ISSUE DATE:

**Aug. 29, 2011**

PL100723

Ontario

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

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| Applicant and Appellant: | Carmela Serebryany-Harris |
| Subject: | Minor Variance |
| Variance from By-law No.: | 438-86 |
| Property Address/Description: | 212 Vesta Drive |
| Municipality: | City of Toronto |
| Municipal File No.: | A-0455/10TEY |
| OMB Case No.: | PL100723 |
| OMB File No.: | PL100723 |

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

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|---|---|
| Appellant: | City of Toronto |
| Applicant: | Carmela Serebryany-Harris |
| Subject: | Minor Variance |
| Variance from By-law No: | 438-86 & 1156-2010 |
| Property Address/Description: | 212 Vesta Drive |
| Municipality: | City of Toronto |
| Municipal File No.: | A-0795/10TEY |
| OMB Case No.: | PL101179 |
| OMB File No.: | PL101179 |

IN THE MATTER OF section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended

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| Request by: | Carmela Serebryany-Harris |
| Request for: | A review of the Board's Decision and Order issued on January 14, 2011 |

**A P P E A R A N C E S :**

| **Parties** | **Counsel** |
|---|---|
| Carmela Serebryany-Harris | Dennis Wood |
| City of Toronto | Brian Haley |

**DECISION DELIVERED BY J. de P. SEABORN AND ORDER OF THE BOARD**

**Introduction**

The matter before the Board is a motion by Carmela Serebryany-Harris (Applicant), pursuant to Section 43 of the *Ontario Municipal Board Act*, requesting a review of a decision issued on January 14, 2011. The Applicant seeks an order allowing the motion for review and a rehearing of the appeal. In its decision the Board authorized some, but not all, of the requested variances. The Applicant argues that this determination amounts to an error of fact and law such that a rehearing is warranted. The City opposes the relief sought and requests an order that the motion be dismissed, which would result in the Board's decision of January 14, 2011 remaining in effect.

**Facts**

The relevant facts for the purpose of the motion to review are as follows. The Applicant commenced construction of a new home at 212 Vesta Drive, in the City of Toronto, south of Eglinton Avenue West and east of Bathurst Street, close to Forest Hill Village. A series of variances from the applicable by-law provisions were required to complete the house in accordance with the preferred plans and applications were made to the Committee of Adjustment (Committee). Variances were requested from the provisions of both the governing zoning by-law, By-law 438-86 (By-law) and the City of Toronto's new zoning by-law, By-law 1156-2010 (new By-law). Although under appeal, following enactment of the new By-law the City's position was that to obtain a building permit, applications and decisions of the Committee (and where an appeal, the Board) must address variances under both by-laws.

Ultimately, seven (7) variances were appealed to the Board by the Applicant and the City arising from two separate decisions of the Committee. The appeals were consolidated and the Board had before it a request to authorize four (4) variances under By-law 438-86 and three (3) variances under the new By-law.

The variances required under By-law 438-86 related to floor space index (fsi), floor level of an integral garage, minimum side yard set back for the portion of the dwelling exceeding a depth of 17 metres, and the height of an uncovered platform above grade. The variances sought under the new By-law (which are no longer required) related to a proposed fsi, building length and main wall (rear) height. No

variance for height was sought or required under either by-law. The City's recent requirement that applicants seek authorization for variances under both by-laws complicated matters as the standards were expressed differently for certain variances (for example, building length) and, for other variances, the standards were simply different (for example, fsi).

In the decision issued January 14, 2011 the Board dismissed the Applicant's appeal of the decision of the Committee dated July 13, 2010. In that decision, the Committee did not authorize a variance to the provisions of By-law 438-86 in respect of fsi. With respect to the Committee's decision of August 18, 2010 the Board allowed the City's appeal, in part. In that decision, the Committee had authorized both a variance in respect of fsi (variance 1), and also authorized the remaining variances referred to as variances 2, 4, 5, and 7. The Board, however, dismissed the City's appeal of variances 3 and 6, "both of which relate to the maximum building length of the house, and authorizes those two variances" (Board Decision, January 14, 2011, p. 13). In summary, the effect of the Board decision was two-fold: first, to authorize an increase in building length for the house; and second, to dismiss the variances in respect of fsi, garage floor level, and height of the front porch.

Following issuance of the Board's decision, the Applicant sought and was issued a building permit for plans dated March 2011, revised to comply with the Board's decision dated January 14, 2011.

**Issue**

The issue for determination is whether the motion for review should be allowed and a rehearing ordered. Counsel agreed that if the motion is successful, the appropriate remedy in the circumstances is a rehearing of the appeal.

**Analysis and Application of the Law**

Section 43 of the *Ontario Municipal Board Act* provides that the "Board may rehear any application before deciding it or may review, rescind, change, alter or vary

any decision, approval or order made by it." The Board's Rules of Practice and Procedure (Rules) set out the procedure to be followed and the matters that are considered by the Chair when a review is sought. Rule 115.01 provides that:

> The Chair may exercise his/her discretion and grant a request and order either a rehearing of the proceeding or a motion to review the decision only if the Chair is satisfied that the request for review raises a convincing and compelling case that the Board:
>
> (a) acted outside its jurisdiction;
> (b) violated the rules of natural justice or procedural fairness, including those against bias;
> (c) made an error of law or fact such that the Board would likely have reached a different decision;
> (d) heard false or misleading evidence from a [party or witness, which was discovered only after the hearing and would have affected the result; or
> (e) should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

Pursuant to Rule 115.01 the Chair exercised discretion and ordered a motion to review the decision of the Board issued January 14, 2011. A rehearing of the proceeding should only be ordered if the request for review raises a convincing and compelling case with respect to one or more of the issues set out in Rule 115.01(a) to (e), inclusive. On this point, the Board rejects the submission that because the Chair has ordered a motion to review the decision, that a convincing and compelling case has been made in respect of one or more of tests and a rehearing should follow. Once a motion is ordered, the Board makes an independent decision on whether or not there should be a rehearing based on the submissions made at the motion hearing. To conclude otherwise, would negate the need for the motion hearing.

While several grounds were advanced in support of a rehearing, the primary argument was that under Rule 115.01(c), the request for review raises a convincing and compelling case that the Board made errors of law or fact such that it would likely have reached a different decision. The Board agrees, for several reasons.

First, given the Board's finding that the "building length has no significant impact, other than providing extra density up three floors" (Board Decision, p. 12), an error was made in failing to authorize a corresponding variance to permit additional fsi. On this point, the City argued that it is not "a natural implication" that the Board's decision to

authorize a building envelope is also an approval for extra density. However, it is clear that the decision is inconsistent on this point. The evidence was that the additional fsi was intended to be allocated internal to the house, without impact to the height and mass. The effect of the Board's decision is that a building envelope and height are authorized and a permit has been issued, yet areas internal to the dwelling cannot be completed in the absence of authorization for additional fsi. The inconsistency in the decision on this point should be the subject of a rehearing.

Second, the Board found that the "integral garage, the height of the rear wall at the back and the elevated front porch all contribute to the height of the building. It is the height as well as the mass of the dwelling that cause it to appear to tower over its neighbours and places it out of step with the general physical character of the neighbourhood" (Board Decision, p. 12). Yet, a comparison of the March 2011, plans for which a building permit has been issued without the variances (except length) show a dwelling that is substantially the same height and mass as the dwelling depicted in the August 2010, plans that were presented to the Committee. Those plans incorporated the variances for fsi, garage floor/slab, and porch and the variances were authorized by the Committee. Accordingly, the height (for which there is no variance, nor is one needed) and the mass of the house will be the same whether the variances for lowering the garage floor/slab and raising the porch are authorized.

Similarly, the additional fsi is requested to complete interior rooms and would, therefore, appear to have no impact on the neighbours. Simply put, based on the evidence filed on the motion, an increase in fsi coupled with incorporating the other two variances that were not authorized, would not appear to, in any material way, to affect the bulk, height or mass of the house. On this basis, an error of fact was made insofar as the Board relied on Ms Spears' opinion that "the house is taller than its neighbours not because of the density variance but because of the integral below grade garage and, to an extent, the variance to the height of the porch" (Board Decision, p. 7).

For these reasons, the Board is satisfied that the request for review raises a convincing and compelling case that an error of law or fact was made within the meaning of Rule 115.01 (c) such that the Board would likely have reached a different decision. It is not necessary to address the other grounds raised by the Applicant in

support of its request for a review, given Counsel agreed only one of the subsections need be satisfied to order a rehearing under Rule 115.01.

**Decision and Order**

The motion is granted. Pursuant to Rule 118, the Board Member or panel that conducts the review hearing is required to rehear the application as directed by the Board's decision arising from the motion to review. In this regard, a rehearing is directed of the part of the proceeding that relates to the minor variances requested from zoning by-law 438-86, as amended. The new City by-law has been repealed and the rehearing will only relate to the variances sought under the in force by-law. In accordance with Rule 115, it is within the discretion of the Chair to assign a Member or panel to conduct the rehearing. Counsel shall provide convenient dates and the Board will schedule the rehearing as soon as practicable.

This is the Order of the Board.

"J. de P. Seaborn"

J. de P. SEABORN
VICE-CHAIR