

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



ISSUE DATE: October 25, 2019

CASE NO(S): PL180706

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

Applicants/Appellants:	Mallory MacLeod and Josh Chute
Subject:	Minor Variance
Variance from By-law No.:	2005-005
Property Address/Description:	128 Thames Avenue
Municipality:	Municipality of Middlesex Centre
Municipal File No.:	A-15/18
LPAT Case No.:	PL180706
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LPAT Case Name:	MacLeod v. Middlesex Centre (Municipality)

Heard: April 9, 2019 in Ilderton, Ontario

APPEARANCES:

Parties

Counsel

Mallory MacLeod and Josh Chute Self-represented

Municipality of Middlesex Centre Wayne Meagher

DECISION DELIVERED BY JUSTIN DUNCAN AND ORDER OF THE TRIBUNAL

REASONS

Background

[1] These reasons for decision follow the hearing of an appeal by Mallory MacLeod and Josh Chute (“Applicants”) from the decision of the Municipality of Middlesex Centre (“Municipality”) Committee of Adjustment (“COA”) to refuse an application for variances to Zoning By-law No. 2005-005 (“Zoning By-law”) to permit the construction of a new accessory structure on a property known as 128 Thames Avenue (“Subject Property”).

[2] The variances sought by the Appellants would permit the development of a new shed/garage structure of 162 square metres at the side yard and to maintain an existing 8 square metre shed on the Subject Property. The variances are as follows:

- a. To permit accessory buildings totalling 170 square metres, whereas the Zoning By-law permits a maximum accessory structures of 50 square metres.
- b. To permit an accessory structure to be located in the exterior side yard, whereas the Zoning By-law does not permit accessory structures to be located in an exterior side yard.

ISSUE

[3] Generally, on an appeal relating to a minor variance, the issue before the Tribunal is whether the application meets the four-part test for a minor variance contained in s. 45(1) of the *Planning Act* (“Act”). The four tests require that the variances:

- a. maintain the general intent and purpose of the official plan (“OP”);
- b. maintain the general intent and purpose of the zoning by-law;

- c. be desirable for the appropriate development or use of the land; and
- d. be minor.

[4] Additionally, the Tribunal must be satisfied that the variance is consistent with the Provincial Policy Statement, 2014 (“PPS”).

DISCUSSION, ANALYSIS AND FINDINGS

[5] Kelly Henderson was called by the Municipality and qualified by the Tribunal to provide expert land use planning evidence. The Municipality also proposed to call a second planner. It was explained that the evidence of the second planner was intended to be called in the event that Ms. Henderson was not qualified by the Tribunal. As the Tribunal had qualified Ms. Henderson to provide expert evidence, the Tribunal did not allow the second planner to testify on the basis that the evidence would be repetitive and would likely amount to improper oath helping.

[6] Ms. MacLeod testified on behalf of the Applicants. During her evidence she explained that the Applicants wished to amend their application in order to address the concerns raised by some neighbours. She explained that the Applicants wished to amend their application to develop a garage of 116 square metres with a variance totalling 124 square metres which would increase the distance of the structure from the southerly lot line from 10.57 to 12.5 metres but which would not alter the exterior side yard variance required.

[7] The Municipality submitted that this amendment to the application should not be permitted and ought to be referred back to the COA for consideration.

[8] On the basis that the Applicants’ proposed amendment to the application can be considered minor in the sense that it reduces the scope of the relief sought from the Zoning By-law, the Tribunal finds that, in accordance with the Tribunal’s powers under

s. 45(18.1.1) of the Act, that additional notice is not required under s. 45(18.1) of the Act and that the amended application will be the relief considered in this decision.

[9] By way of background context, Ms. Henderson started her evidence by explaining that the Subject Property is a half-acre parcel located at the corner of Thames Avenue and Springer Street South amongst similarly sized properties. She explained that in addition to the existing 8 square metre shed on the Subject Property, the property currently hosts a single one-storey residence occupied by the Applicants and that this residence is approximately 151 square metres in size.

[10] Ms. Henderson also explained that the Subject Property is designated “Settlement Area” in the County of Middlesex Official Plan (“County OP”). She explained that the County OP directs attention to local official plans in this context.

[11] Ms. Henderson further explained that the Municipality’s Official Plan (“Municipal OP”) designates the Subject Property “Residential” while the Zoning By-law places it in the Urban Residential Zone 1-3 (UR1-3).

[12] Ms. Henderson explained that assuming that the garage would be used for residential purposes, the variances could be considered consistent with Municipal OP policy.

[13] Ms. Henderson also explained that the Zoning By-law permits accessory uses on the Subject Property. However, she referenced the definition contained in the Zoning By-law for “accessory” and opined that an accessory use is to be subordinate or incidental to the primary residential use of the property. She explained that based on the drawings provided by the Applicants, the accessory structure would protrude beyond the façade of the residential building and it was this situation that necessitates the need for a variance relating to exterior side yard.

[14] Ms. Henderson explained that s. 4.1(b)(i) of the Zoning By-law imposes a limit of either 50 square metres or 3% of lot coverage for accessory structures, with the former limit being applicable in this context. It was her opinion that the purpose of this limit is to ensure accessory structures remain subordinate to a dwelling and maintain the residential character of an area. It was her opinion that the proposed accessory structure would not be subordinate to the primary dwelling. Ms. Henderson also expressed the concern that the garage would be used to store commercial vehicles, whereas the Zoning By-law does not permit home occupations in accessory buildings.

[15] Ms. Henderson opined that the proposal was not minor in nature as it was three times greater than the Zoning By-law standard, was closer to the exterior side yard than the principle residence and is larger than some dwellings in the area.

[16] Ms. Henderson also opined that the proposal would not be desirable as the garage will become the dominant building on the lot, even if it were revised to 116 square metres as proposed by the Applicants during the hearing.

[17] Ms. Henderson explained that although there is a large accessory structure located immediately to the west of the Subject Property at 122 Thames Avenue, the structure pre-dates the current Zoning By-law and the Municipality does not have records of a building permit being issued for the structure.

[18] In cross-examination, Ms. Henderson acknowledged that a minor variance had been approved for 127 Thames Avenue permitting the construction of an accessory structure which she believes is approximately 139 square metres.

[19] Ms. MacLeod explained that the Applicants had applied to increase the size of their residence after purchasing the property in 2017. She explained that the construction was completed in March 2019 and that the house is now 174 square metres in size. She also explained that of the six neighbours opposing the application, three of them have large accessory structures similar to what has been proposed.

[20] Ms. MacLeod explained that the accessory structure proposed, at 3 metres in height, will not be taller than the principal residence on the Subject Property and that it will not be used for any commercial purposes. She explained in cross-examination that the garage would be used to temporarily store larger vehicles used by Mr. Chute while he is in transit for work. She also explained that the Subject Property, as a corner lot, is oriented differently than other properties in the neighbourhood and that locating the proposed garage on the opposite site of the dwelling close to Springer Street would necessitate the removal of several mature trees. She also explained that moving the structure further back from Thames Avenue to align with the façade of the dwelling would similarly require the removal of a mature tree.

[21] Ms. MacLeod provided an aerial map of the neighbourhood around the Subject Property and provided detailed evidence about the size, location and date of construction for accessory structures in the area. She explained that although it pre-existed current zoning standards, the property next door at 122 Thames Avenue hosts an accessory building that is close to their property line and that is approximately 167 square metres in size. She also explained that the property immediately south of the Subject Property on Thames Avenue hosts a larger accessory building but she acknowledged that it is 49 square metres in size and meets current zoning standards. She also explained that just prior to zoning changes being adopted by the Municipality, a large accessory structure was constructed at 127 Thames Avenue, immediately across the street from the Subject Property. Ms. MacLeod explained that this structure is approximately 139 square metres. She also pointed out various large accessory structures appearing larger than principle residences on the aerial photograph within a block of the Subject Property.

[22] Ms. MacLeod expressed the view that the amended application would render the application more in keeping with the existing accessory structures in the area and more in keeping with the purpose of the Zoning By-law as set out by Ms. Henderson.

a. Consistency with the PPS

[23] None of the parties raised evidence relating to consistency or inconsistency with the PPS. I have reviewed the policy of the PPS and find that the application raises no matters of inconsistency with the PPS.

b. Four-Part Test

i. General Intent and Purpose of the OP

[24] Both the COA in its decision and Ms. Henderson in her evidence acknowledged that the variances meet the general intent and purpose of the Municipal OP and the Tribunal agrees. The variances are consistent with the Municipal OP and they do not give rise to any issues with respect to the County OP.

ii. General Intent and Purpose of the Zoning By-law

[25] The Tribunal accepts Ms. Henderson's evidence that the intent of the Zoning By-law is to ensure that any accessory structures remain secondary to the residential dwelling located on the Subject Property. However, the Tribunal cannot agree with her application of this purpose in this context.

[26] In considering all of the evidence provided by the parties, the Tribunal finds that whether viewed from the perspective of either Springer Street or from Thames Avenue, the Subject Property will be experienced as a residential property with a dwelling predominate with the 174 square metre dwelling being experienced at all angles from the two streets. Although the garage may extend somewhat into what is technically considered the exterior sideyard, I cannot find that the garage would dominate the property or interfere with the residential character of the property or the area more broadly.

[27] Furthermore, with the Applicants proposing to reduce the size of the garage, there is an opportunity to reduce the protrusion into the exterior side yard. The Applicants have proposed an amendment to their application that increases the setback to the garage to 12.5 metre from the southerly lot line. To reduce the protrusion into the exterior sideyard, as a condition of approval, I would alter the position of the accessory structure by shifting it back from Thames Avenue to the 10.57 metre setback from the southerly lot line as originally proposed, resulting in a setback from the exterior lot line from 8 metres to 9.93 metres. I find that such a shift towards the southerly lot line would reduce the visibility of the garage even further, thereby reducing its visibility from the street.

[28] As part of its analysis, the Tribunal must also consider the potential for impact on neighbouring properties and not just directly from the street. However, it will only be from 122 Thames Avenue that anyone could say that the garage structure proposed dominates. It is the only property from which the greatest massing of the garage will be directly visible. However, an accessory structure larger than what the Applicants now propose is located at 122 Thames Avenue between the dwelling on that property and the Subject Property.

[29] In considering the character of the area, which consists of large residential lots with a variety of large and small accessory structures, I find that the Applicants' proposal for a 116 square metre accessory structure set back 9.93 metres from the exterior lot line would fit with the character of the area as intended by the Zoning By-law.

[30] Furthermore, in reviewing the language of the Zoning By-law against the evidence of Ms. MacLeod, the parking of a work vehicle temporarily is not what is contemplated by home occupation in the Zoning By-law. The definition of 'Home Occupation' in s. 2.84 of the Zoning By-law suggests that what is contemplated is the carrying out of work on a residential property. I would not include the parking of a work vehicle on one's property at the end of a workday or between job assignments at other

locations as being contemplated by this definition. However, if other materials, goods or equipment were to be stored in the garage that would likely run afoul of the prohibition contained in the Zoning By-law. This matter, in my view, can be addressed though a condition of approval specifically prohibiting home occupations in accessory structures.

iii. Desirability

[31] In asking the question as to whether the proposed variance is desirable for the appropriate use of the land, the Tribunal generally asks whether the proposed development facilitated by the variance will be compatible in relation to its surroundings.

[32] On the basis of the evidence heard, the Tribunal finds that the proposal will fit within this neighbourhood. The proposal will not change, destabilize or be out of character with the neighbourhood. The location of the proposed garage specifically on this property will ensure that it remains secondary to the residential dwelling, similar to other larger accessory structures in this area.

[33] Additionally, the aerial photograph of the area reveals that part of the character of the neighbourhood is that it hosts a large number of mature trees. The Tribunal further finds that the Applicants' proposal to locate the structure in a manner that maintains the mature trees on the Subject Property is also desirable in the sense that it will maintain this characteristic of the neighbourhood.

iv. Minor

[34] The test for whether the variances are minor generally asks whether any unacceptable adverse effects will result from the proposed variances. This is not a numerical examination. The fact that the proposed garage is more than twice the size of what is permitted by the Zoning By-law standard is not particularly germane to the Tribunal's analysis. The question is one of whether any unacceptable adverse impacts will arise.

[35] On the basis of the evidence heard, the Tribunal finds that the proposal will not give rise to any unacceptable adverse impacts. Although the garage will be visible, it will remain subordinate to the dwelling on the Subject Property. No concerns were raised about direct impacts to neighbouring properties which is understandable given the separation distances achieved between structures on the very large lots located in this neighbourhood.

Conditions of Approval and Conclusion

[36] Based on the findings above, the variances should be authorized subject to three conditions that will ensure that the purpose of the Zoning By-law continues to be maintained:

- a. Accessory structures be limited to 3 metres in height;
- b. That no home occupation, as defined by the Zoning By-law, be permitted in accessory structures; and
- c. That the proposed garage structure be setback at least 9.93 metres from the Thames Avenue property line.

[37] In conclusion, on the basis of the findings above, the Tribunal concludes that the application for variances meets the four-part test under s. 45(1) of the Act and is consistent with the PPS. The Tribunal finds that the appeal should be allowed and the variances sought by the Applicants in their amended application should be authorized, subject to the conditions set out above.

Timing of the Tribunal's Reasons for Decision

[38] The Applicants' appeal was received by the Tribunal on August 17, 2018. Ontario Regulation ("O. Reg.") 102/18 stipulates, at s. 1(1)4, that the time period for the

disposition of the appeal of the Tribunal is not to exceed six months and, at s. 1(2)1.ii, that the Tribunal may exclude such time periods from the calculation of the six month time period that are deemed necessary to secure a fair and just determination of the appeal. A hearing was scheduled for January 18, 2019 but was adjourned on consent of the parties and subsequently rescheduled to take place on April 9, 2019. Pursuant to O. Reg. 102/18 a decision was to be rendered on this appeal by September 6, 2019.

[39] In these circumstances, the Tribunal has determined that as a result of the adjournment of the hearing and the busy schedule of the Tribunal that it has been necessary to exclude the time between the adjournment and the hearing and also the time period between the conclusion of the hearing and the date at which the Tribunal was able to begin considering the evidence and submissions of the parties, being October 15, 2019, from the calculation of time in order to secure a fair and just determination of this appeal.

ORDER

[40] Pursuant to s. 1(2) of O. Reg. 102/18 and Rule 3.02 of the Tribunal *Rules of Practice and Procedure*, the Tribunal issues a notice of postponement excluding the time period of January 18, 2019 to April 8, 2019 and April 10, 2019 to October 1, 2019 from the calculation of the six-month time period contained in s. 1(1)4 of O. Reg. 102/18 in order to secure a fair and just determination of this appeal.

[41] The Tribunal orders that the appeal is allowed and the following variances are authorized:

- a. To permit accessory buildings totalling 124 square metres, whereas the Zoning By-law permits a maximum accessory structures of 50 square metres.

- b. To permit an accessory structure to be located in the exterior side yard, whereas the Zoning By-law does not permit accessory structures to be located in an exterior side yard.

[42] The variances are subject to the following conditions:

- a. Accessory structures be limited to 3 metres in height;
- b. That no home occupation, as defined by the Zoning By-law, be permitted in accessory structures; and
- c. That the proposed garage structure be setback at least 9.93 metres from the Thames Avenue property line.

“Justin Duncan”

JUSTIN DUNCAN
MEMBER

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Local Planning Appeal Tribunal

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Website: www.elfto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248