Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Monday, December 16, 2019

PROCEEDING COMMENCED UNDER Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): 1432029 ONTARIO LIMITED

Applicant: SAVA MIOKOVIC

Property Address/Description: 2 WESTMOUNT AVE

Committee of Adjustment Case File: 19 116113 STE 09 MV

TLAB Case File Number: 19 198137 S45 09 TLAB

Hearing date: Monday, December 02, 2019

DECISION DELIVERED BY S. GOPIKRISHNA

APPEARANCES

Name	Role	Representative
Sava Miokovic	Applicant/Appellant's Legal Rep	
1432029 Ontario Limited	Owner/Appellant	
Keith O'Brien	Expert Witness	

INTRODUCTION AND BACKGROUND

1432029 ONTARIO LIMITED is the owner of 2 Westmount Ave., located in Ward No 9 (Davenport), of the City of Toronto (the City); it is also the applicant and appellant for the purposes of this Appeal.

The Company applied to the Committee of Adjustment (COA), to alter the existing 2½-storey detached dwelling, with a rear one-storey detached garage by creating a third dwelling unit in the basement, a fourth dwelling unit in the garage, and by constructing a second storey addition on top of the garage. The Committee of Adjustment (COA) heard the application on July 11, 2019, and refused the application in its entirety.

The Applicant then appealed the COA's decision to the Toronto Local Appeal Body (TLAB), which scheduled a Hearing on December 2, 2019.

MATTERS IN ISSUE

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

1. Chapter 10.5.50.10.(3)(A), By-law 569-2013
A minimum of 50% (77.17 m2) of the rear yard is required to be maintained as soft landscaping. In this case, 2.4% (3.7 m2) of the rear yard will be maintained as soft landscaping.

2. Chapter 10.5.60.1.(2), By-law 569-2013
An ancillary building may not be used for living accommodation. The altered one-storey ancillary building (detached garage) will be used for living accommodation.

3. **Chapter 10.5.60.40.(3), By-law 569-2013**
An ancillary building or structure may not have more than one storey.
The altered one-storey ancillary building (detached garage) will be two-storeys.

4. Chapter 10.5.60.40.(2)(B), By-law 569-2013
The maximum permitted height of an ancillary building or structure is 4.0 m.
The altered one-storey ancillary building (detached garage) will have a height of 5.26 m.

5. Chapter 10.5.60.50.(2)(B), By-law 569-2013
The maximum permitted total floor area of all ancillary buildings or structures on a lot is 40.0 m2. The altered one-storey ancillary building (detached garage) will have a total floor area of 128.32 m2.

6. Chapter 10.10.60.70.(1), By-law 569-2013
The maximum permitted lot coverage by an ancillary building or structure is 5% of the lot area (15.98 m2). The altered one-storey ancillary building (detached garage) will have a lot coverage of 21.88% of the lot area (67.77 m2).

7. Chapter 10.5.60.60.(1), By-law 569-2013
The eaves of a roof on an ancillary building may encroach into a building setback of 0.3 m, if the eaves are no closer to a lot line than 0.15 m.
The altered one-storey ancillary building (detached garage) will have roof eaves that will be 0.03 m from the west lot line.

8. Chapter 150.10.20.1.(1), By-law 569-2013
A secondary suite is a permitted use provided that it is located only in a detached house, semi-detached house and a townhouse if it is in the Residential (R) Zone.
In this case, a secondary suite will be located in the ancillary structure (detached garage).

9. Chapter 200.5.10.1.(1), By-law 569-2013
A minimum of three parking spaces are required to be provided.
In this case, two parking spaces will be provided.

10. Section 4(5)(B), By-law 438-86
A minimum of three parking spaces are required to be provided. In this case, two parking spaces will be provided.

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area ('Growth Plan').

Minor Variance – S. 45(1)

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- are desirable for the appropriate development or use of the land; and
- are minor.

EVIDENCE

At the Hearing held on December 2, 2019, the Appellant was represented by the Agent, Mr. Sava Miokovic, and the Expert Witness Mr. Keith O'Brien, both of whom are urban designers. There were no other Parties, nor Participants in this matter

Mr. Keith O'Brien was sworn in, and recognized as an Expert Witness in field of Land Use Planning. It is important to note that Mr. O'Brien is an urban designer with fifteen years of experience, and has a Masters degree in Architecture from the University of Toronto.

The Hearing consisted of a series of questions and answers, with Mr. Miokovic asking questions of Mr. O'Brien, to which the latter would respond to provide evidence.

Mr. O'Brien began by describing the proposal with the aid of the pictoral representation, illustrated above. He said that the proposal was to construct a second storey addition, above an existing detached garage, in order to create a 700 sq.ft. apartment. The illustration on the left is a rendering of the proposal, as it will look when viewed from Regal Road. . On the right, there is a rendering of the proposed structure as viewed from the north-east corner. The physical characteristics of the proposed addition were stated to be "aesthetically pleasant, with massing elements designed to minimize the perception of scale, and reduce impact on neighbouring properties", while "The roof has been designed on all sides to bring the eaves closer to the ground, creating the look of a one and half storey building with attic dormers". Mr. O'Brien opined that the dormers and windows along the south face greatly improve the appearance of the existing unattractive garage, and is thus a welcome improvement to the streetscape".

Mr. O'Brien asserted that there would be no impact to any private property, as a result of the proposed alteration of the south building face. The property to the west at 1525 Dufferin has its own detached garage. According to Mr. O'Brien, this garage would block the view of almost all of the proposed addition, minimizing the impact of any alteration to the west building face. He also stated that the impact of the east building face "would be limited to 2 Westmount itself, and to a small degree, from the back of 4 Westmount".

He said that the eaves on all sides, but especially at the north face, had been brought down closer to grade, to further minimize the impact of the massing of the addition. He noted that the existing garage would be surrounded by garages on all adjacent properties. Based on this, Mr. O'Brien concluded that the proposed addition would not be visible from most vantage points on adjacent properties. Mr. O'Brien suggested that there was strong community support for the project, and illustrated the same through a map, highlighting the the houses of the neighbours who had signed letters of support.

He suggested that there were examples of similar projects which had been approved in the community. Stating that one could find "carriage Houses, pool houses, etc, that have been converted, in whole or in part, into living accommodations" in the City, Mr. O'Brien specifically refeers to the two examples at 41 and 47 Glenholme Ave., located 330 m from the Subject property.

He said that these two examples front onto Springmount Avenue, “although they are part of properties with legal addresses on Glenholme Avenue”. Both of these examples front onto a street, not a lane. Mr. O’Brien said that at 47 Glemholme Ave, there was a “2 storey garage at the rear of 47 Glenholme Avenue, which provides accommodation for a vehicle on the ground floor, and living accommodation on the 2nd floor, fronting onto 102 Springmount Avenue

In response to a question about how the variances could be classified as being minor, Mr. O’Brien began by categorizing variances 1,6 and 7, (as recited in the list of variances in the “Matters In Issue” Section), Variances 9 and 10 as Parking Variances, 3 and 4 as Height related Variances, 5 as a GFA related variances, and Variances 2 and 8, as Laneway Suite Variances.

Speaking to their appropriateness, Mr. O’Brien said tha the existing two parking spaces will be retained. Given the urban context, proximity to transit, and the increasing preference of urban dwellers to rely on transit / bicycles / bike sharing / car sharing and generally on modes of transportation other than private car ownership, he said that he felt that the existing two parking spaces are more than adequate, and that the variance to remove the requirement of a third parking space is appropriate.

Speaking next to the height variances, he explained why the variances are of a technical nature, stating that they were “ forced to measure height to the top of the skylite, generating a height of 5.26m”., though the height to the actual top of roof is 5.11m. Thie additional height is the result of measuring from average grade at the south face of the garage, where it meets the street. However, if the height can be measured at the actual grade condition at the north building face, where the property does abut other private properties, the grade condition here is such that the height works out to be 4.77m above grade. Mr. O’Brien asserted that a building height of 0.77m beyond the by-law requirement is minor in nature, and would be considered “non-offensive in any circumstance”. He said that any issues with height woud be further mitigated as a result of the building being “so shielded from the view of neighbouring properties”.

He then spoke to the total floor area variances, and said that the existing garage roof could be modified such that it would present a massing very similar to what is proposed, but with an attic space, rather than a usable second floor. According to Mr. O’Brien, there would be no variance required, with the hypothetical attic space . Based on the conclusion that a similar massing, with an attic would be achieved as of right, he concluded that its inclusion should be considered minor in nature.

The proposed use variances were discussed last. Mr. O’Brien said that the notion of creating a secondary suite, in an ancillary building is “not a new one in the City of Toronto”. He also opined that “given the historical precedent throughout the city to grant this variance as a means to address the need for housing within the city, and given the fact that the rationale behind this bylaw is being aggressively replaced by the move toward allowing Laneway Suites as-of-right”, this variance should be considered

minor in nature. By way of editorial comment, I note that the explanation for why the use variances are considered minor are directly quoted from Mr. O'Brien's evidence.

Mr. Miokovic next asked a question which premised that if the proposal didn't involve a dwelling unit, would the remaining variances (i.e. the ones not discussed in the previous discussion) would be "exceptional". Mr. O'Brien stated that if the applicant were to propose to simply enlarge the garage, and allow for additional storage, a workshop, or any other use not involving living accommodation, "the list of variances and their values would all be fairly commonplace". He asserted that a survey of the neighbourhood would reveal a number of ancillary structures that have been enlarged beyond the limits of the bylaw, granted by variances, for one reason or another. All of the required variances that relate to size, setback, height, etc. are un-contentious; "*a fact recognized by Planning and members of the Committee*".

Based on this, Mr. O'Brien reassessed the primary question of the validity of the proposal as: The issue then whether it is reasonable or not to add a fourth unit to the property, and if so whether it is reasonable for it to be located in the ancillary building.

In response to the question asked above, about the fourth unit, Mr. O'Brien said that the answer to the first part is yes, as a matter of right, because four dwelling units are allowed as-of-right on the property. However, the answer to the second would also be - yes, as-of-right if the property were located on a laneway. However, notwithstanding the fact that the house was not located on a laneway, Mr. O'Brien deemed the variance to be "minor, reasonable exception to the bylaw" because" it did not violate the intent of the bylaw or the official plan".

The next question from Mr. Miokovic was if he proposed scope of work was fundamentally equivalent to a Laneway Suite, and if so, how would the proposed scope of work be evaluated by Zoning under the lens of the Laneway Suite By-Law.Mr. O'Brien responded by saying that in response to the rapidly growing shortage of housing, the Government of Ontario passed revisions to the Planning Act, through Bill 108. He then discussed how Bill 108 brought about changes to the Planning Act n such that municipalities are required to provide policies in their Official Plans to allowhomeowners to create an additional residential unit in another building on the same property, such as above garages.

Mr. O'Brien then discussed th City of Toronto's response to Bill 108, and the creation of the Laneway Suites Initiative, which according to him " eliminated many of the planning restrictions that would necessitate minor variances in order to create a laneway suite". He informed the TLAB that "The city and province are working together to enthusiastically encourage a proposal, such as the one under consideration here, as part of a strategy to tackle the housing crisis". He then asserted that the proposed scope of work "is exactly aligned with the objectives and interests of both levels of government and with the needs of Torontonians".

Accoridng to Mr. O'Brien, one of the major impediments for the proposal's being approved was when the case was heard by the COA on July 11, 2019, the Laneway

Suites Initiative was confined to certain portions of the city, and 2 Westmount fell just outside the boundary established by the City, within which Laneway Suites were permissible. However, since that date the, City Council has passed Amendment 460 to the Official Plan, expanding the Laneway Suites Initiative to the entire City Mr. O'Brien then stated that the proposed scope of work had all of the characteristics of a Laneway Suite, with one technical difference: Rather than accessing a municipal street via a laneway, the suite would have direct access to a municipal street.

Mr. O'Brien then provided the following explanation to address the issue of the proposal's being considered a laneway suite, notwithstanding that it is not located on a laneway

"*It would also be understandable to insist on separately characterizing a corner lot from a laneway lot if there were some aspect of the lane that protected neighbouring properties from the impact of an ancillarybuilding second suite. In practice, however, the presence of a lane has no impact one way or another. The same conditions could existing between 2 Westmount and all of its neighbours if Regal Road were a lane instead of a municipal street, or if where the garage face intersects Regal Road were instead the north end of a lane running north-south. This point is recognized by the zoning by-law*."

At this stage, I asked Mr. O'Brien, in the Zoning By-Law, this "point" could be found, and was informed that while the "point" existed, Mr. O'Brien did not being it with him to the TLAB Hearing.

I asked him to ensure that the relevant material would be submitted to the TLAB.

Mr. O'Brien continued with "Where a lane runs parallel to the side lot line of a property, rather than the back lot line, there is no constraint against a laneway suite fronting onto this side lot lane. Where a laneway suite is located on a corner lot, backing onto a lane and with a municipal street at the side lot, the suite is allowed to front on either the lane or the municipal street. Corner properties, even when not abutting a laneway, often possess all the same attributes that a property that *does* abut a laneway has, supporting an ancillary building secondary suite. In fact, a corner property is even better suited than most laneway properties, because the ancillary building can directly front onto a street, not just a laneway. All the concerns about direct access to public property, access for emergency services, windows/doors facing away from neighbouring properties, setbacks etc, are all addressed with a corner property situation like the current proposal. The corner lot condition allows the proposed structure to provide these fundamental attributes to a degree that is actually superior to the average laneway suite, and so should be considered fundamentally equivalent to a laneway suite"

Mr. O'Brien discussed the actual variances next- the variances are listed on the next page, followed by his explanation.

1 Minimum Lot Line on a Lane – A Variance would be required to allow this requirement to be reduced to 0.0m. Mr. O'Brien justified the variance by stating that the

corner lot condition allows the garage to front onto a municipal street, “which is an improvement over fronting onto a lane”. He also noted that the driveway has a width of 8.49m, “over twice the minimum requirement, lending further argument to the superior condition that a corner lot presents in terms of vehicular and pedestrian access and frontage onto public property”.

2 Minimum Soft Landscaping The minimum soft landscaping requirement between the Rear Main Wall of the Residential Building, and the Front Main Wall of the Ancillary Building is 85% However, a variance is required to retain the existing condition with 2.4% soft landscaping. Mr. O’Brien justified the variance by stating that it was an existing condition. .

3a Minimum Separation between Residential Building and Ancillary Building – A separation of 7.5m is required between the Residential and Ancillary Buildings, when the Ancillary Building height is greater than 4.0 m. In this case, the proposed separation is 6.96m, because the proposal is to build directly over the footprint of the existing garage. According to Mr. O’Brien, the 6.96 m is 93% of the required 7.5m, and” is therefore minor.” He also noted that the distance, when measured from the small rear addition at the back of the house, is “ compliant at 9.30m”

3b Maximum Height of Ancillary Building – Mr. O’Brien said that this variance would be required to allow the proposed height of the garage of 5.26m, exceeding the allowable 4.5 m, and added that this requirement is “inextricably” to the separation requirement He added that “if the proposed structure were located just 0.54m further away, the height could be 6.0m as-of-right”.

He then summarized his observations on how the existing variances correspond to what is of right. According to Mr. O’Brien, the relationship to the variance in the “first should be considered irrelevant since the actual site condition is an improvement over the condition that this requirement seeks to protect”. The relationship between the requested and what is of right in the “ second should be considered ancillary to the discussion since it reflects an existing condition that is not generated by the proposal under consideration.” He then stated that in the third variance, the relationship” should be considered extremely minor as it is only centemeters away from compliance”.

There was also some speculation about how to interpret the absence of a report for the benefit of the COA panel, on this proposal from the City Planning Staff. I advised the Party that speculation could not be taken into account for the purposes of decision making.

Mr. O’Brien briefly discussed. How “the By-Law and Official Plan have been amended to aggressively encourage private homeowners to develop their properties in precisely the manner presented here, in order to increase housing stock within neighbourhoods throughout downtown Toronto”.

I specifically asked Mr. O'Brien if he had comments about how the proposal upholds the purpose, and intent of the Official Plan, and was informed that he did not have any comments.

Since no Witness Statement had been submitted prior to the Hearing, I asked the Appellants to submit the statement relied upon by Mr. O'Brien. I thanked the Appellants for attending the Hearing, and informed them that I would reserve my Decision.

The Witness Statement, as well as a copy of By-Law 810-2018, (to permit laneway Suites), were both sent by email on the afternoon of December 2, 2019.

ANALYSIS, FINDINGS, REASONS

It may be important to briefly discuss my qualifying Mr. O'Brien as an Expert Witness in the area of land use planning. Notwitthstanding that he did not train to be a planner,or become a Registered RPP(Registered Professional Planner), I qualified him as an Expert Witness..*Prima facie*, it is reasonable to think that an architect with as many years of experience as Mr. O'Brien would have had, would be able to discuss planning principles, and how they apply to a given case. Notwithstanding my qualifying him as an Expert Witness under the circumstances, I donot consider this methodology, or reasoning for Expert Witness qualification, to be precedent setting. .

I would like to begin by acknowledging the Question and Answer format used by the Appellants to explain the principle features of the proposal, followed by their perspective on how the variances meet the four tests under Section 45.1. The grouping of variances into height related variances, traffic related variances and other categories, was also helpful. However, if the Appellants' logical approach for information presentation was the boon, the bane lay in their inability to concentrate on the four tests in Section 45.1, and assuming that the unproven had in fact been proven, or was an axiomatic truth that did not require to be proven.

The discussion of the Official Policy is illustrative of my conclusions.. I was made aware that " the Official Policy and Zoning By-Laws had been amended to aggressively encourage private homeowners to develop their properties in precisely the manner presented here"; however, when asked for specific examples of such policies, the Appellants' answer was that they did not bring them to the TLAB. Likewise, there was no discussion of how the variances satisfied the performance standards of the By-Laws- in fact, the expression "performance standard" was not mentioned even once in the entire Hearing. The only Zoning related document, which was submitted after the Hearing, is the Laneway Suite By-Law, with no explanation of where applicable By-Laws would be found, and how they are applicable.

The lack of information about the OP, and the Zoning By-Laws, results in my concluding that the proposal has failed both the tests of the OP and the Zoning By-Law.

The strategy of assuming the unproven to be the axiomatic truth that doesn't have to be proven, requires the adjudicator to simultaneously make numerous leaps of faith, and

leap without even a cursory look at the yawning chasms of information and explanation. – a detrimental, if not dangerous approach, when applying relatively new By-Laws such as the Laneway Suites By-Law.

.In terms of the test of minor, I am confronted with an interesting dichotomy- there is a logical explanation of the genesis of the variance, which is a stark contrast to a nebulous demonstration of how the said variance satisfies the test of minor. As an example, the genesis of the height variance is explained clearly, because of of how it is measured from the grade. This expalantion, however,is followed by an assertion, from the Appelants, about how 0.77 m between the requested height of the garage, and what is allowed of right, is minor- while the difference may be a few centimetres, the impact of the extra height is not explained. Notwithstaniding a blanket assertion, at the beginning of the presentation, of how the increased height would not impact any of the neighbours, there is no demonstrable nexus between the extra height, and the lack of unacceptable, adverse impact on the neighbours.

While I respect the Appellants' exuberant enthusiasm for Laneway Suites, I expect them to present replicable roadpaths of reasoning to understand how their proposal satisfies the statutory tests under Section 45.1.

I find that there is inadequate information, and reasoning provided, to conclude that the proposal meets the test of minor. Lastly, there was no demonstrable nexus between the evidence, and the test of appropriate development- in fact the expression "appropriate development" was not used even once by the Appellants. I therefore find that the proposal does not pass the tests of minor, or appropriate development

Given the above, I find that the Appeal fails all four tests under Section 45.1, and the Appeal is refused.

DECISION AND ORDER

1) The Appeal respecting 2 Westmount Ave. is dismissed, and none of the variances are approved. The decision of the Committee of Adjustment dated July 11, 2019, is confirmed herewith.

   So orders the Toronto Local Appeal Body

X

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body