COMMITTEE OF ADJUSTMENT & LOCAL PLANNING APPEAL TRIBUNAL, *A Guide To Objecting*

The following is offered as a brief guide for persons wishing to object to an Application to a Committee of Adjustment, for a minor variance of a zoning bylaw and/or division or severance of land and will be helpful also for appeals to the Local Planning Appeal Tribunal, (LPAT). Both are included here under "tribunal".

OBJECTING TO A MINOR VARIANCE

Sub-section 45(l) of the Planning Act (PA) sets out four statutory tests which must be considered by the tribunal and satisfied by the applicant, before an Application for zoning variance can succeed. If the Application fails any one of the Four Tests, while passing the other three, then the Application must fail. These tests, being created by statute, are mandatory and accordingly all must be met. However, notwithstanding that a proponent may satisfy all Four Tests, the tribunal may in its discretion still refuse relief. The following are the Four Tests to be applied;

1. Is the variance minor?
A variance can be held to be not minor for either of two reasons. Firstly, that it is too large in actual measurement or secondly that it is too important in relation to the community to be considered minor. The latter reason can be resolved by determining the extent of the impact on neighbouring properties in the immediate and general area. The primary issues raised for abutting owners are related to loss of sunlight, privacy, views, spacing and openness which may result from the mass, height and bulk of the proposed development. There may also be issues related to access, trees, parking, drainage, traffic and noise.
The issues that may arise related to the general area are that the development is incompatible with the established built form and character of the neighbourhood and that it erodes the aesthetics of the streetscape. A zoning amendment may be argued as more appropriate for some variances not considered minor.

2. Would the granting of the variance result in a development that would be desirable for the appropriate development or use of the applicants land or building?
It can be assumed that the applicant thinks the variance is desirable but the issue here is whether it is desirable from a planning and public interest perspective, not that of the applicant. The test of desirability includes consideration of the many factors that can affect the broad public interest as it relates to the applicants property and accepted planning principles and the existing pattern of development.

3. Does the variance requested maintain the general intent and purpose of the zoning by-law?
The intent and purpose of a zoning by-law is to prescribe the front, rear and side yard set backs, building size, height and use. It speaks to matters such as spacing, privacy, density, light and air and gives the neighbourhood its built form and character. By-laws passed in the

earlier part of the last century when our older communities were developed tended to be more restrictive than the present ones leaving these areas more vulnerable now to the current policy of intensification and so called “infill”, the current euphemism for demolition and redevelopment. A proposed redevelopment which is not compatible with existing homes in the neighbourhood with respect to size and setbacks, insensitive to issues such as privacy, scale and spacing and detrimental to the streetscape or the character of the neighbourhood, should not pass this test. Familiarization with the local architectural and zoning history, (were earlier by-laws more restrictive?), registered plans and lot sizes will be helpful here.

4. Does the variance requested maintain the general intent and purpose of the Official Plan (OP)?
The OP, although a city document, derives its authority from section 16 of the PA and is the overall master-planning document for the city. It contains the goals, objectives and policies to guide future land use and development within the city and contains elements of the provincial government's intensification policy including a requirement that new development respect the character of existing neighbourhoods. This document must be researched and the provisions supporting your case documented.

In 2016 the Smart Growth For Our Communities Act came into force and amended the PA to allow the province, (by passing new regulations under the Act), and local municipalities, (by passing a by-law), to provide additional criteria to which a minor variance would need to conform in addition to satisfying the above Four Tests. As of this date the province has not acted on this new initiative nor has the City of Ottawa but this must be monitored.

Provincial Policy Statement
Under the Planning Act, the Minister of Municipal Affairs from time to time issues a Statement on matters of provincial interest related to land use planning and did so most recently in 2014. Part V of this Statement embodies the provincial initiatives of intensification and redevelopment and persons objecting to matters coming before planning tribunals should be aware of it as under subsection 3(5) of the PA the decisions of all planning tribunals are required to be consistent with the Provincial Policy Statement (PPS). This Statement may be read at www.mah.gov.on.ca.
The above subsection 3(5) also requires that all planning tribunal decisions conform to any relevant Provincial Plans. These are recited in subsection 1(1) of the PA under the heading “Provincial Plans”, (a) to (f).

ASSESSING AN APPLICATION

THE FIRST STEP in assessing an Application is to examine the relevant zoning by-law and the building plans filed with the tribunal and determine the extent of the variance(s) and what planning issue(s) it may give rise to.

THE SECOND STEP is to research the OP and PPS and document any provisions which are relevant to the planning issues.

THE THIRD STEP is to consider the Four Tests and assess to what extent their requirements

have been met by the applicant.

THE FOURTH STEP is to list your objections and marshal the hard evidence necessary to support your case before the tribunal, keeping the focus on the Four Tests. The case will be decided on how well these tests have been responded to.
All Applications are referred to the city's planning department and the member assigned to your case may be helpful in assisting you to assess an application.

OBJECTING TO A LAND SEVERANCE

A severance of land Application is a request to sever one parcel from another and thereby create a new lot on which a building can be constructed and separately sold. Often an Application for a minor variance will also include a request for a severance, however, it must be borne in mind that when such a joint Application is made, a severance cannot be granted unless the minor variance is first approved.

The tribunals authority to grant severances is found in section 53 of the PA and the criteria that must be addressed in hearing these Applications is found in subsection 51(24) of that Act. The latter sub-section contains thirteen items of which the following five are usually the most relevant;

1. The effect of development of the severance on matters of provincial interest. (See PPS).

2. Whether the proposed severance is premature or in the public interest.

3. Whether the plan conforms to the OP and adjacent plans of subdivision, i.e. neighbouring lot sizes.
4. The suitability of the land for the purposes for which it is to be severed.

5. The dimensions and shape of the proposed lots.

Many of the quality of life issues referred to above that are relevant in considering a minor variance, will also be applicable in assessing a severance Application. The comments concerning the Provincial Policy Statement, seen above in item 1, apply here also. An assessment here will involve reviewing that document as well as the OP. It is important to note that sub-section 51(25) of the PA authorizes the Committee to impose such conditions on the approval of a severance as in its opinion are reasonable.

The steps to be taken when assessing a severance Application will be the same as a minor variance except that the five criteria referred to above will take the place of the Four Tests.

The Planning Act and the Official Plan are easily accessed on the internet.

THE ISSUES

The following are the issues that most often arise and are argued before the planning tribunals.

CHARACTER OF THE NEIGHBOURHOOD

The built form of the neighbourhood should be considered to see whether it exhibits a reasonably uniform building period in style or design, scale and spacing. If it does, then irrespective of whether the zoning by-law or intensification policies now permit a larger structure, the character of the neighbourhood is deserving of protection and this will be a factor considered by planning tribunals. New development should be compatible and respect the established physical character of the neighbourhood. Proposed re- developments which may be considered: out of scale; out of character; inappropriate; destabilizing the character of the neighbourhood; a break in the pattern of the neighbourhood; insensitive; visually incongruous or detrimental to the streetscape, should be discouraged and objected to. All of these terms have been employed in Reported Decisions dismissing redevelopment proposals. Building and streetscape photos will be helpful in arguing this issue. Apart from the built form and heritage arguments that may be advanced here, it should be said that a primary factor often considered by people motivated to purchase in a particular neighbourhood, is the degree of spaciousness, sunlight and privacy that was dictated by the zoning by-laws existing when the neighbourhood was developed. They paid a higher purchase price and higher annual taxes for the enjoyment of these qualities and are entitled to protection from a reduction in zoning standards. Some consider zoning by-laws a community contract enshrining the rhythm and character of a neighbourhood and it has been argued that residents should be able to rely upon a municipalities former zoning policies and consider it a breach of trust when they are diminished.

LIGHT, PRIVACY and VIEWS

While there is no legal right in Ontario to sunlight, privacy or views, the planning tribunals have often in the face of insensitive development granted relief to neighbouring owners facing the loss of these qualities. The issue is not whether neighbours have a right to "light, privacy and views", (they don't), but whether a proposed obstruction to such long established amenities is of such a magnitude as to cause an unacceptable adverse impact upon the neighbourhood to the point where the intent and purpose of the zoning by-law is not maintained. (Test 3)

SUNLIGHT

Shadowing is the result of overbuilding and an insensitive increase in mass, height and bulk. Where this is a serious issue, it will warrant a sun and shade study which is easily obtainable. Such an objective and professionally qualified Report will greatly increase the chance of success in this issue. The number, size and location of windows in your home and the nature of family activities inside the areas served by those windows, (e.g. early morning sun in a breakfast room), will be important factors in assessing the impact on a families quality of life as will the loss of enjoyment in gardening and other outside activities in areas to suffer shadowing. The advent of solar panels moves this issue beyond simple quality of life and introduces an economic factor to be considered.

PRIVACY

There is recognition in Reported Decisions for the degree of discomfort for which a sense of being exposed can bring and proposed overbuilding allowing an overview of neighbouring properties is discouraged. Visual intrusion of this nature can take the form of views into

windows of abutting homes or overviews of gardens and other outside private family areas. Exterior upper storey decks and the number, size and location of windows in both the proposed and abutting houses will be important factors.

VIEWS
While as stated there is no legal right to a view over the property of others, where privacy is not an issue, planning tribunals have on occasion protected the views and visual enjoyment of open areas shared by the community as a whole and the negative impact of insensitive and obstructive overbuilding on greenery and openness can be argued.

MASS, BULK and HEIGHT
In establishing the front, side and rear yard setbacks and allowable height, zoning bylaws dictate the maximum legal size of a residential structure. Seeking variances to overbuild beyond what is allowed as of right frequently raises issues of mass, bulk and height. Computer or actual modeling can be useful in dramatizing existing, as of right and proposed developments and the comparative effect on adjoining homes. A factor for consideration is whether the proposed construction is limited to the rear yard or does it impact on the openness and spacing of the streetscape and by encroaching into the side yards create a windowless barrier effect to the neighbours. A subject to be raised here is whether some part of the proposed structure can be reduced in mass or height to minimize the impact on neighbouring homes.

DRAINAGE
The foundations of older homes are particularly vulnerable to water leakage and lot drainage problems created by any redevelopment must be addressed. It is against the law for existing grades to be altered, in any manner or for any reason, to the detriment of abutting properties Most municipalities have drainage by-laws which may be referenced here.

BUILDING MAINTENANCE
Variance Applications for a reduction in side yards may create serious access problems with respect to re-roofing and general maintenance work respecting abutting properties and this must be argued where a reduction would impede these necessary activities.

TREES
The issue here is the impact on neighbouring properties from loss with respect to screening, shade and greenery. Questions to be raised are how many trees, or roots, are to be lost, condition or health of trees and age. An arborist may be consulted for a Report. Replacement or replanting may be negotiated if there is sufficient space and sunlight and the tribunals have often imposed these conditions as a qualification of consent. The arguments of adjoining owners will be assisted by Ottawa's new Tree Protection By-law No. 2020-340 which among many new tree and root protective provisions, requires a permit to injure or destroy a tree on private property measuring 30cm, (12 inches), or more at breast height.

TRAFFIC and PARKING
In certain busy locations traffic may be a problem and this issue should be raised. Larger residential structures, intensification and redevelopment policies will inevitably result in more occupants per building as well as persons visiting. This leads to developers attempting

to accommodate more vehicles on site creating problems related to troublesome automobile easements as well as street and unlicensed front yard parking with visual impacts on adjoining yards and streetscapes, the negative aspects of which can be argued.

NECESSITY
The question should always be asked as to whether need can be shown for an increase in floor space. How many occupants will there be? Can the increase in density and the impact on the abutting owners and neighbours be warranted where no hardship or compelling reason or need can be demonstrated for overbuilding? Can the developer's requirements be met with a structure within the limits of the existing by-laws? Can the height or mass be reduced? Although not one of the four Statutory Tests, variances have been refused where the applicant has been unable to give persuasive reasons beyond whimsy, convenience or profit, none of which are considered valid reasons by planning authorities. Need is a valid issue to be raised and may be the straw that would tip the scales in the objectors favour.

PROCEEDING WITH AN OBJECTION

Some Applications will be of no significance and may be ignored, however, others may have considerable impact on abutting and neighbouring homes and will require time and research if they are to be successfully opposed. The following is a brief summary of matters to be considered if proceeding with an objection;

1. Attend the Committee of Adjustment offices to get the details of what is proposed. What can they do as of right and how much more is being sought? Re-attend shortly before the hearing to examine material filed by others which may assist or require a response.

2. Engage neighbours to rally their support.

3. Solicit the community association to support your case with a letter to the tribunal or personal representation at the Hearing.

4. Consult your ward council member for a letter of support or personal representation at the Hearing.

5. Consult with the city planner assigned to the case and ask for a copy of the planners Report.

6. Ask the developer to attend a meeting with affected neighbours to discuss problems and possibly negotiate some issues.

7. Attend the Hearing to personally voice your objections or, if unable, support others in doing so and whether you speak or not, file a letter with the Committee stating your objections, (with reasons), and encourage other neighbours to do likewise.

Except in routine cases involving minimal impact on neighbouring properties, applicants seeking deviations from city zoning standards will often have professional consultants such as architects or planners all of whom are familiar with the process and have been

working on the project for many months. Neighbours lacking knowledge and experience in the process and addressing the relevant issues must consider retaining professional assistance if they wish to successfully resist the Application. Hearing adjournments can be easily obtained to allow for more time when necessary. In all events, if the city planner's Report is favourable to the objector's position, he or she can be subpoenaed to give supporting professional evidence without any expense. Experience has shown that planning tribunals most often agree with the municipal planning staff.

LPAT and former OMB Decisions are available on line for many years back. These give an analysis of cases appealed from committees of adjustment and provide useful knowledge of the planning issues and related arguments, for and against. A word of warning here, unlike Courts of law, planning tribunals are not bound by previous decisions, however, notwithstanding this they can be cited if highly relevant and may prove influential. The LPAT web site is Elto.gov.on.ca. For assistance you may call 416-212-6349 or toll free 1-866-448-2248.

THINGS YOU SHOULD KNOW

BURDEN OF PROOF

Legal Doctrine assumes the validity of the status quo and accordingly places a heavier burden of proof upon the party seeking a change. This means that a developer requesting a change must demonstrate a stronger case than the persons objecting. At the Hearing, the developer must make out a prima facie case that the relief sought satisfies good planning principles which raises a presumption in his favour. This will be more easily done if the developer has adduced professional evidence. The burden of proof then shifts to the objector who must adduce evidence to rebut this presumption. If at the conclusion of the hearing the scales are evenly balanced, the developer must fail. For the proponent to succeed his case must be stronger than yours and if you feel that it is no better, or worse, you may discretely remind the tribunal of its obligation in this respect.

EVIDENCE

An objector cannot go before the tribunal with a few unsupported catch phrases. Community sentiment and unsupported opposition are not accepted. All arguments must be backed up with hard evidence. Vague, general statements, wishes and anecdotal observations will not succeed against expert witnesses, consultants Reports, studies, plans, photos, computer and actual modeling, visual aids and other professional planning evidence. This is what is meant by "hard evidence". When faced with this type of professional evidence, often long in the making, the objector will unfortunately have no choice but to compete at the same level. Unlike traditional courts, most of the work of planning tribunals involves not questions of fact, but rather of opinion. Professional opinion is what the experts provide to tribunal members who may have no training or special knowledge of planning and this is why it is so often said that experts rule these tribunals. Although not always achieved, the acknowledged governing factor in deciding these cases is the application of good planning principles and ordinary ratepayers, while politely listened to, will normally be considered unqualified to give opinions on planning matters. If the objector has not retained an expert to establish rebuttal evidence, under the rules of evidence the professional opinion of the developer's expert will be accepted. Consultants may be retained by objectors to provide expert evidence,

however, consideration should also be given to subpoenaing a city planning official if he has raised concerns in his Report and his professional evidence will buttress your case.

STUDIES & REPORTS

Impact Studies and Reports may be ordered from professional planners and other consultants on all municipal planning issues for presentation at hearings. Demonstrative evidence such as computer and actual modeling of existing, as of right and proposed redevelopment is obtainable as are sun and shade studies graphically illustrating shadowing by proposed redevelopment in all seasons and daylight hours. It will be necessary for the author of the Report or Study to attend the hearing to respond where necessary to opposing opinions or questions raised

PLANNING TRIBUNALS ARE NOT INDEPENDANT

Ontario planning tribunals do not enjoy the independence of traditional courts of law. Despite their web site declarations they are not independent bodies. They are creatures of the provincial government and must heed statutory requirements and government directives and policies such as those set out in sections 2 and 3(5) of the PA and elsewhere. Their members cannot render the decisions they would sometimes like to. The reconciliation involved in preserving built communities while at the same time pursuing the government's intensification and other policies has become a very difficult exercise for planning tribunals and given that these tribunals are sometimes considered pro-development, it is indeed a hard road.

SURVEY

Owners abutting redevelopment sites should be knowledgeable regarding the location of their lot lines and aware of section 443 of the Criminal Code which makes it an offence to move or disturb survey bars, even temporarily, as developers have frequently been known to do when excavating or landscaping.

AIR & SUBTERRAINIUM RIGHTS

One of the results of intensification has been an increasing number of Applications for seriously compressed side yard setbacks, and the threat of construction close to a lot line will always have an understandably disquieting affect upon an adjoining owner. Accordingly it should be understood that the law provides owners abutting redevelopment sites with an absolute, exclusive and undisturbed title to the limits of their lot lines, including the air space above and the subsurface terrain below, and a trespass of any nature whatsoever, on, above or below grade, is actionable. There is also an absolute right to ground support so that any cave in, subsidence, erosion or foundation damage is also fully compensable.

EASEMENTS

The increasing requests for the narrowing of rear and side yard setbacks caused by over building, may necessitate the creation of easements by the developer for parking, access, building maintenance and servicing. While not affecting adjoining owners, the existence of these easements can be a source of problems and disputes related to their use and maintenance and for this reason the necessity for a developer to create easements is not always looked upon favourably by the planning tribunals. It should not be forgotten by neighbours objecting to a proposed redevelopment that easements do not improve the developer's case even though

they may have no affect on abutting properties.

HERITAGE
Inquiry must be made to determine if the subject property falls under any of the following heritage categories;

A. Designation under Part IV of the Ontario Heritage Act, (OHA).
B. Inclusion in a HERITAGE CONSERVATION DISTRICT, (HCD), under Part V, OHA, and identification as a contributing building, having similar protection as under A, or as a non-contributing building where demolition or exterior modifications will require approval and must not damage cultural heritage values of HCD.
C. Inclusion in the OTTAWA HERITAGE REGISTER, under section 27, OHA, which indicates a building of heritage interest to the city and 60 days notice of intention to demolish must be given to allow the city to make a decision on Designation under Part IV, OHA.
D. Inclusion in a HERITAGE OVERLAY, under section 60, Bylaw 2008-250, which places restrictions on additions to an existing building or the redevelopment if demolished.
E. Inclusion in a MATURE NEIGHBOURHOODS OVERLAY, under sections 139 & 140, Bylaw 2008-250, which requires a Streetscape Character Analysis to be undertaken.
F. Inclusion in an area specified by the Provincial Policy Statement and supported by the cities OP requiring that development on lands adjacent to an HCD or a Part IV Designation be evaluated to ensure the heritage attributes of the protected property be preserved.

It must be noted that items D, E and F, above, involve zoning bylaws and are accordingly subject to minor variance applications.
An inquiry with the cities heritage authorities will determine if the subject property falls under any of the above categories and if so will support an argument concerning the retention of its heritage attributes. Refer Planning, Infrastructure and Economic Development Department, 110 Laurier St. West, 4th Floor, Ottawa, K1P-1J1, T. 613-580-2424 ext. 21586

BUILDING PERMIT APPEALS
Under subsection 25(1) of the Building Code Act, a municipality's decision to issue a building permit can be appealed within 20 days of its issuance by any neighbor, or group of neighbours, who consider themselves aggrieved by the decision, if the proposed building contravenes any applicable law. The term applicable law has been defined in sentence 1.4.1.3. (1) of Division A of the Ontario Building Code and includes zoning by-laws passed under section 34 of the PA.

RIDEAU CANAL
The Rideau Canal, being an UNESCO World Heritage Site, the federal government, under Parks Canada, has certain obligations related to site preservation and protection with respect to development within a 30 meter buffer zone from the canal. If this is a consideration, Parks Canada should be notified as should the local municipality which is also involved. A Cultural Heritage Impact Statement is required under section 4.2 of the Ottawa OP for the

development of any property abutting this site. UNESCO may also be informed. The Canal is also a National Historic Site and is designated a Cultural Heritage Landscape.

IF CONSTRUCTION PROCEEDS

In addition to confirming with the city's Building Services Branch that the plans conform to the Ontario Building Code and municipal by-laws and that a Permit has been issued, it is advisable to monitor the construction to be certain that no plan deviations or liberties are taken in the actual completion of the work as sometimes happens. The building inspection authorities should not be relied on here.

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