

Ottawa developer ordered by LPAT to complete a Phase-I environmental site assessment

By Admin, Ontario Civil Liberties Association
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SUMMARY: The Committee of Adjustment (COA) of the City of Ottawa has been disregarding provincial environmental protection law and policy in approving triplexes and other buildings by so-called “minor variance applications” in Old Ottawa East (OOE, Ward 17); while simultaneously the City refuses to disclose the results of its active soil toxicity measurement program in OOE. Minor variance applications are requests to derogate from bylaw restrictions. The bylaw does not allow triplexes on the lot sizes in OOE. A resident appealed against the COA approval of a triplex on a lot in front of his home. He argued on appeal to the Local Planning Appeal Tribunal (LPAT) that the approval itself was unconstitutional (derogation from a democratically enacted bylaw), that the COA and LPAT do not have jurisdiction to approve the development because the variance from the bylaw is not “minor”, and that the development is harmful and unjustified.

Parties in the appeal:

APPELLANT: Dr. Hadi Salmasian, resident, self-represented

APPLICANT: 170 Presten Ltd., co-owner Mr. Anthony Cava, developer, self-represented

PARTY: City of Ottawa, acquired party status, represented by lawyer Ms. Kristina Mahon

The appeal (File No PL180613: *Salmasian v. 170 Preston Ltd.*) was heard by LPAT Member Justin Duncan in Ottawa on October 3, 2018. The hearing lasted all day, from 10 AM to 5:35 PM, with a 40 minute lunch break (1:20 PM to 2 PM).

Hadi Salmasian was aided by Ontario Civil Liberties Association researcher Denis Rancourt. (Rancourt was also a witness and is a resident of OOE and an internationally recognized environmental scientist.)

Anthony Cava was aided by consultant and lobbyist Bill Holzman (Holzman Consultant Inc.). (Cava did not offer witness testimony.)

The applicant was initially represented by BLG lawyer Emma Blanchard, who was released by her client and was not present at the hearing.

City lawyer Kristina Mahon was present, with law student Z. Al-Waadh, to seek party status in the appeal.

The issues before the tribunal were:

- I. Is section 45(1) of the *Planning Act* unconstitutional because it violates equality before and under the law?
- II. Is section 45(1) unconstitutionally vague in defining and delimiting statutory authority to decide variances?
- III. Do the Committee of Adjustment and LPAT have no statutory jurisdiction to decide the application because the variance is not minor?
- IV. If constitutionality and jurisdiction are satisfied, should the application be approved?

The first ruling made by the Member was to deny Salmasian's request to make a voice-recording of the hearing. The recording was to supplement Salmasian's personal notes. The request was vigorously opposed by City lawyer Mahon "because there is no official recording or transcript of the LPAT hearing".

"We don't allow it", Duncan said in his ruling.

The second issue was the question of the City's request of party status in the appeal. Salmasian said he welcomed the City's constitutional submissions in aid of the tribunal but opposed the City's full party status. The City said it would voluntarily limit itself solely to the constitutional questions.

The Member's ruling was to grant the City full party status (without constraints). The City as party exceeded the constitutional questions several times during the appeal and always palpably sided with the applicant.

The third issue was that the City contested allowing any hearing of the constitutional grounds (asked for the constitutional issues to be struck out) by alleging the technicality that there was not sufficient proof that the Attorney Generals (of Ontario and Canada) had been given notice of the appeal. The Member heard representations and ruled that there was sufficient reason to conclude that the Attorney Generals had been given due notice.

The first witness was a witness for the appellant. Neighbourhood resident Bruce Saunders testified that there are 4 triplexes that came onto the immediate Chestnut Street area by minor variance applications, that these have been transformed into quadruplexes, and that the buildings disrupt the character and lifestyle of the neighbourhood and cause harm to the residents of the neighbouring detached houses.

The next witnesses were for the applicant.

Jonah Bonn was put forth as an expert witness, in the area of urban planning. Salmasian contested his expert-witness status because Bonn has no relevant education and is a long-time employee of Bill Holzman who, in turn, has an extensive record of lobbying City councillors for clients seeking bylaw changes.

The Member ruled to grant Bonn expert-witness status.

Bonn explained the history of the application and argued that the triplex development should be approved, that an approval would be consistent with the City's Official Plan (OP), the Provincial Policy Statement (PPS) and the *Planning Act*.

Bonn testified that the "4 tests" of the *Planning Act* (s. 45(1)) were satisfied, which is a legal question for the decision maker (Member), not a matter on which an expert planner should give opinion evidence.

In cross-examination, Bonn admitted that the five buildings he used for favorable comparison (exhibit 1-20) were all results of minor variance applications and a site-bylaw change ("spot zoning"). He did not know the PPS provisions about contaminated sites. His characterization that "most houses in the area are war-time bungalows" was challenged and clarified by him accordingly. Actually, most houses in OOE are one, two and sometimes 3-story detached and semi-detached homes, not the rare "war-time bungalows".

The next witness for the applicant was City planner Victoria Bissonnette. Her status as an expert witness was not challenged and was granted by the Member. Bissonnette testified following her original written opinion to the COA that "the City planning department has no concerns with the application".

Bissonnette also testified that "the variances sought meet the four tests under the *Planning Act*". Again, this is a legal question for the decision maker (Member), not a matter on which an expert planner should give opinion evidence. The applicant later argued that the two expert witnesses had given this same "evidence" and that there was no counter expert evidence on this point. The Member had no problem hearing such submissions and this kind of thing has often found itself in the words of decisions by the Ontario Municipal Board (prior name of the tribunal).

On cross-examination, Bissonnette testified that the management instrument for "impact reduction" is the bylaw. Regarding variance from the bylaw, Bissonnette explained that in her practice as a City planner and in her expert testimony "minor variance" means "impact on the site, on neighbouring properties, and on the Streetscape".

Bissonnette's meaning defies the legal definition of "minor", in which the quantified magnitude (size) of the variance or the qualitative magnitude (importance) of the variance disjunctively

can be sufficient, irrespective of “impact”, to make a variance not “minor” and, therefore, beyond the jurisdictions of the COA and of the LPAT.

“Streetscape” refers to “Streetscape Character Analysis (SCA)”, a technical practice that controls visual impact in mature neighbourhoods according to technical criteria solely about front yard character, front door position, and parking space position; without any measures whatsoever regarding relative bulks, shapes, and heights of buildings. Bissonnette agreed that visual impact could be beyond Streetscape parameters.

Next, for the appellant, Salmasian himself testified about the nature of the recent developments involving large triplex and quadruplex buildings that violate the bylaw restrictions for the lot sizes.

On cross-examination, Salmasian was asked whether he knew that it would be against the law for the applicant to transform his triplex into a quadruplex. Salmasian testified that he does not know those legalities.

Rancourt then testified for the appellant.

Rancourt tried to enter a 17-page document listing the lobbying activities of Bill Holzman, by arguing its relevance. The Member did not accept the evidence because he could “not see its relevance”. The evidence was denied.

Rancourt entered a signed letter from Ronald Rose, Chair of the Planning Committee of the OOE Community Association, which described the undesirable nature and characteristics of the triplex developments on Chestnut Street, and the Association’s opposition to these developments.

Rancourt used many pictures to show the character of the OOE neighbourhood. Rancourt gave a detailed description with pictures of the egregious case of “minor variance” developments of large triplexes/quadruplexes at 35 and 43 Chestnut Street, which isolated the home at 39 Chestnut Street and caused harm to the resident as: many surrounding air-conditioning units, walling in on both sides, high balconies removing any backyard privacy, shadowing, and so on.

Rancourt gave testimony supported by pictures of profitable new developments in OOE, on Simcoe Street, which strictly follow the bylaw, without any derogation. These are detached 2-story homes that are for sale at the asking price of \$1.3 million each. The new homes preserve the neighbourhood character and intended purpose of the bylaw.

Rancourt gave picture evidence that visual impact of bylaw-disallowed triplex buildings is important and is not captured by Streetscape analysis, which is meant for bylaw-allowed similar homes in mature neighbourhoods.

Rancourt gave documented testimony about the established soil toxicity problem in the area, about the on-going City and Ministry joint soil toxicity study of the very area of the impugned development, about the City's refusal to provide the analysis results, and about the known nature of the relevant historic landfill site falling under industrial activity regulated by Ontario statutes.

Rancourt tried to enter a written opinion, sent to him directly in affidavit form, from former long-time Ward 17 councillor Clive Doucet. The said opinion of Doucet detailed that Doucet has two urban planning university degrees, has sat on major planning committees, and has written books and reports about urban planning. The Member found that there would be insufficient evidence before him to support expert-witness status. The Member went on to strike out the duly filed document completely from the appellant's Book of Exhibits.

Finally, Rancourt tried to file a 16-page "Review of court and tribunal decisions regarding s. 45(1) of the Planning Act" prepared by him. The City argued vigorously to strike out the document. The Member ruled that he would not receive the document but that the appellant could cite case law in his closing statement. The document contained many examples of tribunal and appellate court decisions that are contradictory or incorrect, as evidence that s. 45(1) is unconstitutionally vague.

The evidence was followed by the closing statement of the appellant.

Salmasian stated:

"To the best of my knowledge, this is the first constitutional challenge of the *Planning Act*. 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 of the vagueness that comes with not defining "minor", market forces have free reign. The variance provision has become a planning instrument in-effect without democratic oversight, and the impacts on established neighbourhoods are devastating, in Ottawa at least.

Applications for changes to building types not allowed by the bylaw are virtually always approved, where no reasonable person would consider the changes in building type to be "minor" derogation from the bylaw.

Before I outline my legal arguments, let me explain in plain language the nature of the loophole that this minor variance application represents:

The neighbourhood is zoned "R3P". From Table 160A of section 160 of Bylaw 2008-250, it follows that the lot at 7 Chestnut Street — having a width of 10.98 m and an area of

318.5 m² — does not allow a triplex. Period. Only the building types “detached”, “duplex”, and “linked-detached” are permitted on a lot of these dimensions. This is explicitly the directive of the written bylaw, and is therefore its intent. By variance to 12 m and 360 m², the explicit bylaw constraint on building type is circumvented to allow a triplex. Virtually all the lots in the neighbourhood are the same size and there should be no triplexes. That is the nature of this application.”

Salmasian then went on to explain the four issues in the appeal.

The applicant made a short closing statement.

Next it was time, at 5:30 PM, for the City to make its arguments against the appellant’s constitutional arguments.

The Member said that he did not need to hear the City and that he was prepared to make his ruling immediately.

The Member ruled that the appeal is received in part: The applicant developer was ordered to secure a Phase-I environmental site assessment as a condition to LPAT accepting the application. The constitutional charges were denied without explanation.

Earlier in the hearing, the Member said he first read the legal submissions of the parties (80 pages, in three books) during the 40-minute lunch break. After giving his final ruling, the Member stated that he would provide “fulsome” reasons for his decision in approximately “two months”.

RELATED OCLA REPORTS ON THIS CASE, with links to tribunal-filed documents:

- OCLA supports opponents of Ontario’s vague and unfair planning law ([September 5, 2018](#))
- BLG lawyer asks LPAT to consider denying full right to appeal urban development decision ([September 10, 2018](#))
- Final submissions in the constitutional challenge against Ontario’s vague bylaw variance law ([October 2, 2018](#))

About the Member:

Justin Duncan has been a member of the Ontario Municipal Board since 2016 and the Environmental Review Board since 2014. Prior to his appointments, he worked for 12 years as a lawyer advocating on public interest environmental, natural resource, and planning issues. Mr. Duncan's community involvement includes being a member of the Society of Ontario Adjudicators and Regulators, and a member of the Sustainability Network. He is a member of the Law Society of Upper Canada and holds a Bachelor of Science degree from the University of

Western Ontario and a Bachelor of Laws degree from Queen's University. [From the LPAT webpage.]