

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JUSTICES MATLOW, JARVIS, MOLLOY

B E T W E E N:)
))
KITSON VINCENT) N. Jane Pepino, for the Appellant
Appellant))
- and -))
))
FREDDY and WENDY DEGASPERIS) A. Brown and L. Richetti, for the
) Respondents
Respondents))
AND BETWEEN:))
))
THE ROSEDALE GOLF ASSOCIATION) Chris Paliare, for the Appellant
LIMITED))
Appellant))
- and -))
))
FREDDY DEGASPERIS JR. and) A. Brown and L. Richetti, for the
WENDY DEGASPERIS) Respondents
Respondents))
- and -))
))
ONTARIO MUNICIPAL BOARD) M. Michaels, for the Intervenor, Ontario
Intervenor) Municipal Board
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- and -))
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CITY OF TORONTO) Andrew Weretelnyk, for the Intervenor,
Intervenor) City of Toronto
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) **HEARD:** February 21, 2005

MATLOW J.

REASONS FOR JUDGMENT

[1] Both of these appeals are allowed. The order of the Ontario Municipal Board is set aside and the appeal by the DeGasperis' before the Board is remitted to the Board to be heard by a different panel in accordance with these reasons. If the parties cannot agree on the disposition of costs, written submissions regarding costs may be exchanged and submitted by counsel in triplicate. The submissions by parties claiming costs are to be submitted within one month and all submissions in response are to be delivered within two weeks thereafter.

[2] The appeals are brought pursuant to section 96 (1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 ("the OMB Act") which provides for an appeal from an order of the Board to this Court, with leave, on a question of law. Leave was granted by Cunningham, A.C.J.S.C. whose reasons are reported at [2004] O.J. No. 1153. Both appeals were heard together on the consent of all of the parties and the intervenors.

[3] The order in appeal was an order made by the Board allowing, in part, an appeal by the "DeGasperis'", from a decision of the Committee of Adjustment of the City of Toronto which had dismissed their application for certain minor variances from the zoning by-law applicable to their property at 35 Green Valley Road.

[4] The DeGasperis' initial application is described at the outset of the Board's reasons as follows;

Green Valley Road is located in the City of Toronto (formerly the City of North York) along which are large lots with substantial homes. The property at No. 35 is one such lot and dwelling. The area is a mature enclave of prestige structures. The applicants, (Mr. F. and Mrs. W. DeGasperis, Jr.) propose to demolish the existing structure and to replace it with a larger, modern, home. Minor variances to the Zoning By-law provisions were sought from the Committee of Adjustment as follows:

1. north side yard setback of 1.22 metres to the proposed dwelling whereas 1.8 metres is required;
2. length of dwelling to the rear (living space portion) of 21.3 metres, and length of dwelling to the rear of the proposed covered patio and open terrace above of 26.9 metres whereas 16.8 metres is permitted;
3. dwelling height of 10.63 metres whereas 8.0 metres for a flat roof is permitted; and
4. front balcony area of 23.5 square metres and rear balcony area of 81.47 square metres (revised from 110.6 on appeal – the Board accepts the amendment to the application is minor and no further notice is required,

invoking Section 45 (18.1) and 45 (18.1.1) of the Planning Act) whereas 3.8 square metres is permitted for each balcony.

[5] By its order, the Board upheld the Committee of Adjustment's decision with respect to the first of these variances sought. However, with respect to the remaining three, the appeal was allowed and the variances sought were granted.

[6] Various issues arise in this appeal regarding the interpretation and application of section 45 (1) of the *Planning Act*, R.S.O. 1990, c. P.13 ("the Act") which confers jurisdiction on committees of adjustment to grant minor variances. It reads as follows:

45 (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

[7] The issues raised by the appellants on which leave to appeal was granted are set out in the reasons of the Associate Chief Justice as follows:

The moving parties raise four issues which they say demonstrate how the OMB erred in law. These issues are as follows:

1. That the OMB erred in law by subsuming three of the four tests under ss. 45(1) of the Planning Act to the sole question of impact, thereby failing to properly address three of the four tests under that section.
2. That the Board erred in law in rejecting previous decisions of the OMB that a minor variance is a "special privilege" and that applicants must be able to demonstrate why they could not adhere to the by-law. By taking the position it did, the moving parties say the OMB erred in law by holding that the respondents herein were not required to demonstrate any need for the minor variance in order to satisfy one or more of the prescribed tests.
3. That the Board manifestly misapprehended the evidence and thereby erred in law by holding that the length of the "habitable" portion of the proposed new dwelling was within the requirements of the by-law. Further, that the OMB erred in law by holding that

the height limit set out in the by-law was merely a "technical" requirement such that a variance ought to be granted.

4. That the OMB erred in law by taking into account and relying upon an irrelevant consideration when it concluded that no impact would result from an illegal and unenforceable condition as related to the rear balcony.

[8] To the extent that I am persuaded that these issues raise questions of law, I will now address them in roughly the same order, commencing with my analysis of the four tests established by section 45 (1) of the *Act*. I will first deal with the applicable law and then review the proceeding before the Board.

[9] An application for a minor variance must meet what is often referred to as the four part test mandated by the *Act*. To satisfy the requirements of the test a variance must:

1. be a minor variance;
2. be desirable, in the opinion of the committee, for the appropriate development or use of the land, building or structure;
3. maintain, in the opinion of the committee, the general intent and purpose of the zoning by-law; and
4. maintain, in the opinion of the committee, the general intent and purpose of the official plan.

[10] These tests can, and therefore must, be interpreted in accordance with the adequately clear and ambiguous language used in section 45 (1) of the *Act*.

[11] It is incumbent on a committee of adjustment, or the Board in the event of an appeal, to consider each of these requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before any application for a variance is granted, it satisfied all of the requirements.

[12] A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor

even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties.

[13] Accordingly, in my view the Board was required, at the outset, to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.

[14] The second test requires the committee to consider and reach an opinion on the desirability of the variance sought for the appropriate development or use of the land, building or structure. This includes a consideration of the many factors that can affect the broad public interest as it relates to the development or use.

[15] Accordingly, in my view the Board was required to consider each variance sought and reach an opinion as to whether or not it, either alone or together with the other variances sought, was desirable for the appropriate use of the subject property. The issue was not whether the variance was desirable from the perspective of the DeGasperis' plans for their home but, rather, whether it was desirable from a planning and public interest point of view.

[16] The third test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the zoning by-law.

[17] Accordingly, in my view the Board was required to engage in an analysis of the zoning by-law to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.

[18] The fourth test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the official plan.

[19] Accordingly, in my view the Board was required to engage in an analysis of the official plan to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.

[20] I pause here to observe that the proper performance of this prescribed four-step exercise will rarely be simple. It requires, without exception, a careful and detailed analysis of each application to the extent necessary to determine if each variance sought satisfies the requirements of each of the four tests.

[21] I turn now to the reasons given by the Board and my analysis of how the Board interpreted and applied the four statutory tests.

[22] In its reasons the Board expressed its view that obtaining a minor variance is not a "special privilege", a view contrary to a number of earlier decisions of the Board. In those decisions such as *Assaraf v. City of Toronto Committee of Adjustment* (1994), 31 O.M.B.R. 257, the Board had held that a minor variance is a "special privilege" and will not be granted in the

absence of need or hardship. The Board in this case rejected that view, stating at page 3 as follows:

A minor variance is not a “special privilege” that requires the applicant to justify the relief sought on the basis of need or hardship. The Planning Act authorizes variances to the Zoning By-law if four “tests” are met. Section 45 (1) does not create yet a fifth test of need or a sixth test of hardship. Provided the applicant can satisfy Section 45 (1), the application ought to be authorized if proper planning for the site will result, always mindful of what is in the public interest. It can be said an application is “needed” in every case involving a variance – otherwise the application would be redundant if the proposal adhered to the zoning by-law performance standards. To require proof of hardship is to import words and a test which do not exist upon a reasonable interpretation of Section 45 (1). One can think of a multitude of situations where no hardship is evident but where the application has merit and meets Section 45 (1). Are those applications to be arbitrarily denied? Provided the statutory criteria are applied and the application withstands the scrutiny of acceptable planning practice, then additional, unsanctioned, hurdles will not be imposed by the Board to evaluate minor variance requests.

[23] I agree with the Board’s analysis and interpretation of the law as to whether the obtaining a minor variance is a special privilege. However, in addition to what the Board stated I would add that the inclusion of the word “may” in section 45 (1) indicates that the jurisdiction given to a committee of adjustment to grant minor variances is permissive and confers on it a residual discretion as to whether or not grant them even when the four tests are satisfied. In exercising its discretion, a committee is entitled to take into account anything that reasonably bears on whether or not an application should be granted and, in my view, need and hardship are factors that, in appropriate cases, can properly be taken into account. However, even when these factors are taken into account and an application for a minor variance is granted, that does not transform the granting of the minor variance into a special privilege.

[24] I turn next to how the Board applied the four tests to the minor variances sought. With respect to variances #2, 3 and 4, there is nothing in the Board’s reasons that indicates that the Board considered whether those variances were patently too large to qualify as minor. The only factor addressed in the Board’s reasons appears to be the likely impact of the variances. It follows, therefore, that the Board’s consideration of this test was inadequate.

[25] The Board’s application of the remaining three tests can be dealt together. In brief, I am persuaded that the Board’s reasons, taken in their entirety, reveal that the Board failed to interpret and apply these tests correctly. In some instances, the Board erred in its interpretation of the tests; in others it failed to consider matters that were essential to their correct application. Throughout the Board’s reasons, there are references to the evidence of witnesses whose evidence the Board accepted but those references do not state what the evidence was and why it

was preferred over other evidence. Throughout the Board's reasons the focus is on the likely impact of the variances sought with no or little regard for anything else. Of equal importance is the omission of any analysis by the Board of the general intent and purpose of the by-law and the official plan and how the granting of the minor variances sought would maintain those intents and purposes.

[26] Examples of some of the inadequacies of the Board's interpretation and application of these tests can be seen in the following excerpts.

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Collectively and individually, the other variances [My note: this refers to the variances other than variance #1] meet the general intent and purpose of the Official Plan. The site is designated Residential Density One (RD-1). The new development will be compatible with the existing area in terms of scale, function and physical character. The evidence presented by the applicants' planner pertaining to the Official Plan, and the opinion regarding intent and purpose, are preferred and accepted by the Board.

The Board accepts the evidence of the applicants' planner that the general purpose and intent of the Zoning By-law will be maintained for the length and height variances.

There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive. The second test requires consideration of "desirability" and not "compatibility". There is no analysis of either the zoning by-law or the official plan or how their respective intents and purposes are maintained. The evidence of the planner pertaining to the official plan is not specified and, because no transcript of the hearing is available, there is no way of determining what that evidence was. Nor are there any details given of the apparently contrary evidence given and why the Board preferred that of the applicants' planner.

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The Board prefers the evidence of the applicants' planner that the four tests in Section 45 (1) are met for the height and length relief.

This repeats the same error described above.

The remaining request for relief deals with the balconies, both at the front and the rear of the dwelling. There is no issue in the Board's view, the intent of the Official Plan is maintained – balconies are integral to residential structures. The real issue is the size of the balconies and the intent of the Zoning by-law. Balconies, be they functional or decorative, are limited to 3.8 square metres in area. The proposed balconies exceed the limit. But the Board must consider the impact. The front balcony is

located on the south side of the dwelling, away from the Ginsler property and adjacent to the service area of the Golf Club. No one is adversely impacted by the front balcony. It will not create a precedent for the area given the location and context. The Board accepts the applicant's planning evidence the four tests are met for the front balcony.

This repeats many of the same errors described above. The focus is on impact. There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive.

The rear balcony is large but it is intended only for the personal use of the occupants of the dwelling. The spectre of party revelers using the balcony to disrupt the neighbouring property uses was tempered by the offer of the applicants, through their counsel, to physically screen and eliminate access to the majority of the balcony and to turn most of it into a decorative feature of the home. About 32 square metres would be allocated to use by the applicants. Counsel for the objectors question the enforceability of such a restriction or condition. However, the Board is satisfied if the rear balcony is restricted physically as proposed by the applicants, enforceability should not be a problem. Any issue of overview to the neighbouring properties will also be eliminated. No adverse impacts will result. The four tests in Section 45 (1) will be met if the useable area of the rear balcony is confined.

This too repeats many of the same errors described above. The focus is on impact. There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive. Despite section 45 (9) of the Act, the restriction imposed requiring screening of the balcony and use of only "about 32 square metres" is beyond the scope of the Board's authority. The use that can be made of a balcony does not change the fact that the balcony still remains a balcony. As well, the notion that the restricted use of the balcony could or would be effectively enforced is unreasonable.

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In conclusion, the Board accepts and prefers the evidence of the applicants' planner that the variances for length, height and balconies meet the general purpose and intent of the Official Plan, meet the general intent and purpose of the Zoning By-law, that they are desirable for the appropriate development of the land and that they are minor, subject to the condition noted and subject to filing revised plans.

This too repeats many of the same errors described above. There is nothing here which satisfies the requirements set out above in paragraph 11. It is not sufficient for the Board to use template

catchwords that refer to the four tests in order to show that it properly considered and applied those tests.

[27] Accordingly, on my reading of the entirety of the Board's reasons, I am persuaded that the Board committed numerous errors in its interpretation and application of the four tests. The consequence of those errors must, however, be determined only after consideration of the proper standard of review that is applicable, namely, correctness or reasonableness.

[28] Counsel did not refer us to any cases in which the standard of review was addressed in appeals from decisions of the Board involving applications for minor variances, nor could I find any. Nevertheless, I am satisfied that there is now sufficient guidance from the Court of Appeal and, as well, from this Court to require us to hold that the standard to be applied is that of reasonableness.

[29] The most recent guidance from the Court of Appeal can be found in *Mississauga (City) v. Erin Mills Corp.*, 71 O.R. (3d) 397 [2004] O.J. No. 2690. The relevant portion of the judgment in which the related but different issue before the Court is described and the issue of standard of review is addressed is found in the following excerpt from the reasons for judgment of Goudge, J.A.:

[33] The Board's fundamental task in each case was to determine the test to be used to decide if there was "a conflict" between the various subdivision agreements and the relevant development charge by-law. In other words, what meaning should be given to that term in s. 17(2)? Having settled on a definition of conflict, the Board's task was to go on to apply it to each instance where the developer alleged that a conflict existed.

[34] In my view, the Board's interpretation of "conflict" in s. 17(2) is properly reviewed using a standard of correctness. The considerations relevant to the pragmatic and functional approach to determining the proper standard of review all point in this direction. Those considerations are well known: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193.

[35] There is no privative clause protecting the Board's decisions when they come before the Divisional Court on appeal with leave pursuant to s. 96(1) of the Ontario Municipal Board Act. This suggests a less differential standard of review.

[36] The appeal to the Divisional Court can only be on a question of law. Thus, what is reviewed by the court is a finding of law, not one of fact. In this case the legal question is the interpretation to be given to the term "conflict" in a regulation to the 1997 DCA. This is not the Board's home statute nor is there any other reason to presume that the Board has unique experience in interpreting it. Neither is it apparent that the Board's general expertise in matters of planning and land use is engaged in defining this term. The Board would seem to have no

greater expertise than the court in giving meaning to the concept of "conflict" between a contract and a by-law. This points to closer scrutiny of the Board's decision.

[30] In the case at bar, however, the *Act* is the Board's home statute and there is good reason to presume that the Board does have "unique experience in interpreting it" in relation to the provisions dealing with minor variances. In *London (City of) v. Ayerswood Development Corp.*,

[2002] O.J. No. 4859 (C.A.), the Court of Appeal held that a reasonableness standard should be applied to decisions in which the OMB is interpreting its own statute. A similar analysis was made and the same conclusion reached by this Court in *Eastpine Kennedy-Steeles Ltd. v. Markham (Town)* O.J. No. 644, a case involving another provision of the *Act*. Accordingly, I conclude that reasonableness is the standard of review that must be applied here.

[31] In the circumstances of this case, I am persuaded that the Board's Reasons cannot withstand the somewhat probing examination involved in the reasonableness test. The errors of the Board are so serious and extensive that they fail to meet the standard of reasonableness.

Matlow J.

Jarvis J.

Molloy J.

Released: , 2005

COURT FILE NO.: Toronto 775/03 & 777/03
DATE: 20050708

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

MATLOW JARVIS MOLLOY, JJ.

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- and -

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REASONS FOR JUDGMENT

MATLOW J.

Released: July 8, 2005