

GUIDE FOR OBJECTING TO A MINOR VARIANCE AND/OR A LAND SEVERANCE

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The following is offered as a brief guide for persons wishing to object to an Application to the Committee of Adjustment (the Committee) for a minor variance of a zoning bylaw and/or division or severance of land.

OBJECTING TO A MINOR VARIANCE

Sub-section 45(1) of the Planning Act (PA) sets out four Statutory Tests which must be considered by the Committee 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 PA requires that the Application must fail. These Tests, being created by statute, are mandatory and all must be met. Notwithstanding that a proponent may satisfy all four Tests, the Committee may in its discretion 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 two reasons, that it is too large or too important 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.

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 20th 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 policies of infill and intensification. A proposed development which is not compatible with existing houses in the neighbourhood with respect to size, set back and side

yards and sensitive to issues such as privacy and parking and detrimental to the streetscape or the character of the neighbourhood, will not pass this test. Familiarization with the 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. This document must be researched and the provisions supporting your case documented and may be accessed at www.ottawa.ca/official plan.

In addition to the above, there is a Statutory requirement in subsection 3(5) of the PA that the decisions of all planning tribunals must be consistent with government policy statements. In 2005 the Ontario government issued a formal document regulating land development known as the Provincial Policy Statement (PPS). This is where the government's intensification policy originates and accordingly persons objecting to any matter coming before the Committee should read and document the provisions supporting their objection and be prepared to respond to any provisions that may support the developer's case. The PPS may be accessed at www.mah.gov.on.ca.

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 Committee 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 the 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 Committee, keeping the focus on the four Statutory Tests and the PPS. The case will be decided on how well these tests have been responded to.

All applications are referred to the cities planning department and the member assigned to your case can be very helpful in assisting you to assess an application.

OBJECTING TO A LAND SEVERANCE

A severance of land Application is a request to the Committee 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 Committee's authority to grant severances is found in section 53 of the PA and the criteria the Committee must have regard to in hearing these Applications is found in sub-section 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 proposed severance on matters of provincial interest.
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, if any.
4. The suitability of the land for the purposes for which it is to be severed.
5. The dimensions and shapes of the proposed lots.

Many of the quality of life issues referred to above that may be relevant in considering a minor variance, will also be applicable in assessing a severance Application. The comments made above concerning the Provincial Policy Statement apply here also and as seen above in items 1 and 3, an assessment here will also involve researching that document as well as the OP. It is important to note that sub-section 51(25) of the Act authorizes the Committee to impose 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 is available in hard copy or may be seen at www.e-laws.gov.on.ca The Official Plan is available at www.ottawa.ca

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 or overbuilding infill, the character of the neighbourhood is deserving of protection and this will be a factor to be seriously considered by both the Committee and the Ontario Municipal Board (OMB). New development should be compatible and respect the established physical character of the neighbourhood. Proposed developments which may be considered: out of scale; out of character; inappropriate; destabilizing the character of the neighbourhood; a break in the pattern or continuity of the street; insensitive; visually incongruous or detrimental to the streetscape, should be discouraged and objected to. All of these terms have been employed by OMB Members in reported Decisions dismissing

development 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. It has been argued that residents should be able to rely upon a municipalities former zoning policies and it is 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 breakfast room) will be an important factor 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. The number, size and location of windows in both the proposed and abutting houses will be an important factor

VIEWS

While as stated there is no legal right to a view over the property of others, the OMB has 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 new development must be addressed. Failure to do so must be argued by abutting owners.

BUILDING MAINTENANCE

Variance Applications for a reduction in side yards may create serious problems with respect to roofing and general maintenance 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 Urban Tree by-law (2009-200), which requires a permit to cut down trees 50 centimetres or larger in diameter.

TRAFFIC and PARKING

In certain busy locations traffic may be a problem and this issue should be raised. Larger residential structures and intensification infill policies will inevitably result in more occupants (and persons visiting) with developers attempting to accommodate more vehicles on site creating problems related to automobile easements and parking (including front yard parking) with visual impacts on adjoining yards and streetscapes, the negative aspects of which can be argued at Tribunal hearings.

NECESSITY

The question should always be asked as to whether need can be shown for an increase in floor space. How many occupants are there to 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's offices to get the details of what is proposed.
2. Engage neighbours to rally their support.
3. Solicit the community association to support your case with a letter to the Committee 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, he or she can be subpoenaed to give evidence supporting the neighbour's position without any expense. Experience has shown that Planning Tribunals usually agree with the cities planning staff.

Committee Decisions are not generally available and in any event are too cryptic to be of any help, however appeals from the Committee to the OMB are published and available in hard copy and on the OMB website (www.omb.gov.on.ca). These Decisions give a detailed analysis of the case dealt with by the Committee and an awareness of the process and what is required as well as a useful knowledge of the planning issues and related arguments, for and against. A word of warning here, planning tribunals are not bound by their previous

Decisions, however, notwithstanding this they should be cited if highly relevant and may prove influential. The OMB may also be called toll free at 1-866-887-8820 for assistance in researching its Decisions.

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 Committee members of their obligation in this respect.

EVIDENCE

An objector cannot go before the Committee with a few unsupported catch phrases. Community sentiment and unsupported opposition are not considered unless fully supported. 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 pure fact, but rather of opinion. Professional opinion is what the experts provide to Tribunal members who rarely have any 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, the rules of evidence dictate that the opinion of the developer's expert must 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 evidence will buttress your case.

STUDIES AND REPORTS

Impact Studies and Reports may be ordered from town planners and other consultants on all municipal planning issues for presentation at Hearings. Computer and actual modeling of existing, as of right and proposed development is obtainable as are sun and shade studies graphically illustrating shadowing by proposed development 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.

GOVERNMENT INTENSIFICATION POLICY

All of the arguments appearing here have been affirmed in numerous OMB Decisions, however, intensification has a clear priority in current government planning policies and traditional planning arguments must be well supported and compelling to offset the accepted necessity of intensification and infill. The reconciliation involved in preserving built communities while at the same time achieving intensification, has become a very difficult exercise for planning tribunals. Matters are made worse by the fact that Ontario's planning tribunals do not enjoy the independence of traditional Courts of Law. They are not independent bodies. They are creatures of the government and must heed government Directives and Policies such as the PPS. Given that our planning tribunals are often considered to be pro-development it is indeed a hard road.

AIR & SUBTERRAINIUM RIGHTS

One of the results of intensification has been an increasing number of Consent 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 neighbouring owners 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 overbuilding, may necessitate, as we have seen, 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 development that easements do not improve the developer's case.

URBAN DESIGN GUIDELINES

The City has published design Guidelines for infill housing to implement the directives of the OP, but there is no formal design review process and no matter how unpleasing a proposed buildings design may be to the neighbours, if it satisfies all zoning by-law requirements, and no consents are required and there are no concerns under the Ontario Heritage Act, a building permit cannot be withheld. However, when municipal requirements are not met and some form of consent is required, these Guidelines have greater relevancy and although not enforceable in any mandatory sense (except for site plans), they are valid concerns that the Committee will hear and consider in its evaluation and a proponent's failure to observe the Guidelines may be argued. Professional evidence may be advisable here.

HERITAGE

In addition to properties specifically designated and protected under the Ontario Heritage Act, there are thousands of homes in Ottawa listed on the cities Heritage Reference List as

having heritage value. A check with the cities heritage authorities (currently under Infrastructure Services and Community Sustainability, 110 Laurier Ave. W., 4th floor, 613-580-2424, ext.21586) will determine if the subject property is listed and if so this fact will support an argument concerning the retention of its heritage attributes.

PROPERTY SEARCH ON CITY WEBSITE

By following the links and submitting the civic address of a specific property on the cities website, www.ottawa.ca/zoning, you can learn the properties pin number, legal description, dimensions, zoning designation, land uses allowed, applicable by-law requirements and much more. General area searches may also be conducted and site maps and aerial photos displayed. Zoning officials at the cities Building Services offices will render any assistance that may be required in this matter. Title searches of ownership still require personal attendance at the Land Registry Office.

RIDEAU CANAL

The Rideau Canal now 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 you may refer to Parks Canada's website for details.

(www.pc.gc.ca/eng/Inh-nhs/on/rideau/index.aspx.)

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 liberties are taken in the actual completion of the work as is sometimes the case. The building inspection authorities should not be relied on here.