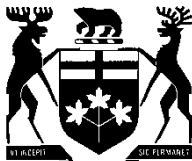


ISSUE DATE:

**July 18, 2013**



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL120925

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

Applicant and Appellant:	Pauline Tseng
Subject:	Minor Variance
Variance from By-law No.:	438-86
Property Address/Description:	38 Brunswick Avenue
Municipality:	City of Toronto
Municipal File No.:	A0165/12TEY
OMB Case No.:	PL120925
OMB File No.:	PL120925

#### **APPEARANCES:**

##### **Parties**

Pauline Tseng  
Shih Drum Tseng  
Yang Feng Tseng

City of Toronto

##### **Counsel\*/Agent**

P. Tseng

R. Kallio\*  
J. Basinger student-at-law

#### **DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE BOARD**

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#### **BACKGROUND**

[1] Pauline Tseng is the owner of 38 Brunswick Avenue. She has appealed against a decision of the Committee of Adjustment (“CoA”) of the City of Toronto (“City”) which denied her application for a variance from the applicable City zoning by-law as it applies to 38 Brunswick Avenue.

[2] The Board understands that Pauline Tseng is a lawyer who lives and works in the United States. She does not appear as counsel in these proceedings. She appears as her own agent and as the agent for Shih Drum Tseng and Yang Feng Tseng.

[3] The City appears in opposition to the requested variances.

### **Addition of Parties**

[4] Shih Drum Tseng and Yang Feng Tseng reside at 38 Brunswick Avenue and have sought party status in this matter. The Board is satisfied that Mr. S. D. Tseng and Ms. Y. F. Tseng have an interest in this matter. Mr. S. D. Tseng and Ms. Y. F. Tseng are added as parties to these proceedings.

### **Addition of Participant**

[5] One interest appeared to seek participant status. The Board added the Harbord Village Residents' Association Inc. ("HVRA") as a participant in these proceedings, represented by Mr. Tim Grant, President.

[6] The Board was advised that the HVRA supports the City position and intended to appear in opposition to the variances being sought.

[7] As a result of scheduling difficulties and severe weather, the HVRA did not give evidence separate from the City's case in these proceedings.

### **Other Interests**

[8] No other interests appeared in this matter. In particular, no owner or resident of the property immediately to the south at 36 Brunswick Avenue or the other half of the semi-detached structure at 40 Brunswick Avenue appeared either in support or in opposition to this application.

### **Multiplicity of Proceedings**

[9] An application for variance for this property was made previously. The CoA refused the application and the refusal was appealed to this Board. The Board refused to authorize the variances sought.

[10] The earlier application sought variances for building depth and north side yard setback. The north side yard setback request has remained the same; the request for a variance for building depth has been reduced.

[11] Mr. S. D. Tseng ("Mr. Tseng") and Ms. Y. F. Tseng ("Mrs. Tseng") are Pauline Tseng's parents. The Board understands that 38 Brunswick Avenue was owned by

other members of the Tseng family at the time of the earlier application for variance and that Pauline Tseng acted as the agent for these family members at the last Board hearing.

[12] By the time of these current proceedings, the Board understands that Pauline Tseng now owns the subject property and her two parents are tenants living in the main floor of the house.

[13] The two-storey addition to the rear of the subject property that has given rise to the application before the Board was built without benefit of a permit. The application before the Board is to authorize the variances necessary to recognize the as-built circumstance of the house as it now stands.

[14] The City and the members of the Tseng family have been engaged in litigation for several years regarding the construction of the illegal addition at the subject property. The Board will not deal with any of these various proceedings except in one respect: Pauline Tseng submits that the City's actions in pursuing these matters constitute constructive discrimination under s. 11 of the *Human Rights Code*, R.S.O. 1990 c. H 19 ["Code"]. This is one of the elements identified by Pauline Tseng in her submissions that assert violations of the Code and the Charter of Rights and Freedoms ["Charter"] that she asks the Board to consider in reaching its decision in these proceedings. The Board deals with this, and the other Code and Charter arguments advanced by Pauline Tseng, below.

### **Release of Exhibit**

[15] Pauline Tseng filed 70 photos as Exhibit 11 in these proceedings. Having reviewed the photos, and on consent of the parties, the Board released all but nine of these photos back to Pauline Tseng.

## **ANALYSIS AND FINDINGS**

### **Human Rights and Charter Issues**

[16] This matter comes to the Board as an appeal under s. 45(12) of the *Planning Act*, R.S.O., 1990, c. P.13 ("Act").

[17] While the City framed the issues in this hearing as being matters of land use planning, Pauline Tseng framed the issues in this hearing as being primarily matters of the Code and the Charter.

[18] She called evidence to support her submissions that the Code and the Charter, correctly applied, should lead the Board to conclude that both variances should be authorized and her parents permitted to stay in their first floor unit at 38 Brunswick Avenue with no demolition or reconstruction of the rear addition regardless of the Board's findings on land use planning grounds. Her final submissions to the Board were composed entirely of argument related to the Code and the Charter with no review of the planning merits of the application for variance.

[19] There is no dispute that the Board must consider the whole law in matters properly before it, and that includes issues related to the Code and the Charter.

[20] The question before the Board is whether the evidence proffered to support an assertion that a particular decision resulting from a land use planning analysis would result in a breach of the Code or Charter and whether submissions on that evidence represent a proper application of the Code or Charter and is persuasive in supporting the assertion.

[21] On the facts of this case, the Board finds that the submissions asserting a breach of the Code or Charter are without merit and do not support the assertion that a decision of this Board to deny the application for variance on land use planning grounds would result in a breach of the Code or Charter. Here are the Board's reasons.

[22] The evidence in the Code and Charter portion of the hearing rests on three witnesses: Mr. Tseng, Mrs. Tseng and Barry Roth, a geriatric, forensic and general psychiatrist certified by the American Board of Psychiatry and Neurology.

[23] Mrs. Tseng's evidence was exceedingly brief and simply repeated Mr. Tseng's evidence that she handled most of the household paperwork and that she has various physical disabilities.

[24] Mr. and Mrs. Tseng provided their evidence through an interpreter, Andy Yao. Mr. Yao is on the roster for interpreters with the federal Immigration and Refugee Board.

The language for interpretation was Mandarin. The Board placed Mr. Yao under oath for these proceedings to interpret for Mr. Tseng and, later, for Mrs. Tseng.

*Evidence of Dr. Barry Roth*

[25] Dr. Roth practices in the northeast United States. He is not licensed to practice in Ontario.

[26] Dr. Roth traveled to Toronto to meet and evaluate Mr. and Mrs. Tseng and to view their current living accommodation at 38 Brunswick Avenue. The Board was advised that Mr. and Mrs. Tseng also traveled to the United States where Dr. Roth conducted a further session with them.

[27] Dr. Roth diagnosed Mr. and Mrs. Tseng as suffering from dementia, major depression and post-traumatic stress disorder ["PTSD"]. He testified that he relied on what Mr. and Mrs. Tseng told him to conclude that the litigation between the City and members of the Tseng family were the cause of the major depression and PTSD.

[28] He went on to testify that Mr. Tseng was unable to cope independently and barely able to cope with assistance. He testified that Mrs. Tseng was in a psychiatric and medical crisis and was deteriorating. He observed that Mrs. Tseng also had mobility problems and relied on an assistive device to walk.

[29] He concluded that, in his expert medical opinion, there was a medical necessity for Mr. and Mrs. Tseng to remain in their current living accommodations as currently configured.

[30] Dr. Roth acknowledged that his testimony was based on both expert medical analysis and the knowledge he obtained as a lay person observing Mr. and Mrs. Tseng and their neighbourhood. He emphasized that he placed great reliance on what Mr. and Mrs. Tseng told him regarding their concerns and preferences regarding remaining in their current living accommodations with no change or reconfiguration.

[31] Mrs. Tseng uses an assistive device, a walker with some wheels, to walk. Dr. Roth provided the Board with a series of 70 photos, filed in these proceedings as Exhibit 11, which he took of Mr. and Mrs. Tseng, their current living accommodations, and their neighbourhood.

[32] His pictures of 38 Brunswick Avenue clearly show a series of steep steps to the front porch of the house. When asked how Mrs. Tseng could enter and exit the front door of the unit with these steps, Dr. Roth indicated that he did not know and suggested that she used the rear entry. The Board notes that pictures filed as part of Exhibit 3 clearly show that a similar series of steep steps provide access to the rear entry of the unit.

[33] Dr. Roth testified that one of the reasons for his medical opinion that Mr. and Mrs. Tseng needed to remain at 38 Brunswick Avenue was what he described as this being a location close to Kensington Market and Chinatown.

[34] Kensington Market and Chinatown are several blocks from 38 Brunswick Avenue.

[35] There are three other houses in the neighbourhood that are owned by members of the Tseng family. One is on Borden Street, just to the west of the subject site. This house is owned by another daughter who now lives in the United States. The second house is on Grange Avenue and is owned by a son who now lives overseas. The third house is on Euclid Avenue and is owned by Mr. and Mrs. Tseng. This is the house in which Mr. and Mrs. Tseng lived prior to moving to 38 Brunswick Avenue.

[36] Dr. Roth did not view any of these houses to determine if accommodation in any of these houses would be appropriate for Mr. and Mrs. Tseng in the event that they needed to relocate, even temporarily, for adjustments to be made to 38 Brunswick Avenue. He simply asserted that no alternate accommodation was acceptable.

[37] Pauline Tseng chose to call both Mr. Tseng and Mrs. Tseng to the stand. As noted above, both Mr. and Mrs. Tseng are parties to these proceedings and were represented by Pauline Tseng. Mr. Tseng was called first.

[38] The City's cross-examination of Mr. Tseng was firm but polite and respectful. Nonetheless, in observing Mr. Tseng's behaviour, the Board became concerned that the cross-examination was creating what appeared to be a particularly stressful environment for Mr. Tseng.

[39] Mr. Tseng testified that he was a real estate agent, now retired. Mr. Tseng appeared to have difficulty answering questions related to the house on Euclid Avenue, to his and his wife's move to Brunswick Avenue, to certain property tax details, to the architectural plans for the layout of the existing ground floor unit at 38 Brunswick Avenue and to alternate uses of the space in that unit.

[40] The Board was unable at this point to assess whether Mr. Tseng's reaction to various questions arose from the normal reaction to questions when cross-examination begins to touch upon areas of potential weakness in testimony or was grounded, instead, in his dementia. The Board stopped the cross-examination and asked Counsel for the City and Pauline Tseng to meet and to determine if they could agree on whether Mr. Tseng should continue in his testimony.

[41] On resumption of the hearing, it was clear that the two sides could not agree. The City took the position that Pauline Tseng had introduced the question of whether Mr. Tseng was sufficiently lucid to testify by introducing his diagnosis of dementia. As such, it was Pauline Tseng's obligation to demonstrate that Mr. Tseng was competent to testify. If that could not be demonstrated, then the City asked that Mr. Tseng's evidence be excluded.

[42] Since there had already been several requests for adjournment and delays prior to the eventual scheduling and start of these proceedings, the City gave notice that it would object to any request for an adjournment to have Mr. Tseng's current state assessed.

[43] Dr. Roth testified that Mr. Tseng was lucid and competent to testify when he examined him in preparation for these proceedings. He advised the Board that he would be able to reassess Mr. Tseng to assist the Board to determine whether, as a result of medical conditions, he should continue to testify.

[44] Following consideration overnight, Dr. Roth then advised the Board that he would not assess Mr. Tseng. He cited as part of his reason that he is unlicensed in Ontario.

[45] Dr. Roth's testimony in general was filled with lengthy, repetitive, formulaic answers that did not address the questions put to him. A regular feature of his testimony

was to display an argumentative response that he had answered the question but would then ask, repeatedly, for the question to be put again.

[46] The Board did not find Dr. Roth's testimony in these proceedings to be helpful and gives little weight to his evidence.

[47] Following Dr. Roth's advice that he would not assess Mr. Tseng after all, Pauline Tseng took the position that Mr. Tseng should be permitted to continue to testify, regardless of the dementia and any stress that may result from continuing his testimony. She did not seek any adjournment to have another psychiatrist assess Mr. Tseng.

[48] In light of the fact that Mr. Tseng is a party to these proceedings and is represented by Pauline Tseng who has called Mr. Tseng as part of the case, and in light of the absence of any medical finding that Mr. Tseng is not lucid or otherwise should not continue his testimony as result of any medical condition, the Board allowed the cross-examination of Mr. Tseng to continue and denied the City request to exclude Mr. Tseng's testimony.

*Evidence of Mr. Tseng*

[49] In terms of support for the requested variances based on human rights arguments, Mr. Tseng's testimony focused on his and his wife's need to remain in their current unit as it is currently configured with the rear addition as built.

[50] The current unit contains a living room at the front, then two bedrooms, a kitchen and the rear addition. On the architect's plans for the rear addition, the first floor room is noted as the dining room.

[51] The Board understands what had been noted as a dining room is actually used as Mrs. Tseng's bedroom and Mr. Tseng sleeps in the first bedroom closest to the living room.

[52] Mr. Tseng testified that he is a light sleeper and the noise from Mrs. Tseng's assistive sleep device would disturb his sleep if she occupied a bedroom closer to his.

[53] Mr. Tseng testified that the addition is also where he and his wife dine.



[54] Finally, Mr. Tseng testified that his deep religious belief and observance requires him to pray frequently and that he uses the ground floor room of the rear addition as his prayer room.

[55] The Board does not challenge the evidence that Mr. Tseng is a light sleeper, that Mrs. Tseng's assistive sleep device is noisy, or that Mr. and Mrs. Tseng eat and pray in the room she uses as her bedroom. The Board is not persuaded that a living room, two non-addition bedrooms and a kitchen could not be modified or repurposed, if necessary, to facilitate alternative sleeping, praying and eating arrangements for Mr. and Mrs. Tseng.

[56] A former hospital on the east side of Brunswick Avenue is now a long term care facility.

[57] This facility was cited as a further reason for Mr. and Mrs. Tseng to stay in their current accommodation with the thought that if one or the other were in the long term care facility then the one still living independently would have a short walk for visits.

[58] There was no evidence before the Board that one or the other would be eligible to live in this facility or was even on a waiting list for admission. Even if this evidence was available and the Board were to give it weight in deciding the minor variances, there are three other houses owned by members of the Tseng family that are very close to the subject site and would involve a short walk to the long term care facility.

[59] The Board attaches no weight to the proximity of this long term care facility as a factor in deciding whether the variances should be authorized.

#### *Constructive Discrimination Under Section 11 of the Code*

[60] Section 11 of the Code states:

##### **Constructive discrimination**

**11.** (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11 (1).

[61] There is no dispute that the two-storey rear addition was built without benefit of a building permit and that the City has pursued litigation as a result.

[62] There is no dispute that Mr. and Mrs. Tseng are older adults who suffer from various medical conditions.

[63] There is no dispute that the City's first order to comply regarding construction of the two-storey addition at 38 Brunswick Avenue without a building permit was dated August 29, 2006.

[64] There is some uncertainty in the evidence regarding the date of a legal change of primary residence for Mr. and Mrs. Tseng from their house on Euclid Avenue to 38 Brunswick Avenue.

[65] Mr. Tseng's evidence seems to be that they began their move in March 2007 but maintained the Euclid Avenue home as their mailing address as well as the location for a great deal of their possessions. His evidence was that the move occurred over a substantial period of time.

[66] Pauline Tseng submits that the Board should take March 2007 as the date of primary residency at 38 Brunswick Avenue. The City submits that the Board should take March 2011 as the date since this appeared to be the date that the mailing address was changed from Euclid Avenue to 38 Brunswick Avenue.

[67] For the purposes of this proceeding, the Board finds that the only relevance in the date of the move of the primary residence is the fact that, for either date, the move occurred after the City had already issued a notice to comply. As such, the move occurred after it was known that the rear addition had been built without benefit of a building permit, was non-compliant with the zoning by-law, and the City was taking enforcement action.

[68] The Board notes that the City's enforcement action was not directed at the detailed living arrangements or occupancy of the ground floor of 38 Brunswick Avenue by Mr. and Mrs. Tseng, or by anyone else. It was directed at the physical non-compliance of the rear addition to 38 Brunswick Avenue and not to any question of

interior layout, design, modification or intra-residential use of the non-rear addition portion of the ground floor of 38 Brunswick Avenue.

[69] The Board finds that the City's actions do not constitute constructive discrimination against Mr. and Mrs. Tseng.

*Toronto Human Rights and Anti-Harassment Policy*

[70] In addition to the Code, Pauline Tseng placed several City policies and various court cases before the Board. The Board reviews these in the following sections, beginning with the Toronto Human Rights and Anti-Harassment Policy.

[71] Pauline Tseng submits that the City's Human Rights and Anti-Harassment Policy establishes an obligation on the City to accommodate those with special needs and cites s. 4.4, which states:

**4.4 Duty to Accommodate:** The legal obligation of an employer to take steps to eliminate disadvantage caused by systemic, attitudinal or physical barriers that unfairly exclude individuals or groups protected under the Ontario Human Rights Code. It also includes an obligation to meet the special needs of individuals and groups protected by the Code unless meeting such needs would create undue hardship. Failure to accommodate a person short of undue hardship is a form of discrimination. (Refer to the Employment Accommodation Policy and Guidelines).

[72] The matter before the Board is not a case of accommodation by an employer.

[73] The City is not providing living accommodation for Mr. and Mrs. Tseng.

[74] Mr. and Mrs. Tseng are not prohibited from living at 38 Brunswick Avenue regardless of the outcome of the appeal on the application for variance.

[75] There is no obligation on the City to accommodate Mr. and Mrs. Tseng with regard to their residence.

[76] The Board finds that there is no breach of the City's Human Rights and Anti-Harassment Policy in the matter before the Board.

*Dixon v. 930187 Ontario Ltd.*

[77] Pauline Tseng asks the Board to consider *Dixon v. 930187 Ontario Ltd.*, 2010 HRTO 256 ["Dixon"], a decision of the Ontario Human Rights Tribunal.

[78] This is a decision dealing with the obligation of a landlord.

[79] The City is not the landlord for Mr. and Mrs. Tseng.

[80] In addition, the City drew to the Board's attention, and the Board agrees, that there are several examples of discrimination by the landlord that are found in Dixon that are not present in the matter before this Board:

1. The Dixons were treated differently because of disability and receipt of social assistance.
2. The request for accommodation was denied as part of an effort to get the Dixons to live elsewhere.

[81] Mr. and Mrs. Tseng are not being treated differently by virtue of any prohibited ground of discrimination.

[82] There is no evidence that the City is trying to get Mr. and Mrs. Tseng to live elsewhere.

[83] The Board distinguishes this case from the matter before the Board.

*Toronto Housing Charter*

[84] The Board has considered the City of Toronto Housing Charter ["Housing Charter"] which states:

...All residents should be able to live in the neighbourhood of their choice without discrimination...

[85] There are no restrictions in the planning instruments before the Board on the neighbourhood in which Mr. and Mrs. Tseng may live. Mr. and Mrs. Tseng may live in the neighbourhood of their choosing.

[86] The Board finds that there is no breach of the City's Housing Charter.

*Godbout v. Longueuil (City)*

[87] The Board has considered *Godbout v. Longueuil (City)* [1997] 3 S.C.R. 844 ["Godbout"].

[88] In this case the majority of the Court explicitly declined to deal with this matter under s. 7 of the Charter and dealt with the case under the Quebec Human Rights Charter instead.

[89] The municipality required municipal employees to live within the municipality. The Court held that the right to choose where to establish one's home falls within the scope of the right to privacy and personal autonomy where individuals may make inherently private choices free from state interference.

[90] Just as there are no restrictions in the planning instruments before the Board on the neighbourhood in which Mr. and Mrs. Tseng may live, there are no requirements in these planning instruments that dictate where Mr. and Mrs. Tseng shall live.

[91] As such, the Board's finds that the matter before the Board is within the permitted purview of *Godbout*.

*Canada (Attorney General) v. PHS Community Service ("Insite")*

[92] The Board considered *Canada (Attorney General) v. PHS Community Service ("Insite")* [2011] 3 S.C.R. 134 ["Insite"].

[93] In this case, the Court found that s. 7 of the Charter was engaged because possession of certain drugs can send one to jail. The Court held that the Minister of Health's failure to grant a statutory exemption from a statutory prohibition criminalizing the possession of illicit drugs by clients at a supervised drug injection facility engaged their rights to security of the person:

...Where a law creates a risk by preventing access to health care, a deprivation of the right to security of the person is made out...

[94] A denial of the application for variance in the matter before the Board does not prevent or deny access to health care.

[95] The Board finds that s. 7 of the Charter is not engaged.

*Syndicat Northcrest v. Amselem*

[96] The Board considered *Syndicat Northcrest v. Amselem* [2004] S.C.C. 47 ["Syndicat"]. In this case the claimants, Orthodox Jews, set up *sukkahs* on their balconies as part of their religious beliefs but in violation of condominium by-laws against alterations and decoration on balconies. The Court held for the claimants in spite of the fact that they agreed to the by-laws when they purchased the condominium unit.

[97] The Board had no evidence that Mr. Tseng's personal religious beliefs required that he pray in the ground floor room of the rear addition and in no other room in the ground floor unit at 38 Brunswick Avenue.

[98] The Board also had no evidence that Mr. Tseng's personal religious beliefs prohibited him from praying in any non-rear addition room in the ground floor unit at 38 Brunswick Avenue.

[99] The evidence before the Board is that Mr. Tseng prays frequently, in a variety of locations and in a variety of circumstances.

[100] The outcome of the application for variance does not impinge upon Mr. Tseng's freedom of religion.

[101] The Board finds that a denial of an application for variance in this case does not engage s. 2(a) of the Charter dealing with freedom of religion.

*R. v. Wiles*

[102] The Board considered *R. v. Wiles* [2005] S.C.C. 84 ("Wiles").

[103] This case deals with s. 12 of the Charter regarding cruel and unusual punishment.

[104] In *Wiles* the Crown sought a mandatory firearms prohibition for a defendant who pleaded guilty to the production of cannabis. The Crown conceded that the firearms prohibition constituted a "treatment or punishment".

[105] In paragraph 4 the Court stated:

This Court has dealt with s. 12 on many occasions and there is no controversy on the test that must be met. Treatment or punishment which is disproportionate or “merely excessive” is not “cruel and unusual”...The treatment or punishment must be “so excessive as to outrage standards of decency”...The court must be satisfied that “the punishment imposed is *grossly* disproportionate for the offender, such that Canadian would find the punishment abhorrent or intolerable...

[106] Pauline Tseng asks the Board, in effect, to equate a denial of the application for variance with a forced eviction, and, further, to identify such forced eviction as the punishment for a rear addition that is non-compliant.

[107] The Board rejects the submission that a denial of the application for variance in this case is a forced eviction. It is not. If the Board denies the application for variance and the rear addition is demolished, Mr. and Mrs. Tseng remain free to live in the non-rear addition part of the existing ground floor unit at 38 Brunswick Avenue.

[108] The Board finds that s. 12 of the Charter is not engaged.

## **Planning Issues**

### *Which Section of the Planning Act applies?*

[109] The application for variance was made “...pursuant to the provisions of subsections 45(1) or 45(2)...” of the Act.

[110] The Act has different tests for applications under each of these sections. Any given application is under one section or the other but not under both.

[111] Both sections speak to the powers of a committee of adjustment, which are assumed by the Board on appeal.

[112] Section 45(2) states:

(2) In addition to its powers under subsection (1), the committee, upon any such application,

(a) where any land, building or structure, on the day the by-law was passed, **was lawfully used for a purpose prohibited by the by-law**, may permit,

(i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or

(ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee; or

(b) where the uses of land, buildings or structures permitted in the by-law are defined in general terms, may permit the use of any land, building or structure for any purpose that, in the opinion of the committee, conforms with the uses permitted in the by-law.

[emphasis added]

[113] The language in s. 45(2)(a) is clear: this section is intended to deal with circumstances where the **use** of the property was legal prior to the current, in-force by-law but is no longer permitted by that by-law.

[114] Similarly, for s. 45(2)(b) to apply, the use of the property would have to be in question and it is not.

[115] The use of the property prior to the current, in-force by-law was residential. The current, in-force by-law permits the residential use that is currently being made of the property.

[116] The use of the property is not at issue.

[117] The Board finds that s. 45(2) does not apply.

[118] By contrast, s. 45(1) contemplates the possibility of a minor variance from the provisions of the by-law 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.

[119] At issue in this matter are certain performance standards in the by-law: the length of the building and the interior north side yard setback.

[120] The Board finds that this matter is appropriately tested under the provisions of s. 45(1) of the Act.



[121] The Board now turns to an analysis of the application for variance under s. 45(1).

[122] Having considered the land use planning evidence, the Board is satisfied that the variances should be authorized. The Board's reasons follow.

*Variances Being Sought*

[123] The Board heard from two land use planners, qualified by the Board to provide independent expert evidence in these proceedings. Both planners acknowledged the expert's duty to the Board.

[124] Michael Manett is a full member of the Canadian Institute of Planners and a Registered Professional Planner in Ontario. He gave evidence in support of the requested variances.

[125] Joanna Kimont is a provisional member of the Canadian Institute of Planners and the Ontario Professional Planners' Institute. She gave evidence in opposition to the requested variances.

[126] The two variances being sought are:

1. A building depth of 23.76 m where the by-law maximum is 14 m.
2. A north side yard setback of 0 m where the by-law requirement is 0.45 m.

[127] The variances are for a two-storey addition at the rear of the semi-detached house at 38 Brunswick Avenue that was built without benefit of a building permit.

[128] The fact that the structure for which the variances are being sought has already been built does not constitute an advantage or a disadvantage to either side in this dispute, either to have the Board authorize the variances or to have the Board deny the variances. The tests in s. 45(1) of the Act remain the same and it is those tests that the Board must apply in reaching its decision. The one element that does change when a structure is already built is that the impact of the requested variances becomes a known circumstance rather than a matter of informed inference.

[129] This is a neighbourhood of semi-detached houses built prior to the passage of the current, in-force by-law. 38 Brunswick Avenue is a semi-detached house, sharing a common wall with 40 Brunswick Ave.

[130] The by-law caps the building depth at 14 m. Both 38 and 40 Brunswick Avenue, built prior to the current by-law, have been built to a depth of 19.5 m. This is a common original building depth in the area.

[131] Also common in the area are rear additions to expand the living space in the houses. The physical addition to 38 Brunswick Avenue is 4.26 m.

[132] Although the variance being sought has the effect of increasing the allowable building depth on the lot, no variance is being sought for a rear yard setback or for the amount of open or amenity space on the lot.

[133] The north wall of the addition at 38 Brunswick Avenue aligns with, and is effectively an extension of, the common wall it shared with the other half of the semi-detached structure at 40 Brunswick Avenue. As such, the north wall of the addition has been built right up to the north side property line.

[134] 38 Brunswick Avenue and 40 Brunswick Avenue previously had matching rear additions. Both rear additions were demolished. 38 Brunswick Avenue now has this new, larger addition. 40 Brunswick Avenue replaced its previous rear addition with a rear deck approximately at grade.

[135] Parking in this area is generally in the rear yard with access off a lane. In this case, the lane generally runs parallel to Brunswick Avenue between the rear of properties on the west side of Brunswick Avenue and the rear of properties on the east side of Borden Street, which lies to the west of Brunswick Avenue.

[136] Most properties have some at-grade outdoor amenity space between the parking area and the rear wall of the house, although the size of this area varies.

[137] Parking at the subject site follows the neighbourhood pattern with a parking slot at the rear of the lot and at-grade outdoor amenity space between the parking area and the rear wall of the addition.

[138] The house to the south at 36 Brunswick Avenue is separated from the subject site by a driveway.

[139] No south side yard variance is being sought.

[140] Unlike the current condition at 38 Brunswick Avenue, the rear yard of 36 Brunswick Avenue is entirely paved and its use is devoted entirely to the parking of several cars. No at-grade amenity space separates the parking area from the rear wall of the house.

*General Intent and Purpose of the Official Plan*

[141] The City of Toronto Official Plan ("OP") designates the subject site as Neighbourhoods. Policy 4.1.1 states:

*Neighbourhoods* are considered physically stable areas made up of residential uses in lower scale buildings such as detached houses, semi-detached houses, duplexes, triplexes and townhouses, as well as interspersed walk-up apartments that are no higher than four storeys...

[142] Physically stable does not mean static. The OP contemplates development in neighbourhoods and sets out criteria to guide the analysis of development proposals.

[143] As set out in policy 4.1.5 of the OP, development in neighbourhoods must:

...respect and reinforce the existing physical character of the neighbourhood, including in particular...

- a) patterns of streets, blocks and lanes, parks and public building sites;
- b) size and configuration of lots;
- c) heights, massing, scale and dwelling type of nearby residential properties;
- d) prevailing building types;
- e) setback of buildings from the street or streets;
- f) prevailing patterns of rear and side yard setbacks and landscaped open space;
- g) continuation of special landscape or built-form features that contribute to the unique physical character of a neighbourhood....

[144] Respecting and reinforcing the existing physical character of the neighbourhood does not mean identical to the existing pattern. Moreover, in a densely urban neighbourhood where houses have been renovated and altered over time, the pattern itself is an evolving range that is not static. Under these circumstances, the challenge for the Board is to assess compatibility with what is sought to be approved with what already exists generally in the neighbourhood.

[145] This rear addition makes no change to items 4.1.5(a), (b), (d), (e) and (g) and, as such, conforms to these requirements of the OP.

[146] No variance is sought to the by-law requirement regarding the rear yard setback or to the amount of landscaped open space that remains on the lot. The rear yard use on the subject site is consistent with the pattern of rear yard use in this area.

[147] The City's planning witness drew the Board's attention to 4.1.5(c) with particular regard to the height and depth of the addition built on the north lot line.

[148] No variance has been sought for height and no witness suggested to the Board that a variance for height is needed.

[149] The City's planning witness expressed the concern that the size and location of the rear addition at 38 Brunswick Avenue resulted in a loss of sunlight and sky view, with some attendant shadowing, for the rear windows of 40 Brunswick Avenue and on the rear deck of that property.

[150] The Board agrees that the addition at 38 Brunswick Avenue results in some reduction in sunlight and some addition to shadowing at 40 Brunswick Avenue.

[151] The City's planning witness took the position that impact should not be judged by whether or not the adjacent owner or residents at 40 Brunswick Avenue objected to the requested variances. Rather, the City's planning witness testified that the Board should consider the possible impact on future owners or residents who may wish to make different use of the rear rooms of the house at 40 Brunswick Avenue or enjoy greater sunlight and less shadowing on the rear yard.

[152] Since the immediate neighbours to the north in the other half of the semi-detached structure did not appear in these proceedings, the Board concludes nothing more than that they elected not to appear. The Board has no evidence for the reason for non-appearance and makes no finding on whether the reason for non-appearance is that the neighbours are satisfied with the addition and do not oppose the variances.

[153] By the same token, however, the Board is not persuaded by some hypothetical possible future preference for a different level of shadowing or use of the rear yard

amenity space by some hypothetical future residents of properties adjacent to 38 Brunswick Avenue.

[154] The height, massing and scale of the addition generally fit the pattern of rear additions in the neighbourhood. The fact that there is some loss of sunlight and some increase in shadow is insufficient for the Board to find that the proposed rear addition offends policy 4.5.1(c).

[155] The subject property is within a heritage conservation district established by the Harbord Village Conservation Plan. With the addition at the rear of the property the streetscape is not impacted and no heritage issues are engaged.

[156] The Board finds that the two variances for the rear addition maintain the general intent and purpose of the OP.

*General Intent and Purpose of the Zoning By-law*

[157] The purpose for the limitation on depth in the zoning by-law, coupled with the requirement of an interior side yard setback of 0.45 m, is to ensure reasonable privacy, sunlight and rear yard amenity space.

[158] There continues to be rear yard amenity space on the subject site and the Board finds that the reduction in sunlight and increase in shadowing on 40 Brunswick Avenue is acceptable.

[159] The north wall of the rear addition has no windows overlooking 40 Brunswick Avenue.

[160] The Board had no evidence before it that the roof of the rear addition at 38 Brunswick Avenue had a deck.

[161] The Board finds that there is no intrusion of privacy or overlook on to 40 Brunswick Avenue.

[162] In addition, the evidence before the Board is that a number of properties in the neighbourhood have decks on the roof of the houses, frequently on the roof of rear additions. The decks clearly create some intrusion of privacy and some overlook on

adjacent and other properties in the neighbourhood. These decks form part of what is now the pattern of the neighbourhood.

[163] Side yard windows on the addition face south, toward 36 Brunswick Avenue. There is no south side yard setback that is being sought.

[164] This is a dense urban neighbourhood. Any south side windows on the addition, including those at grade, look out on a paved parking slab at the rear of 36 Brunswick Avenue.

[165] Pauline Tseng advised the Board that if the Board had a concern about privacy and overlook on to 36 Brunswick Avenue that a condition to require translucent, rather than clear, windows on the south side of the rear addition would be acceptable.

[166] The Board sees no reason to require translucent windows on the south side of the rear addition. The Board dismisses any concern about privacy and overlook on this completely paved area devoted entirely to parking that constitutes the rear yard amenity at 36 Brunswick Avenue.

[167] The Board finds that the variances for building depth and side yard setback maintain the general intent and purpose of the zoning by-law.

*Desirable and Minor*

[168] The two remaining tests for each variance are whether the variances are desirable for the appropriate development and use of the land and whether they are minor.

[169] The addition adds to living space and is an appropriate extension of the existing residential unit.

[170] In the context of the preceding analysis of each variance the Board finds these two variances are desirable for the appropriate development and use of the land.

[171] The test of whether a variance is minor is not simply a question of numbers. The principal consideration is the impact the variance has and whether that impact is minor.

[172] In the context of the preceding analysis of each variance the Board finds that the impact of these two variances is acceptable and fits within the evolving pattern of the neighbourhood.

[173] The Board finds that the two variances are minor.

*The Provincial Policy Statement and the Growth Plan for the Greater Golden Horseshoe*

[174] The application for these two variances accommodates a rear addition to an existing house in a settlement area on full municipal services. Both the Provincial Policy Statement (“PPS”) and the Growth Plan for the Greater Golden Horseshoe (“GGH”) encourage the efficient use of land and infrastructure through development in settlement areas and on full municipal services.

[175] The Board finds that these two variances are consistent with the PPS and conform to the GGH.

*Regard for s. 2 of the Act*

[176] Section 2 of the Act sets out matters of provincial interest to which the Board must have regard in reaching its decision in this matter. Having done so, the Board finds that the application before the Board contributes to the adequate provision of a full range of housing, identified as one of the matters of provincial interest in this section of the Act.

**ORDER**

[177] The Board orders that the appeal is allowed and

1. The variance to by-law 438-36 to permit a building depth of 23.76 m at 38 Brunswick Avenue is authorized.
2. The variance to by-law 438-36 to permit a north side yard setback of 0 m for the rear addition is authorized.

“Susan de Avellar Schiller”

SUSAN de AVELLAR SCHILLER  
VICE CHAIR