OMB File No.: PL 180027

ENVIRONMENT AND LAND TRIBUNALS ONTARIO
ONTARIO MUNICIPAL BOARD

BETWEEN:

DENIS RANCOURT

(Appellant)

and

ARTERRA HOMES INC.

(Applicant)

SUBMISSIONS OF THE APPELLANT DR. DENIS RANCOURT

(Re: original lots at 31 & 33 Simcoe Street, Ottawa)

Appellant's submissions in the matters scheduled to be argued for two days starting on Thursday, June 28, 2018, at 10:00 AM, at City Hall, Keefer Room, 110 Laurier Avenue W., Cartier Square, Ottawa, ON K2P 2L7.

Consent Applications to the Committee of Adjustment, City of Ottawa
File No.: D08-01-17/8-00374 to DO8-01-17/8-00376
Owner(s): Arterra Homes lnc.
Location: 31 Simcoe Street, (134 & 136) Evelyn Avenue [31 & 33 Simcoe Street]
Minor Variance Applications to the Committee of Adjustment, City of Ottawa
File Nos.: D08-02-17/A-00304, DO8-02-17/A-00310 & D08-0 2-17 tA-00311
Owner(s): Arterra Homes lnc.
Location: 31 Simcoe Street, (134 & 136) Evelyn Avenue [31 & 33 Simcoe Street]

May 8, 2018

Dr. Denis Rancourt
(Appellant)

SUMMARY: Ontario is the only province in Canada whose bylaw-variance provision in its planning act sets a jurisdictional threshold as "minor variance", without defining "minor" and without providing the established criteria of undue harm from compliance with the bylaw and absence of injury to neighbouring properties.

As a result, the known market and political forces have free reign. The variance provision has become a tribunal planning instrument in-effect without democratic oversight, and the impacts on established neighbourhoods are devastating, in Ottawa at least.

Ontario's bylaw-variance provision (s. 45(1) of the *Planning Act*) is unconstitutional for violation of the doctrine of vagueness and for violation of the *Charter* right of equal protection and benefit from the law.

In the present applications, even the fact that the subject property of two urban lots is on a former industrial landfill, with "widespread presence" of toxic heavy metals and cancer-causing polycyclic aromatic hydrocarbons (PAHs),* was not enough for the Committee of Adjustment to consider and to follow the law (Provincial Policy Statement directives ss. 3.2.1, 3.2.2 and 4.8.3(1)) by not approving the applications until after the required studies are proven to be accomplished.

The appellant requests:

i. A declaratory finding that s. 45(1) of the *Planning Act* is unconstitutional and therefore cannot be applied.
ii. A declaratory finding that the Committee of Adjustment and the Ontario Municipal Board do not have the jurisdiction to decide the variance applications.
iii. A declaratory finding that the Committee of Adjustment should not have refused to hear the appellant's constitutional and jurisdictional arguments.
iv. Dismissal of the six impugned applications.
v. Recommendations for correctly proceeding with any new-building development of the subject lots, in the soil toxicity and soil or bedrock instability circumstances of the site.

* See attached documents (Book of Tabs); and see *What Health Effects Are Associated With PAH Exposure?*, Agency for Toxic Substances and Disease Registry, USA gov., https://www.atsdr.cdc.gov/csem/pah/docs/pah.pdf , p. 34

TABLE OF CONTENTS

I. Litigation history and the constitutional and jurisdictional charges

1. The appellant made written submissions to the Committee of Adjustments (the "Committee"), City of Ottawa, opposing a developer's applications for severance consents and so-called "minor variances" to build-up two (2) lots immediately adjacent to the appellant's home, in a modest neighbourhood of detached single-family dwellings.

-

Written submissions of Dr. Denis Rancourt and [redacted], Ottawa, Ontario, In the matter of consent and minor variance applications to the Committee of Adjustment, City of Ottawa, Submitted prior to the public meeting scheduled to be held on December 6, 2017, dated Novemebr 28, 2017, pp. 13 [TAB 1] [Separate Book of Tabs]

2. The consent and variance applications were heard together on December 6, 2017. The Committee expressly refused to hear or consider two of the appellant's arguments:
   (a) Challenging the Committee's jurisdiction pursuant to s. 45(1) of the *Planning Act* (the "Act"); and
   (b) Challenging the constitutionality of the *Act* on the grounds of violating the principle of the rule of law.

-

Partial transcript of the Committee hearing of December 6, 2017, re jurisdiction [TAB 2]
Partial transcript of the Committee hearing of December 6, 2017, re unconstitutionality [TAB 3]
And original recordings made by the Committee

3. The Committee heard the appellant's other grounds and, by majority, summarily dismissed the objections of the appellant and of other neighbours and authorized all the applications, in deciding that the variances were "minor".

-

Decision - Minor Variance, Helena Prockiw (Chair), December 15, 2017, File Nos. D08-02-17/A-00304, D08-02-17/A-00310 & D08-02-17/A-00311 [TAB 4]
Decision - Consent, Helena Prockiw (Chair), December 15, 2017, File Nos. D08-01-17/B-OO374 to D08-01-17/B-00376 [TAB 5]

4. The appellant duly filed his Notice of Appeal to the Ontario Municipal Board (the "Board") to contest the Committee decisions on January 4, 2018.

-

Notice of Appeal (Appellant Form (A1)) of Dr. Denis Rancourt, dated January 4, 2018, pp. 9 [TAB 6]

5. The appellant filed and served a Notice of Constitutional Question, pursuant to s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 on March 1, 2018.

-

Notice of Constitutional Question, dated March 1, 2018, pp. 9 [TAB 7]

6. On March 5, 2018, the Board informed the parties that "the City of Ottawa has interest in appearing before the Board concerning the Constitutional Question only". The appellant informed the Board, City and applicant that he does not object to City intervention-status submissions limited to helping the Board understand the constitutional question in relation to City bylaws and City policy and practice.

7. The appellant submits that s. 45(1) of the *Act* is unconstitutionally vague and therefore of no force or effect. The appellant disjunctively submits that s. 45(1) of the *Act* is unconstitutional because it violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. As such, the Committee and the Board do not have the jurisdiction to hear the applications for variances from the bylaws, and there is no basis to approve the consent applications.

8. In the alternative, whereas s. 45(1) of the *Act* grants limited jurisdiction to hear variance applications solely if the variances are "minor" [see discussion of the law, below], the appellant submits that the Committee and the Board do not have the jurisdiction to decide the applications for variances because the variances are not "minor".

9. In the alternative, the appellant submits that it is unreasonable to approve the applications.

10. The facts in support of the constitutional challenge and in support of the alternative charges include the following.

II. Facts relied on

11. The consent for severance of two (2) original lots (31 & 33 Simcoe Street) into three (3) lots and the "minor variance" authorization to construct two (2) new large buildings constitute a substantial development.

-

Building plan, filed by applicant, accessed 2017-11-24 [TAB 8]

Illustrated here:

Left: Map of planned building footprints on lots (two and three stories; thick solid black lines) — with current buildings also shown (two and one stories; dashed black lines).
Right: Satellite picture of same lots with original house at 31 Simcoe Street and utility building (garage). Red lines show green yard spaces.

12. The variances violate a current interim control bylaw to prevent buildings from being used as or being transformable into *de facto* rooming houses with more than four (4) bedrooms, while a City study is under way.

-

Ottawa City Council minutes for July 12, 2017 [TAB 9]
Ottawa Interim Control Bylaw No. 2017-245 [TAB 10]

13. One of the applied-for building plans (two-unit three-story building) has six (6) nominal bedrooms, can accommodate ten (10) more bedrooms in basements, dens, and rec rooms (for a total of sixteen (16)), and exceeds the Interim Control Bylaw building floor area limit.

-

Building plan, filed by applicant, accessed 2017-11-24 [TAB 8]

14. Each unit in the particular said applied-for building can accommodate eight (8) bedrooms and exceeds the Interim Control Bylaw unit floor area limit by 246%.

15. The Interim Control Bylaw is repealed on July 12, 2018, and may be renewed for another year, while the "ongoing R4 Study" continues (see City Council minutes).

16. It is not contested (see Committee's decision) that the variances are also not in conformity with the pre-existing general bylaw, which may be changed following the said "ongoing R4 Study".

17. The land of the said development is in the primary study area of a current joint (city and environment ministry) soil toxicity and former industrial-waste-site footprint study, the results of which are not known, and the first results of which are not expected to be available until "spring 2018". An Ottawa Public Health email to the Committee stated, *inter alia*:

> The purpose of the soil study is to determine the footprint of a former landfill site on private residential properties and to characterize the contaminants within the shallow soil that may warrant handling precautions to minimize potential health risks to residents. The properties that are the subject of this minor variance application are within the study area …

-

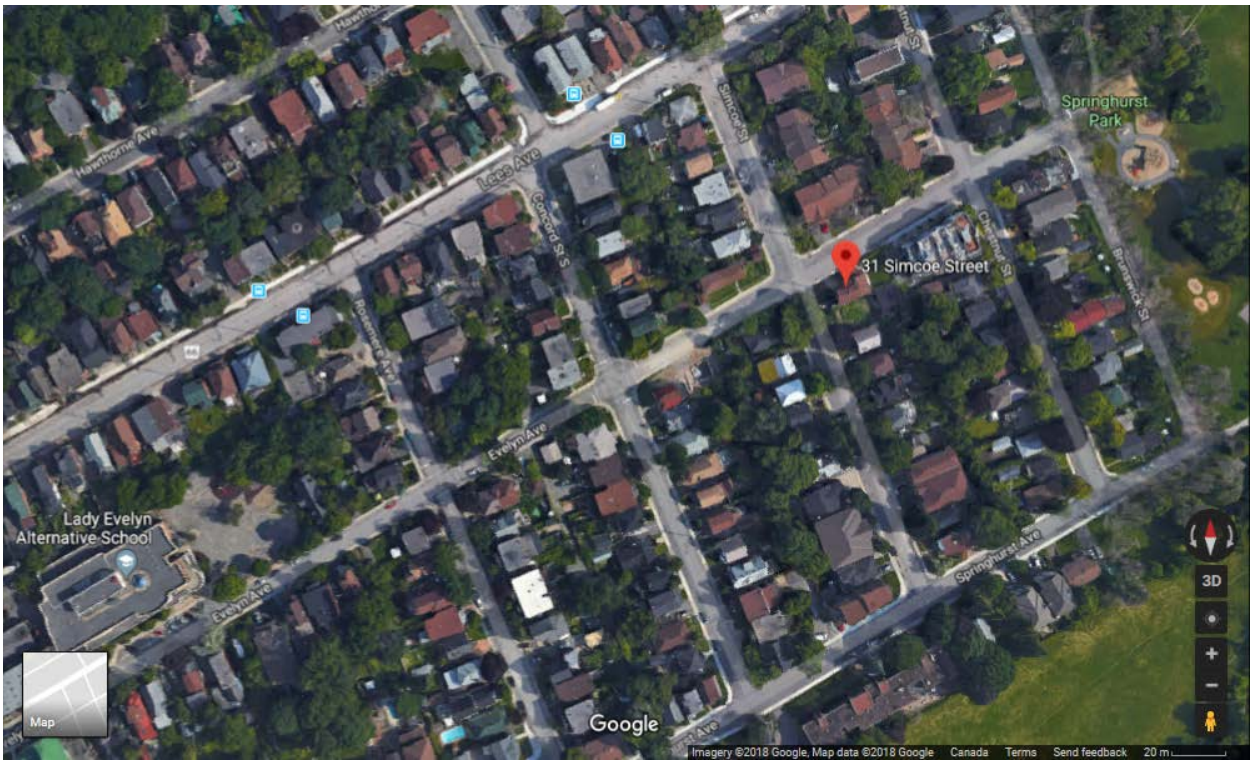
Ottawa Public Health email to Committee, December 5, 2017 [TAB 11]
City's Notification Letter to residents, Re: Soil sampling, August 21, 2017 [TAB 12]

18. Thus, the land is potentially contaminated and Committee authorization of the said development is in violation of Article 4.8.4, Policies 1, 2 & 3, of the Official Plan made pursuant to the Act.

19. The land is potentially unstable soil or bedrock (former industrial-waste site), such that Committee authorization of the said development is in violation of Article 4.8.3, Policy 1, of the Official Plan made pursuant to the Act.

20. The consents and applications are (the said development is) at odds with the dominant character of the neighbourhood and of the city block, which consists of one and two-story

detached single-family dwellings with large backyards, and moderately large front yards with old-growth trees:



Satellite colour view, showing the backyard green spaces between houses, 280m x 460m (2015)


Colour pic: Simcoe Street segment (east side) at the subject property. Red brick house with chimney is 35 Simcoe Street (April 2018).

Colour pic: Simcoe Street segment (west side) at the subject property, facing 31-39 Simcoe Street (April 2018).

Colour pic: Backyards looking South from 35 Simcoe Street (February 2018).

Colour pic: Backyard of 31 Simcoe Street (April 2018).
(After applicant's demolition of exterior.)

21. The said development has the effect of placing the appellant's home directly in boundary contact with a neighbourhood of different character, which is incompatible with neighbourhood backyard life and community, and which is based on the model of large two-and-three-storey whole-lot-footprint units with no yards and with near-boundary entrances to parking garages rather than driveways.

22. The Committee summarily discarded the appellant's liabilities resulting from the said development, which include: in-effect condemning three (3) windows, loss of sky view from the appellant's property, loss of neighbouring backyards, physical high-walling of appellant's backyard on one side at and near the property line, loss (to the appellant and to the neighbourhood) of the large Norway maple tree (*Acer platanoides*), which is on the North-side property line, in the appellant's front yard. [See record of proceeding]

23. Seven other neighbourhood residents claimed personal and public nuisance liabilities, including parking, laneway access and neighbourhood character, which were summarily discarded by the Committee. [See record of proceeding]

24. The Committee adopted an incorrect and unreasonable assessment of neighbourhood character, which ignored the layout and sizes of the homes actually and predominantly present in the neighbourhood, by relying on a City planner's opinion about "streetscape" analysis (i.e., house-front appearance, seen from the street) and solely for its consideration of whether a driveway entrance must be facing the front.

-

Decision - Minor Variance, Helena Prockiw (Chair), December 15, 2017, File Nos. D08-02-17/A-00304, D08-02-17/A-00310 & D08-02-17/A-00311; at 2nd para., p. 5 [TAB 4]

25. The Committee did not have and did not request evidence of the actual character and environment of the neighbourhood, such as independent field reports, photographs, areal views, footprint/lot-size statistics, building-height statistics, tree density, and so-on.

26. The Committee was silent on the fact that the applicant submitted an incorrect Streetscape Character Analysis for Evelyn Ave. (incorrect "AAA" versus correct "CAA") — using only ten (10) neighbouring units — in arguing its position; and adopted the applicant's resulting argument about the development to the north and east of the subject property (see below).

-

<u>Correct "CAA"</u>: Comments to the Committee, by City planner Robert Sandercott, November 30, 2017; see header and unnumbered pp. 2-3 [Record of the proceeding]
<u>Incorrect "AAA"</u>: Applicant's cover letter, by Danna See-Har, October 31, 2017; see last para. of unnumbered p. 5 [Record of the proceeding]

27. Even through the limited prism of correctly-performed Streetscape Character Analysis, the plans for the Evelyn-facing building do not conform to the general bylaw:

> Relief is required as one of the proposed semi-detached units does not meet the Parking Access and Front Yard Pattern provisions of the Mature Neighbourhoods Overlay, as determined through the Streetscape Character Analysis process. In addition, the proposed semi-detached dwelling does not meet the gross floor area restrictions of Interim Control By-law 2017-245 and the Owners have also applied for relief from this By-law. […] A Streetscape Character Analysis was completed for this property in accordance with Sections 139 and 140 of the City's Zoning By-law 2008-250. […] The proposal does not conform with the results of the Streetscape Character Analysis submitted for the Evelyn Avenue frontage, in particular […]

-

Comments to the Committee, by City planner Robert Sandercott, November 30, 2017; at its unnumbered pages 1, 2 and 3 [Record of the proceeding]

28. The Committee decided that the violation of the general bylaw was acceptable by reference to the "developments to the [immediate] north and east of the subject property" (see below), however, the Committee gave no consideration (was silent) on the fact that Evelyn frontage is solely relevant because the Committee concomitantly approved the accompanying land-severance consent application and that streetscape non-compliance would be unacceptably large for Simcoe frontage of the pre-consent Simcoe-fronting lots.

29. The dominant Character Group on Evelyn is "CAA" (yard/parking/main-entrance) whereas it is "BBA" on Simcoe [Comments to the Committee, by City planner Robert Sandercott, November 30, 2017]. Parking Character Group B permits driveways that are less than or equal to one-third in width than the actual lot width. The plans for the multi-unit building

on Evelyn do not comply. The approved-application front-yard setbacks for Evelyn are less than half the front-yard setbacks on Simcoe.

30. In this way, the consent application approval in-effect circumvents the Mature Neighbourhoods Overlay streetscape provisions of the general bylaw, and subverts the minor variance jurisdictional provision of the *Planning Act*.

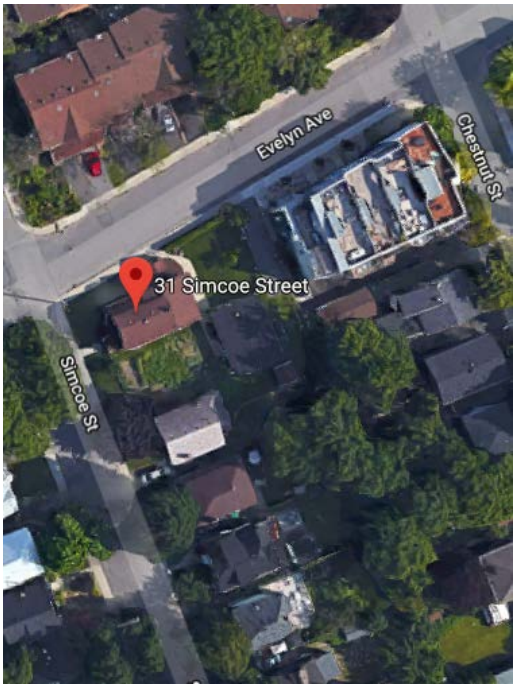
31. The Committee adopted a cherry-picking methodology by relying on a few large buildings on the neighbourhood boundary, in approving the applications:

> The Committee is cognizant of the fabric of the neighbourhood, and takes particular note of the fact that there are townhouse developments to the north and east of the subject properly. [Emphasis added]

-

Decision - Minor Variance, Helena Prockiw (Chair), December 15, 2017, File Nos. D08-02-17/A-00304, D08-02-17/A-00310 & D08-02-17/A-00311; at 2nd para., p. 5 [TAB 4]

32. The Committee is referring to the relatively massive buildings to the immediate North and East of the subject property, which can be seen in this satellite colour view (top is North):



33. As such, the Committee relied on uncharacteristically large buildings relatively recently erected at the boundary of the Simcoe-Evelyn-Chestnut bloc, in arguing what can be done at a property that is immediately adjacent. This is a classic “domino-effect” encroachment argument.

34. The applicant submitted and utilizes the same false reasoning adopted by the Committee:

> This SCA examined ten lots fronting on Evelyn Avenue, five of which make up the townhouse development to the east of the Subject Property. This townhouse development contains a private rear lane that provides rear yard parking access to individual units. This townhouse development skewed the results of the established Front Yard, and Parking and Access Patterns in the neighbourhood. Developments which are not accessed by a rear lane, including other townhouses in the neighbourhood, are characterized by driveways.
>
> *Figure 3. Townhouses to the North of the Subject Property, across Evelyn Avenue*
>
> [picture of the building front of townhouses to the north]
>
> [Underline-emphasis added]

-

Applicant's cover letter, by Danna See-Har, October 31, 2017; at last para. of unnumbered p. 5 and Figure 3 [Record of the proceeding]

35. Domino-effect encroachment has had a devastating effect on the appellant's neighbours. The case of 39 Chestnut Street is documented in the following February and April 2018 colour pictures and 2015 aerial view.

36. Looking east from the Evelyn-Chestnut intersection. The small white house is 39 Chestnut Avenue:

37. The new developments progressed from north to south, engulfing the small house. The "minor adjustment" at 43 Chestnut was appealed to the OMB, where a deleterious domino-effect was argued *inter alia*, to no avail. [1]

[1] *Dawson v. Ottawa (City)*, 2015 CanLII 78979 (ON OMB), PL150798, http://canlii.ca/t/gmbzw ; see para. 19 [BOA]

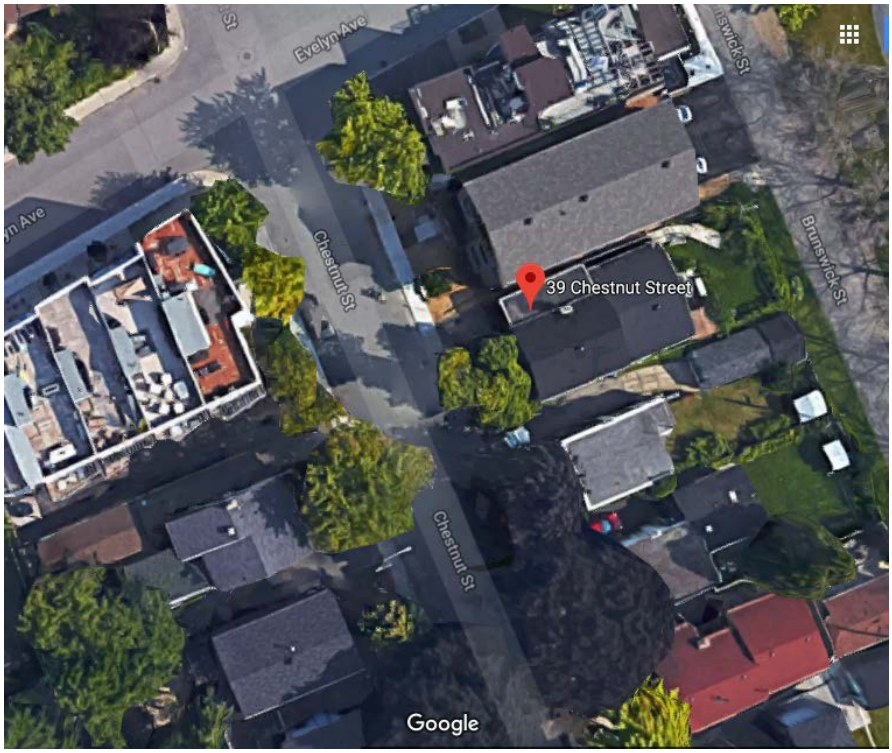
38. The back view of the same white house at 39 Chestnut Avenue, looking west from Brunswick Street (April 2018):

39. The developing situation on the other side of Chestnut Avenue is similar (February 2018):

Right: Looking west from 39 Chestnut Avenue. The large building to the north fronts Evelyn and is adjacent to the subject property at 31 Simcoe Street.
Left: The rest of Chestnut, looking south-west.

40. And seen from the Chestnut-Evelyn intersection, looking south down Chestnut (April 2018):

41. Satellite colour view illustrating the domino-effect overrun of 39 Chestnut, just prior to the development at 43 Chestnut Avenue (2015):



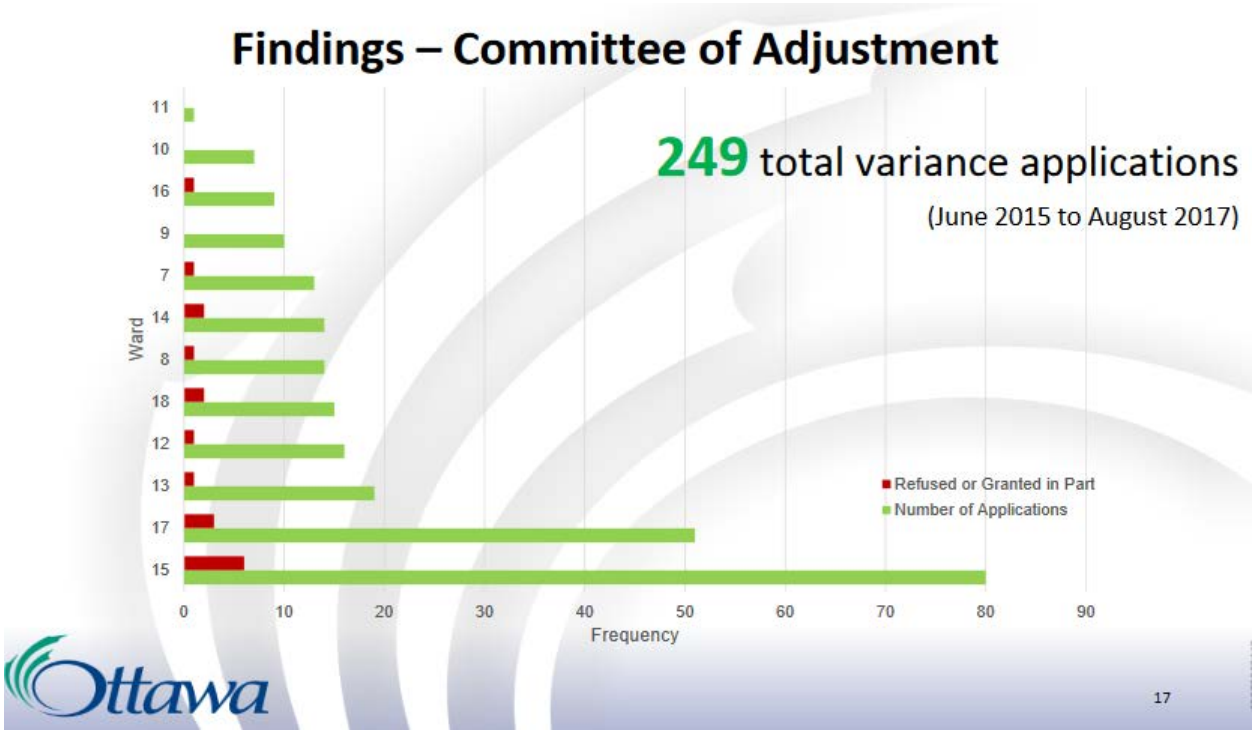
42. A similar phenomenon (another “minor variance”) just north of the 39 Chestnut case, in the segment north of Evelyn, at 11 Chestnut (April 2018):

43. Coming back to Simcoe Street, immediately across from the subject property at 31 Simcoe Street, we have this large grey three-story double-garage single-unit building fronting Evelyn Avenue and in hind-contact with the two-story established homes; looking south-west from the Simcoe-Evelyn intersection (April 2018):

44. An emergent “domino-effect”, or boundary effect, is also present at the south end of Simcoe Street, across Springhurst Avenue; looking south from the Simcoe-Springhurst intersection (February 2018):

45. All the large multi-unit and three-story buildings seen in the above pictures replaced established neighbourhood homes and were typically approved as “minor variances”, in City of Ottawa Ward 17.

46. Whereas “minor variance” applications are by definition requests for approval to violate the existing planning bylaws, virtually all as-submitted applications are approved by the Committee in Ottawa: [2]



[2] “Monitoring the Infill Zoning Regulations”, Presentation, City of Ottawa, Zoning & Interpretation Unit, April 3, 2018 [accessed 2018-04-26] https://documents.ottawa.ca/sites/documents.ottawa.ca/files/monitor_infill_en.pdf

47. From June 2015 to August 2017, in Ward 17, 3 of the 51 applications for "minor variances" were refused or granted in part. The other 48 applications were granted in entirety: 94% of the applications were approved as submitted. Some fraction of the 6% was approved in part. The same result is City-wide. In Ward 15, 98% of the 80 applications were approved as submitted.

48. An appellant's expert witness will testify on the administrative conditions that have prevailed in Ottawa for decades:

    (a) Minor variance applications are virtually always approved in favour of developers.
    (b) Large developers can secure unreasonably large "adjustments".
    (c) One consequence is great loss of city greenspace, since most greenspace is on private land.
    (d) Lot-line to lot-line construction is approved irrespective of bylaws and guidelines.
    (e) Developers run the city, largely through the mechanisms of campaign donations from the development industry, and proximity to City staff.
    (f) The city's main qualities are being substantively eroded, as a result.
    (g) Neighbourhood streets are being devastated, as a result.
    (h) Overdevelopment is everywhere, with buildings being too high, too intense and too intrusive, as a result.

49. In one example of staff proximity to developers, which benefits from some public transparency, a recent CBC's report described the work-leave circumstances of City senior bureaucrat Marco Manconi. The report quotes Ward 17 Councillor David Chernushenko saying:

> "Because it's in the development/building industry, it's going to have the whiff of something unsavoury, even if there isn't anything."

The reporter understates:

> "And in a city where some believe the relationship between the municipal bureaucracy and the development industry is already too cozy, a senior manager working for a homebuilder — albeit a relatively small-scale one — i[s] unlikely to sit well."

-

"City project manager granted leave to work for developer", *CBC News*, April 5, 2018 [TAB 13]

http://www.cbc.ca/news/canada/ottawa/marco-manconi-city-ottawa-projects-leave-1.4605000

III. Issues and law

Issues before the Board

50. The issues in this appeal are the following.

A. Is section 45(1) of the *Planning Act* unconstitutional because it violates the appellant's s. 15(1) *Canadian Charter of Rights and Freedoms* rights?
B. Is section 45(1) of the *Planning Act* unconstitutionally vague and therefore of no force or effect?
C. If section 45(1) of the *Act* is constitutional, do the Committee and Board have jurisdiction to hear the applications?
D. If the Committee and Board have jurisdiction, should the applications be approved?

Board's jurisdiction to hear the constitutional challenge and duty to hear the jurisdictional challenge

51. Section 35 of the *Ontario Municipal Board Act* provides:

> **Power to determine law and fact**
> **35** The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact. R.S.O. 1990, c. O.28, s. 35.
>
> [emphasis added]

52. In such statutory circumstances, the Supreme Court has been clear that the administrative tribunal (here, the Board) must hear the constitutional challenge: [3]

> The Tribunal can, and indeed must, refuse to apply guidelines that it finds to be ultra vires the Commission as contrary to the Commission's enabling legislation, the *Act*, the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Tribunal's power to

[3] *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 SCR 884, 2003 SCC 36 (CanLII), http://canlii.ca/t/1g6pk , at para. 47 [BOA]

> "decide all questions of law or fact necessary to determining the matter" under s. 50(2) of the *Act* is clearly a general power to consider questions of law, including questions pertaining to the *Charter* and the *Canadian Bill of Rights*: see *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854.

53. This conclusion is cited favorably by the Court of Appeal, for the specific case of the Board.[4]

54. The detailed test for any administrative tribunal to have jurisdiction to hear constitutional challenges is provided by the Supreme Court in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*.[5]

55. The law applicable to the Board and the Board's duty to hear jurisdictional challenges to its authority were summarized by Cumming J. as: [6]

> The Legislature intended to confer upon the OMB the power to interpret and apply the Charter in dealing with matters within its jurisdiction. The jurisdiction of a tribunal is limited in that it does not have jurisdiction to make a formal declaration of invalidity on the basis of unconstitutionality but is restricted simply to treating any impugned provision as invalid for the purpose of the matter before it. The ability to make a determination as to its own jurisdiction is a corollary to its ability to render a decision within its jurisdiction: Cuddy Chicks at p. 18 S.C.R., p. 130 D.L.R.
>
> [emphasis added]

Constitutional principle of the rule of law, and the doctrine against vagueness

56. The constitutional status of the principle of the rule of law is beyond question, and the principle can be (and has been) applied to judicially declare a provincial statute invalid: [7]

---

[4] *Toronto (City) v. Goldlist Properties Inc.*, 2003 CanLII 50084 (ON CA), http://canlii.ca/t/4t0r , see para. 41 [BOA]
[5] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54 (CanLII), http://canlii.ca/t/50dn , see para. 48 [BOA]
[6] 913719 Ontario Ltd. v. North York (City), 1996 CanLII 8012 (ON SC), http://canlii.ca/t/1vtsv , p. 8 [BOA]
[7] *Re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 CanLII 33 (SCC), http://canlii.ca/t/1ftz1 , at CanLII para. 63 and see paras. 59 to 67 [BOA]

> The constitutional status of the rule of law is beyond question. [...] This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (*per* Rand J., *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142). [...]
>
> [emphasis added]

57. Pursuant to the rule of law, "the law should be such that people will be able to be guided by it".[8] [Emphasis added.]

58. The rule of law provides a shield for individuals from arbitrary state action: [9]

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.
>
> [emphasis added]

59. The rule of law engenders the doctrine against vagueness and requires that a law must provide fair notice to citizens and must limit enforcement discretion: [10]

> The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion. Understood in light of its theoretical foundations, the doctrine against vagueness is a critical component of a society grounded in the rule of law: *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606, at pp. 626-27; *Canadian Foundation for Children,*

[8] *Re Manitoba Language Rights*, 1985, at CanLII para. 62
[9] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC), http://canlii.ca/t/1fqr3 , para. 70 [BOA]
[10] *R. v. Levkovic*, [2013] 2 SCR 204, 2013 SCC 25 (CanLII), http://canlii.ca/t/fx94z , para. 32 [BOA]

Youth and the Law v. Canada (Attorney General), 2004 SCC 4 (CanLII), [2004] 1 S.C.R. 76, at para. 16.

[emphasis added]

60. The Supreme Court has characterized the doctrine against vagueness as having at least the following characteristics: [11]

> The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness, […]. These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition. [p. 632, g-j]
>
> […] In any event, given that, as this Court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not a central concern in a vagueness analysis. [p. 633 f-g]
>
> Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague. [p. 635, c-d]
>
> A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.
>
> For instance, the wording of the vagrancy ordinance invalidated by the United States Supreme Court in Papachristou and quoted at length in the *Prostitution Reference*, at pp. 1152-53, was so general and so lacked precision in its content that a conviction would ensue every time the law

[11] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 1992 CanLII 72 (SCC), http://canlii.ca/t/1fs9g [BOA]

> enforcer decided to charge someone with the offence of vagrancy. The words of the ordinance had no substance to them, and they indicated no particular legislative purpose. They left the accused completely in the dark, with no possible way of defending himself before the court. [p. 636, a-f]
>
> What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion. The need to provide guidelines for the exercise of discretion was at the centre of the ECHR reasons in Malone, supra, at pp. 32-33, and the Leander case, judgment of 26 March 1987, Series A No. 116, at p. 23.
>
> Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions. [12] […] [p. 642, e-j]
>
> [emphasis added]

61. In Ontario, the doctrine against vagueness has frequently been used in determining that impugned bylaws are without force and effect as a result of vagueness and uncertainty [13] or that bylaw provisions are vague and void for uncertainty. [14] In *2312460 Ontario Ltd.*, paras. 17 to 27, Himel J. reviewed several cases where laws and bylaws were determined to be void by the doctrine against vagueness. In *Wainfleet Wind Energy Inc.*, Reid J. determined that a bylaw "is invalid and without force and effect as a result of vagueness and uncertainty" for the given reason that the definition of "property" as a point to which a

[12] And see: *Ibid.*, pp. 634-635

[13] *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 (CanLII), http://canlii.ca/t/g6zz5 , see para. 110 [BOA]

[14] *2312460 Ontario Ltd. and 748485 Ontario Ltd., and 2312460 Ontario Ltd., v. City of Toronto*, 2013 ONSC 1279 (CanLII), http://canlii.ca/t/fwbt7 , see para. 36 [BOA]

setback distance to an industrial wind turbine site could be measured was too vague to allow judicial review. [15]

Constitutional methodology

62. The Board is being asked, among other things, to determine the constitutionality of a law: s. 45(1) of the *Act*.

63. The appellant's constitutional challenge has two disjunctive heads:
    (a) The impugned provision is unconstitutional because it violates the appellant's s. 15(1) *Charter* rights.
    (b) The impugned provision is unconstitutionally vague (rule of law, doctrine against vagueness).

64. Regarding the *Charter* head, there is an uninterrupted jurisprudence establishing that when a statutory provision is itself constitutionally challenged a formal (or *Oakes*) methodology must be applied. [16]

65. Regarding the vagueness head, vagueness is fatal and cannot be cured by any *Charter* s. 1-like consideration.

66. Tribunal decisions of statutory constitutionality, and of jurisdiction, must be correct, not merely reasonable.

Jurisprudence of zoning variance law, and breakdown in the practice

67. There is a lengthy and uninterrupted jurisprudence of the legal principles underlying zoning variance rules and statutes in common law jurisdictions: [17]

> VARIANCES ARE THE PRINCIPAL ADMINISTRATIVE DEVICE for granting relief to individual property owners from the unnecessary harshness of zoning laws. Their grant or denial is generally determined by a quasi-

[15] *Wainfleet Wind Energy Inc. v. Township of Wainfleet*, 2013 ONSC 2194 (CanLII), http://canlii.ca/t/fx2wd , see paras. 31 to 40 [BOA]
[16] *R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC), http://canlii.ca/t/1ftv6 [BOA]
[17] Osborne M. Jr. Reynolds, "The Unique Circumstances Rule in Zoning Variances - An Aid in Achieving Greater Prudence and Less Leniency", *The Urban Lawyer*, 1999, vol. 31, pp. 127-148; at p. 127 [BOA]

> judicial body known as a board of adjustment or board of zoning appeals. Such boards, and their power to allow the special originated in New York City's 1916 zoning ordinance and are now found in almost every locality that engages in zoning. A variance permits a property owner to depart from the literal requirements of the zoning law as it applies to his or her land.
>
> [references omitted] [emphasis added]

68. Especially with urban land, interdependence and the need of cooperation has always been sufficiently urgent to demand specific usage rules. Unavoidable difficulties in applying the said usage rules to real conditions, in turn, demanded equitable variance rules: [18]

> It is therefore not surprising that occasionally, instead of any attempt to formulate a rule, we simply find a reference to a map showing the set-back lines, and a reference to the board of appeals for necessary variations.
>
> Clearly one of the outstanding difficulties of the law of zoning is the irreducibility to type of the situations with which it deals.
>
> [emphasis added]

69. The uninterrupted and established overarching jurisprudence of zoning variances is correctly summarized as: [19]

> A variance permits a property owner to depart from the literal requirements of the zoning law as it applies to his or her land. The basic requirement for the grant of such a variance is usually said to be a showing of "unnecessary hardship" if the law is literally applied, and the commonly accepted components of such hardship are: (1) that the property cannot earn a reasonable return if used as zoned, (2) that this problem arises from unique circumstances peculiar to the property, not from general conditions in the neighborhood, and (3) that the use allowed by the variance will not alter the essential character of the neighborhood. It has frequently been emphasized by courts and commentators that the power to award variances should be exercised sparingly [...]

[18] Ernst Freund, "Some Inadequately Discussed Problems of the Law of City Planning and Zoning", *Illinois Law Review*, 1929, vol. 24, pp. 135-149; at p. 141 [BOA]
[19] Osborne M. Jr. Reynolds, 1999; at pp. 127-128 and 129

> The variance has often been referred to as a "safety valve" that relieves the pressure created when a particular application of a zoning law has consequences that are harsher than needed to achieve the desired planning for the community.
>
> [references omitted] [emphasis added]

70. This jurisprudence is reflected in Ontario's official *Citizen's Guide* to zoning bylaws, which informs the original intent of the Ontario statute (s. 45(1) of the *Planning Act*): [20]

> **What if you only need a minor change?**
>
> If your proposed change doesn't conform exactly to the zoning by-law, but follows its general intent, you can apply for a minor variance. For example, you might want to locate something on your property but the shape of your lot won't let you meet the minimum setback requirements.
>
> To obtain a minor variance, you will have to apply to your local committee of adjustment appointed by council to deal with minor problems in meeting by-law standards. […]
>
> [underline emphasis added]

71. Despite the established clarity in judicial law and despite any original intents of statutes, the practice has been systemically problematic: [21]

> But the criticism is frequently made that variances have, in the practice of many communities, been so widely and liberally granted that the device has become "one of danger rather than safety."
>
> [emphasis added]

72. The said "danger" has been identified for a long time. A young Robert M. Shapiro put it this way in 1969: [22]

---

[20] *Citizen's Guide Zoning By-Laws - 3 In a Series*, Ministry of Municipal Affairs and Housing, Province of Ontario, Updated 2010, http://www.mah.gov.on.ca/AssetFactory.aspx?did=11156 (accessed February 4, 2018), at p. 6 [BOA]

[21] Osborne M. Jr. Reynolds, 1999; at p. 129

[22] Ronald M. Shapiro, "The Zoning Variance Power - Constructive in Theory, Destructive in Practice", Maryland Law Review, 1969, vol. 29, pp. 3-23; at p. 3 [BOA]
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol29/iss1/4

> The variance power, to be consistent with its theoretical objectives and legal limitations, should be exercised sparingly, with particular care to avoid harmful side effects. However, the local boards of appeal, the possessors of the variance power, have apparently given little effect to these legal and theoretical restraints. Board decisions are frequently the product of improper considerations, ranging beyond the scope of legal limitations and legitimate land use policies. This course of conduct has led and will increasingly lead to a flood of illegal variations which challenge the protective aims of zoning and, consequently, endanger the integrity and desirability of urban neighborhoods.
>
> [emphasis added]

73. It is not difficult to make and verify a reasonable hypothesis about the systemic mechanism that causes variance practice to spiral out of control, and to create an inequity crisis regarding greater building height and building density in existing neighbourhoods.

74. *Systemic mechanism of decisional overreach.* Committee and Board proceedings and the decisions themselves provide the answer: individual self-represented complainants are pitted against the hired experts and lawyers of experienced and connected developers. Developers who have the economic incentive and means to appeal decisions as much as "needed". When judicial review courts side with well-represented appellants, the Board is "trained" into submission. Its case law and conceptual framework evolve in the direction of the corporate litigants who have the disproportionate means and motives.

75. Additionally, the said spiralling out of control is amplified by a "positive feedback" of influence from the Board towards the appellate court, at least in Ontario: [23]

> I note finally that we were referred to a number of decisions of the Ontario Municipal Board dealing with the issue of "minor variance". In my view, the decision at issue in this application is very much in line with matters found to be "minor variances" by that tribunal when entertaining appeals from committees of adjustment: [...].
>
> I conclude that in light of the terms of the official plan, the zoning by-law and the terms of the statutory power conferred upon the Committee, it cannot be said that the Committee exceeded its jurisdiction in finding this to be a "minor variance" within the meaning of the Planning Act.
>
> [references omitted] [emphasis added]

[23] *Fred Doucette Holdings Ltd. v. Waterloo (City)*, 1997 CanLII 16235 (ON SC) (Div. Court), http://canlii.ca/t/g1c87, at p. 14 [BOA]

76. Although the Committee and the Board have a permissive discretion to refuse variances, eventually an inverse onus infects their outlook. The change in outlook has been noticed by the appellate court in Ontario and is occasionally resisted: [24]

> In its reasons the Board expressed its view that obtaining a minor variance is not a "special privilege", a view contrary to a number of earlier decisions of the Board. In those decisions such as […], the Board had held that a minor variance is a "special privilege" and will not be granted in the absence of need or hardship. The Board in this case rejected that view […]
>
> […] However, in addition to what the Board stated I would add that the inclusion of the word "may" in section 45 (1) indicates that the jurisdiction given to a committee of adjustment to grant minor variances is permissive and confers on it a residual discretion as to whether or not grant them even when the four tests are satisfied. In exercising its discretion, a committee is entitled to take into account anything that reasonably bears on whether or not an application should be granted and, in my view, need and hardship are factors that, in appropriate cases, can properly be taken into account. […]
>
> [emphasis added]

77. Without barring variances, the immediate statutory protection against the said spiralling out of control is to have statutory language that is sufficiently clear to ensure compliance with the intended purpose of zoning law and to ensure equity and procedural fairness. This is the subject of the instant constitutional challenge.

78. By comparison, clear statutory language is provided in the planning acts of all the Canadian provinces except Ontario and New Brunswick, and the provincial variance provisions that are sufficiently clear to prevent the said spiralling out of control also conform to the above-reviewed jurisprudence: see below.

[24] *Vincent v. Degasperis*, 2005 CanLII 24263 (ON SCDC), http://canlii.ca/t/1l4rd , at paras. 22 and 23 [BOA]

Section 45(1) of the *Planning Act* conditionally grants jurisdiction

79. The appellant attempted to make (Committee) and makes (Board) a direct jurisdictional challenge. [See Facts]

80. The legal question, regarding the power to allow variances from zoning bylaws, of whether s. 45(1) of the *Act* conditionally grants jurisdiction to the Committee and to the Board is relevant to issues "B" (unconstitutional vagueness) and "C" (absence of jurisdiction) in the instant appeal.

81. Section 45(1) of the *Act* conditionally provides jurisdiction to the Committee and to the Board to hear a variance application, solely if the variance is "minor":

> Powers of committee
> 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.
>
> [Emphasis added]

82. The exercise of the power to authorize a minor variance from a bylaw provision is a true jurisdictional question. The Board cannot improperly assume jurisdiction, nor can it improperly deny its jurisdiction. The leading authority is *McNamara* in the Divisional Court: [25]

> This appeal raises a question of jurisdiction of the Ontario Municipal Board and committees of adjustment to authorize minor variances under s. 42 of the Planning Act, R.S.O. 1970, c. 349. [at p. 2]
>
> The committee found the application a reasonable one and, acting under the jurisdiction conferred on it by s. 42(1) of the Planning Act, R.S.O. 1970, c. 349, to authorize minor variances, exempted the owners from the by-law requirement […] [at p. 3]

[25] *Re McNamara Corporation Ltd. et al. and Colekin Investments Ltd.*, 1977 CanLII 1050 (ON SC) (Div. Court), ("*McNamara*") http://canlii.ca/t/g1j9s [BOA]

> […] the fact the exemption sought is the full elimination of the set-back distance does not of necessity mean that the variance is not minor and must be beyond the jurisdiction of the committee and the Board. [at p. 6]
>
> The owners in this case are entitled to have their application determined under the procedure of s. 42 and not required, as suggested, to seek relief from City Council by amendment to the zoning by-law unless the Board determines if it does on the merits of the matter that the exemption sought is not, as the Committee of Adjustment found, a minor variance.
>
> In sum, the Board erred in law in concluding it was without jurisdiction in respect to the variance in question. As a result it improperly declined to exercise its statutory powers under the Planning Act. [at p. 6]
>
> [emphasis added]

83. The variance must be "minor" as a conditional threshold for accepting the jurisdiction conferred by the *Act*. This is consistent with the wording of section 45(1) and it has, following *McNamara*, been continuously applied by the appellate courts hearing the jurisdictional challenge. Such as in 1982: [26]

> If I have appeared ambivalent in my approach to the determination of the issue of "notice" it is perhaps because during its course I have possessed no reluctance or reservation about the other ground upon which judicial review is sought. I have no hesitation in concluding that the decision of the Committee went beyond the granting of
>
> > such minor variance from the provisions of the by-law ... as in its opinion is desirable for the appropriate development or use of the land, building or structure, provided that in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

[26] *Convenience Services Ltd. v. Barrie Committee of Adjustments*, 1982 CanLII 3161 (ON SC), http://canlii.ca/t/gbg30, para. 16 and at para. 17 [BOA]

> The decision of the Committee, therefore, is beyond its power and jurisdiction and, accordingly, the issue of the sufficiency of "notice" is not determinative of the application for judicial review.
>
> I cannot think of circumstances where to permit the right to a use which is not permitted under a zoning by-law can be considered a "minor variance" of that zoning by-law. That is the effect of the Committee's decision here. […]
>
> [emphasis added]

84. And such as in 2005 (which may not have been a direct jurisdictional challenge): [27]

> Various issues arise in this appeal regarding the interpretation and application of section 45 (1) of the Planning Act, R.S.O. 1990, c. P.13 ("the Act") which confers jurisdiction on committees of adjustment to grant minor variances. It reads as follows: […]
>
> Accordingly, in my view the Board was required, at the outset, to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.
>
> The second test requires the committee to consider and reach an opinion on the desirability of the variance […]
>
> [emphasis added]

Issue "A": Is section 45(1) of the *Planning Act* unconstitutional because it violates the appellant's s. 15(1) *Canadian Charter of Rights and Freedoms* rights?

85. The appellant's constitutional challenge of s. 45(1) of the *Act* has two disjunctive heads:
    i. The impugned provision is unconstitutional because it violates the appellant's s. 15(1) *Charter* rights.
    ii. The impugned provision is unconstitutionally vague (rule of law, doctrine against vagueness).

[27] *Vincent v. Degasperis*, 2005, paras. 6 and 13, and at para. 14

86. Section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") provides:

> Equality before and under law and equal protection and benefit of law
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

87. Section 45(1) of the *Act* is unconstitutional because in-effect it infringes or denies the appellant's s. 15(1) *Charter* right of every individual's equality before and under the law:
    (a) The applicant's common law property rights are kept intact, whereas the common law property rights (nuisance tort) of the appellant are prejudicially negated, disregarded and violated.
    (b) The residents living near the applicant's land are denied the full protection and benefit of the zoning bylaw whereas other residents are not.

88. The tribunal's power to approve a variance application is exercised without a statutory obligation to consider or weigh any nuisance harm to the litigant opposing the application. Nuisance liability is a common law tort that is upheld in the *Charter* era (s. 26 of the *Charter*) and that directly stems from the original Land Patent or Crown Grant. Tribunal approval of the application is a finding that the variance is both "desirable" and "minor". As such, the said approval is prejudicial against and arguably bars any direct nuisance tort liability claim to a court: [28]

> Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: Tock, at pp. 1190-91. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.
>
> I therefore find that a private nuisance cannot be established where the interference with property interests is not, at least, substantial.

[28] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, [2013] 1 SCR 594, 2013 SCC 13 (CanLII), http://canlii.ca/t/fwdn1 , at paras. 23 and 24 [BOA]

89. That there is no written statutory obligation for the Committee or Board to consider or weigh any nuisance harm to the litigant opposing the application is evident in:
   (a) the text itself of s. 45(1) of the *Act*;
   (b) the text of the purposes of the *Act* (s. 1.1);

> **Purposes**
> 1.1 The purposes of this Act are,
> (a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;
> (b) to provide for a land use planning system led by provincial policy;
> (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
> (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
> (e) to encourage co-operation and co-ordination among various interests;
> (f) to recognize the decision-making authority and accountability of municipal councils in planning.

   (c) the text of s. 45(17)(a)(i) of the *Act* and of Rule 56 of the Board's *Rules of Practice and Procedure*:

> […] the Tribunal may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if, (a) it is of the opinion that, (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal, [or] […]
>
> [emphasis added]

   (d) the body of tribunal reasons and the body of tribunal decisions, and see expert testimony for the appellant, and
   (e) for example, the Board will expressly refuse jurisdiction to hear the classic nuisance liability from affected property value: [29]

> Given that the Appellants were self-represented and inexperienced in the appeal process and Ontario Municipal Board proceedings, at the start of the hearing the Board briefly set out its powers and jurisdiction in minor variance appeals under s. 45(1) of the *Planning Act*, R.S.O,

[29] *Nantuck Investments Inc. v. Oshawa (City)*, 2016 CanLII 67453 (ON OMB), http://canlii.ca/t/gv220 , para. 3 [BOA]

> c.P.13, as amended (the "*Act*"). In particular, the Board noted that rental real estate market competition and property values are not legitimate land use planning grounds upon which the Board could refuse the application.

90. By its application, s. 45(1) of the *Act* allows one litigant (the applicant) to violate a democratically enacted bylaw, where such violation can have deleterious consequences for the opposing litigant (appellant or complaining interested party), in a statutory scheme where the said deleterious consequences (public or private nuisance) are not excluded, are not limited by law, are not required to be considered or weighed, and in part or in whole would not arise if the bylaw was enforced.

91. Furthermore, a resident (the appellant) who suffers nuisance harm from an approved variance does not have "equal protection and equal benefit of the [by]law" as any neighbour who is not subjected to nuisance from the contested development. A variance is local and affects only those residences near the applicant's land. Section 45(1) of the *Act* vitiates equality of protection and benefit under the bylaw. It structurally violates s. 15(1) of the *Charter* in every application in which opponents to the application claim or suffer any degree of deleterious effects.

92. Thus, by its character and application the impugned provision (s. 45(1) of the *Act*) is structurally a violation of equality before and under law. The applicant and appellant are not equal: one is considered to be allowed to violate the bylaw, irrespective of claimed harm to the other who asks that the bylaw be enforced.

93. Only in the (rare) cases where an application is refused are all the residents and litigants equal: all must follow and all benefit from the same zoning bylaw.

94. The impugned provision (s. 45(1) of the *Act*) enables the state to use discretion in deciding whether to enforce democratically enacted laws, in a manner that treats opposing litigants and different residents unequally. It is undeniable that this in fact occurs [see Facts].

95. Section 45(1) of the *Act* is not saved by a s. 1 *Oakes* analysis *inter alia* because the infringements against the individual's *Charter* equality rights are not prescribed by law. The *Act* is silent on this structural deficit of equality.

96. In the alternative, s. 45(1) of the *Act* is unconstitutional because in-effect it infringes or denies the appellant's s. 15(1) *Charter* right of equal protection and equal benefit of the law

without discrimination. The appellant is discriminated against as an ordinary individual resident of a dwelling, acting in personal interest to protect his living environment, compared to a non-resident corporate developer acting with a business interest and obviously motivated by profit. [30]

97. The legal and material distinctions between a citizen and a corporation are many, including motives, fundamental needs, political reach, and financial means. The facts establish that corporations are winning contested variance applications and citizen residents are suffering the consequences. That is discrimination in-effect and in palpable outcome. The Supreme Court's guidance is relevant: [31]

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

98. The appellant is also discriminated against as an older person in an established neighbourhood, who is in-effect being forcibly expropriated into a neighbourhood having a different character (see Facts).

99. The said discriminations are established in the body of Committee and Board decisions, are quantitative and palpable, are established in the appellant's expert's testimony, and are thus not saved by a s. 1 *Oakes* analysis. They are not prescribed by law nor demonstrably justified in a free and democratic society.

Issue "B": Is section 45(1) of the *Planning Act* unconstitutionally vague and therefore of no force or effect?

100. The doctrine against vagueness is founded on two rationales (see above):
    i. a law must provide fair notice to citizens and

[30] The subject property is currently listed for sale by the applicant, as two two-storey buildings with asking prices totalling $2,678,000. https://www.royallepage.ca/en/property/ontario/ottawa/31-simcoe-street/7606061/mls1103973/ ; https://www.royallepage.ca/en/property/ontario/ottawa/33-simcoe-street/7606055/mls1104030/ (accessed on 2018-05-02)

[31] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 (SCC), http://canlii.ca/t/1ft8q , p. 174, h-i [BOA]

ii. it must limit enforcement discretion.

101. Any provision of law, which does not satisfy both rationales of the doctrine against vagueness, is invalid and without force or effect.

102. There are several areas demonstrating vagueness of the impugned section (s. 45(1) of the *Act*):

(a) The wording of the section itself, in its statutory context.
(b) The case law applying and interpreting the section, at the Committee, at the Board, and in the courts.
(c) The interpretations of the section communicated by the municipality, the Committee, the Board and the province.
(d) The applications and interpretations of the section enshrined in regulations that derive from the *Act* (Official Plan, Provincial Policy Statement, Rules of Procedure of the Board).
(e) The consequences on the ground of opposed and authorized so-called minor variances.

103. Glaring evidence that the impugned section is vague is the widespread false methodology of treating "minor" as a discretionary decision. It is a jurisdictional threshold, not a discretionary factor or "test" (see law, reviewed above). If the threshold is met, then the tribunal has jurisdiction and the matter of whether the variance is "minor" need not and should not be addressed further.

104. Following the jurisdictional question, the "test" that is then evaluated with tribunal discretion is a three-part (3-part) inquiry:

i. desirable for the appropriate development or use of the land, building or structure
ii. maintains the general intent and purpose of the by-law
iii. maintains the general intent and purpose of the official plan, if any

105. Jurisdiction is never a matter of discretion. Any jurisdictional challenge to a court or tribunal must be answered correctly, based on statutory criteria. The widespread "folding in" of the jurisdictional question into the so-called "four (4) tests" is an improper methodology that itself proves ambiguity in the impugned provision. In the instant case, the Committee expressly refused to hear the jurisdictional argument (see Facts).

106. It is not uncommon for the Committee or the Board, to incorrectly treat the jurisdictional question as a matter of discretion and to defer to expert testimony on the said jurisdictional question: [32]

> Mr. Parsons, planner for the City, gave expert evidence in opposition.
> [...]
> Mr. Parsons reviewed the four tests required under subsection 45(1) of the *Planning Act* and concluded that the tests were not met.
>
> Having considered all the evidence presented, the Board prefers expert evidence from Mr. Parsons and finds that the variances requested do not meet the tests set out in subsection 45(1) of the *Planning Act*.

107. The ambiguity of the statutory language results in litigants often not explicitly casting their objections regarding magnitude of the variance as a jurisdictional challenge. The litigant's ambiguity then translates into unclear tribunal reasons and sometimes less-than-crisp judicial reasons.

108. More evidence of the vagueness of the impugned provision is that the City has adopted an illegal definition of "minor variance" in the very text of its Official Plan: [33]

> **Minor Variance**
> A departure from the provisions of the zoning by-law or any other by-law which is deemed by the Committee of Adjustment to maintain the general intent and purpose of the zoning by-law and of the Official Plan pursuant to the Planning Act.

109. The Official Plan definition is incorrect, misleading, and fails to address that a "minor variance" is a jurisdictional threshold that must respect the definitional constraints established by appellate courts: [34]

> A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many

[32] *Radchenko v. City of Brampton*, Order of the Board, issued March 22, 2007, Decision/Order No. 0749, PL060628 [BOA]
[33] City of Ottawa Approved Official Plan – Consolidation, Section 8 – Glossary, https://ottawa.ca/en/city-hall/planning-and-development/official-plan-and-master-plans/official-plan/volume-1-official-plan#section-8-glossary (accessed as PDF on 2018-05-02)
[34] *Vincent v. Degasperis*, 2005, paras. 12 and 13

other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties.

Accordingly, in my view the Board was required, at the outset, to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.

[emphasis added]

110. In the present case, the Committee *ipso facto* actuated the definition of "minor variance" that is prescribed in the Official Plan, which vitiates the statutory jurisdictional limit imposed by s. 45(1) of the *Act*.

111. Further, the impugned provision has become so extended due to vagueness that the City of Ottawa Official Plan describes the minor variance application as one type of "Development Application", in its "Section 4 – Review of Development Applications": [35]

Proposed Site Development

The following applications control design and what is built:

- Site plan;
- Minor variance;
- Public works.

In most situations, the development application applies to only one site-specific property. The affected lands may range in size from a single-dwelling residential lot to a redevelopment site in the downtown of the city or a vacant parcel of land of tens of hectares in area. A development application is usually submitted by one of three groups of applicants:

[35] City of Ottawa Approved Official Plan – Consolidation, Section 4 – Review of Development Applications, https://ottawa.ca/en/city-hall/planning-and-development/official-plan-and-master-plans/official-plan/volume-1-official-plan/section-4-review-development-applications (accessed as PDF on 2018-05-02)

- Individual homeowner or landowner – e.g., a minor variance for a house addition or rural severance application;
- Developer or builder – e.g., a rezoning for a shopping plaza or an application for a new subdivision;
- Public agency – e.g., a site plan for a new school, city community centre or fire hall.

[underline emphasis added]

112. There is nothing in the *Act* to suggest that the minor variance provision can or should be used as a development tool, and this is contrary to the extensive jurisprudence on zoning bylaw variances (see above). Yet, here it is in the Official Plan, as a policy. The Official Plan, in turn, is used by the Committee and by the Board to justify approving minor variances, in what is a circular dysfunction that defeats the purpose of the *Act* and of the zoning bylaws.

113. The impugned provision does not provide sufficiently clear guidance to City officials and tribunal and judicial decision makers. Therefore, it certainly does not "provide fair notice to citizens". The first foundational rationale of the doctrine against vagueness is violated.

114. The second rationale (it must limit enforcement discretion) is also violated because "minor variance" is not defined in the *Act*, nor can its meaning be derived from the text of the *Act*. Not defining "minor" and not providing an analytic framework or criteria for determining "minor" amounts to giving the tribunal discretion over its jurisdiction to decide variances, which equates to state discretion without criteria or oversight about whether a bylaw must be followed, as is the observable outcome in the application results (see Facts, case law, and statistics).

115. The uncertainty in the impugned provision occurs at the nexus of a true jurisdictional question of statutorily attributed power; in which a tribunal of the state is given the power to allow non-compliance with a duly and democratically adopted bylaw. Therefore, the said uncertainty undermines the constitutional division between the judiciary and the legislature, and thereby further offends the doctrine against vagueness. Basically, unelected tribunals decide what a "minor variance" can be, irrespective of the original intent of the law makers (see Ontario's official *Citizen's Guide* to zoning bylaws, above, in Zoning Jurisprudence).

116. Furthermore, the vagueness in the Ontario law is not needed for any practical reason, nor is it unavoidable in the planning context in Canada. This is seen on examination of the planning acts of the other provinces. Only Ontario and New Brunswick have unconstitutionally vague variance provisions. Otherwise, typically, the allowed minor variances are either explicitly small (maximum 10%) or must be justified by unavoidable and unusual hardship arising from bylaw compliance, and cannot cause injury to neighbouring properties:

Variance provisions in the planning acts of the other provinces [emphasis added]

British Columbia: *Local Government Act*, RSBC 2015, c. 1: Section 542(1)

http://www.bclaws.ca/civix/document/id/consol31/consol31/r15001_14

542 (1) On an application under section 540, the board of variance may order that a minor variance be permitted from the requirements of the applicable bylaw, or that the applicant be exempted from section 531 (1) [alteration or addition while non-conforming use continued], if the board of variance

(a) has heard the applicant and any person notified under section 541,

(b) finds that undue hardship would be caused to the applicant if the bylaw or section 531 (1) is complied with, and

(c) is of the opinion that the variance or exemption does not do any of the following:

(i) result in inappropriate development of the site;

(ii) adversely affect the natural environment;

(iii) substantially affect the use and enjoyment of adjacent land;

(iv) vary permitted uses and densities under the applicable bylaw;

(v) defeat the intent of the bylaw.

(2) The board of variance must not make an order under subsection (1) that would do any of the following: […]

Alberta: *Municipal Government Act*, RSA 2000, c. M-26

http://www.qp.alberta.ca/documents/Acts/m26.pdf

In Alberta individual land use bylaws may provide minor variance powers to the development authority. The provincial statute does not expressly provide jurisdiction for allowing minor variances. For example, see s. 642(1).

Saskatchewan: *The Planning and Development Act, 2007*, SS 2007, c. P-13.2: Section 60(1)

http://www.publications.gov.sk.ca/freelaw/documents/English/Statutes/Statutes/P13-2.pdf

60(1) If a zoning bylaw authorizes a procedure for making and processing applications for minor variances pursuant to clause 49(h), the zoning bylaw may authorize the council or the development officer to vary the requirements of the zoning bylaw, subject to the following conditions:

(a) a minor variance may be granted for variation only of:

(i) the minimum required distance of a building from the lot line; and

(ii) the minimum required distance of a building to any other building on the lot;

(b) the maximum amount of minor variance must be established in the zoning bylaw and must not exceed a 10% variation of the bylaw requirements;

(c) the development must conform to the zoning bylaw with respect to the use of land;

(d) the relaxation of the bylaw must not injuriously affect neighbouring properties; and

(e) a minor variance must not be granted:

(i) in connection with an agreement entered into pursuant to section 69 respecting the rezoning of land; or

(ii) if it would be inconsistent with any provincial land use policies or statements of provincial interest.

Manitoba: *The Planning Act*, CCSM, c. P80: Section 102(1)

http://web2.gov.mb.ca/laws/statutes/ccsm/p080e.php

102(1) A board or council may, by by-law, authorize a designated employee or officer to make an order that varies

(a) any height, distance, area, size or intensity of use requirement in the zoning by-law by no more than 10%; or

(b) the number of parking spaces required by the zoning by-law by no more than 10%.

Quebec: *Act respecting land use planning and development*, SQ, c. A-19.1

http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/A-19.1

145.1. The council of a municipality provided with an advisory planning committee may pass a by-law concerning minor exemptions from the provisions of the zoning or subdivision by-laws other than those relating to land use and land occupation density.

145.2. Every minor exemption from the zoning and subdivision by-laws shall respect the aims of the planning program. No minor exemption may be granted for a zone in which land use is subject to particular constraints for reasons of public safety.

145.4. The council of a municipality in whose territory a by-law concerning minor exemptions is in force may grant such an exemption. The exemption may be granted only if the application of the by-law causes a serious prejudice to the person who applied for the exemption. Moreover, it shall not be granted where it hinders the owners of the neighbouring immovables in the enjoyment of their right of ownership.

Nova Scotia: *Municipal Government Act*, SNS 1998, c. 18: Section 235

https://nslegislature.ca/sites/default/files/legc/statutes/municipal%20government.pdf

235 […]

(3) A variance may not be granted where the

(a) variance violates the intent of the development agreement or land-use by-law;

(b) difficulty experienced is general to properties in the area; or

(c) difficulty experienced results from an intentional disregard for the requirements of the development agreement or land-use by-law.

Newfoundland: *Urban and Rural Planning Act*, SNL 2000, c. U-8: Section 36(1)

http://www.assembly.nl.ca/Legislation/sr/statutes/u08.htm

36. (1) The minister shall, as follows, make development regulations that shall be included in the development regulations of councils and regional authorities with respect to

(a) appeals made under the Act;

(b) allowable variances in development standards to a maximum of 10%;

(c) the non-conforming development and use of land; and

(d) the enforcement of violations under the Act.

New Brunswick: *Community Planning Act*, SNB 2017, c. 19: Section 55(1)

http://laws.gnb.ca/en/showfulldoc/cs/2017-c.19//20180505

55(1)Subject to the terms and conditions it considers fit, the advisory committee or regional service commission may permit

(a) a proposed use of land or a building that is otherwise not permitted under the zoning by-law if, in its opinion, the proposed use is sufficiently similar to or compatible with a use permitted in the by-law for the zone in which the land or building is situated, or

(b) a reasonable variance from the requirements referred to in paragraph 53(2)(a) of a zoning by-law if it is of the opinion that the variance is desirable for the development of a parcel of land or a building or structure and is in keeping with the general intent of the by-law and any plan under this Act affecting the development.

55(2)Subject to the terms and conditions that he or she considers fit, a development officer may permit a reasonable variance from the requirements referred to in subparagraph 53(2)(a)(i), (iii), (iv), (v), (vii), (viii), (ix) or (xiii) if the development officer is of the opinion that the variance is desirable for the development of a parcel of land or a building or structure and is in keeping with the general intent of the by-law and any plan under this Act affecting the development.

[Included for completeness.]

PEI: *Planning Act*, SPEI, c. P-08

https://www.princeedwardisland.ca/en/legislation/planning-act

PEI does not attribute any powers to approve variances from zoning bylaws.

117. In conclusion, the impugned law does not provide fair notice to citizens (nobody can know how great or how important a violation of the bylaw will be granted and no defined limit can be ascertained) and it does not limit enforcement discretion (whatever is requested is granted). Due to its vagueness, section 45(1) of the *Act* has improperly become a tribunal planning instrument that:
   (a) circumvents democratic bylaw amendment procedures;
   (b) gives non-resident developers virtually whatever they want;
   (c) vitiates common law land ownership rights regarding the tort of nuisance;
   (d) violates equality of bylaw protection and benefits among residents; and
   (e) produces deleterious consequences on the ground, in neighbourhoods.

118. Section 45(1) of the *Act* is unconstitutionally vague and of no force or effect. It cannot be implemented. It is void.

Issue "C": If section 45(1) of the *Act* is constitutional, do the Committee and Board have jurisdiction to hear the applications?

119. In the alternative, if s. 45(1) of the *Act* is constitutional (which is denied), then the Committee and the Board do not have jurisdiction to hear the applications.

120. The applications are improper (abuse of process) in that they *ipso facto* constitute a land severance and building development application on two lots, not a minor adjustment related to a home improvement. The six applications taken together are incongruent with the intent and purpose of the minor variance provision and with the planning doctrine of minor variance.

121. The applications are in-fact a development proposal for two lots in an established neighbourhood, which creates two new additional frontal addresses on Evelyn Avenue, a large three-story building on a street block with almost exclusively one and two-story detached homes, and near-full-lot-footprint buildings in an established neighbourhood characterized by large and open backyards. The variances cannot be considered variances, let alone considered minor. The six applications constitute a development proposal to in-effect spot zone an island that is out of character with the neighbourhood.

122. Thus, there is no jurisdiction to approve the applications.

123. In the alternative, if the variance applications can be considered by the tribunal to be proper variance applications pursuant to s. 45(1) of the *Act* (which is denied), then the Committee and the Board do not have jurisdiction to hear the variance applications because the variances are not "minor".

124. Section 45(1) of the *Act* grants conditional jurisdiction to hear variance applications provided the variances are "minor" (see above section on jurisdiction). A variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. [36]

125. Since the *Act* gives no directive about what would be "too large" or "too important", then the answer must be sought in the jurisprudence of zoning bylaw variances.

126. The said jurisprudence establishes the following criteria regarding approval of a zoning bylaw variance (see above-review jurisprudence and statute provisions in other provinces). A variance is approved solely if:
   (a) The need arises from a rare particular difficulty of application of the bylaw, regarding the unique local circumstances on the subject property;
   (b) An unreasonable hardship is caused to the applicant if the bylaw is complied with; and
   (c) No unjustified public or private nuisance is created by the non-compliance with the bylaw.

127. In the latter regard, departure from the general intent and purpose of the zoning bylaw and of the Official Plan is one measure of unjustified public nuisance (i.e., nuisance distributed at large to many neighbourhood residents).

128. In the instant case:
   (a) There is no particular difficulty whatsoever to complying with the general bylaw.
   (b) There is no particular difficulty whatsoever to complying with the interim control bylaw.
   (c) No hardship is caused to the applicant, and none is claimed, if the bylaws are complied with.
   (d) An unjustified public nuisance is created by deteriorating the character of the neighbourhood.
   (e) An unjustified public nuisance is created by violating the interim control bylaw.
   (f) An unjustified private nuisance is created for the appellant by subjecting his residence to the outcome of the six applications (see Facts and below).

129. Therefore, the variance applications are not "minor" for the purpose of applying s. 45(1) of the *Act* and there is no jurisdiction to approve the applications.

130. The land severance consent applications have no justification in law except in conjunction with the so-called minor variance (building) applications. Therefore, since there is no jurisdiction to grant the variance applications, the as-filed consent applications cannot be approved.

[36] *Vincent v. Degasperis*, 2005, see para. 12

Issue "D": If the Committee and Board have jurisdiction, should the applications be approved?

131. In the alternative, if the Committee and Board have jurisdiction to hear the applications (which is denied), then the applications should not be approved because the variances from the provisions of the general and interim control bylaws, in respect of the land, building or structure or the use thereof, are not desirable for the appropriate development or use of the land, building or structure, nor is the general intent and purpose of the by-law or of the Official Plan maintained.

132. The intent and purpose of the interim control bylaw is to prevent the development (new construction) of any building that does not comply with its provisions. The provisions of the interim control bylaw are widely contravened (see Facts).

133. The applications are not desirable for appropriate development and should not be approved because (see Facts and litigation history):

(a) The interim control bylaw is violated, prior to a possible renewal for another year, and without knowing the outcome of the City's live R4 review of land use planning policies associated with low-rise single detached and multi-unit dwellings, which is the reason for the interim control bylaw.

(b) The City and Environment Canada are performing a live soil toxicity study of the area containing the subject property and the results are not known. The appellant's own residence is part of the soil toxicity study, and soil sample have been collected. See Facts.

(c) In addition to the on-going soil toxicity and landfill footprint study of residences in the subject neighbourhood, there have been environmental studies required in support of the Oblate lands redevelopment occurring in the adjacent neighbourhood south of Springhurst Avenue:
   i. An Environmental Impact Statement (EIS) was prepared by Golder Associates, dated January 2015.
   ii. A Phase One ESA was prepared by Golder Associates, dated November 2014 (Ref #: 14-1122-0005 (1100)).
   iii. A Phase Two ESA was prepared by Golder Associates, dated December 2014 (Ref #: 14-1122-0005/7100).

-

***The Oblate Lands Redevelopment*, First Edition, January 8, 2015, The Regional Group et al., see p. 90-91 [TAB 14]**

(d) The said Phase One ESA results for "potentially contaminating activities" were summarized as: [37]

> 1. The former presence of a gasoline 100,000 L underground storage tank and pump associated with a private fuel station on the Site;
> 2. The presence of fill containing construction debris, asphalt, concrete and, potentially, refuse in the southern part of the Site, and within the southeast part of the Site along the west bank of the Rideau River;
> 3. The presence of a former industrial property and the Lees Avenue Closed Landfill (L-28) on adjacent lands to the northeast of the Site and the possibility that the Closed Landfill may have extended onto the northeast corner of the Site;
> 4. The presence of fill containing ash originating from the historical coal burning that reportedly took place on the Site; and
> 5. The presence of a private garage on the Site (circa 1940s) where maintenance and minor repairs were performed for the convent's vehicles.
>
> The findings of the Phase One ESA were that further investigation in the form of Phase Two ESA would be required.
>
> [emphasis added]

(e) The said Phase Two ESA identified "widespread presence" of toxic heavy metal and PAH (polycyclic aromatic hydrocarbon) contamination in the Oblate lands. [38]

(f) Application approval regarding soil toxicity contravenes the s. 1.1(a) purpose of the *Act*: "to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act".

(g) Application approval regarding soil toxicity fails to comply with the ss. 2(h) and 2(o) directives of the Act: "the orderly development of safe and healthy communities" and "the protection of public health and safety".

(h) Application approval regarding soil toxicity contravenes s. 4.8.4 of the Official Plan:

> **4.8.4 – Contaminated Sites**
> [Amendment #40, April 26, 2006]
>
> Potentially contaminated sites are sites where the environmental condition of the property (soil and/or groundwater) may have potential for adverse effects on human health, ecological health or the natural environment. In order to prevent these adverse effects, it is important

[37] *The Oblate Lands Redevelopment*, First Edition, January 8, 2015, The Regional Group et al., p. 91
[38] *Ibid.*

prior to permitting development on these sites, to identify these sites and ensure that they are suitable or have been made suitable for the proposed use in accordance with provincial legislation and regulations.

While the identification of potentially contaminated sites is important in the planning application review process, the policies in this section should not be interpreted as a commitment on the part of the City of Ottawa to identify all contaminated sites or properties. Rather, the objective of the City of Ottawa is to responsibly utilize available information in the development application review process in order to help ensure that development takes place only on sites where the environmental conditions are suitable for the proposed use of the site.

Policies

1. The City will require applicants to document previous uses of a property or properties that are subject of a development application and/or properties that may be adversely impacting the property that is subject of a development application in order to assist in the determination of the potential for site contamination.
2. The City will require an affidavit from a qualified person as defined by provincial legislation and regulations, confirming that a Phase 1 Environmental Site Assessment (ESA) has been completed in accordance with Ontario Regulation 153/04, as amended from time to time, as follows:
    a. For all applications for proposed plans of subdivision;
    b. For all other development applications under the Planning Act where a property or properties have been identified through the City's development review process as potentially contaminated due to previous or existing uses on or adjacent to the property.

    A Phase I ESA documents the previous uses of the property and provides an assessment of the actual or potential soil or groundwater contamination on the site.
3. Where a Phase 1 ESA indicates that the property or properties that are subject of a development application under the Planning Act may be contaminated, the City will require the application to be supported by an affidavit from a qualified person as defined by provincial legislation and regulations, confirming that a Phase 2 ESA has been completed in accordance with Ontario Regulation 153/04, as amended from time to time. A Phase 2 ESA provides a sampling and analysis of the property to confirm and delineate the presence of soil or groundwater contamination at the site or confirm the absence of contamination at the site.

[…]

[underline emphasis added]

(i) A Phase One ESA does indicate that the subject property may be contaminated (see above)[39]. The applications are not "supported by an affidavit from a qualified person as defined by provincial legislation and regulations, confirming that a Phase 2 ESA has been completed in accordance with Ontario Regulation 153/04", as required.

(j) Section 5.2.1 (1) of the Official Plan provides:

> The Province issues Provincial Policy Statements from time to time to provide direction on matters of provincial interest. The City will ensure that the intent of any such policy statements are adequately reflected and implemented through this Plan. Where Provincial Policy Statements are in effect, the decisions of the City and the Committee of Adjustment shall be consistent with the policies of this Plan and the Provincial Policy Statement that is in effect on the date of the decision. [Amendment #150, December 21, 2017]
>
> [emphasis added]

(k) Application approval regarding soil toxicity contravenes Part IV of the Provincial Policy Statement, which provides: [40]

> The Provincial Policy Statement directs development away from areas of natural and human-made hazards. This preventative approach supports provincial and municipal financial well-being over the long term, protects public health and safety, and minimizes cost, risk and social disruption.
>
> [emphasis added]

(l) Application approval regarding soil toxicity contravenes s. 1.2.1(f) of the Provincial Policy Statement, which provides: [41]

> A coordinated, integrated and comprehensive approach should be used when dealing with planning matters within municipalities, across lower, single and/or upper-tier municipal boundaries, and with other orders of government, agencies and boards including:
>
> f) natural and human-made hazards;
>
> [emphasis added]

(m) The opposite of an informed, preventative and said "coordinated, integrated and comprehensive approach" was used by the Committee (see decisions).

---

[39] *The Oblate Lands Redevelopment*, First Edition, January 8, 2015, The Regional Group et al., p. 91

[40] *Provincial Policy Statement, 2014*, Ministry of Municipal Affairs and Housing, Province of Ontario, http://www.mah.gov.on.ca/Page10679.aspx , Part IV, at p. 5 (PDF document)

[41] *Provincial Policy Statement, 2014*, s. 1.2.1, at pp. 11-12 (PDF document)

(n) Application approval regarding soil toxicity contravenes the "Protecting Public Health and Safety" provisions of the Provincial Policy Statement: ss. 3.0, 3.1.7 and 3.2. In particular, s. 3.2.2 of the Provincial Policy Statement, regarding human-made hazards, provides: [42]

> Sites with contaminants in land or water shall be assessed and remediated as necessary prior to any activity on the site associated with the proposed use such that there will be no adverse effects.
>
> [emphasis added]

(o) Given the known coal industrial activities tied to the landfill of concern and the known widespread presence of heavy metal and PAH contaminants (see above), the subject land is land affected by mining and energy processing hazards. Therefore, consent and building application approval regarding soil toxicity violates the "Protecting Public Health and Safety" section 3.2.1 of the Provincial Policy Statement, which provides: [43]

> Development on, abutting or adjacent to lands affected by mine hazards; oil, gas and salt hazards; or former mineral mining operations, mineral aggregate operations or petroleum resource operations may be permitted only if rehabilitation or other measures to address and mitigate known or suspected hazards are under way or have been completed.
>
> [emphasis added]

(p) In simple terms: on several counts, the development constituted by the consent and variance applications is illegal in the present circumstances regarding soil toxicity. It cannot be approved by the Board.

(q) The directives for "Implementation and Interpretation" of the Provincial Policy Statement were disregarded by the Committee and cannot be disregarded by the Board. The violated sections are: ss. 4.1, 4.2, 4.4, 4.6, 4.9, 4.10 and 4.11. [44]

(r) The subject land is on a former landfill site, which is the reason for the City's and Environment Ministry's joint on-going soil toxicity and landfill footprint study (see Facts). The appellant submits that a former landfill of unknown composition, depth and extent must be presumed to be "unstable soil or bedrock" for the purpose of planning decisions made by the Committee and the Board. As such, Section 4.8.3 (1) of the Official Plan is violated, which provides:

[42] *Provincial Policy Statement, 2014*, s. 3.2.2, at p. 32 (PDF document)
[43] P*rovincial Policy Statement, 2014*, s. 3.2.1, at p. 32 (PDF document)
[44] *Provincial Policy Statement, 2014*, s. 4, at pp. 33-34 (PDF document)

> Applications for site plan, plan of subdivision, condominium and consent shall be supported by a geotechnical study to demonstrate that the soils are suitable for development.
>
> [emphasis added]

(s) The land severances (three consent applications) and development plan (buildings) offend the character of the neighbourhood (see Facts):

i. The building size and bulk are uncharacteristic of the subject urban block and area.

ii. A large three-story multi-unit building is incongruent with the neighbourhood of detached one and two-story homes with large adjacent backyards.

iii. The planned building at "31 Simcoe Street" would be the only double-lot-width detached dwelling on Simcoe Street.

iv. A large double-lot-width near-full-(new)lot-footprint detached dwelling is incongruent with the neighbourhood of detached one and two-story homes with large adjacent backyards.

v. The planned backyard setbacks are contrary to the character of the urban block and area.

(t) As such, the character and uniqueness of the established neighbourhood is destroyed rather than preserved (see Facts).

(u) The common law nuisance complaints from eight (8) near vicinity residents have been summarily disregarded (see Committee decisions). Only one Committee member of five dissented against the applications. See Facts.

(v) The applicant and the Committee provided incorrect reasons that constitute improper "domino-effect" development: see Facts, above. As such, the character of the established neighbourhood was disregarded, and substituted by uncharacteristic anomalies.

(w) The said incorrect reasons also incorporate a tunnel vision approach in which all the important features that define the character of a neighbourhood are incorrectly reduced to streetscape analysis; which, in addition, was incorrectly performed by the applicant (see Facts) (incorrect "AAA" versus correct "CAA").

(x) The planning development of the applications has the effect of placing the appellant's home directly in boundary contact with a neighbourhood of different character, which is incompatible with neighbourhood backyard life and community, and which is based on the model of large two-and-three-storey whole-lot-footprint units with no yards and with at-or-near-boundary entrances to parking garages.

(y) The appellant would suffer nuisance harm against enjoyment of his residence, resulting from the said development, which includes:

i. In-effect condemning three (3) windows.
ii. Loss of sky view from the appellant's property.
iii. Loss of neighbouring backyards to the north.
iv. Physical high-walling of appellant's backyard on one side at and near the property line.
v. Loss of privacy in the appellant's backyard from overlooking windows and balconies.
vi. Increased noise from multiple air conditioning units near the appellant's backyard.
vii. Absence of protection against loss (to the appellant and to the neighbourhood) of the large Norway maple tree (*Acer platanoides*), which is on the north-side property line, in the appellant's front yard.

(z) These and other deleterious effects have been opposed and suffered by several established neighbourhood residents who have been subjected to similar proximity-construction development, since approximately 1990, usually at boundaries of the neighbourhood. The appellant may bring witnesses to that effect.

134. The applicant knowingly made false statements on the six (6) solemnly declared applications, under Oath, pursuant to the *Canada Evidence Act*. The Committee was aware of this, as it had the applications in hand and the matter was conclusively elucidated at the hearing:

(a) In all six application forms, the applicant's agent (Danna See-Har) swore on November 1, 2017, that the applicant had pre-consulted with their neighbours.

-

Three (3) Committee Consent Applications and three (3) Committee Minor Variance Applications, sworn on November 1, 2017, by Danna See-Har, Planner [TAB 15]

(b) The appellant and none of the neighbours were consulted whatsoever.

(c) The lack of consultation was corroborated at the hearing before the Committee.

-

Partial transcript of the Committee hearing of December 6, 2017, re consultation [TAB 16]
And original recordings made by the Committee

135. The false statements constitute offences pursuant to ss. 131, 132 and 134 of the *Criminal Code*, and should invalidate the Committee's decision to grant the applications and prevent the Board from same because:

(a) Otherwise, the Committee and the Board appear to condone the acts and the administration of the tribunal process and the Committee and Board themselves are put into disrepute.
(b) The credibility of the applicant is lost such that its applications cannot be trusted on any matter and are void for being unreliable and incomplete.

IV. Order requested

136. The appellant requests:

i. A declaratory finding that s. 45(1) of the *Act* is unconstitutional and therefore cannot be applied.
ii. A declaratory finding that the Committee and the Board do not have the jurisdiction to decide the variance applications.
iii. A declaratory finding that the Committee should not have refused to hear the appellant's constitutional and jurisdictional arguments.
iv. Dismissal of the six impugned applications.
v. Recommendations for correctly proceeding with any new-building development of the subject lots, in the soil toxicity and soil or bedrock instability circumstances of the site.
vi. Such further order as the appellant may advise or as is appropriate in the circumstances.

All of which is respectfully submitted on this 8th day of May, 2018.

May 8, 2018

Dr. Denis Rancourt
Appellant

[redacted]
Ottawa, ON, [redacted]

Tel. [redacted]
Email: denis.rancourt@gmail.com

TO The Attorney General of Ontario
Constitutional Law Branch
4th floor
720 Bay Street
Toronto, Ontario M5G 2K1
c/o: Attorney General
Email: attorneygeneral@ontario.ca

The Attorney General of Canada
Justice Building
234 Wellington Street
Ottawa, Ontario K1A 0H8
c/o Attorney General
Email: mcu@justice.gc.ca

Keith A. MacLaren and Joshua Moon
Lawyers for the applicant Arterra Homes Inc.
PERLEY-ROBERTSON, HILL & McDOUGALL LLP
1400-340 Albert Street, Ottawa, ON KIR 0A5
Email: KMacLaren@perlaw.ca
Email: JMoon@perlaw.ca

Christine Enta
Solicitor, City of Ottawa
110 Laurier Avenue West
Ottawa, ON K1P 1J1
(613) 580-2424
Christine.enta@ottawa.ca

Jason C. Kwan
Planner
Ontario Municipal Board
655 Bay St., 15th Floor, Toronto, ON M5G 1E5
Email: jason.c.kwan@ontario.ca