

ISSUE DATE:

**March 15, 2012**



PL100723  
PL101179

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

Applicant and Appellant: Carmela Serebryany-Harris  
Subject: Minor Variance  
Variance from by-law number: 436-86  
Property Address/Description: 212 Vesta Drive  
Municipality: City of Toronto  
Municipal File No.: A-0455/10TEY  
OMB Case No.: PL100723  
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IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: City of Toronto  
Applicant: Carmela Serebryany-Harris  
Subject: Minor Variance  
Variance from By-law Nos.: 438-86 & 1156-2010  
Property Address/Description: 212 Vesta Drive  
Municipality: City of Toronto  
Municipal File No.: A-0795/10TEY  
OMB Case No.: PL101179  
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IN THE MATTER OF section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended

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

**APPEARANCES:**

**Parties**

City of Toronto

Carmella Serebryany-Harris

Y. Birenzweg, D. Wagman and D. Bank

**Counsel**

B. Haley

D. Wood

D. Bronskill

**DECISION DELIVERED BY C. HEFFERON AND H. GOLDKIND AND  
ORDER OF THE BOARD**

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**Background**

Carmela Serebryany-Harris (“applicant”) owns a property at 212 Vesta Drive in the south part of the Forest Hill neighbourhood of Toronto. Sometime in early fall of 2009, an older home that was on the site was demolished and construction on the new home began. To accommodate construction of the new, considerably larger home, the applicant applied to the City of Toronto Committee of Adjustment (“Committee”) for seven minor variances from the provisions of Zoning By-law 438-86 (“By-law”).

On August 18, 2010, the Committee refused the requested minor variances. The applicant subsequently appealed that decision to the Ontario Municipal Board (“Board”).

In a decision issued on January 14, 2011, a differently constituted panel of the Board allowed the appeal in part. That Board authorized a minor variance to the sideyard setback and building depth provisions of the By-law but did not allow the (five) other minor variances requested.

Pursuant to section 43 of the *Ontario Municipal Board Act* (“OMBA”), the applicant requested a review of that January 14, 2011 decision. As a result of that review, an Order issued August 29, 2011 directed that the matter should be re-heard by a different panel of the Board.

The subject proceeding is the re-hearing of the matter. Pursuant to the provisions of the *OMBA*, the subject proceeding is conducted *de novo*, which is to say that it is conducted as if this were the first time the matter had come before the Board. The two minor variances that had earlier been authorized are therefore rescinded.

**Nature of the Subject Proceeding**

The applicant seeks the Board's authorization for four minor variances from the provisions of the By-law respecting a partially-constructed dwelling known as 212 Vesta Drive (“subject property”). The applicant appeals the refusal of the Committee to

authorize the requested minor variances. The minor variances before this panel of the Board have been amended from those previously before the Committee and have been reduced in both number and size.

The applicant and the other parties have agreed that the other parties would not oppose the applicant's appeal, nor would they support it. The other parties offered no evidence and did not contest the evidence of the applicant's witnesses.

All of the parties agreed that the amendments to the variances from the provisions of the By-law are minor and would not require re-circulation pursuant to subsection 45(18.1) of the *Planning Act*. After consideration of the submissions of counsel on this question, the Board finds that these amendments are minor and orders that service of notice of such amendments is dispensed with in accordance with subsection 45 (18.1) of the *Planning Act*.

### **Matter Before the Board**

At this hearing, four minor variances from the provisions of the By-law are requested. These are needed for the purpose of bringing the existing structure into substantial compliance with the relevant performance standards set out in the By-law:

1. To permit an integral garage with a floor level of the garage located below grade, whereas section 6(3) Part IV 3(ii) of the By-law sets out that the floor level of an integral garage shall not be below grade;
2. To permit a front uncovered platform (porch) with a height of 1.594 metres above grade whereas section 6(3) Part II 8 D of the By-law sets out that the maximum height of a platform shall not exceed 1.2 metres above grade;
3. To permit sideyard setbacks of 0.63 metre and 0.61 metre for the rear 3.13 metres of the building that extends beyond 17.0 metres, inclusive of 0.42 metre of the residence, 2.45 metres for the attached deck and 0.26 metre representing the distance the main building is set back from the required front yard setback, whereas section 6(3) Part II 3 B (ii) of the By-

law sets out a minimum sideyard setback of 7.5 metres for that portion of a building extending beyond 17.0 metres in length;

4. To permit a residential gross floor area of 0.79 times the lot area in place of the 0.6 times the lot area permitted by section 6(3) Part II of the By-law.

### **Legal Context**

The relevant provisions of the *Planning Act* are found in subsection 45(1). Subsection 45(1) gives the Board power to authorize a minor variance from the provisions of a zoning by-law provided certain criteria are satisfied. These criteria are known as the four tests.

### **Evidence and Findings**

The Board granted participant status to two neighbourhood residents; Ms Spring and Mr. Isenberg. Neither participant retained either legal counsel or expert witnesses. Mr. Isenberg supported the application; Ms Spring opposed it. Ms P. Kazman, who was not a participant but who also resides in the neighbourhood, expressed her opposition to the requested minor variances. A number of letters signed by residents of the area were filed both in opposition and in support of the requested minor variances. The letters are found in Exhibits 6 (oppose) and 14 (support).

Two witnesses were presented by the applicant: Mr. B. Clarkson was qualified by the Board to provide opinion evidence on land use planning; Mr. H. Kohn was qualified to provide opinion evidence on architecture.

Mr. Clarkson testified the subject property is in an area designated "Neighbourhoods" in the City of Toronto's Official Plan (OP). Section 4.1 of the OP sets out that development in areas designed "Neighbourhoods" will respect and reinforce the existing physical character of that neighbourhood.

The first requested minor variance from the provisions of the By-law concerns the proposed below grade garage. Exhibit 11, Figure 3 shows a number of dwellings in the area that have received planning permission for below grade garages. Below grade garage floors are typically associated with reverse slope driveways, which have

demonstrated a propensity to cause upstream basement flooding. They are prohibited by the By-law.

Although the applicant proposes a below grade garage floor, the architect's drawing (Exhibit 8b) shows that the driveway itself will have a positive slope. Mr. Kohn stated that there is no danger of upstream basement flooding since the driveway slopes away from the dwelling. This directs any storm water out onto the street. After consideration of the uncontested evidence of Messrs. Clarkson and Kohn, the Board finds that the proposed below grade garage conforms to the general intent and purpose of the By-law and the OP.

The second minor variance pertains to gross floor area. The proposed gross floor area of the dwelling results in a floor space index (FSI) of 0.79 times the area of the lot, whereas the prescribed FSI in the By-law is 0.60. Mr. Clarkson explained that the general intent and purpose of both the By-law and the OP is to ensure that new development does not offend the existing physical character of the area. The Board heard uncontested opinion evidence from Mr. Clarkson that equal or greater FSIs are found in a significant number of the new homes in this neighbourhood.

In the recent past, for example, 214 Vesta Drive, which is next door to the subject property, was granted a minor variance to permit an FSI of 0.86. Exhibit 11, Figure 6 shows the dwellings in the area that in the recent past have received planning permission for similar variances. After consideration of all the evidence on this matter, the Board finds the requested minor variance from the FSI provisions of the By-law conforms to the general intent and purpose of the OP as well as the By-law.

The third minor variance concerns the prescribed sideyard setbacks from the rear 3.13 metres of the applicant's dwelling – the portion that extends beyond the prescribed 17.0 metres maximum building depth. The applicant requests a 0.61 metre setback from the north lot line and a 0.66 metre setback from the south lot line. The By-law requires a 7.5 metre setback from both side yard property (lot) lines for that portion of the structure that exceeds 17.0 metres in depth. The portion of the building that exceeds 17.0 metres in depth, that is, the 3.13 metres in question, mainly comprises the rear deck.

Mr. Kohl testified that the 3.13 metre section has three discrete components: the first is a 2.45 metre rear deck; the second is a 0.42 metre extension of the main part of the house beyond the prescribed 17.0 metre depth; and the third is the extra 0.26 metre that the front wall of the house is set back from the front lot line beyond what is required in the By-law. The Board was assured by both expert witnesses that this last component resulted from a mistake in measurement made by the building contractor. This was not contested.

Mr. Clarkson pointed out that a raised rear deck is typical in the subject neighbourhood. Exhibit 11, Figure 5 shows a large number of dwellings in the area have received planning permission for this particular variance from the standard established in the By-law. After consideration of the evidence, the Board finds the requested setbacks of the subject property from the four lot lines are consistent with sideyard setbacks found throughout the neighbourhood and conform to the general intent and purpose of both the By-law and the OP.

The proposed variance for the uncovered front porch of the subject property is for a height of 1.594 metres above grade, whereas the By-law provides for a maximum height of 1.2 metres above grade. Mr. Kohl testified that an uncovered front porch that is at least 1.594 metres above grade is similar to the height of a number of other front porches interspersed throughout this neighbourhood (Exhibit 11, Figure 4). The Board concurs with the uncontested evidence of the architect Mr. Kohn and finds that the increased height (approximately 14 inches) beyond what is prescribed in the By-law is imperceptible from the street and will have no adverse impact on surrounding properties. After consideration of the evidence, the Board finds that the requested minor variance conforms to the general intent and purpose of both the By-law and the OP.

Neighbourhood concerns about the dwelling itself appear to centre on its size and in particular, its height. However, the height of the subject building is less than the 11 metres permitted by the By-law. Further, it is clear from the evidence of Mr. Kohn that the subject property has no significant incremental adverse impact on surrounding properties with respect to shadowing (Exhibits 8(g) – 8(m)). Common throughout the neighbourhood is an abundance of mature landscaping, which in Mr. Clarkson's opinion, provides a sense of privacy and helps prevent overlook from property to

property. The Board concurs with Mr. Clarkson's opinion evidence and finds that the subject building has no adverse shadowing or privacy impact on surrounding properties.

Pointing to Exhibit 12, which is a book of photographs of properties in the area of the applicant property, Mr. Clarkson testified that this part of Forest Hill is a neighbourhood with considerable variety in housing style, building height and scale, building materials and lot size. In his opinion, the requested minor variances do not result in a building that is out of character with other buildings in the area and so conforms to the general intent and purpose of both the OP and the By-law. The Board relies on this evidence and concurs with this opinion.

After consideration of the uncontested opinion evidence of Mr. Clarkson, the Board finds that the proposed variances as amended cumulatively and singularly maintain the general intent and purpose of both the OP and the By-law.

The By-law contains numerical standards for such matters as height, density, lot size, lot depth, and other matters to ensure that new development will be compatible with the existing physical character of the neighbourhood. There are new homes to the immediate north and south of the applicant property and there are new homes to the rear of this property. The Board heard uncontested evidence that this part of the Forest Hill neighbourhood (indeed much of Forest Hill) has for many years been undergoing reinvestment and revitalization in the form of both renovation and entirely new construction. Mr. Clarkson testified that this helps to guarantee the neighbourhood's future stability and reinforces its existing character. After consideration of this evidence, the Board finds that the re-development of the subject property is consistent with the type of reinvestment and revitalization that has long been going on in this neighbourhood, and is desirable for the appropriate development of the property.

The Board relies on Mr. Kohn's evidence and finds that the variances from the as-of-right structure are visually imperceptible from the street and will have no negative impact on either the adjacent properties or the neighbourhood as a whole. After consideration of the uncontested expert testimony, the Board finds that the requested variances both cumulatively and individually are minor.

## **General Finding**

The Board is satisfied that the proposed variances, as amended from the original application, satisfy the four tests under subsection 45(1) of the *Planning Act*. After consideration of all the evidence, the Board also finds that the requested minor variances do not offend Provincial Policy and represent good planning.

## **Disposition**

The Board Orders the applicant's appeal from the August 18, 2011 decision of the Committee of Adjustment is allowed. The Board Orders that the requested variances are authorized in the form set out below:

1. The new dwelling will have a gross floor area equal to 0.79 times the area of the lot, which is 381.72 square metres;
2. The proposed integral garage is below grade and vehicle access to the garage is located in a wall facing the lot line;
3. The proposed deck (front porch) will be a maximum of 1.594 metres above grade; and
4. The rear 3.13 metres of the dwelling including a deck exceeding a depth of 17.0 metres will be located 0.66 metres from the south lot line (the deck will be located 3.4 metres from the south lot line) and 0.61 metres from the north lot line.

So Orders the Board.

"C. Hefferon"

C. HEFFERON  
MEMBER

"H. Goldkind"

H. GOLDKIND  
MEMBER