

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: January 11, 2018

CASE NO(S): PL170710

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

Appellant:	Stonechurch Cooperative Homes Inc.
Applicant:	CPDL Mancini Holdings Inc.
Subject:	Minor Variance
Variance from By-law No.:	6593
Property Address/Description:	630 Stone Church Road West
Municipality:	City of Hamilton
Municipal File No.:	A-127/17
OMB Case No.:	PL170710
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OMB Case Name:	Stonechurch Cooperative Homes Inc. v. Hamilton (City)

Heard: October 17, 2017 in Hamilton, Ontario

APPEARANCES:

Parties

Representative

CPDL Mancini Holdings Inc.	Unrepresented
Stonechurch Cooperative Homes Inc.	Gary Pana

DECISION DELIVERED BY ANNE MILCHBERG AND ORDER OF THE BOARD

[1] Stonechurch Cooperative Homes Inc. ("the Appellant") has appealed the May, 2017 decision of the Committee of Adjustment ("CoA") of the City of Hamilton ("the City") to approve variances for the property at 630 Stone Church Road West ("the

subject property"), which contains a commercial bakery/delicatessen. The Applicant is CPDL Mancini Holdings, Inc ("Applicant").

[2] The variances are requested to legalize a 38 square metres ("sq m ") rear yard addition which includes a freezer covered by a roof structure. According to the Applicant's witness at the hearing, J. P. Campana of Kalos Engineering, this illegal construction was discovered by authorities after a car crashed into the front of the bakery. An order to comply was issued by the City, and an application to the CoA was submitted for the following variances from Zoning By-law No. 6593 ("the ZBL"):

- A rear yard of a 1.2 metres ("m") shall be provided instead of the minimum required 5.17 m rear yard setback. (Variance 1)
- No landscaped area shall be provided instead of the 3.0 m wide landscaped area required along the north and east lot lines. (Variance 2)

[3] The Appellant is an incorporated cooperative ("co-op") housing development comprised of 54 townhouses at 620 Stone Church Road West, next door to the subject property. The co-op property is irregularly shaped, and a portion of it (including the back yards of several townhouses) abuts the rear property line of the bakery. There is a grade drop of approximately 1.22 – 1.52 m between the subject lands and the co-op lands in this area, managed by a wooden retaining wall.

[4] Carin Finch, a resident of the co-op/Appellant who testified on its behalf, alleged that the illegal addition (which would require the allowance of Variance 1 to become legalized) :

- diverts rainwater away from the bakery, flooding co-op homes whenever there is a significant rainfall; and
- is the cause of the degradation of the retaining wall between the two properties.

[5] Mr. Campana, a professional engineer retained by the Applicant, testified in support of the proposed variances. His testimony focused on the flooding claim and on the retaining wall. Though Mr. Campana initially appeared at the hearing as the Applicant’s sole representative, and intended to be the sole witness as well, the Board directed him to choose one role or the other. He chose to be a witness, and in doing so, could not cross-examine the Appellant’s witness. As a workaround, the Board offered to hear questions he might have pertaining to the Appellant’s evidence, and to relay relevant ones to the Appellant.

[6] Neither of the Parties brought expert land use planning witnesses to the hearing, or provided much detail about the neighbourhood context. The only planning evidence before the Board on the four tests of a minor variance under the *Planning Act* (“Act”) was contained in a May 18, 2017 report from the Planning and Economic Development Department (“Planning Report”), found within Exhibit 1. It was quite thin on analysis, but was the only planning evidence before the Board in this matter.

[7] No representative from the Planning and Economic Development Department appeared at the hearing to speak to the Planning Report.

ANALYSIS AND DISPOSITION

[8] Section 45(1) of the Act sets out four tests that a minor variance must meet. The Board focused on these in its analysis and disposition.

Are the proposed variances minor?

[9] Variances can be deemed minor if there are no undue impacts arising.

[10] In the case of Variance 2, neither the Appellant nor the Planning Report identified any undue impacts or issues with the requested relief from the 3 m landscape strip

requirement along the north and east property lines, nor could the Board discern any undue impacts. On this basis, the Board concludes that Variance 2 is minor.

(a) Retaining wall:

[11] In the case of Variance 1, which entails relief from the rear yard setback, Ms. Finch asserted that reducing the rear yard setback from 5.17 m to 1.2 m caused the retaining wall between the two properties to become unstable. She conceded that this was speculation on her part, as she is not an engineer. In contrast, Mr. Campana's position was that the condition of the retaining wall was unrelated to the relief requested by Variance 1. An engineer, he testified that the freezer addition within the rear setback did not introduce new structural loads or grading changes in relation to the retaining wall.

[12] There was no planning evidence before the Board to prove that the condition of the retaining wall was directly related to the reduced setback. More importantly, the Board was obliged to frame its analysis of impact as if the freezer had not yet been constructed on the lands. Had the variance been applied for in advance of the illegal construction, any concern raised about maintaining the integrity of the retaining wall would have been an engineering/construction matter outside the Board's jurisdiction, not a planning matter. For this reason, the Board finds that Variance 1 has no planning-related impact on the retaining wall.

(b) Storm water management:

[13] The other perceived impact Ms. Finch raised with respect to Variance 1 had to do with storm water management. Instead of having an open area at the rear of the subject property (with the 5.17 m ZBL setback) where the ground can absorb the rainwater, she claimed, the freezer addition diverts rainwater onto the Appellant's lands. Her observation was that, ever since the freezer was built, storm waters from the subject property overflow the retaining wall and flood a section of the co-op lands and

some townhouses during significant rainfall. She claimed that the Applicant's later addition of an eavestrough did not alleviate the flooding.

[14] Prior to the construction of the freezer, Ms. Finch claimed, no flooding occurred on the co-op lands. She testified that these lands had been specifically graded and landscaped to manage storm water, and include a swale.

[15] Mr. Campana disagreed with Ms. Finch's flooding claim. He testified that the roof over the freezer, which has a single slope from the south towards the north property line, collects all the storm water over the freezer, and the eavestrough discharges it directly into a storm water grate on the subject property. In his estimation, the freezer addition causes no diversion of rain water to the Appellant's property. Mr. Campana also claimed that the City was satisfied that storm water was being properly managed in the vicinity of the freezer, but proffered no proof of this.

[16] The Board analyzed the dispute about storm water impact as if the freezer had not yet been constructed on the lands, along these lines:

- How was storm water handled on the subject property pre-construction?
- What would be the storm water impact of adding the freezer?
- If needed, what mitigation measures would be introduced? Would they be effective?

[17] Mr. Campana testified that, prior to construction of the freezer, the open space at the rear of the property was covered by rain-impervious concrete slabs at grade. In his view, the freezer's sloped roof and eavestrough provided better storm water management than the prior condition of the open space covered by concrete slabs, and could not have dumped more water onto the co-op lands. The Board adjusted the weight of these comments upon hearing that Mr. Campana had been hired by the Applicant after the illegal construction of the freezer had been discovered by authorities, and that he had not witnessed the exact pre-construction site conditions of either the subject property or the adjacent co-op lands.

[18] While Ms. Finch’s testimony pointed to the possibility that the Applicant’s storm water mitigation measures may not have been adequate, there was not enough evidence to show certainty or even probability that the freezer construction caused the flooding. The Board concluded that it did not have sufficient evidence to make a finding on impact.

[19] Consequently, the Board relied on the other three tests of the Act to determine whether Variance 1 should be allowed.

Do the proposed variances maintain the general intent and purpose of the Urban Hamilton Official Plan (“UHOP”)?

[20] The Planning Report notes that the subject lands are designated as “Neighbourhoods” in Schedules E and E-1 of the UHOP.

[21] With respect to Variance 2, the Planning Report opined that eliminating 3 m planting strips inside the north and east property lines would not be inconsistent with the character of the existing neighbourhood.

[22] In distinction, with respect to Variance 1, the Planning Report opined that reducing the rear yard setback would be counter to the character of the existing neighbourhood, and on that basis, does not maintain the general intent and purpose of the UHOP. The Board finds accordingly.

Do the proposed variances maintain the general intent and purpose of the ZBL?

[23] The subject lands are zoned “Existing Residential “HH-S-725” under the ZBL [Exhibit 1].

[24] In the case of Variance 2, the opinion in the Planning Report is that the elimination of 3 m planting strips inside the north and east property lines would have no negative effect on area character.

[25] With respect to Variance 1, the Planning Report suggests the reduced rear yard setback may be incompatible with the existing residential land uses at the rear (i.e., the co-op). One of the purposes of a rear yard setback is to allow for the adequate separation of adjacent, incompatible uses, to avoid land use conflicts. There was no conclusion on the Board's part as to whether the freezer addition caused the flooding, but it appears to be incompatible with the co-op next door.

Are the variances desirable and appropriate for the development of the subject property?

[26] In the case of Variance 2, the elimination of the 3 m planting strips did not elicit any concerns from the Appellant or the planning staff, and the Planning Report opines that the general intent and purpose of the OP and ZBL are maintained. On this basis, the Board concludes that Variance 2 is desirable and appropriate for the development of the subject property. The Board finds accordingly.

[27] In the case of Variance 1, the Planning Report opined that the reduced setback results in built form that is not in keeping with the neighbourhood character. The Board's observation in hearing evidence from the Parties is that the lack of setback heightens the conflict between incompatible uses.

CONCLUSIONS AND ORDER

[28] There was no evidence in the hearing that Variance 2 should not be allowed, and even the Appellant advised the Board as much. The Planning Report opinion was that Variance 2 met all four tests of the Act. Therefore, the Board will allow this variance.

[29] As for Variance 1, the Board finds that it does not maintain the purpose and intent of the UHOP and ZBL, and is not desirable for the appropriate development of the subject property. In order for a variance to be allowed, all four tests of the Act have to be met. In this case, the variance fails on three tests.

[30] Accordingly The Board orders that the appeal is allowed in part and that:

- the variance to Zoning By-law No. 6593 to permit a rear yard of a 1.2 m instead of the minimum required 5.17 m rear yard setback is not authorized.
- the variance to Zoning By-law No. 6593 to permit no landscaped area along the north and east lot lines, instead of the required 3 m wide landscaped area, is authorized.

"Anne Milchberg"

ANNE MILCHBERG
MEMBER

If there is an attachment referred to in this document
please visit www.elfto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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