

ISSUE DATE:

March 27, 2014



PL140045

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 45 (12) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant:	William Connelly
Appellant:	R. Keith Tregunna
Applicant:	Durham Outlook for the Needy
Subject:	Minor variance
Variance from By-law No.:	60-94
Property Address/Description:	227 Simcoe Street South
Municipality:	City of Oshawa
Municipal File No.:	A-2013-62
OMB Case No.:	PL140045
OMB File No.:	PL140045

IN THE MATTER OF subsection 45(17) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Motion By:	Durham Outlook for the Needy
Purpose of Motion:	Request for an Order Dismissing the Appeal
Appellant:	William Connelly
Appellant:	R. Keith Tregunna
Subject:	Minor Variance
Property Address:	227 Simcoe Street South
Municipality:	City of Oshawa
Municipal File No.:	A-2013-62
OMB Case No.:	PL140045
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APPEARANCES:

Parties

Durham Outlook for the Needy

W. Connelly

R. K. Tregunna

Counsel

K. Mullin

DECISION DELIVERED BY C. CONTI AND ORDER OF THE BOARD

INTRODUCTION

[1] This is the Decision on a motion brought by Durham Outlook for the Needy (“Applicant”) seeking to dismiss appeals against the approval by the Committee of Adjustment of the City of Oshawa (“City”) of variances to Oshawa Zoning By-law No. 60-94 for a property at 227 Simcoe Street South to facilitate its use as a soup kitchen, office and retail store. The proposal involves the construction of a one-storey building on the subject property with associated parking area.

[2] The appeals were filed by three parties, William Connelly, Tregunna and Craig Sutherland. Prior to the start of the motion hearing, the Board was informed that Mr. Sutherland was withdrawing his appeal. Mr. Connelly and Mr. Tregunna were both self-represented. The Board understands that Mr. Connelly is Counsel, but does not practice in the area of municipal law. The hearing proceeded to consider the motion in the regard to of the appeals of Mr. Connelly and Mr. Tregunna (“Appellants”).

[3] The City did not appear at the hearing. However, the motion record included correspondence from the City indicating that it supported the Committee of Adjustment decision.

[4] At the beginning of the hearing, Mr. Connelly requested an adjournment of the motion, indicating that he did not have time to properly prepare because he received notice of the motion only two days prior to the hearing. The request for the adjournment was opposed by Ms. Kimberly Mullin who indicated that Mr. Connelly should have received the motion on March 3, 2014, which would have provided ten days’ notice in accordance with the Board’s Rules of Practice and Procedure (“Rules”).

[5] The Board refused the request for an adjournment noting that the Board’s Rules only allow last minute adjournments in cases of emergencies.

[6] The Applicant had filed a motion record in accordance with the Board’s Rules. The Appellants did not file a written response, but the Board allowed the motion to proceed based upon oral submissions by the Appellants.

GROUNDS FOR THE MOTION

[7] The grounds for the motion, as contained in the motion record and as provided in Ms. Mullin's oral submissions, can be summarized as follows:

1. The proposed uses of the subject property for an office, store and soup kitchen are permitted through the PSC-A (Planned Strip Commercial) zoning that applies to the property through City of Oshawa By-law No. 60-94.
2. The Oshawa Committee of Adjustment, after receiving comments from the public, approved four variances for the proposal: to reduce the minimum distance between a parking area and the street line, to provide a parking space in a corner sight triangle, to reduce the minimum number of parking spaces and to reduce the interior side yard setback of an accessory building. The approval was subject to a condition that the variance for the number of parking spaces applies only to a social service establishment.
3. The majority of reasons for appeal contained in the notices of appeal filed by the Appellants pertain to the proposed use of the property as a soup kitchen which is a permitted use in the By-law for the subject lands, is not a matter that is within the Board's jurisdiction to consider in the variance appeal and is not a ground upon which the Board could allow all or part of the appeal.
4. The Appellants raised issues about the variances for reduced parking requirements and the parking space in the sight triangle, but failed to provide technical rationale in support of their issues.
5. The Appellants raised an issue about the magnitude of the variance for parking requirements claiming that it is not minor, but the determination of the test if minor, is not a simple mathematical calculation.
6. The proposed parking is sufficient for the proposed use in light of the proximity of the site to transit and the experience of parking requirements at the current facility operated by the Applicant.
7. The Appellants have simply raised apprehensions rather than issues worthy of adjudication, which cannot be supported in view of the favourable expert

planning opinion provided by the City planner to the Committee of Adjustment when the application was approved.

8. The appeals do not address the four tests, whereas the opinion of the City's planner was that the four tests are met and the variances should be approved.
9. The Appellants have not disclosed any apparent land use planning grounds upon which the Board could allow all or part of the appeal, the appeals are frivolous and vexatious and intended only for the purpose of delay.

[8] The Applicant's motion was supported by an affidavit from David Stapleton, Principle Planner with the City, which the Board recognized as an expert planning opinion.

[9] Based upon the above, the Applicant contends that the appeals should be dismissed without a hearing.

RESPONSE TO THE MOTION

[10] The Appellants raised the following points during the hearing in response to the Applicant's motion.

1. The Appellants maintain that their appeals are not frivolous and vexatious and that the variances are not minor.
2. The Appellants contend that some matters raised in the Motion Record are evidentiary matters that need to be considered in the hearing on the appeals.
3. The Appellants contend that the sight triangle issue is a valid planning issue that could pose a safety concern for pedestrians.
4. The reduction in the number of parking spaces to less than 50% of the requirement in the By-law constitutes a major variance to the By-law.

[11] Mr. Tregunna requested that he be allowed to question Frank Lowe of Durham Outlook for the Needy who was in attendance. Ms. Mullin agreed to some limited

questioning of Mr. Lowe and the Board allowed it provided that the questions were specifically related to the variances and relevant to the motion.

[12] Through the questions and Mr. Lowe's responses, Mr. Tregunna raised concerns that "social services establishments" which he maintains are defined in s. 16 of the Zoning By-law (Exhibit 4) and is the provision that includes soup kitchens, are not specifically permitted in the zoning for the subject lands.

[13] The Appellants indicated that they intend to call expert engineering evidence at the hearing and intend to obtain Counsel.

[14] Based upon the above considerations, the Appellants contend that the appeals should not be dismissed and a hearing should be scheduled.

ANALYSIS AND FINDINGS

[15] The Board has considered the submissions of the parties including the authorities provided on behalf of the Applicant.

[16] The Board's authority to dismiss appeals of minor variance applications is provided by s. 45(17) of the *Planning Act* which states the following:

"Dismissal without hearing

(17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal,

(ii) the appeal is not made in good faith or is frivolous or vexatious,

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;

- (b) the appellant has not provided written reasons for the appeal;
- (c) the appellant has not paid the fee prescribed under the *Ontario Municipal Board Act*; or
- (d) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1994, c. 23, s. 26 (6); 2006, c. 23, s. 18 (4, 5).”

[17] The Applicant’s Motion contends that the Board should dismiss the appeals based upon s. 45(17)(a)(i), (ii) and (iii) as noted above. Ms. Mullin noted that the appeals could be dismissed if the Board finds that any one of these provisions is proven.

[18] In considering the motion, the Board wants to acknowledge, at the outset, the valuable function carried out by the Applicant in providing low cost meals to members of the community. Furthermore, after reviewing the submission, the Board agrees with the Applicant’s contention that many of the reasons for the appeals, as set out in the appeal notices, relate to the use of the land and issues that may be beyond the Board’s jurisdiction to consider at a hearing.

[19] However, the Appellants have raised issues in their respective appeals about the reduced corner sight triangle and the reduced parking requirements and the potential impacts of approving these variances on parking in the area and on foot and vehicle traffic. These are planning issues, as Ms. Mullin has acknowledged and they relate directly to the variances, rather than the proposed use. Therefore, the key determination for the Board in its decision on the motion, is whether these planning issues constitute any “apparent planning ground” upon which the Board could allow the appeal in whole or in part.

[20] Ms. Mullin raised a number of authorities in support of the Motion, including the Board Decision *East Beach Community Assoc. v. Toronto (City)* [1996] O.M.B.D. No. 1890 (“*East Beach*”) (Authorities, Tab 5). The conclusion of the *East Beach* decision which is supported by the other authorities provided by the Applicant and has been supported in the relevant jurisprudence through the years, is that notices of appeal must not simply “raise apprehensions” (Tab 5, paragraph 12), but must raise “triable issues to enable the hearing to proceed” and issues “worthy of the adjudicative process” (Tab 5,

paragraph 9). Ms. Mullin contends that if one examines the issues raised in the notices of appeal, the Appellants have simply raised apprehensions about the planning matters, have not provided any substance to support these issues and that the Appellants are actually most concerned about the proposed use of the property which is beyond the Board's jurisdiction to consider in an appeal of the variances.

[21] However, the Board also notes the caution in paragraph 9 of the *East Beach* decision that "the Board should not take away the rights of appeal whimsically, readily and without serious consideration of the circumstances in each case." The Board also notes that s. 45(17)(a)(i) requires consideration of whether the notices of appeal disclose an "apparent" planning ground upon which the appeal could be allowed. From the language of s. 45(17), the Board concludes that the planning ground must be substantive, but the use of the word "apparent" implies that the Board need not be absolutely certain that the issue has validity. The Board only needs to conclude that the notices of appeal have disclosed a substantive planning ground that may be determinative in the appeal for the appeal to move forward to a hearing.

[22] In this case, it is clear that planning issues have been raised and the variance for parking, in particular, calls for a large reduction in the requirement. While Ms. Mullin is correct in contending that when considering variances the test of "minor" is not a strict numerical determination, the test does require the consideration of the magnitude of the proposed change from the By-law's standards as well as impact of the variance. Furthermore, it is not clear from the submissions that it has been demonstrated that the proposal will not have a negative impact on parking in the area.

[23] After reviewing the submissions, the Board concludes that the concerns raised by the Appellants in the notices of appeal regarding the parking variance, in particular, qualify as apparent planning grounds upon which the appeal could be allowed in whole or in part. The evidence at a hearing could lead the Board to conclude that the parking variance is not appropriate or that more on-site parking should be provided.

[24] Therefore, from the submissions, the Board finds that the appeals disclose apparent planning grounds upon which the appeals could be allowed. The Board is making no determinations about the variances, the merits of any evidence that may come forward or the outcome of a hearing. The Board has reviewed the affidavit

evidence provided by Mr. Stapleton. However, based upon the submissions, the Board concludes that the variances must be considered in relation to full evidence brought forward at a hearing.

[25] Given the above findings that the reasons for appeal disclose apparent planning grounds, the Board also concludes that the appeals have been made in good faith and are not frivolous, vexatious or made only for the purposes of delay. The planning grounds must be tested in consideration of full evidence at a hearing. The Board accepts the Appellants' oral commitment that they intend to obtain Counsel and will be bringing forward appropriate evidence at a hearing, which should be scheduled as soon as possible.

[26] Based upon the above, the Board finds that the requirements for dismissing an appeal without a hearing have not been met in this case and that the appeals should move forward to a hearing.

ORDER

[27] The Board orders that the motion to dismiss the appeals is denied and a hearing should be scheduled for the appeals of Mr. Connelly and Mr. Tregunna. In this regard the parties should contact the Case Coordinator to obtain a date for the hearing which should be set as soon as possible.

"C. Conti"

C. CONTI
MEMBER