

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: March 12, 2019

CASE NO(S): PL180692

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Appellant:	Anna Simkovic
Applicant:	Najat Basheer
Subject:	Minor Variance
Variance from By-law No.:	0205-2007
Property Address/Description:	23 Plainsman Road
Municipality:	City of Mississauga
Municipal File No.:	A278/18
LPAT Case No.:	PL180692
LPAT File No.:	PL180692
LPAT Case Name:	Simkovic v. Mississauga (City)

Heard: October 30, 2018, in Mississauga, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Najat Basheer

Ronald Webb*
Hannah Bahmanpour*

Anna Simkovic

Milan Simkovic

**DECISION DELIVERED BY ANNE MILCHBERG AND ORDER OF THE
TRIBUNAL**

[1] Anna Simkovic (“Appellant”) has appealed the July, 2018 decision of the Committee of Adjustment (“CoA”) of the City of Mississauga (the “City”) to approve an application for a minor variance for the property at 23 Plainsman Road (the “subject property”; “the lands”). Proposed is the construction of a new, two-storey single detached dwelling on the subject property, on the existing, to-be-retained foundation of the existing, to-be-demolished single detached dwelling. New additions would be made to the front and rear of the existing foundation.

[2] Najat Basheer (the “Applicant”), requires the variance to permit the gross floor area (“GFA”) of the new dwelling to exceed that permitted by the City’s Zoning By-law No. 0205-2007, as amended (the “ZBL”). The proposed GFA is 463.98 square metres (“sq m”), whereas the ZBL permits a maximum of 330.20 sq m.

[3] No variances are sought for setbacks, height or other ZBL controls; the only requested variance is for GFA.

[4] The Appellant resides next door to the subject property, in a single detached dwelling at 25 Plainsman Road. She testified on her own behalf, with her spouse, Milan Simkovic, serving as cross-examiner of the Appellant’s witness, John Kucera, an architect.

[5] The Appellant, who is an unlicensed architectural technologist [Exhibit 1, Tab 21], insisted that she be qualified as an expert witness in land use planning matters, and that she had the full competency and experience to give expert planning opinion on the four tests (the “Four Tests”) for minor variance set out in section 45(1) of the *Planning Act* (the “Act”). The Tribunal declined Ms. Simkovic’s request because she lacked professional planning training and experience, or any valid equivalent, and had never been qualified as an expert in land use planning in the past. Moreover, this was a hearing in which she had an inherent bias as the Appellant, and her views lacked independence from her own interests.

[6] The Tribunal clearly informed Ms. Simkovic that it was interested in

understanding how the proposal impacted her and her neighbourhood (as impact has bearing on the Four Tests). Mr. Kucera, a registered architect, was qualified by the Tribunal as an expert witness in architecture.

[7] Jennifer Lynn, Kirk Currie and Deborah Lamb-Green, all neighbourhood residents, appeared in opposition to the proposal. Dinyar Sarkari, another neighbour, appeared in support. Each was granted participant status and gave testimony on their concerns or assent with the proposal.

[8] There was a marked absence of expert planning opinion evidence at the hearing. A report from the City's Planning and Building Department provided to the CoA ["Planning Report"; Exhibit 1, Tab 5] was the only formal planning evidence before this Tribunal, but it did not analyze the proposal in relation to the three of the Four Tests, the exception being the Test related to zoning. No City planning staff attended the hearing, so no further detail was available.

[9] The July, 2018 decision of the CoA noted as follows:

[The] Committee has taken into consideration correspondence received from area resident [sic] and three residents who presented at the hearing. They have also considered all relevant materials including: information provided by the applicant, plans submitted, and staff and agency comments, and find that the application is minor in nature, desirable for the appropriate development on the subject property, and that the general intent and purpose of the Zoning By-law are maintained. [Exhibit 1, Tab 4]

[10] In final submissions, Counsel for the Applicant submitted that the CoA's finding that the variance had met the Four Tests served as confirmation that the Four Tests had been met. However, the Tribunal poured through all the exhibits and the appeal record, and could find no detailed analysis that could support the 'blanket' findings that the CoA made.

[11] Gaps in relevant evidence had a substantial impact on the Tribunal's ability to

analyze the variance against the Four Tests, and on its disposition.

[12] The Tribunal underscores the importance of having thorough, complete evidence before it.

BACKGROUND

[13] The subject property is located in the “Streetsville Neighbourhood Character Area”, so designated by the Mississauga Official Plan (“OP”), near the intersection of Britannia Road West and Queen Street North, in a suburban neighbourhood of single detached dwellings near the Credit River.

[14] The subject property has an overall size of 2,556.74 sq m, and is subject to split OP and zoning designations that restrict and constrict development somewhat.

[15] The Credit River runs through the rear portion of the lands, creating a floodplain area and significantly sloped topography. Starting from top of bank, around 1,656 sq m (two-thirds) of the subject property is under the jurisdiction of Credit Valley Conservation (“CVC”). These lands have an OP land use designation of “Greenlands” and a zoning designation of “G1” (Greenlands) [Exhibit 1, Tab 3]. Single detached dwellings are not permitted on G1 lands, though accessory structures may be.

[16] The balance of the lands, 901 sq m in area, front onto Plainsman Road. On this portion, single detached dwellings are permitted by the OP land use designation of “Residential Low Density 1” and the zoning designation of R2-50 (residential) [Exhibit 1, Tab 3]. It is on this portion of the lands that the new dwelling is proposed.

APPELLANT AND PARTICIPANT CONCERNS

[17] Ms. Simkovic asserted that:

- the stated GFA does not correlate with the GFA in the plans that were

- submitted to the CoA and are before the Tribunal;
- grade had been miscalculated on the proposal, which would have an impact on the GFA calculation;
 - soil stability is an issue, and the size of the proposed dwelling will cause undue risk to the slope below top of bank;
 - shadow impacts of the proposal on her property were going to be a “big problem”;
 - the proposal will cause trees and bushes on the subject property and on her property to die;
 - the excess density on the proposed dwelling was being transferred from the lands zoned G1 below the top of bank;
 - the proposed dwelling has three times the GFA of any other dwelling in the neighbourhood;
 - the GFA increase is “so major” that it ought to be a ZBL amendment rather than a variance; and
 - the proposed variance fails all Four Tests.

[18] The Participant neighbours opposed to the proposal expressed concern that:

- the dwelling would be double or triple the size of existing dwellings in the neighbourhood, and that this was a character/compatibility issue. They alleged that there were no other homes of this size in the neighbourhood;
- allowing very large homes would be a negative precedent for the

neighbourhood;

- the increased density would result in more parked cars, with parking spilling into the road allowance. The road has no sidewalks, and it was their view that parked cars could create visual barriers and safety risks for pedestrians;
- trees would be removed from the subject property; and
- the proposed development would add to light pollution in the neighbourhood.

ISSUES, ANALYSIS AND DISPOSITION

[19] The first two issues (accuracy of the application, alleged density from the G1 zone) have no bearing on the Four Tests but were the subject of testimony during the hearing.

Accuracy of the Application

[20] The Planning Report stated that “the Planning and Building Department has no objection to the requested variance, but the applicant may choose to defer the application in order to verify the accuracy of the requested variance” [Exhibit 1, Tab 5].

[21] It was Ms. Simkovic’s assertion that the GFA figures stated in the variance application and before the Tribunal were not correct. Further, she alleged that the location of grade was miscalculated, which would have an impact on the GFA calculations. No detailed proof of these was provided by Ms. Simkovic, and Mr. Kucera testified to the contrary – that the GFA and grade were correct.

[22] The Tribunal is not an arbiter of GFA calculations or confirmations, or the determiner of grade, nor is the Appellant or the Applicant’s architect. Confirming the accuracy of GFA and the establishment of grade are the domain of the City’s Chief Building Official (“CBO”). Neither the Appellant nor the Applicant provided any

documentary evidence from the CBO confirming or denying the accuracy of the application, and as such, the Tribunal cannot make any finding in this regard.

Was Density Transferred from G1 Lands?

[23] Ms. Simkovic devoted some time to allege that the additional density requested by the Appellant was being transferred from the part of the lot zoned “G1”, which is not permitted. She may well have gotten this impression from the Appellant’s application for Minor Variance, where the Appellant’s agent, Mr. Kucera, seemed to be justifying the increased density on the basis of the overall size of the lot, even though part of it is zoned G1 [Exhibit 1, Tab 3, sections 4.0 and 5.0]. The City’s Planning Report appeared to offer a similar justification [Exhibit 1, Tab 5, page 2].

[24] It is clear to the Tribunal that no density is being transferred from the G1 to the R2-50 zone on the subject lands. The G1 lands have no density attributable to them. The proposal is for a density increase within the R2-50 zone only, and it is on that basis that the Tribunal is evaluating the merits of the proposal.

Soil Stability, Shadow Impacts, Impacts on Vegetation, Parking and Light Pollution

[25] Ms. Simkovic claimed that the increased density associated with the requested variance would adversely affect the soil stability on the part of the subject lands under CVC jurisdiction, but provided no proof of this.

[26] Evidence showed that the CVC was circulated on the CoA application. The CVC had no objection to the proposal [Exhibit 1, Tab 6], and issued a permit approving the development [Exhibit 1, Tab 7], which it surely would not have done if it found that proposal adversely affected soil stability. Beyond the CVC’s review, the proposal is also subject to review for building permit, which is outside this Tribunal’s jurisdiction.

[27] On the matter of shadow impacts, Ms. Simkovic’s property is to the north-west of

the subject property. Accordingly, the Tribunal was interested in exploring her claim that the proposed massing (as a function of increased GFA) would cause adverse shadow impacts on her property. Ms. Simkovic, however, provided no shadow study.

[28] In response, Mr. Kucera provided the Tribunal with a fulsome shadow study [Exhibit 14] that demonstrated limited to no shadow impact on Ms. Simkovic's property. The study showed that during the early morning on June 21, there would be a small amount of shadowing in the north-east corner of the Simkovics' front yard. The Tribunal finds that this is minor.

[29] As for Ms. Simkovic's assertion that the proposal will cause trees and bushes on her property to die, she provided no evidence of this.

[30] The neighbour Participants expressed concern about the loss of vegetation on the subject property. They were also concerned about parking spilling onto the street, and about anticipated light pollution from the new dwelling. The Tribunal finds that none of those concerns are related to the variance being sought – as-of-right development could equally lead to the loss of vegetation, parking spilling onto the street, and light pollution. In the case of parking, Mr. Kucera noted that the proposal has a garage that will accommodate three vehicles and a driveway that will accommodate two vehicles.

Character, Compatibility and Density Increase

[31] Mr. Kucera testified that the area was 'in transition' with a modest amount of redevelopment, with newer two-storey dwellings to the north, and a mix of existing one-storey, one-and-a-half-storey and two-storey dwellings closer to the subject property. Because the proposal complied with the height and setback restrictions of the ZBL, it was his view that the density of the proposal was compatible with the neighbourhood, and as the dwelling was intended to be set back from the road allowance, any impact of the massing would be lessened.

[32] Ms. Simkovic and three out of four neighbour Participants painted a different

picture for the neighbourhood built-form fabric – one of relative uniformity, with predominance of one-storey and one-and-a-half-storey dwellings, none at the scale or density of the proposal.

[33] There was no numerical data (polls on height or density) to back up the claims of either the Applicant or the Appellant. Although Exhibits 5 and 9 had photos of selected dwellings, neither exhibit helped to provide clarity to the Tribunal on whether the proposed development would be compatible with its context.

[34] Overall, the Tribunal was not provided with a fulsome understanding of built-form context. This was problematic because the question of compatibility has a prominent role in all Four Tests.

FOUR TESTS ANALYSIS

[35] The Tribunal considered the variance request pursuant to the Four Tests :

- Does the proposed variance maintain the general intent and purpose of the Official Plan (“OP Test”)?
- Does the proposed variance maintain the intent and purpose of the ZBL (“ZBL Test”)?
- Is the variance minor?
- Is the variance desirable for the appropriate development of the land? (“Desirable/Appropriate”)

OP Test

[36] The City’s Planning Report [Exhibit 1, Tab 5] was silent on whether or not the general intent of the OP was maintained. However, the Planning Report does identify

the split land use designations on the subject property, “Residential Low Density 1” and “Greenlands”. Based on two designations, the Tribunal is able to make a finding that the proposed single detached dwelling and its siting comply with the land use designations set out in the OP.

[37] In addition, the subject property is located in the “Streetsville Neighbourhood Character Area”. No excerpt of this OP policy was submitted as an exhibit.

[38] As the Tribunal noted earlier in this decision, there was insufficient evidence provided to allow the Tribunal to make a finding on how the proposal relates to the character of the area. On this basis, the Tribunal finds that the OP test has not been met.

ZBL Test

[39] The City’s Planning Report [Exhibit 1, Tab 5] stated that “[i]n our [i.e., the Planning and Building Department’s] opinion, the general intent of the Zoning By-law is maintained”, and that “the proposed additions will have minimal impact to the Greenlands”. This appeared to be the extent of the planning analysis and opinion on the ZBL Test in this hearing, and it was uncontroverted.

[40] The Planning Report was silent on whether the proposal to increase density on the subject lands had an adverse impact on the R2-50 zoned lands in the neighbourhood – in other words, on the single detached dwellings around it. The Tribunal cannot guess what the planners were thinking, even if they stated that they had no objection to the proposal.

[41] There was insufficient evidence provided on how the proposal relates to the character of the lands zoned R2-50. On that basis, the Tribunal finds that the ZBL test has not been met.

Is the variance minor? Is it Desirable/Appropriate?

[42] Save for the outstanding (and, in the Tribunal member's mind, unresolved) question of compatibility, the Tribunal finds that the other impacts raised in the hearing are negligible or are unrelated to the requested density increase.

[43] The Tribunal cannot conclude that the variance is minor at this time because there was no conclusive evidence provided that the proposal will "fit" in the neighbourhood.

[44] For the same reasons, the Tribunal cannot conclude that the variance is desirable or appropriate.

CONCLUSION AND ORDER

[45] In order to authorize a variance, the Tribunal must be satisfied that the variance satisfies all four tests under s. 45(1) of the Act. In this case, the Tribunal finds that none of the Four Tests have been satisfied for the variance, as there was insufficient and inconclusive planning and context evidence to allow the Tribunal to make sound, informed findings on each of the tests.

[46] Consequently, the Tribunal orders that the appeal is dismissed and the variance is not authorized.

"Anne Milchberg"

ANNE MILCHBERG
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.

Local Planning Appeal Tribunal

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