

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: September 9, 2014

CASE NO(S): PL130989

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Patrick Ko, Christina Ma
Subject: Consent
Property Address/Description: 1 Milmar Court
Municipality: Town of Markham
Municipal File No.: B/11/13
OMB Case No.: PL130989
OMB File No.: PL130989

PROCEEDING COMMENCED UNDER subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Patrick Ko, Christina Ma
Subject: Minor Variance
Variance from By-law No.: 2571
Property Address/Description: 1 Milmar Court
Municipality: Town of Markham
Municipal File No.: A/98/13
OMB Case No.: PL130989
OMB File No.: PL130991

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Applicant and Appellant: Patrick Ko, Christina Ma
Subject: Minor Variance
Variance from By-law No.: 2571
Property Address/Description: 1 Milmar Court
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Municipal File No.: A/97/13
OMB Case No.: PL130989
OMB File No.: PL130990

Heard: July 15-17, 2014 in Markham,
Ontario

APPEARANCES:

Parties

Patrick Ko and Chistina Ma (the "Owners")

City of Markham ("City")

Mark Cattral and Erin Cattral
Richard Clemens and Doris Hausen
Rajka Soric and Jakasa
2240627 Ontario Inc.
Adrian Burrafato
Monica Lee and Joe Lee
Fran Kleiner and Irv Kleiner
Irwin Gould and Judith Gould
Leslie Landecker and Jennifer Landecker
Michael McPherson and Rosemay McPherson
John Patterson and Dorothy Patterson
Maria Kumaran Ratnam
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**DECISION OF THE BOARD DELIVERED BY BLAIR S. TAYLOR AND ORDER
OF THE BOARD**

INTRODUCTION

[1] On or about July 5, 2013 the Owners, through their authorized agent, made application to the City for consent to sever the lands known municipally as 1 Milmar Court (the "Subject Lands"). The consent application was accompanied by two minor variance applications. The first minor variance application was for the lands to be retained and sought relief for:

- a. a minimum lot frontage of 52 feet ("ft.") whereas a minimum of 100 ft. was

required,

- b. a minimum lot area of 9,350 square feet (“sq. ft.”) whereas a minimum of 30,000 sq. ft. was required,
- c. and for relief to allow side yard stairs and hard landscaping to encroach into the exterior side yard, where no such encroachments are allowed.

[2] The second minor variance for the lands to be severed sought relief for a minimum front yard setback of 21 ft. whereas a minimum of 35 ft. is required. The City staff report recommended against the consent and the two minor variances as they were not compatible with the existing development in the adjacent area, based on properties within 60 metres (“m”) of the Subject Lands. The Committee of Adjustment denied the consent and the two minor variances, and the Owners appealed to the Ontario Municipal Board (the “Board”). The Board notes that the City of Markham Zoning By-law uses imperial measurements and the Board will do the same.

DECISION

[3] For the reasons set out below, the Board dismisses the appeal of the variances for the proposed lot to be retained, and dismisses the consent appeal.

BACKGROUND AND CONTEXT

[4] The Subject Lands are located on the southwest corner of Milmar Court and German Mills Road. The Subject Lands have frontage onto German Mills Road of about 158 ft., flankage along Milmar Court of about 237 ft. and a total area of just over 39,000 sq. ft. The Subject Lands are improved by an existing one and one half storey detached dwelling which has its front façade to Milmar Court. In addition the Subject Lands also have an existing wood frame garage and wood carport located in the front yard as defined by the Zoning By-law. There are two points of ingress and egress to the Subject Lands: the first from German Mills Road, and the second from Milmar Court. The two points of ingress and egress are connected by an extensive concrete

driveway that leads to and through the existing garage and carport. The site photographs and surveys provided depict significant mature vegetation in the form of mature trees and an extensive cedar hedge and wooden fence, the latter two items being mostly located within the City's right of way. The photos filed with the Board illustrate the highly vegetated state, such that the existing dwelling is largely screened from public view by the vegetation.

[5] The Subject Lands were developed in the 1960s era apparently by a Plan of Survey. Exhibit 15 is the Plan of Survey from 1961 and it depicts that at that time there was one detached dwelling on what is now Lot 5, with access from German Mills Road via a private driveway that crossed Lot 1 (part of the Subject Lands) and Lot 2 (a portion of which now makes up the Subject Lands).

[6] The Plan of Survey (Exhibit 15) created a total of 10 lots, eight of which were located on Milmar Court, and Lots 9 and 10 had their frontage onto German Mills Road. The lots ranged in lot area from the smallest at 22,606 sq. ft. to the largest at 45,411 sq. ft. Milmar Court was constructed to a 66 ft. right of way but with no curbs or sidewalks, and no sanitary sewers.

[7] Lot 2 had an area of some 31,820 sq. ft. and in 1998 was improved with a two storey detached dwelling with an attached garage and a tennis court that abutted Lot 1. The then owners of Lot 2 made application to the City for a consent to sever off the area of Lot 2 occupied by the tennis court (being about 57 ft. of frontage and a depth of about 150 ft.) to be conveyed to the then owner of Lot 1, along with a minor variance application to authorize the reduction in the area of Lot 2 to 23,195 sq. ft. Both applications were approved by the City on the condition that no new lot be created, and thus the former tennis court lands of Lot 2 were severed off and added to Lot 1 to create the Subject Lands.

[8] In 2007 City Council authorized the construction of the Milmar Court sanitary sewer system on a cost recovery basis from a number of the owners on Milmar Court.

As the Subject Lands had frontage to German Mills Road, it already had servicing available to it.

[9] The Subject Lands are generally located in the German Mills Neighbourhood, which is a mature and stable residential area. As noted above the Subject Lands were created in the 1960s and the lots on Milmar Court have large homes on very large lots. The homes do not occupy the entire building envelopes but rather occupy a relatively modest portion of the building envelope. The immediately surrounding developments were built in the 1970s and 1980s and have somewhat smaller homes on smaller lots, but those homes occupy a larger portion of the building envelopes. Those lots have frontages that range from minimums of 50 ft. to 100 ft. and generally were built through plans of subdivision and incorporate the usual urban road standard.

[10] On the west side of German Mills Road, the lands to the north of the Milmar Court development are zoned R2, and appear not to have been developed by plan of subdivision. Still on the west side of German Mills Road but south of the Subject Lands, the abutting properties fronting onto Framingham Drive were developed by plan of Subdivision, are zoned R2 and thus generally have a minimum of 75 ft. of frontage and a minimum lot area of 9,750 sq. ft.

[11] On the east side of German Mills Road, the lands commencing north of the “Y” intersection of German Mills Road and Simonston Boulevard are also zoned R2 and were developed by plan of subdivision. South of the “Y” intersection the lands are zoned R4 and were developed by plan of subdivision and have a minimum lot frontage of 50 ft., and a minimum lot area of 6,250 sq. ft.

[12] The Markham Official Plan designates the Subject Lands as Urban Residential, the Thornhill Secondary Plan designates the Subject Lands as Low Density Housing, and the Zoning By-law zones them as Single Detached Residential (R1).

THE AMENDED DEVELOPMENT PROPOSAL

[13] At the commencement of the hearing, counsel for the Owners advised the Board that a revised development proposal with two amendments would be advanced and sought the Board's approval under s. 45(18.1) of the *Planning Act* ("PA"). Whereas the consent sketch had been processed with a slight "jog" in the mutual lot line between the lands to be retained and the lands to be severed, it was now proposed that the "jog" be removed (the first amendment). This altered the lot area for the lands to be retained and reduced it to 29,170 sq. ft. Previously the lot area had exceeded the required 30,000 sq. ft. and this change necessitated a new variance for the retained lot. Additionally the Owners sought to add a new variance for the lot to be severed (the second amendment) to permit an accessory building (garage) to be erected in the side yard, which is not otherwise permitted.

[14] With the "jog" in the mutual lot line removed, and additional lot area added to the lands to be retained, the original variances for the lands to be severed were requested to be revised to increase the minimum lot area to 10,210 sq. ft. (increased from the previous 9,350 sq. ft.

[15] Counsel for the City and counsel for the 13 neighbours opposed to the development proposal (the "Neighbours") submitted that they were of the view that the proposed revisions to the variances requested arising out of the elimination of the "jog" in the lot line (the first amendment) were of a minor nature, and required no further public notice. However with regard to the request for the permission to permit an accessory building in the side yard of the lot to be severed (the second amendment), they submitted that that was a totally new variance for which no public notice had been given, and it had not been considered either by City staff or by the Committee of Adjustment. Therefore they were of the view that it was not minor and the hearing could not proceed on that amendment without further public notice.

[16] The Board agreed with the City and Neighbours and found that the amended variances requested as a result of the change to the "jog" in the lot line were minor in nature and did not require further public notice.

[17] However with regard to the requested second amendment to allow a new variance for a garage in the side yard for the proposed lot to be severed, which was not previously sought, nor previously part of the public notification process, the Board found that it was not minor and the hearing could not proceed without further public notice.

[18] Counsel for the Owners advised the Board that the Owners wished to proceed with the hearing, and understood that the Board would hear evidence on the amended application for the “jog” only, and not on the second amendment. The hearing proceeded on that basis.

DEVELOPMENT PROPOSAL

[19] The essence of the development proposal is that the Owners would effectively take the current “front yard” of the Subject Property (where the garage and carport are located) demolish those structures, erect a new two storey detached home for themselves with frontage now to Milmar Court, (but the façade of the new dwelling would face German Mills Road), and all the while retaining the existing home on the proposed lot to be severed.

[20] This development proposal would result in the lot to be retained having 52 ft. of frontage to Milmar Court and a lot area of just over 10,000 sq. ft. which necessitates two of the variances. To augment the façade to German Mills Road, there are landscaping features, walkways and planters estimated to be about 550 sq. ft. in area that are proposed to encroach into the exterior side yard. The new dwelling would comply with the required front yard setback, and as shown on the proposed drawing, have a rear yard setback of 55 ft. to the rear wall of the dwelling and about 47 ft. to the elevated rear deck off the second floor.

LAND USE PLANNING REGIME

[21] The case for the Owners places significant reliance on the matters of provincial interest in s. 2 of the PA (efficient use of sewage and water services, orderly

development, adequate provision of a full range of housing, and the appropriate location of growth and development), the Provincial Policy Statement (“PPS”) through its management and direction policies to achieve efficient and resilient development and land use patterns in settlement areas, accommodating an appropriate range and mix of residential uses, promoting cost efficient development patterns, the efficient use of infrastructure, are transit supportive, and promotion of appropriate development standards that facilitate intensification, and the Places to Grow (“PTG”) which through its policies directs a significant portion of new growth to the built up areas of a community through intensification.

[22] The recently approved York Region Official Plan 2010 provides that intensification will be accomplished with a strategic focus on regional centres and corridors, (s. 5.3) and that local municipalities are to complete and adopt their own intensification strategies. The definition of “intensification” specifically includes local infill.

[23] The City of Markham Official Plan designates the Subject Lands as Urban Residential which is intended to be further modified or refined in a secondary plan.

[24] The City’s Official Plan in s. 2.7 contains severance policies. Of note is s. 2.7.1 (b) which provides as follows:

a) In addition to the matters under the Planning Act, R.S.O. 1990 c P.13, as amended, the Committee of Adjustment, in determining whether a consent is to be given shall have regard to the following matters in consultation with the appropriate departments and agencies:

i. Adjacent Uses

1. Regard shall be had to the **compatibility of the size, shape** and proposed use of the lot to be created with the present and proposed **uses in the adjacent area.** (Emphasis added)

[25] The Board notes that there is no definition of “adjacent area” contained within the Official Plan.

[26] Additionally the City's Official Plan provides in s. 2.7.2 that

...Infilling which economizes the use of urban space without disturbing the pattern of the existing development, or perpetuating an undesirable pattern of development or prejudicing the pattern of future development, shall be considered acceptable.

[27] For the Subject Lands the City also has a secondary plan i.e. the Thornhill Secondary Plan. As Thornhill is essentially built out, the secondary plan in s. 5.1 provides that:

Lacking any significant vacant land for new low density housing construction, future additions to the housing stock will be primarily in the form of multiple housing.

[28] Where infilling such as proposed here is advanced, the Thornhill Secondary Plan provides in s. 5.4.3 (d) the following:

- a. When applications are made for severances, minor variances, zoning amendments or site plan approval, the applicant shall be expected to demonstrate **compatibility with the existing character of the adjacent area** with respect to natural vegetation and development standards such as lot frontage and area, coverage and density, building setbacks and heights. (Emphasis added)

[29] Turning to the City's Zoning By-Law, the Subject Lands (and all of the lots created by the 1961 Plan of Survey) are zoned R1 by By-law 2571.

[30] The Development Standards for the R1 to R4 lots are found at Schedule B to By-law 2571. The Board notes the hierarchal structure of the Zoning By-law whereby the R1 lots are the largest with a minimum of 100 ft. of frontage and a minimum of 30,000 sq. ft. of lot area required. (The Board also notes that the R1 zone has no required minimum rear yard setback.) The R2 zone lots decrease in lot frontage to a minimum of 75 ft., and a minimum lot area of 9,750. In turn R3 zoned lots are required to have a minimum of 60 ft. of frontage and a minimum lot area of 7,500 sq. ft. For the R4 zoned lots, they are required to have a minimum of 50 ft. of frontage and a minimum lot area of 6,250 sq. ft.

[31] On an as of right basis, the proposed lot to be retained with its proposed 52 ft. of frontage and lot area of just over 10,000 sq. ft. would comply with the R4 zone.

[32] The Zoning By-law in s. 3.10 contains a provision with regard to lots in the R2 or R3 zone that if the lot has municipal services the lot may be used for single family residential purposes with a minimum lot frontage of 50 ft., and minimum lot area of 6,250 sq. ft.

THE HEARING

[33] During the course of the hearing the Board heard an arborist and a land use planner on behalf of the Owners, a land use planner on behalf of the City, and a third land use planner on behalf of the Neighbours.

APPROACH

[34] With regard to the consent application, inasmuch as it is dependent on the minor variances being sought, the Board will first consider first the minor variances under s. 45 (1) of the PA and then to consider the consent application using the criteria set out in s. 51(24) of the PA.

[35] As relief is sought for both the proposed lands to be retained (where the new house is proposed) and for the lands to be severed (where the existing house is located), the Board will deal first with the relief sought for the lands to be retained.

[36] In that regard there are three variances to be considered: minimum lot frontage, minimum lot area and encroachments into the exterior side yard.

[37] The proposed minimum lot frontage is 52 ft. whereas the by-law requires 100 ft. It is noted that the Zoning By-law provides that lot frontage is to be measured 27 ft. from the front lot line if the front lot line is straight. For the proposed lands to be retained, they are somewhat concave at German Mills Road, with the result that the front lot line

is actually 44 ft. wide, and only reaches the width of 52 ft. when measured 27 ft. into the proposed lands to be retained due to the curvature of the street.

[38] The proposed minimum lot area is 10,210 sq. ft. whereas the by-law requires 30,000 sq. ft.

[39] The third variance is for landscaping and side yard stairs and walkways to encroach into the exterior side yard. The calculation provided by the Owners' planner was that there were some 550 sq. ft. of area that would be authorized by such a variance.

[40] In considering the first test of s. 45(1) of the PA, the test is whether the proposed variance meets the general intent and purpose of the Official Plan. In this regard the planner for the Owners was asked by the Board to identify the "adjacent area" as required by the Thornhill secondary plan. His initial response to the Board was that it was not the "neighbourhood" but rather closer: next door, across the street, behind and similar to what had been reviewed in the staff planning report that went to the Committee of Adjustment. Following a break in the hearing, the Owners' land use planner returned to the witness stand and stated that on review that the adjacent area was identical to the study area that he had prepared. His study area is found in Exhibit 1, Tab 36. The Board would first note that Tab 36 is entitled Lot Area Analysis and the red dotted line is noted in the legend as being the boundary for the Neighbourhood. There is no notation in the legend for the "adjacent area". The Lot Area Analysis depicts an area bounded by John Street to the North, Don Mills Road to the east, the park open space area to the west, and the open space area and Granada Court to the south. This area includes a number of zoning categories of which some are a considerable distance from the Subject Lands.

[41] In contrast the land use planner for the City told the Board that the adjacent area means near to or adjoining the Subject Lands. His study area is found in Exhibit 11 and it identifies his lot study boundary and then in a pink outline he identified a much smaller

adjacent area development boundary that essentially includes only the north lots on Farmingham Drive, four lots into German Mills Road then north generally in line with the lots that have frontage onto German Mills Road and then west two lots above the former plan of survey for Milmar Court.

[42] The land use planner for the City utilized MPAC data for his study and he noted to the Board that the MPAC data for frontage was the measurement at the front lot line and not measured 27 ft. back from the front lot line as the City's Zoning By-law would require. He then reviewed all the lots within the Adjacent Area Development Boundary and all the lots were in excess of 44 ft. of frontage. Beyond that into his Lot Study Boundary, again all the lots were in excess of 44 ft. of frontage.

[43] With regard to lot area, the land use planner for the Owners testified that as the Subject Lands had been created originally with private services that justified the size of the large lots. Now with municipal services available and with the provincial policy directions for intensification, the proposed lot to be severed would be over 10,000 sq. ft. in area and being located at the corner of the German Mills Road and Milmar Court would complement the existing development that had subsequently occurred south, east, and north east of the Subject Lands. Occupying the corner and being located with the front façade facing German Mills, would complement and contribute to the German Mills Road streetscape.

[44] The land use planner for the City produced Exhibit 8B, Tab 13 being a large area context map with house numbering and depicting the existing homes on their lots. To this exhibit he then took a scaled version of the Owners' site plan for the proposed new lot and dwelling and inserted it into the exhibit at its proposed location. This proposed new lot with its proposed new dwelling he said was effectively "shoe-horning" the proposed new house onto the former front yard of the Subject Lands, all the while retaining the existing house. This he said was clearly out of character with the adjacent area and particularly the remaining parcels on Milmar Court with their very large lots and generous and spacious yards.

[45] Referencing the third variance request for the encroachment into the exterior flankage for walkways and landscaping, he saw this as another indicator of overdevelopment when the proposed lot could not accommodate the landscaping component within the regulated area.

[46] The opinion of the City's planner was supported by the land use planner for the Neighbours. He testified that Milmar Court was a unique enclave with the largest lot and largest frontages in the Zoning By-Law. In contrast, he pointed out that the proposed lot to be retained would only meet the R4 zoning standard, and it would be inappropriate to introduce a R4 lot into this unique enclave with its different character and feel.

[47] The Board prefers the evidence of the land use planners for the City and the Neighbours. The Board finds that the "adjacent area" is not the German Mills Neighbourhood, and is not the study area of the land use planner for the Owners, but rather is a smaller and more proximate area to the Subject Lands, as set out by the land use planner for the City. Within that adjacent area there was not one lot that had a 44 ft. front lot line. Section 2.7.1 of the City's Thornhill Secondary Plan makes specific reference to the compatibility of the size and shape of the lot to the adjacent area. The Board finds that the lot and the proposed development would be an attempt to shoe horn in a large detached dwelling into the former front yard of the Subject Lands, while maintaining the existing dwelling, resulting in the loss of the generous and spacious yards. The Board finds that the requested variance for the encroachment of the landscaping features and walkways of some 550 sq. ft. is illustrative of the proposed overdevelopment, as the proposed lot cannot even accommodate its own landscaping features without relief from the Zoning By-law. The Board finds that the requested variances do not meet the general intent and purpose of the Official Plan.

[48] Turning to the second test the Board finds that the requested variances individually and cumulatively do not meet the general intent and purpose of the Zoning By-law. The existing zoning is R1 which has lots of an estate size, within which are

located large homes, but not so large as to dominate the lots. In the case at hand the evidence is that the homes are secondary to the large lots due to the spacious and generous yards. The development proposal here would turn that intent on its head. Here the proposal would create an undersized lot of an R4 vintage in an R1 zone that would be the smallest on Milmar Court and with a proposed narrow interface between the proposed new dwelling and the existing house on the Subject Lands, which would create a condition that does not now exist on Milmar Court. The Board does not find that the general intent and purpose of the Zoning By-law is met.

[49] Is the proposal desirable for the appropriate development of the Subject Lands? While the Owners' planner suggests that the proposal would be compatible with the surrounding lands, the Board finds that it would represent the introduction of an undersized lot that is uncharacteristic of the adjacent area context for the purpose of intensification. The intensification promoted in the PPS and PTG is not intensification at all costs. Rather s. 4.7 in the PPS states that the most important vehicle for the implementation of the PPS is the municipality's official plan. Here the Board has already found that the variances do not meet the general intent and purpose of the Official Plan.

[50] Turning to the final test of "minor", the Board notes that the new dwelling will be very closely positioned next to the existing home on the Subject Lands. The Board finds that to be uncharacteristic of the area that otherwise has generous and spacious yards with mature vegetation. Moreover there is an elevated second floor rear yard deck which will also create issues of overview and privacy for the existing home on the lot to be severed. The Board finds this to be uncharacteristic of the area and would create a new abrupt condition that did not exist before and one the Board finds to represent an unacceptable adverse impact, and therefore not minor in nature.

[51] The Board also has serious concerns that the character of the adjacent area would be significantly altered in the proposed introduction of such an undersized lot into an estate pattern of development such that the adjacent area might be destabilized.

[52] Thus the Board finds that none of the four tests of s. 45(1) of the PA are met with regard to the variances proposed for the lot to be retained, and wholly dismisses the variance application for the lot to be retained.

[53] As the variances for the proposed lot to be retained are not authorized, it is not necessary to deal with either the variances proposed for the lot to be severed or the consent application.

[54] However the Board will note with regard to the consent application that the Board has previously found that the general intent and purpose of the Official Plan has not been met, that it had serious concerns with regard to the dimensions and shape of the proposed lot to be retained, and serious concerns with regard to the possible destabilization of an otherwise mature and stable area, which leads the Board to find that the consent application is not in the public interest, does not conform to the official plan and therefore does not meet s. 51(24) (b) (c) and (f) of the PA. Thus the Board wholly dismisses the consent application.

[55] This is the Order of the Board.

“Blair S. Taylor”

BLAIR S. TAYLOR
MEMBER

Ontario Municipal Board

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