# Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

**ISSUE DATE:** November 23, 2021 **CASE NO(S).:** OLT-21-001019

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

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|---|---|
| Appellant: | Charles Matthews |
| Applicant: | Gillian Francis |
| Subject: | Minor Variance |
| Variance from By-law No.: | Zoning By-Law 6593 |
| Property Address/Description: | 109 East 11th Street |
| Municipality: | City of Hamilton |
| Municipal File No.: | HM/A-21:07 |
| OLT Lead Case No.: | OLT-21-001019 |
| OLT Case No.: | OLT-21-001019 |
| OLT Case Name: | Matthews v. Hamilton (City) |

**Heard:** October 29, 2021 by video hearing ("VH")

**APPEARANCES:**

| **Parties** | **Counsel** |
|---|---|
| Charles Matthews ("Appellant") | Self-represented |
| Gillian Francis ("Applicant") | Balwinder S. Sran |
| City of Hamilton | Patrick MacDonald |

## DECISION DELIVERED BY K.R. ANDREWS AND ORDER OF THE TRIBUNAL

## BACKGROUND

[1] Gillian Francis ("Applicant") applied to the City of Hamilton ("City") Committee of Adjustment ("COA") for the authorization of a variance from section 19 of Zoning By-law No. 6593 (as amended) to permit the conversion of the existing single-family dwelling to contain two dwelling units at 109 East 11th Street, Hamilton, Ontario. The COA approved the request.

[2] The Applicant's neighbour, Charles Matthews ("Appellant"), appealed the COA's decision to this Tribunal.

## VARIANCES REQUESTED

[3] Section 19 of the subject By-law sets out provisions regarding "residential conversion requirements" to permit a second dwelling unit. All of the requirements must be satisfied to permit the conversion of the existing single-family dwelling to contain two dwelling units, or a variance must be authorized. The Applicant sought a variance with respect to two of these requirements.

[4] The variance was characterized as follows before the COA:

1. To permit the floor area of one dwelling unit to be at least 50.0 metres squared ("m²"), whereas 65.0 m² is the minimum floor area required for each dwelling unit; and

2. To permit the obstruction by another vehicle of the manoeuvring space and accessibility to the parking space located within the detached garage, whereas the By-law requires an unobstructed manoeuvring aisle having a minimum width of 6.0 metres ("m") and unobstructed access to the required parking space.

[5] Despite the COA's characterization of the variance being sought as two separate variances, the Tribunal finds that the requested variance is more properly characterized as two aspects of a single variance regarding section 19 of the subject By-law. This is important to distinguish because the Applicant cannot be permitted to undertake the proposed development without concurrently varying both aspects of the section 19. Therefore, more accurately, the requested variance being considered at this hearing is as follows:

1. To permit the floor area of one dwelling unit to be at least 50.0 m² and to permit the obstruction by another vehicle of the manoeuvring space and accessibility to the parking space located within the detached garage, whereas the By-law requires a minimum floor area 65.0 m² for each dwelling unit and an unobstructed manoeuvring aisle having a minimum width of 6.0 metres ("m") and unobstructed access to the required parking space.

**CONSOLIDATED REPORT OF CITY PLANNING STAFF AND AGREED FACTS**

[6] The City's Planning Department provided a report to the COA including the following recommendations:

1. Variance 1: although the proposed dwelling unit is 50.0 $m^2$ whereas the Zoning By-law requires 65 $m^2$, a kitchen, bathroom, bedroom and living room are provided, as well as an outdoor amenity area. The Ontario Building Code provides minimum room size requirements which is assessed through the Building Permit process. Staff supports the variance as the intent of the Official Plan and the Zoning By-law are maintained, it is desirable, and minor in nature.

2. Variance 2: a reduction in the minimum parking space size was not requested by the applicant, nor does it appear to be required based on the dimensions of the detached garage and the driveway. As a result, staff recommends that the variance be withdrawn.

[7] It is important to note that the parties were all in agreement that the planning staff's conclusions were wrong in relation to "Variance 2", insofar as this aspect of the requested variance is in fact necessary to permit the proposed development.

[8] Relatedly, the Parties agreed to the following facts:

- The distance between the side of the house and the property line, constituting the maximum possible width of a driveway, is 16 feet 7 inches (5.06 m);

- The existing driveway is narrower by 2 feet due to a flower garden planted along the length of the driveway beside the fence, making the current hard-surfaced driveway a total of 14 feet 7 inches (4.45 m) wide; and

- A concrete step coming out of the house encroaches on the driveway by another 15 inches (0.38 m), leaving 13 feet and 4 inches (4.06 m) wide of unobstructed driveway.

[9] The result of these agreed facts is that the second aspect of the variance is clearly necessary to satisfy the requirements of the subject by-law. This is true even if the Tribunal considered the matter while assuming the entire width between the house and the fence could serve as the required "manoeuvring aisle", which is supposed to have a minimum width of 6.0m.

[10] It is also noteworthy that the Tribunal asked the Applicant to confirm whether or not she had any evidence to submit to demonstrate that two cars could pass each other in the given space between the house and the fence (5.06 m), and she confirmed that she did not. In any event, the request before the Tribunal is to authorize a variance which includes an aspect to essentially excuse the Applicant altogether from the requirement to provide "unobstructed access to [parking]". It is on this basis, therefore, that the Tribunal must consider the matter.

**VALIDITY OF THE COA DECISION AND JURISDICTION OF THE TRIBUNAL**

[11] At the outset of the hearing, counsel for the City appeared and confirmed that his attendance was limited to addressing a potential issue respecting the validity of the COA decision.

[12] He explained that, at the time of the COA hearing, which was done remotely via a video hearing, members of the public (including the Appellant) who had registered to speak at the hearing were not heard by video due to technical issues at the City. This fact was confirmed by all of the parties. However, the parties also confirmed that all of the people who had registered to speak (including the Appellant) had previously provided written submissions outlining their issues.

[13] Council for the City further confirmed that, as a result of these technical issues, the COA rendered its decision without hearing oral submissions from the public, but did consider their written submissions received earlier.

[14] The City took no particular position regarding the potential impact that this fact might have on the hearing before the Tribunal, stating that it merely wished to draw the Tribunal's attention to the fact. The Tribunal asked the Applicant and the Appellant if they took any issue from this fact, and they confirmed that they did not and were content to proceed. Just the same, it is incumbent upon the Tribunal to satisfy itself that this fact does not create an issue of jurisdiction. The following analysis and decision was rendered at the time of the hearing.

[15] The relevant sections of the *Planning Act* regarding this issue, as raised by the City, are as follows:

> 45(6) The hearing of every application shall be held in public, and the committee shall hear the applicant and every other person who desires to be heard in favour of or against the application, and the committee may adjourn the hearing or reserve its decision. [emphasis added]
>
> 45(8) No decision of the committee on an application is valid unless it is concurred in by the majority of the members of the committee that heard the application. [emphasis added]

[16] The questions which arise from these sections are as follows:

1. Are written submissions sufficient to be “heard” pursuant to section 45(6)?

2. Does section 45(8) have the effect of invalidating a COA decision if “every other person who desires to be heard” is not “heard” pursuant to section 45(6)?

[17] In the present case, the Tribunal finds that the receipt and consideration of written submissions in advance of the COA’s decision is sufficient to be “heard” pursuant to section 45(6). The COA decision is therefore clearly valid, and there is no issue with respect to jurisdictions of the Tribunal. The Tribunal notes, at the same time, that the present hearing is a hearing *de novo*, and the Tribunal is therefore in a position to consider the matter and provide the relief requested in any event.

**ISSUES AND ANALYSIS**

[18] When considering a proposed variance, the Board must consider each of the four parts of the test set out in s. 45(1) of the Act:

1. Does the requested variance maintain the general intent and purpose of the official plan?

2. Does the requested variance maintain the general intent and purpose of the zoning by-law?

3. Is the requested variance desirable for the appropriate development or use of the land? and

4. Is the requested variance minor in nature?

All four elements must be satisfied.

**First aspect of the variance: minimum 50.0 m² versus 65.0 m²**

[19] Midway through the hearing, the Appellant confirmed that he took no issue with the first aspect of the requested variance; being to permit the floor area of one dwelling unit to be at least 50.0 m², whereas 65.0 m² is the minimum floor area required for each dwelling unit. The Appellant confirmed that his issues were all about parking concerns.

[20] According to the Consolidated Report prepared by the City, City staff supported this aspect of the requested variance, as it found that the intent of the Official Plan and the Zoning By-law are maintained, it is desirable, and it is minor in nature. The COA came to the same conclusion, noting that it was satisfied that "there will be no adverse impact on any of the neighbouring lands".

[21] The evidence provided by Mr. Matthews also supported this aspect of the requested variance. Mr. Matthews has lived on the subject street since 1993. He testified that many houses on the street feature extended families living in the same house. He testified that he believed five or six houses out of 27 seemingly feature a second dwelling (but he wasn't sure if these were "legal").

[22] The Tribunal sees no reason to interfere with this part of the COA decision, having provided due regard for the COA decision and staff report in accordance with section 2.1(1)(a) of the Act.

[23] However, as noted above, the Applicant must be successful with both aspects of the requested variance in order to be successful with her efforts to be permitted to convert her single detached home into two dwelling units, pursuant to the requirements of section 19 of the subject By-law.

**Second aspect of the variance: to be excused from providing unobstructed parking for both units**

[24] The second aspect of the requested variance has been characterized as follows:

> To permit the obstruction by another vehicle of the manoeuvring space and accessibility to the parking space located within the detached garage, whereas the By-law requires an unobstructed manoeuvring aisle having a minimum width of 6.0m and unobstructed access to the required parking space.

[25] The Tribunal notes that this is not merely a request to depart from the minimum 6.0 m width for an “unobstructed manoeuvring aisle”. Instead, the Appellant requests an exception altogether from a requirement to provide unobstructed access to the required parking.

[26] Given that the City determined that this variance was not required, the City did not provide a position on whether it supported or opposed the request. As a result, the City provided nothing for the Tribunal to consider in accordance with Act. The COA also provided nothing to consider in its brief reasons. It was not even apparent whether or not the COA considered the request necessary.

[27] It is the Applicant’s position that the requested variance satisfies all four parts of the test set out in section 45(1) of the Act. It was an uncontested fact that the driveway and garage can accommodate parking of multiple vehicles, but only in tandem without room to pass each other. The Appellant testified that future tenants could simply park in tandem in the single lane driveway, and it is not necessary to provide a maneuvering aisle to access the required parking spaces.

[28] When asked how she proposed to deal with the fact that the vehicle of one tenant would inevitably be blocked in by the vehicle of the other tenant, the Applicant proposed to deal with it contractually through the tenants’ respective leases. Her proposal essentially involves a contractual promise by each tenant to cooperate by moving their respective vehicles to let the other out.

[29] When asked how she intended to deal with any disputes that might arise from a failure to cooperate, the Applicant responded by positing that it could be dealt with by Ontario’s Landlord and Tenant Board. However, through her testimony on the subject, the Tribunal finds that she lacked an understanding of how that process might actually work.

[30] When asked how she intended to deal with either tenant parking on the street, if any dispute arose between them in relation to them sharing the driveway, the Applicant indicated that it would be an issue for by-law enforcement to deal with. It is noteworthy that the Applicant was unable to confirm any knowledge about parking restrictions on her street, but she speculated that it was probably around a three-hour maximum.

[31] The Applicant submitted that the allowance of a second dwelling in the house is a desirable use of the land to provide additional housing to satisfy a high demand and help maintain affordable housing in the area. She also posited that the request is minor and maintains the general intent of the OP and By-law.

[32] The Appellant took the opposite position, submitting that the requested variance does not satisfy the test set out in section 45(1) of the Act because it did not maintain the general intent and purpose of the zoning by-law, it was not desirable for the appropriate development or use of the land, and it was not minor in nature.

[33] The Appellant posited that disputes between the tenants are easily foreseeable, and the result is most likely going to involve at least one of the tenants parking on the street. He believed that this will lead to additional disputes between the tenants and area residents. He stated that the Applicant's plan is "not viable", and problems are "inevitable".

[34] The Appellant's position is that the by-law clearly contemplated the issue of parking and that is why the parking requirements are in place as a condition to permit the conversion of a single dwelling to two dwellings. He submitted that it is more than minor to eliminate this requirement altogether, it is not desirable for the appropriate development or use of the land because it introduces inevitable disputes, and it does not maintain the general intent of the by-law because it undermines the very purpose of the requirement to provide unobstructed on-site parking.

[35] It is noteworthy that the Appellant testified that the "average" house on the street has two to three cars, and all but two out of 27 houses feature single lane driveways

with parking in tandem. However, the Appellant also testified that most of these other properties feature a single family living in the same household, albeit sometimes being an extended family. When it was suggested to him by the Applicant that these households have seemingly managed to deal with multiple cars being parked in tandem, he took the position that it was different to expect cooperation between people within a single household, compared to cooperation between people living in two separate households.

[36] The Tribunal is persuaded to accept the Appellant's position and will not authorize the variance on account of the aspect pertaining to parking. The Tribunal agrees that it does not maintain the general intent of the by-law, it is not desirable for the appropriate development or use of the land, and it is not minor in nature – all for the same reasons posited by the Appellant.

[37] It is noteworthy that the Tribunal agrees with the Applicant's position insofar as it is desirable to provide additional housing in the area, and to contribute to affordable housing, but this does not justify granting the requested variance due to the issues pertaining to parking. The Tribunal finds that disputes between tenants are inevitable without unobstructed parking, and ongoing street-parking is the likeliest of results. This will inevitably cause further disputes with area residents. The Tribunal finds that the subject by-law was designed to avoid this very issue, so it is more than minor in nature and does not maintain the general intent of the by-law to altogether dispense with the requirement of providing unobstructed access to parking.

**ORDER**

[38] **THE TRIBUNAL ORDERS** that the appeal is allowed and the variance to Zoning By-law No. 6593 of the City of Hamilton is not authorized.

*"K.R. Andrews"*

K.R. ANDREWS
MEMBER