Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: May 30, 2014 **CASE NO.:** PL131366

Applicant and Appellant:	Elia Nabil Mazzawi & Negar Bahardoust
Subject:	Minor Variance
Legislative Authority:	Subsection 45(12) of the *Planning Act,* R.S.O. 1990, c. P.13, as amended
Variance from By-law No.:	569-2013 & 438-86
Property Address/Description:	129 Baldwin Street
Municipality:	City of Toronto
Municipal File No.:	A0836/13TEY
OMB Case No.:	PL131366
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APPEARANCES:

Parties	**Counsel**
Elia Mazzawai and Negar Bahardoust	P. Herrington
City of Toronto	G. A. McKay

HEARING EVENT INFORMATION:

Hearing:	Held in Toronto, Ontario on February 24, 2014

DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD

[1] Elia Mazzawai and Negar Bahardoust ("Applicant/Appellants") applied for the following minor variances for a semi-detached house at 129 Baldwin Avenue ("subject property") in the City of Toronto ("City"):

1. **Chapter 10.10.40.10.2(a), By-law 569-2013**

   The maximum permitted height of all rear exterior main walls is 7.0 metres.

   The height of the rear exterior main walls is 9.01 metres.

2. **Chapter 10.10.40.30.1 (A), By-law 569-2013**

   The maximum permitted building depth for a semi-detached house is 17.0 metres.

   The building depth is 24.97 metres (measured from the average front yard setback to the rear wall).

3. **Section 6(2) 1 (iii), By-law 438-86**

   The maximum permitted residential gross floor area increase for a converted house is 0.15 times the area of the lot (41.3 square metres).

   The converted semi-detached dwelling will have a residential gross floor area increase of 0.39 times the area of the lot (107.83 square metres).

4. **Section 6(2) 1 (iii), By-law 438-86**

   One addition is permitted.

   In this case, more than one addition will be constructed.

5. **Section 6(3) Part II 5 (II), By-law 438-86**

   The maximum permitted building depth of a semi-detached dwelling is 17.0 metres.

   The building depth is 24.97 metres (measured from the average front yard setback to the rear wall).

[2] The Committee of Adjustment ("COA") denied the application and the Applicant/Appellants appealed to the Board pursuant to s. 45(12) of the *Planning Act* ("Act").

HEARING

[3] Paul Stagl gave expert land use planning evidence and opinion on behalf of the

Applicants/Appellants. The City called no planning evidence.

[4] The following neighbourhood residents were Participants in the hearing, all in opposition to the application:

- Corrinna Mah
- Ming Wong
- Nick Schefter
- Max Allen
- Ronald Ho

SUBJECT PROPERTY

[5] The subject property is located on the south side of Baldwin Street, east of Spadina Avenue. It is zoned “R” (Residential) in both the former City of Toronto By-law 438-86 and the new harmonized By-law 569-2013. The purpose of the zoning by-law is to maintain a stable built form and to limit the impact of new development on adjacent residential properties.

[6] The subject property is designated Neighbourhoods in the Official Plan (“OP”), requiring new development to have regard for the physical characteristics of the neighbourhood.

FINDINGS

[7] The Board well understands the degree of frustration and apprehension expressed by the residents at the hearing. This is the fifth time since June 2007 the Applicants/Appellants have placed different proposals before the City for minor variances related to proposals for the subject property, each time either being denied by the City or withdrawn. Most recently, a decision issued on May 1, 2012 by Board member Sniezek dismissed an appeal for yet another proposal (Exhibit 1, Tab 14).

[8] The subject property has, in fact, a history dating back to January 6, 2006 when the Building Division issued an Order to Comply for an addition being constructed without proper approvals. This was to be followed by two more Orders to Comply, the third in January 2008 for the second and third floor additions.

[9] For each application to the COA there was a planning report prepared by the Director of Community Planning, Toronto and East York District (Exhibit 1, Tabs 7, 8, 9, 10 and 17). In each case but the last, the proposal before the Board, the planning report recommended refusal of the application. In the most recent report, dated November 30, 2013 (Exhibit 1, Tab 17), the director wrote:

> In previous reports to the Committee, staff identified concerns related to building depth, gross floor area and the number of units proposed. The number of units proposed has now been reduced from six units to two units, the depth of the first two storeys of the rear addition matches that of the adjacent building at 127 Baldwin Street and the total building gross floor areas complies with that which is permitted by the Zoning By-law.

[10] The report recommended a number of conditions “to ensure that there are no further changes to the proposal which could result in negative impacts.”

[11] Unlike previous reports, it does not recommend refusal of the application, a fact amplified by the lack of any planning evidence proffered by the City at the hearing.

[12] The application before the Board proposes to legalize and maintain the ground floor rear addition and a portion of the second and third storey rear additions constructed without the benefit of a building permit.

[13] Portions of the existing first, second and third storey additions will be demolished and re-constructed to match the depth of the first and second-storey portions of the adjacent dwelling at 127 Baldwin Street, with the exception of the third storey, which will match the depth of the proposed second storey and therefore extend beyond that of the adjacent neighbour. A second storey deck and stairs to grade are also proposed at each side of the rear addition.

[14] The semi-detached dwelling will be converted to contain two residential dwelling

units as opposed to the six it currently houses.

[15] The fact that the additions were constructed without a building permit is not one upon which the Board can base a decision. In *Turner v. Vaughan (City) Committee of Adjustment* [1994] O.M. B. R. 2036, members Yao and Fish made a statement that has stood the test of time:

> When structures are **built without a permit**, the Board must not make a decision based solely on the fact that the construction is illegal. On the other hand, it should not be motivated by its wish to spare the owner the expense of removing the construction. Out approach must be to pretend that the structure is not there, and to imagine what would be the planning consequences of the Turners were proposing to build these structures for the first time.

[16] In *MacDonald v. Richmond Hill (Town)* [2001] 43 O.M.B.R 167, 33 M.P.L.R. (3d) 151, member Beach wrote:

> Applications made after the fact are particularly vexing for the municipality and particularly those who oppose the application. There is the feeling on the part of those opposed that the Board should deal harshly with such application. Or, to use a very morally sounding phrase, such applications have not come to the Board with clean hands. However, as vexing as these applications appear to be, the Board considers them without the input of emotion. It takes into account the facts pertaining to the applications, the arguments for and against, the applicable statutes and planning documents and arrives at a decision as if the works were not there.

[17] In this instance, the applicable planning document is s. 45(1) of the Act which outlined four tests with a minor variance must meet. It must:

- be minor;
- be desirable for the appropriate development or use of the land, building or structure;
- maintain the general intent and purpose of the zoning by-law (“ZBL”); and
- maintain the general intent and purpose of the OP.

[18] At the hearing the participants spoke of their frustration with what has happened

with the subject property. Ms. Mah talked about the distress and anxiety she and her parents, who live in the adjoining house at 127 Baldwin Street, have experienced, and of "the abuse of process by the applicant." She spoke of the noise emanating from the subject property, including loud music and student parties. She worried about fire hazards, electrical codes, water leakage and the overall structural soundness of the subject property.

[19] Ms. Wong supported Ms. Mah and shared her apprehensions. Mr. Schefter, a board member of the Grange Community Association, as well as a small general contractor and 23-year resident of the area, was concerned about retrofit deficiencies and violations of the fire code.

[20] Mr. Allen, vice president of planning and development for the Grange Community Association, spoke eloquently of planning issues such as density and overdevelopment, as well as the broader issue of the public good. Mr. Ho made reference to rooming houses.

[21] In a letter to the Board (Exhibit 7), the ward councillor, Adam Vaughan, spoke of his "great frustration and disappointment" regarding the application. He wrote of the additions constructed without a building permit, and of over-intensification of the site (making reference to the six units confirmed in a 2010 City inspection) and the resultant "noise, garbage, fire hazards, and more."

[22] "As stewards of the public interest, I believe we share a responsibility to immediately ensure that the structure is safe for both its residents and the neighbours," Councillor Vaughan wrote.

[23] The Board must deal with the planning issues before it, namely whether the requested variances meet the four tests of s. 45(1) of the Act. It is the responsibility of the City, its by-law enforcement officers and building inspectors to enforce the City's by-laws, including the noise by-law, as well as its building, electrical and fire codes. Those responsibilities are beyond the purview of the Board. Each of City and Board has its assigned roles as stewards of the public interest.

[24] The expert evidence and opinion of Mr. Stagl was uncontested. It was his opinion that the variances, individually and collectively, meet the four tests of the Act.

[25] He informed the Board that the first variance, for height, was not required, and that the area of the lot had been confirmed at 42.42 square metres, not 41.3 square metres as stated in the third variance. This change results in a residential gross floor area of .154 times the area of the lot, not .39 as stated.

[26] Mr. Stagl reviewed to the Board's satisfaction s. 4.1.5 of the OP, which deals with the physical character of the neighbourhood, which in this case includes one to four-storey structures. The Board accepts Mr. Stagl's opinion, substantiated by the photos in Exhibit 3, that there will be no change to the physical character of this neighbourhood in dwelling or building type, setback, height, massing or scale if the application is approved.

[27] Mr. Stagl also reviewed each of the requested variances in relation to the ZBLs. The variance for depth is to legalize a situation that has existed since at least 1924. The depth of the first and second-storeys will match that of the adjacent house.

[28] Mr. Stagl pointed out that the increase in gross floor area will now only be 1.1 square metres over what is permitted.

[29] It was his opinion that the application meets the intent and purpose of the ZBLs and that the variances are minor. The Board concurs.

[30] There was no evidence of any negative impacts resulting from the variances themselves. The concerns of the neighbours regarding building and other code issues, as well as noise and issues related to the behaviour of the residents of the subject property are issues with which the City is mandated to deal. The fact that the semi-detached dwelling will now contain two units as opposed to six should mitigate issues surrounding noise, odours and garbage.

[31] The Board also concurs with Mr. Stagl's opinion that, given the above, the proposal is desirable for the suitable development of the land. Based on Mr. Stagl's

uncontested expert opinion and for the reasons outlined above, the Board finds that the four tests of s. 45(1) of the Act have been met.

ORDER

[32] The Board orders that the appeal is allowed and the following variances are authorized:

1. **Chapter 10.10.40.30.1 (A), By-law No. 569-2013**

   The maximum permitted building depth for a semi-detached house is 17.0 metres.

   The building depth is 24.97 metres (measured from the average front yard setback to the rear wall).

2. **Section 6(2)1(iii), By-law No. 438-86**

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[33] The authorization of these variances is subject to the following conditions:

1 the proposal shall be constructed substantially in accordance with the revised plans submitted to the Board as Exhibit 5B, date stamped November 5, 2013;

2 the maximum number of dwelling units shall be two;

3 the basement shall remain as uninhabitable space;

4 the east elevation of the third-floor addition shall not contain any windows; and

5 prior to the issuance of a demolition and/or building permit, the applicant shall satisfy all matters relating to City and Privately owned trees to the satisfaction of the Supervisor, Urban Forestry -- Tree Preservation and Plan Review. Urban Forestry will issue a clearance letter to Toronto Buildings provided that the above mentioned criteria are fulfilled.

"Sylvia Sutherland"

SYLVIA SUTHERLAND
MEMBER