therefore the general intent and purpose of the ZBL is not met.

[16] Further, it was her evidence that the request for an additional 2.3 m in height is the equivalent of 7.5 feet. With a typical storey at 9 feet she stated that this is not minor.

[17] Ms. West spoke to the examples of the two accessory structures referenced by the Applicant. She stated that while variances were sought for the area of the accessory structure at 136 Orchard Drive, there was no variance for height.

[18] No evidence was provided to the Board that a variance was sought or granted for height of the accessory structure at 219 Lover's Lane. Mr. MacDonald submitted that 219 Lovers Lane has different zoning than the subject property, is a larger property and is much closer to the edge of the built-up area of Ancaster. Ms. West stated that when undertaking a review of a variance application, she considers context, size of lot and setting when assessing whether the four tests under the Act are met.

[19] The Board Member asked Ms. West what her opinion was of this increase in height given the reduced rear yard setback and increased footprint, Ms. West responded that the increased height so close to the property line created a visual impact.

[20] Mr. Al-Kazely stated in closing that the cabana was built for his family's enjoyment. He stated that he should not be penalized since the accessory structure was already built. He said that if the ZBL states that this is too large an accessory structure, then the by-law should be changed.

DECISION

[21] The Board has considered the evidence respecting the four tests under s. 45(1) of the Act. The variance for height was considered on its own merits without prejudice either to the City or the Applicant with respect to the structure already having been built.

[22] The Board finds that the Applicant did not present compelling evidence to demonstrate how the requested variance is in keeping with the general intent and purpose of the ZBL. Further, the Board preferred the uncontested expert land use planning evidence of Ms. West that the requested variance for additional height is not minor, particularly considering the footprint of the structure and its location 2.1 m from the rear property boundary.

ORDER

[23] The Board orders that the appeal is dismissed and the variance is not authorized.

"L. M. Bruce"

L. M. BRUCE
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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