

ISSUE DATE:

Feb. 20, 2008



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL070715

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

Appellant:	Diane Westlake
Applicant:	Corporation of the Town of Orangeville
Subject:	Minor Variance
Property Address/Description:	Part of West Half of Lot 2, Concession 2 WHS
Variance from By-law:	22-90
Municipality:	Town of Orangeville
OMB Case No.:	PL070715
OMB File No.:	V070352
Municipal File No.:	A-8/07

APPEARANCES:

Parties

Agent

Diane Westlake

Town of Orangeville

J. Stiver

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

This was a variance dispute over the frontage of a proposed lot, created from the sale of the right-of-way (for a suburban road), which the Town had declared surplus.

A generation ago, in the middle of a suburban setting in the Town of Orangeville (Town), the Town foresaw that Westmorland Avenue would connect to College Avenue; but instead, the last 35 metres of the road allowance were left fallow. In 2007, the Town found that connection superfluous, so it declared the 66-foot road allowance surplus. It proposed to retain 24 feet as a pedestrian walkway, and sell the remaining 42 feet of frontage along College as a residential lot. However, Zoning By-law 22-90 required a minimum frontage of 49.2 feet (15 metres); so the Town applied for a variance, which the Committee of Adjustment (COA) authorized subject to a five-point Condition.

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Neighbours objected. Over the years, rather than leave this land untended, they had taken the initiative of laying topsoil, seeding, planting the occasional plant, and turning it into an informal mini-park. Neighbour Diane Westlake (appellant), appealed the COA's Decision to the Board. At the hearing, neither side was represented by counsel.

The Board has carefully considered all the evidence, as well as the submissions of both sides. Despite able argument by the neighbours, the Board concludes that the variance meets the four tests of Section 45(1) of the *Planning Act* and should be authorized, but subject to Conditions including more specificity for landscaping. The appeal is otherwise dismissed. The details and reasons are set out below.

PROJECT AND HISTORY

The area is quintessentially suburban. Numerous photographic exhibits leave no doubt as to its visual character. Westmorland Avenue (north-south) is clearly aligned to connect with College Avenue (east-west) when, some 35 metres short of the proposed T-intersection and within plain sight, it stops dead without so much as a turning circle. Based on the mental image which most Canadians have of suburbs, the Board finds that a passer-by would normally expect to see asphalt there.

That is also what the documents foresaw, e.g., the Plan of Survey (Exhibit 4), and the Lot Grading Plan (Exhibit 5). It was undisputed that at all relevant times until 2006, the subject property was planned to be an extension of the street.

No record shows it ever being officially considered as potential parkland. There is already a park slightly over one block west (albeit across busy Blind Line); and there are conservation lands slightly over one block east.

The road allowance is flanked by 428 College Avenue and 430 College Avenue. Beneath the road allowance, on its east side, is a water main. Land slopes downward from College to Westmorland (with a drop of some two metres), to a swale running from west to east along the southern edge of the subject property.

As mentioned, the relevant Zoning By-law requires a minimum of 15 metres (49.2 feet) of frontage, and in the case of two-storey dwellings, it requires a 1.5 metre side

yard setback. On the south side of College, houses typically appear to be two storeys, on 60-foot lots, with 5-6 foot side yard setbacks.

The Town's current proposal foresees that the 66-foot road allowance would be split. A 24-foot wide section, atop the water main on the east side, would be retained as a pedestrian walkway from College to Westmorland, whereas the remaining 42 feet to the west would be sold as a residential lot. The only question submitted to the COA – and to the Board – pertained to the variance for frontage, to allow 42 feet instead of the required 49.2 feet.

Neighbours presented a petition to the COA, with several arguments recorded in the COA Minutes. The neighbours expressed concerns about drainage, and about Westmorland Avenue being "aligned directly into what would be a backyard – (a) dangerous situation". They also objected to the impact on streetscapes at both the front and back: they said that at the front along College Avenue, the "consistent esthetic would be destroyed by a smaller home situated off-centre on a 42 foot lot"; and they called the prospective back view, from Westmorland Avenue, "unsightly". They also argued that the walkway space over the water main was insufficient for maintenance/repairs (though that argument was not corroborated by the Town's Public Works Department, and was essentially not pursued at the hearing).

A majority on the COA was not persuaded by the objections. The COA authorized the variance, subject to a five-point Condition, including a requirement for a chain-link fence and landscaping. The Minutes indicate that the Town's Chief Administrative Officer "suggested that placing a figure on landscaping would tie the hands of Council"; accordingly, the COA specified a "minimum of \$1000".

APPLICABLE CRITERIA

For variances, the criteria (often called "the four tests") are set forth at section 45(1), namely that a variance must be minor, desirable for the appropriate development or use of the property, and maintain the general intent and purpose of both the Zoning By-law and of the Official Plan.

OBSERVATIONS AND FINDINGS

This variance application was about the frontage of the proposed lot – but most of the debate was about other issues.

The Town's planner testified that the variance met the four tests. The adjustment to frontage, she said, did not digress from the neighbourhood's Official Plan designation as "Low-Density Residential". Infill, she added, was consistent with public policy. As for the Zoning By-law, she said that the intent and purpose of the frontage provisions was to promote visual "consistency" of streetscape, and that the Town's overall arrangement (with the proposed lot immediately abutting a landscaped walkway) would not noticeably digress from that intent. She called the proposed frontage desirable and appropriate, and insisted that the frontage issue was "minor", notably in the sense of having no significant negative impact on neighbours.

Although the neighbours disputed the argument about streetscape "consistency", their challenge was overwhelmingly focused less on the frontage than on the overall change of use. They had no experts, but nonetheless raised eloquent objections that were both procedural and substantive.

From a procedural standpoint, they argued that the property should have been surveyed, and the implications assessed, to a greater extent before the Town took this initiative. That argument might have been more persuasive, if there had been some professional evidence of a procedural shortfall involving a significant obstacle; but on the contrary, the Town's planner testified specifically that all preliminary considerations had been fully assessed, and this testimony was not refuted. Indeed, she insisted that the Town's Department of Public Works had been consulted not once, but twice.

The neighbours remained skeptical, notably concerning drainage. That objection, however, had its own problem – because drainage questions are normally considered at the building permit stage, when proposed construction is reviewed in light of the *Ontario Building Code*. Furthermore, the Board was not shown how the frontage of the property (the subject-matter of the appeal) would affect its drainage or vice versa. In short, the Board found no evidence of a technical shortcoming – and even if it had, it was not shown that it would necessarily obstruct the proposed variance itself.

Turning to the substantive merits, the Board finds that the core of the neighbours' objections pertain less to the four tests as applied to frontage, than to the merits of the proposed disposal of the space. A space that had been planned for asphalt -- but which had instead been informally planted -- was now being reassigned for a dwelling. Two preliminary observations are in order. First, it was not the neighbours' intention to reassert the property's originally-planned function. On the contrary, their objective was to give the site a function for which it had never been planned. Second, aside from the variance, there was no suggestion that the Town lacked legal jurisdiction to pursue its proposed course, or that the Town's decision to declare the property "surplus" was even before the Board.

It was therefore not within the Board's purview to address whether a residence backing onto Westmorland Avenue would cause traffic difficulties, or be "unsightly". The single issue which the Board was mandated to adjudicate was the frontage variance.

The neighbours nonetheless raised three planning arguments of note. They pointed to section 1.9.3 of the Town's Official Plan, including its reference to "local vistas"; they claimed that the space had become an asset, which helped define neighbourhood character in a positive way. "The status quo is working... it's imprinted!". Second, they argued that the variance would produce a narrower lot, breaking the "esthetic" symmetry of the streetscape along College Avenue. Third, they objected to some of the detailing, i.e., the physical features of the walkway and surrounding area.

First, as for the vista, the Board might have found the neighbours' argument more compelling, if it had not been for the photographic evidence. The site's rightful destiny might arguably have been to be a neighbourhood mini-park -- if it actually looked anything like a neighbourhood mini-park. The Board finds that it does not. It looks like what it is: a truncated street, missing 35 metres of asphalt before the corner. Despite the laudable efforts of neighbours to dress it up, it is a "vista" which is no less incongruous than what the Town proposed.

As for consistency of the streetscape along College Avenue, that argument too might have been more compelling, were it not for three factors. First, right across the street, the facades have different proportions and a different visual character. Next, the Board was not persuaded that when a passerby looked up or down College Avenue

toward the subject property, the perspective of the proposed dwelling lot *in tandem* with the landscaped walkway would produce a cumulative visual impact that was jarring. The Board found that evidence scant to non-existent. Finally, any visual idiosyncrasy (such as it is) there can be mitigated through buffering, as will be described later.

The question of detailing is more problematic. Although the Board was advised of no dispute over the legal right of the Town to declare properties surplus, it would have been reasonable for the Town to pay particular attention to greenery, for two reasons: first, if only to acknowledge the neighbours' investment of their own time, effort and money in maintaining this Town property. If the Town had merely conducted routine maintenance of the property (let alone paved it, as it had planned) rather than leaving maintenance to the neighbours, it might likely have spent far more over the years than the \$1000 now budgeted for landscaping.

Second, and more importantly from a planning perspective, it is not uncommon for a variance to be conditional on measures to help disguise potential visual idiosyncrasies arising from the variance – particularly when, as in this case, there is an apparent planning intent to favour streetscape “consistency”. Here, the Board agreed with the Town’s expert that based on the photographic exhibits, no visually jarring impact was likely in the pattern of facades and openings when viewed in tandem with the walkway. However, there are two caveats, both relating to the role of foliage.

The first is the truism that visual impact depends on what is within the field of vision. The visibility of variations in frontages, facades, and distances between buildings is affected by foliage. The Board heard expert evidence that the pattern of massing would look reasonably normal, all other things being equal – which presupposes that the foliage would also look reasonably normal. However, if the site were relatively barren, it is not clear that the visual impact would be the same. By the same token, though the Board heard about the pattern of *massing*, it heard almost no evidence on the pattern of *surfaces*.

On the other hand, the Committee of Adjustment (COA) apparently concluded that if the proposal were to proceed, landscaping was a necessity. That is not an unusual Condition: green buffering is a frequent tool to mitigate visual inconsistencies.

Here, neither side disputed that Condition, and based on the photographic evidence, the Board finds no dispute with that Condition either.

However, that begs the question of the *standard* for that landscaping. It would be unhelpful to call for “landscaping”, without indicating the extent.

The dimensions are substantial enough – a walkway area 7.3 metres (24 feet) wide, and 35 metres (115 feet) long, plus a new lot backing onto Westmorland Avenue to an unusually visible extent. Following the “suggestion” of the Town's Chief Administrative Officer, the COA said that landscaping should represent “a minimum of \$1000”; but the Board heard no evidence on where the COA obtained that figure, what standard of landscaping was being referred to, or, most importantly for the four tests, whether that standard would be adequate to meet the intent of “consistency” and “buffering” mentioned earlier.

In municipalities with the sophistication of Orangeville, it is normal to have landscaping standards, which are committed to writing. These are usually found in site plan approval procedures, design guidelines, or some similar public document from the local planning department.

As a general principle, it is usually desirable for governments to apply standards to *themselves* which are no lower than the standards they demand of others. Accordingly, the Board is prepared to apply the same landscaping Condition as the COA had, with the addendum that there should be consistency between the Town's landscaping, and what the Town would expect of others. The terms are outlined below.

CONCLUSION

THE BOARD ORDERS that the appeal is dismissed, and that the variance to By-law 22-90 of the Town of Orangeville is authorized, subject to the following Conditions:

1. Compliance with the five points stipulated as a Condition in the Decision No. A-8/07 of the Committee of Adjustment; and
2. Production of a landscape scheme, to a standard which, in the written professional opinion of the Chief Official of the

Town's Planning Department, is no lower than that prescribed under the Town's relevant site plan approval procedures and/or design guidelines, for projects of comparable scale and visibility.

If there are undue difficulties in applying the above Conditions, the Board may be spoken to.

It is so Ordered.

"M.C. Denhez"

M. C. DENHEZ
MEMBER



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: The Corporation of the Town of Orangeville

LOCATION OF PROPERTY: Part of the West 1/2 of Lot 2, concession 2, WHS,
Parts 7 & 8 on Reference Plan 7R-2689
(between 428 & 430 College Avenue)

PURPOSE OF APPLICATION: The applicant is requesting a minor variance to reduce the minimum lot frontage requirement from 15 metres (49.2) feet to 12.8 metres (42 feet) to permit the sale of a surplus portion of the Westmorland Road allowance as a vacant residential building lot.

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 1st day of August, 2007.

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

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

I, Cheryl Johns, Acting Secretary-Treasurer of the Committee of Adjustment certify that this is a true copy of the decision of the committee given on August 1, 2007 with respect to the application recorded therein.


Cheryl Johns, Acting Secretary-Treasurer
Committee of Adjustment

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 a written notification, giving reasons for the appeal, accompanied by a cheque 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: AUGUST 8, 2007

LAST DAY FOR APPEALING THIS DECISION: AUGUST 21, 2007

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

CONDITIONS:

THAT the following be required as a condition of sale:

- A privacy fence is erected along the property line between 430 College Avenue and the subject property.
- A minimum of \$1,000 is spent on landscaping.
- A municipal address for the property will not be a hardship to the neighbourhood.
- The walkway is divided from the adjacent properties by a chain link fence.
- A hard-surface walkway is constructed.

REASONS FOR DECISION: The variances as approved are 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.