

ISSUE DATE:

**Apr. 28, 2011**



PL101464

**Ontario Municipal Board  
Commission des affaires municipales de l'Ontario**

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

Appellant:	Michael Demczur
Applicant:	David Philpott
Subject:	Minor Variance
Variance from By-law No.:	22-90
Property Address/Description:	22 Clarke Avenue
Municipality:	Town of Orangeville
Municipal File No.:	A14/10
OMB Case No.:	PL101464
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**APPEARANCES:**

**Parties**

**Counsel**

Michael & Jacqueline Demczur

H. Elston

David Philpott

Town of Orangeville

J. Self

**MEMORANDUM OF ORAL DECISION DELIVERED BY C. HEFFERON ON  
APRIL 13, 2011 AND ORDER OF THE BOARD**

**Background**

In 2010, David Philpott constructed a set of wooden stairs at the side of his house at 22 Clarke Avenue. Clarke Avenue is located in an approximately six to eight year old subdivision composed of single family detached homes on approximately 45 foot lots on the south side of Orangeville. As built, the stairs have zero setback from the interior side yard lot line with the home of Michael and Jacqueline Demczur.

Zoning By-law 22-90 ("By-law"), which applies to the subject subdivision (shown in crosshatched markings in Exhibit 6) requires a minimum side yard setback of 1.5 metres. However, it also allows an encroachment of up to 0.7 metres into the side yard

for stairs and other structures provided a setback of a minimum of 0.6 metres is maintained.

Mr. Philpott had already constructed the stairs before applying to the Orangeville municipal officials for a building permit. When he applied, he was informed that he required a minor variance from the provisions of the By-law. On December 1, 2010, the Committee of Adjustment of the Town of Orangeville ("Committee") granted the required minor variance.

Michael and Jacqueline Demczur, who live at 24 Clarke Avenue, appealed the decision of the Committee.

### **Evidence & Analysis**

Mr. Elston, counsel for the Appellants, advised the Board that the fact that Mr. Philpott had constructed the stairs without first obtaining permission from the Town of Orangeville is not at issue. Nor is the fact that the stairs already exist in final finished form. The issue is, he contended, whether the minor variance to the provisions of the By-law required for issuance of a building permit passes the four tests under section 45 (1) of the *Planning Act*.

Ms T. Atkinson, RPP, was qualified by the Board to give opinion evidence on land use planning. Mr. Philpott was not represented either by counsel or by a land use planner. The third party to this matter, the Town of Orangeville, indicated that it did not intend to present any evidence. I therefore relied on Ms Atkinson as a qualified land use planner to present fair and objective opinion evidence that took into account the interests not only of the Parties to this dispute but also of the broader, long term interests of the public.

Ms Atkinson gave her opinion that while the requested minor variance complies with the general intent and purpose of the Town of Orangeville Official Plan, it fails to comply with the general intent and purpose of the By-law. In addition, she testified that the requested minor variance is not desirable for the appropriate development of the property and it is not minor.

I heard uncontested evidence that the subject property is set on a steep slope that falls an estimated 2.5 to 3 metres from the back of the house to the sidewalk (see photos in Exhibit 3) and that it is not unreasonable that a homeowner might need or simply want a set of exterior stairs in order to facilitate access to the rear yard.

The R4H zoning provisions of the By-law that apply to the subject neighbourhood require a minimum side yard setback of 1.5 metres. Ms Atkinson testified that this is intended to ensure adequate privacy, light and air as well as sufficient space for dealing with snow building up in winter and controlled storm water runoff the remainder of the time.

Subsection 5.22 of the By-law deals with "Yard Encroachments" and allows for exterior stairs (and other structures) provided that a minimum setback of 0.6 metres from any of the property lines is maintained. But, as the uncontested land use planning evidence showed and the photos in Exhibit 3 illustrate, the stairs as constructed provide zero setback from the interior side yard lot line, and this, Ms. Atkinson testified, is contrary to both the provisions and the general intent and purpose of the By-law.

As Mr. Philpott did not present any land use planning evidence, I adopt and rely on the land use planning evidence of Ms. Atkinson. Accordingly, I find that the requested minor variance does not comply with the general intent and purpose of the By-law.

After consideration of this and other land use planning opinion evidence of Ms Atkinson, I find that the requested minor variance also fails the remaining two tests under section 45(1) of the *Planning Act*, viz., it is not desirable for the appropriate development of the property and it is not "minor". It is not desirable for the appropriate development of the property not just because it consumes the entire sideyard of the Philipott property but also because, as Ms. Atkinson's evidence indicates and the photos in Exhibit 3 demonstrate, this has an adverse impact on the Demczur property.

I find it is not necessary to discuss the second set of evidence presented by Ms Atkinson in support of the appeal. This evidence suggests that portions of the offending staircase might also be considered to be a "ground oriented amenity area" as defined by subsection 2.59 of the By-law, and that if it is, it fails to satisfy the setback requirements as set down in subsection 5.2.2A of the By-law (Exhibit 6, page 19).

**General Finding**

After consideration of all the evidence and the submissions of both Mr. Philpott, who is the Applicant, and Mr. Elston, who is counsel for the Appellants, the Demczurs, I find that the requested minor variance fails three of the four tests required by section 45(1) of the *Planning Act*.

**Disposition & Order of the Board**

The Board Orders the Demczur appeal is allowed and the requested minor variance is not authorized.

So Orders the Board.

"C. Hefferon"

C.HEFFERON  
MEMBER

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COMMITTEE OF ADJUSTMENT  
DECISION OF COMMITTEE WITH REASONS  
RE APPLICATION FOR MINOR VARIANCE

Planning Act, R.S.O. 1990, c. P.13, ss. 45(8)

APPROVAL AUTHORITY: THE CORPORATION OF THE TOWN OF ORANGEVILLE  
RE AN APPLICATION BY David and Donna Philpott  
LOCATION OF PROPERTY: Lot 86, Registered Plan 7M-21  
22 Clarke Avenue  
PURPOSE OF APPLICATION: The applicants are requesting a minor variance to reduce the minimum side yard set-back requirement from 1.5 metres (4.92 feet) to 0 metres to legalize the existing stairs at the side of the dwelling.

WE, the undersigned, in making the decision upon this application have considered whether or not the variance requested was minor and desirable for the appropriate development and use of the land and that the general intent and purpose of the zoning by-law and the official plan will be maintained, or in the case of a change in a use of property which is lawfully non-conforming under the by-law as to whether or not this application has met the requirements of Section 45(1) of the Planning Act,

CONCUR in the following decisions and reasons for decisions made on the 1<sup>st</sup> day of December, 2010.

THE REQUEST IS HEREBY **APPROVED**

THIS DECISION:

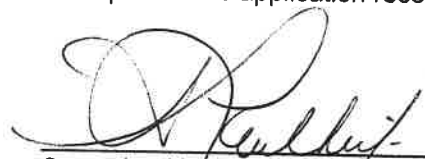
IF **APPROVED**: IS SUBJECT TO THE CONDITIONS AND FOR THE REASONS SET OUT ON PAGE TWO OF THE NOTICE OF DECISION OF THE COMMITTEE OF ADJUSTMENT.

IF **REFUSED**: IS FOR THE REASONS SET OUT ON PAGE TWO OF THE NOTICE OF DECISION OF THE COMMITTEE OF ADJUSTMENT.

  
Signature of Member  
  
Signature of Member  
  
Signature of Member  
  
Signature of Member  
Signature of Member

CERTIFICATION  
Planning Act, 1990, R.S.O. c. P.13, ss. 45(10)

I, Susan Lankheit, Secretary-Treasurer of the Committee of Adjustment certify that this is a true copy of the decision of the committee given on **December 1, 2010** with respect to the application recorded therein.

  
Susan Lankheit, Secretary-Treasurer  
Committee of Adjustment

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This decision or any condition is subject to appeal to the Ontario Municipal Board by filing with the Secretary-Treasurer of the Committee of Adjustment an appeal form, available from the OMB website at [www.omb.gov.on.ca](http://www.omb.gov.on.ca). The appeal form must be accompanied by a certified cheque or money order in the amount of \$125.00 payable to the Minister of Finance.

Only individuals, corporations and public bodies may appeal decisions in respect of applications for minor variance to the Ontario Municipal Board. A notice of appeal may not be filed by an unincorporated association or group. However, a notice of appeal may be filed in the name of an individual who is a member of the association or group on its behalf.

DATE DECISION MAILED: DECEMBER 2, 2010

LAST DAY FOR APPEALING THIS DECISION: DECEMBER 22, 2010

(Appeals must be received no later than 4:30 p.m. on the above date)

CONDITION: None

REASONS FOR DECISION: The variance as approved is considered minor in nature. It is the opinion of the Committee of Adjustment that the general intent and purpose of the Official Plan and Zoning By-law are maintained and the proposal is desirable for the appropriate development or use of the land, building or structure.