

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



ISSUE DATE: June 03, 2019

CASE NO(S): PL180798

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 Cauduro
Applicant:	Farzana Hassan
Subject:	Minor Variance
Variance from By-law No.:	05-200
Property Address/Description:	700 Centre Road
Municipality:	City of Hamilton
Municipal File No.:	A-282/18
LPAT Case No.:	PL180798
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LPAT Case Name:	Cauduro v. Hamilton (City)

Heard: March 8, 2019 in Hamilton, Ontario

APPEARANCES:

Parties

Representative

Anna Cauduro

Self-represented

Farzana Hassan

Hassan Rasul

DECISION DELIVERED BY PAULA BOUTIS AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This is an appeal by Anna Cauduro (“Appellant”) of a decision of the Committee of Adjustment (“Committee”) authorizing a minor variance application by Farzana Hassan at property located at 700 Centre Road (“Subject Property”), in the former Town of Flamborough.

[2] Farzana Hassan (“Applicant”) seeks two variances to facilitate the construction of a two-storey addition to the existing single detached dwelling, which will consist of a three bay garage and a second storey house addition. The proposal requires the demolition of the existing porch and a partial foundation will need to be built.

[3] The variances sought are the following:

- A minimum southerly side yard of 1.5 metres (“m”) shall be provided instead of the minimum required side yard of 3 m; and
- The width of the driveway shall be permitted to exceed the width of the garage whereas a driveway is not permitted to exceed the width of the garage.

[4] The Committee authorized variances subject to one condition:

- That the decision shall be subject to the submitted floor plans by Ashenhurst Newens & Associates Inc. dated May 16, 2017 to the satisfaction of the Manager, Development Planning, Heritage and Design for the City of Hamilton (“City”).

[5] The Appellant was opposed to the variances, primarily, but not exclusively, on the basis that it will harm her hedge of mature cedar trees on her side of the property line, which would then result in reduced privacy at the same time as having a new two-storey structure in her back yard.

[6] The Tribunal reserved its decision, noting at the close that it would seek to confirm what rules were in place regarding tree protection where the Subject Property is located.

[7] After careful review of the evidence submitted by the parties, the Tribunal has concluded it will allow the appeal. It authorizes the variances, but with an added condition for the purposes of protecting the Appellant's trees.

EVIDENCE AND ANALYSIS

Issues

[8] The *Planning Act* ("Act") places several obligations on the Tribunal when it makes a decision.

[9] The Act requires that every decision of the Tribunal be consistent with the Provincial Policy Statement, 2014 ("PPS") and, in this case, conform to the Growth Plan for the Greater Golden Horseshoe, 2019 ("2019 Growth Plan"), which plan came into force on May 16, 2019, replacing earlier iterations of the plan, initially passed in 2005 and then amended in 2017.

[10] Under s. 2 of the Act, the Tribunal must have regard to matters of provincial interest, including the appropriate location of growth and development.

[11] Finally, of most significance to this matter, the four-part test for minor variances under s. 45(1) of the Act is the following. The proposed minor variances must:

- 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 or use of the land; and

d. be minor.

[12] Regarding the minor variance test, item c) relates to desirability in the public interest, not that of an applicant. Regarding item d), the main concern is unacceptable impacts.

[13] On appeal, the Tribunal, like the Committee, has authority under s. 45(9) of the Act to impose conditions when authorizing the variances.

Proposal and Immediate Area Context

[14] The initial proposal for the two-storey addition included an additional bathroom. However staff was not supportive of this due to hydrogeology in the area. As a result, the matter was deferred from its original Committee hearing date in 2017. Thereafter, the Applicant revised the proposal to remove the proposed bathroom and it proceeded to a Committee hearing on August 9, 2018, with a positive staff report recommending authorization of the variances, with the aforementioned condition.

[15] The Appellant lives next door to the east at 698 Centre Road. To the immediate west of the Subject Property is a farm operation, at 702 Centre Road. Across the street are other detached homes, and to the west of those homes are a church and a school.

[16] Ms. Cauduro provided the following history and context about how the Subject Property and her lot were developed. Ms. Cauduro indicated that the owner of 702 Centre Road used to own the Subject Property at 700 Centre Road and her property. These properties were severed over the years. When her family purchased the property at 698 Centre Road, 700 Centre Road was also for sale, but as a vacant lot.

[17] She described her neighbourhood as a “typical rural hamlet on a Regional Road”, with homes that are mostly smaller, original houses. She indicated the home at 714 Centre Road is a larger home, set back well from the road with almost a forest in front of it. She indicated 752 Centre Road is adjacent to the park and it is a smaller home.

[18] Immediately to her east is 694 Centre Road. At the hearing, Ms. Cauduro described the home there as a “huge home”. In written comments prior to the Committee hearing(s), she and her husband commented:

We were not informed of our neighbor’s new construction at 694 Centre Road, another monstrosity that towers over our house. The construction ruined the privacy provided by our cedars ...

[19] At the hearing, she advised that her cedars along that eastern property line were impacted when that property redeveloped. The Tribunal surmises that Ms. Cauduro was unaware of the construction proposal because no variances were requested when that property was redeveloped. It therefore further surmises that the minimum required setback under the Hamilton Zoning By-law No. 05-200 (“ZBL”) of 3 m was complied with when that construction occurred.

[20] She described the Subject Property’s home as quite large compared to the others in the hamlet, though it is evident it is quite set back from Centre Road relative to the Appellant’s home, which is why the proposed two-storey addition at only 1.5 m from the property line will directly abut her backyard space.

[21] Ms. Cauduro was also concerned about overwhelming the tile bed with the addition of the garage, but the Tribunal notes from the staff report that Development Engineering with the City had no comments on the proposal.

[22] Ms. Cauduro did provide a thorough arborist’s report from Amy Choi, which investigated how the proposed development along the western property line may impact her trees, and what precautions must be taken to avoid harming those trees (Exhibits 5 and 6, consisting of three aerial photos outlining Tree Protection Zones with a four page report). Ms. Choi concluded the following in her Summary and Recommendations (Exhibit 6, Page 3):

The findings of the study indicate a total of 5 trees and 1 tree polygon [are] situated on 698 Centre Road adjacent [to] the proposed development.

The following recommendations are suggested to minimize impact to trees identified for preservation. Refer to Figure 1 [Exhibit 5] for additional tree preservation notes and the Tree Preservation Fence Detail.

- Tree protection barriers and fencing should be erected at locations prescribed on Figure 1.
- Tree protection measures will have to be implemented prior to construction to ensure the trees identified for preservation are not impacted by the development.
- Roots and branches that extend past prescribed tree protection zones that require pruning must be pruned by a qualified Arborist or other tree professional. All pruning of tree roots and branches must be in accordance with good arboricultural standards.
- Site visits, pre, during and post construction are recommended by either a certified arborist (I.S.A.) or registered professional forester (R.P.F.) to ensure proper utilization of tree protection barriers. Trees should also be inspected for damage incurred during construction to ensure appropriate pruning or other mitigation measures are implemented.

[23] At the hearing Mr. Rasul commented that he loved the trees too and he would like to protect them. He also provided a brief arborist's report (Exhibit 3, consisting of one page) which indicated that a minor encroachment into the recommended 2.4 m Tree Protection Zone of the Appellant's property is expected and that a qualified member of Arborcorp's staff would be present during the excavation to direct, monitor and report on the excavation. The report noted that "additional recommendations and appropriate arboricultural actions, if required, shall be carried out [at the time of the excavation]" and "no negative impacts ... are expected from this encroachment".

[24] The Tribunal now turns to the planning analysis.

Planning Analysis

[25] The only planning evidence the Tribunal had before it was in the form of a staff report ("Staff Report") which the Committee relied on for the purposes of its decision (Exhibit 1).

[26] The Staff Report confirmed that the Greenbelt Plan did not impact this proposal, as the lands are designated Hamlets in Schedule 1 of the plan.

[27] Regarding the applicable official plan, the Rural Hamilton Official Plan (“RHOP”) policies apply. The Subject Property is designated Rural Settlement Area and development is to proceed in accordance with specific policies and designations for each Rural Settlement Area subject to certain conditions (Policy A.1.2.4). Specifically, the development is to be of a density, height, area and nature that is compatible with the existing built environment; approval must be obtained from the City for servicing; and development must comply with the Natural Heritage System Policies of the RHOP.

[28] Policy A.1.2.9 requires that to conserve the settlement character, construction of new buildings or renovation of existing buildings shall be “sympathetic to and consistent with the existing heritage attributes of the Rural Settlement Area”. No new development is permitted until a hydrogeological study is completed, per Policy A.3.2.4.1.

[29] Regarding archeology concerns, the City concluded a study was not required, but a caution regarding same was provided to the applicant as part of the approval.

[30] The Staff Report described the area as follows:

The existing single detached dwelling has existed for some time. The surrounding neighbourhood is characterized by both large homes on long and narrow lots with minimal side yards setbacks. In evaluating the addition, staff are of the opinion that the proposal respects the existing neighbourhood character and is modest in size and scope. *In addition the property is surrounded by mature trees to the east which will assist in alleviating any overlook condition onto the neighbouring property to the east.* The existing home is also set back a significant distance more than the other houses along Centre Road which further diminishes impacts on neighbouring properties. Therefore with respect to these policies, staff are satisfied that the application conforms to the intent of the Rural Hamilton Official Plan.

The previous iteration of the application proposed one (1) additional bathroom (sic) to which staff were not supportive due to hydrogeology in the area. This has been removed from the proposal. Staff require that the decision is tied to the revised floor plans submitted with the application. Based on the foregoing, staff are of the opinion that the application meets the intent of the [RHOP] (sic). [emphasis added]

[31] The Tribunal notes that the staff’s opinion on the official plan relies at least in part on the maintenance of the cedar hedge on the Appellant’s property. In that context, the

Tribunal is of the view that the Applicant must be required to take the appropriate steps to protect that hedge in accordance with the Appellant's arborist's report to avoid unacceptable impacts and to ensure it maintains the general intent and purpose of the official plan.

[32] The parties were unable to clarify at the hearing whether the Subject Property was subject to a tree protection by-law. As discussed at the hearing with the parties, the Tribunal therefore took steps after the hearing to understand how Hamilton's tree protection system operates. The City has a by-law addressing trees on public properties. In addition, trees on private property are protected by by-law based on the former municipality in which the lands are located. In this instance, it appears that Regional By-law No. R00-054 ("Tree By-law") applies. It applies to a number of municipalities including the former Town of Flamborough, where the Subject Property is located.

[33] The Tree By-law does not provide protection to the trees located on Ms. Cauduro's property, as it applies to woodlands of a specified size only. The Tribunal also notes there was no City department related to tree protection which commented on this proposal. Only the Building Division, Development engineering, and Transportation Planning and Parking Division (Traffic), provided comments, further suggesting that there is no oversight by the City on private trees.

[34] Given the Appellant's arborist's report and the evidence and submissions of the parties at the hearing, the Tribunal will impose a condition that requires the Applicant to follow the recommendations as outlined by Ms. Cauduro's arborist in Exhibits 5 and 6.

[35] Given the Appellant's commitment, as expressed at the hearing, to the protection of his neighbour's trees, the Tribunal is confident that he will take the necessary steps to meet those conditions and will allow Ms. Cauduro and/or an arborist of her choosing to access the Subject Property to monitor the matter, if she so requests. However, should a concern arise, the Appellant may contact the Case Co-ordinator to arrange for a telephone conference call with the Tribunal to address the matter.

[36] Regarding maintaining the general intent and purpose of the ZBL, staff was of the view that the reduced side yard setback would continue to allow for adequate access and drainage to the rear of the property. Regarding the driveway width, staff noted the variance recognizes the existing width of the driveway. As there are no changes and the width facilitates vehicles entering and exiting the property in a forward manner, staff was of the opinion that the proposal maintained the purpose and intent of the ZBL. Staff further concluded that the variances are minor in nature and desirable for the appropriate development of the Subject Property, but that approval be subject to the condition that the variance be tied to the floor plans noted earlier. The Tribunal concurs with staff's opinion.

[37] Regarding the width of the driveway, the Tribunal will modify the variance so that the width in question is to reflect the existing condition.

[38] Regarding the condition that ties the authorization to the Ashenhurst Nouwens & Associates Inc. plans, the Tribunal notes the firm name is incorrectly spelled. The condition will therefore be corrected to refer the correct spelling of the firm name. In addition, the condition refers to floor plans. In addition, the floor plans in evidence are variously dated July 5, 2017 or April 25, 2017, not May 16, 2017 as reflected in the condition currently. Only the survey/site plan in evidence is dated May 16, 2017. Both the floor plans and the survey/site plan were carefully reviewed at the hearing. The condition will therefore be appropriately revised to reflect the site plan and floor plans that are in evidence at Exhibit 2, which consists of the Application and Sketches in the Tribunal's file, and which became an exhibit at the hearing.

[39] With the addition of a condition to protect the Appellant's trees and corrections to the other condition as noted above, the Tribunal is satisfied that the proposal will meet the four-part test under the Act for minor variances given the planning evidence otherwise provided.

[40] Regarding provincial interests, given the nature of the proposal, the Tribunal has no difficulty concluding that the proposal has sufficient regard to the requirements of s. 2

of the Act, is consistent with the PPS and conforms to the 2019 Growth Plan.

ORDER

[41] For the foregoing reasons, the appeal is allowed.

[42] The Tribunal authorizes the following variances:

- A minimum southerly side yard of 1.5 m shall be provided instead of the minimum required side yard of 3 m; and
- The width of the driveway shall be permitted to exceed the width of the garage, reflecting and in accordance with the existing condition, whereas the ZBL does not permit a driveway to exceed the width of the garage.

[43] The authorization is subject to the following conditions:

- The decision shall be subject to the submitted survey/site plan and the floor plans prepared by Ashenhurst Nouwens & Associates Inc., in accordance with Exhibit 2, to the satisfaction of the Manager, Development Planning, Heritage & Design for the City of Hamilton.
- The decision is further subject to the Applicant satisfying the tree protection measures recommended within Exhibit 6 at page 3 and in accordance with Exhibit 5. The Applicant/Owner shall allow access to the property at reasonable times before, during and after construction by the Appellant's arborist and/or the Appellant, if requested by the Appellant, to monitor the construction and protection measures required for the protection of the Appellant's trees.

[44] The Tribunal may be spoken to in the event any difficulties arise in the implementation of this decision.

“Paula Boutis”

PAULA BOUTIS
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

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