

ISSUE DATE:

**Jun. 29, 2011**



PL100576

Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

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

Applicant and Appellant: Alder Ridge Development Inc.  
Subject: Minor Variance  
Variance from By-law No.: 1984-63  
Property Address/Description: 74/76 Trafalgar Road  
Municipality: Town of Oakville  
Municipal File No.: A-059/2010  
OMB Case No.: PL100576  
OMB File No.: PL100576

IN THE MATTER OF subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Referred by: Alder Ridge Development Inc.  
Subject: Site Plan  
Property Address/Description: 74/76 Trafalgar Road  
Municipality: Town of Oakville  
OMB Case No.: PL100576  
OMB File No.: PL100965

**APPEARANCES:**

**Parties**

Alder Ridge Developments Inc.

Town of Oakville

Regional Municipality of Halton

**Counsel**

R. D. Cheeseman

D. Baker

D. Beck

**DECISION DELIVERED BY J. G. WONG AND ORDER OF THE BOARD**

**Background**

Alder Ridge Developments Inc. (Applicant) is appealing a Town of Oakville (Town) Committee of Adjustment decision C.A.V. A/059/2010 refusing approval of minor variances to permit the construction of a three-unit, three-storey apartment building on

lands known municipally as 74/76 Trafalgar Road (Subject Lands). The Applicants are also appealing a related Site Plan Approval that Council failed to make a decision on within the prescribed time period. Both of these appeals have been combined for the purposes of this hearing.

At the outset of the hearing, Mr. Cheeseman, Counsel for the Applicant, advised that they were seeking revised variances consisting of some minor increases and decreases in their numeric values and with one variance being dropped (now a total of 8 instead of 9). Pursuant to subsection 45 (18.1) of the *Planning Act*, the application is amended and having regard to subsection 45 (18.1.1) of the *Planning Act*, the Board finds in this instance that the amendments to the original application are minor as it represents a mixture of slight increases and decreases in magnitude with one less variance in total (now 8 instead of 9). No further notice will be given.

The Applicant requests the following “revised” variances from the Town of Oakville (Town) Zoning By-law 1984-63 as amended:

1. To permit the proposed three storey apartment building, whereas the Special Provision 89(51) of the Zoning By-law only permits multiple-attached dwellings and to permit it to be regulated by apartment house regulations found in the R8 zone.
2. To permit the proposed apartment building on the lot with a lot frontage of 19.61 m whereas the Zoning By-law requires a minimum lot frontage of 24 m for an apartment house.
3. To permit the proposed apartment building on the lot with a lot area of 624.3 sq. m., whereas the Zoning By-law requires a minimum lot area of 1,486.5 sq. m. for an apartment house.
4. To permit a minimum front yard setback of 2.1 m, whereas the Zoning By-law requires a minimum front yard setback of 7.5 m for an apartment house.

5. To permit a minimum westerly side yard setback of 2.0 m, whereas the Zoning By-law requires a minimum side yard setback of 25% of the building height but not less than 4.5 m. for an apartment house.
6. To permit a minimum easterly side yard setback of 1.9 m, whereas the Zoning By-law requires a minimum side yard setback of 25% of the building height but not less than 4.5 m for an apartment house.
7. To permit a maximum lot coverage of 51.6% (331.67 sq. m.), whereas the Zoning By-law only permits a maximum lot coverage of 35%.
8. To permit a maximum building height of 11.2 m, whereas the Zoning By-law regulates the height in relation to the side yard setbacks.

### **Evidence**

John Ghent, a qualified land-use planner, appeared on behalf of the Applicant. Mr. Ghent testified that the Subject Lands located at the corner of Robinson and Trafalgar are in a transition area abutting a heritage district that runs parallel to the central business district. Across the street, on the north side of Robinson Street, are low rise commercial and on the south side of Robinson are low rise, semi-detached, and residential townhouses. The Subject Lands as being occupied by a house form with 43% lot coverage facing onto Trafalgar. According to Mr. Ghent, the Applicant proposes to build a three-unit, three storey apartment building with an entrance off of Robinson Street and the driveway from Trafalgar.

Mr. Ghent testified that the Provincial Policy Statement supports intensification, a mix of housing types, and the efficient use of resources that this proposed development encompasses. In his opinion, this proposal is also consistent with the Regional Official Plan and Oakville's Official Plan (OP) which designates the lands for medium density residential and permits apartments and multiple dwellings. The Town's zoning map indicates the Subject Lands are designated "R8" but subject to "Special Provision 51" (SP 51), which accordingly overrides any other provision. In this case, SP 51 regulates the permitted building type which is "Multiple-attached dwellings". Hence, the need for a variance to permit the apartment building use.

Mr. Ghent testified that a Heritage Impact analysis was prepared in conjunction with this application that concludes there is no impact from this proposal to the adjacent Heritage Area.

According to Mr. Ghent, this proposal calls for one unit per floor with a total of three floors. This proposal is for a small scale, low rise apartment building in a transition area. Mr. Ghent submits that very little in the immediate neighbourhood actually conforms to the zoning by-law use and the lot standard. There have been numerous minor variances approved in this neighbourhood.

According to Mr. Ghent, the intent of the ZBL is to facilitate the transition between commercial and residential and that the proposed apartment building simply represents a townhouse “stretched out” and there are no significant resulting impacts from traffic, privacy or building mass. He submits that the resulting increase in lot coverage from 35% to 52% is not noticeable to the public.

In terms of Variance 1, according to Mr. Ghent, the OP permits apartments and the scale of development here is compatible with existing uses since the proposed use is residential so there is no change in use. The intent of the ZBL is to facilitate the transition between two land uses and the apartment form can better achieve the transition than a townhouse form. Mr. Ghent contends that this proposal is minor because it does not present any adverse impacts. He testified it is desirable because it presents an attractive design to area residents.

According to Mr. Ghent, Variance 2 deals with lot frontage and most of the surrounding properties don't comply and a variance is needed for any type of development. The proposed apartment building represents a building type that is consistent with the lifestyle and age demographics of the area residents.

In terms of Variance 3, lot area, Mr. Ghent testified that the apartment standard here is outdated (from some 45 years ago). He submits there is no impact from the reduction and it is appropriate because it achieves the proposed building program.

In terms of Variance 4, front yard setback, according to Mr. Ghent the proposed setback is consistent with neighbourhood. It is minor because there is no impact to the

adjacent properties. Furthermore it is appropriate, because it allows for larger rear yard and this adds to the separation from the adjacent heritage district.

In terms of Variance 5, interior side yard, according to Mr. Ghent the proposal is consistent with the neighbourhood and he notes that the property to the west has ‘zero’ setback to the property line. He submits that the proposed development is more akin to a three-storey townhouse which only has a required setback of 3.5 m and not the 4.5 for apartments. And hence the variance is appropriate because it allows for the development.

In terms of Variance 6, east side yard setback, according to Mr. Ghent this is an improvement over the existing setback. Mr. Ghent submits the intent of the ZBL is to maintain access to the building and this is achieved. The variance here is appropriate because the property flanks a sidewalk and there is no impact.

In terms of Variance 7, lot coverage, according to Mr. Ghent the proposed coverage represents an appropriate scale and massing for a transition area when compared to adjacent developments to the north and south. The coverage here is appropriate and there are no adverse impacts.

In terms of Variance 8, building height, according to Mr. Ghent the variance is appropriate because the ZBL for townhouses permits three storeys – 10.5 m and this building is 0.7 m higher with a flat roof. There is no impact to adjacent properties, the variance is appropriate because it allows for a three-unit building, which achieves the intent of the ZBL.

Mr. Ghent submits the proposed variances represent good planning and are in the public interest in a transitional area.

When asked, Mr. Ghent said nothing would be gained from a rezoning application because all of the required studies such as traffic, arbourist report, heritage planning report and functional servicing have already been submitted by the Applicant. Mr. Ghent acknowledged that a Zoning By-law Amendment (ZBLA) involves greater public participation but the minor variance application includes public notice and an information meeting with an opportunity for public comment. Mr. Ghent contends that

the public input on Minor Variances (MV) is the same as ZBLA. Further, he submits that the recent revisions to the variances were in part a result of the public consultation.

The Board heard from various local residents objecting to the proposed development. J. Sarnecki objects to the MV application and says it is a rezoning. David Johnstone with the Oakville Lakeside Residents' Association testified that this sets a precedent for the south side of Robinson Street. Connie Breem, whose property backs on the Subject Property, objected because the zoning ensures the transition and buffer between the commercial and residential areas is protected. Anne F. Oakley lives next door and says the proposal is too big and will loom over her house. Ms Fortini-Traifores represents her parents who live next door, testified that the proposal is too big and too high, imposing on neighbours and the side yard setback isn't sufficient when compared to her parent's property.

Philip Goldsmith, a qualified architect specializing in heritage properties appeared on behalf of the Applicant. Mr. Goldsmith prepared the Heritage Impact Assessment (HIA) that was submitted to the Town. According to Mr. Goldsmith the Subject Property is outside the Heritage Conservation District and therefore, a permit for alteration is not needed. In Mr. Goldsmith's opinion, there is no impact from the proposed variances to the historic area to the south.

Susan Schappert, a Heritage Planner with Oakville, provided technical evidence on its behalf. According to Ms Schappert, the proposed apartment building south view at 3 - 3.5 storeys is out of proportion with the scale and massing of the abutting of the Heritage Conservation District. She agrees that there is no historic context to the existing buildings on the subject site.

Charles McConnell a qualified land-use planner and the Town's Manager of Current Planning and Urban Design appeared on its behalf. According to Mr. McConnell, all the required variances deal with an apartment house but the subject lands only permit a multiple-attached dwelling. Mr. McConnell submits this is not minor variance application but should be a rezoning application because it represents a new use under the zoning.

Mr. McConnell testified the specific zoning here was established some 50 years ago and it remains in-place. The site is designated "SP 51" and it only permits "multiple

attached dwellings” and this has constant and unchanged from both a policy and planning perspective since 1965. The intended use is “multiple attached dwelling” and this is consistent with the intensification policies in the Provincial Policy Statement and the Growth Plan.

According to Mr. McConnell, the variances seeks significant relief from the zoning regulations, these units are divided horizontally with living space all on one floor, side yards are reduced to contain the additional massing and the built form deviates from the existing community. He submits it does not comply with the existing development pattern which is a low scale, ground orientated development.

In Mr. McConnell’s opinion, the required relief to numerous performance standards makes it inappropriate. The proposed development deviates from the existing pattern of development. This proposal introduces a built form with underground parking and a narrow buffer strip which is not permitted and it is trying to change the zoning with a minor variance.

In Mr. McConnell’s opinion, the zoning does not explicitly permit apartment buildings and therefore, this application should not proceed as a minor variance. The Applicant has used the wrong process here. He submits that the development at 104 Robinson (AKA “Shelly’s Proposal”) utilized a ZBLA to permit a four storey apartment building with underground parking. And that this application requires a ZBLA.

### **Disposition**

In this case, the Board agrees with Mr. McConnell that this minor variance application goes beyond the scope of the usual minor variance process and should be more properly zoned through a zoning by-law amendment. Consequently, the proposed variances do not meet the intent of the OP nor the ZBL and they fail. Significant issues concerning the proposed development such as shadowing, overlook, and lost of privacy have been raised that could be vetted through the rezoning process.

Mr. McConnell testified that the proposal is out of character and scale of development of the surrounding neighbourhood consisting of low scale singles, semis and townhouses that are one to two storeys in height. That the finer grained

development on the south side of Robinson stands in contrast with the bulkier forms on the north side of Robinson. According to Mr. McConnell, the proposed use is not permitted therefore it cannot meet the intent of the ZBL and the Board agrees. The purpose of SP 51 is to create a buffer between the CBD to the north and the lower scale conservation district to the south. Mr. McConnell contends the variances are not desirable or appropriate from a public policy perspective because the resulting development does not maintain the existing character of the neighbourhood.

The zoning for the Subject Lands is “Special Provision 51” (SP 51). The zoning designation SP 51 dates from 1965 and By-Law No. 1965-136 and continues through to By-Law No. 1989-266, which remains in full force and effect. It was not contested that SP 51 is consistent with the policies of Province Policy Statement and the Growth Plan. Throughout a period of almost 50 years, the zoning designation has been continually reconfirmed by council without change. The Board finds Council’s position on the zoning for the south side of Robinson (including the Subject Lands) has remained constant for almost 50 years and throughout this time the zoning has been continuously reaffirmed by successive councils.

The Board finds that only permitted use under the designation SP 51 is “Multiple-attached dwellings”. Multiple-attached dwellings are defined in Zoning By-Law No. 1965 – 136 as:

“multiple-attached dwelling” or “terrace dwelling” means a building consisting of several non-communicating two-storey single-family dwelling units with a common wall between adjoining units but with private front and rear access to each;

Variance 1 is seeks to vary zoning by-law Special Provision 89(51) (also known as SP 51) to permit a three storey apartment building and for it to be regulated by the R8 apartment house regulations. In the Board’s opinion, what is being sought by Variance 1 is a change in use. The definition of an “apartment house and/or apartment dwelling” is defined in Zoning By-Law No. 1965 – 136 as:

“apartment house” means a multiple-family dwelling with at least 3 separate dwelling units with a shared entrance;

“apartment dwelling” or “apartment” means a building containing 3 or more dwelling units which is not a multiple-attached dwelling,

Based on these by-law definitions the Board finds that that Variance 1 seeks to permit an “apartment building use”, which is a use that is explicitly excluded from the permitted “multiple-attached dwelling” use. The Board acknowledges that the underlying zoning is Residential but the presence of SP 51 narrows the uses so that only a multiple attached dwelling use is permitted.

In the Board’s opinion, a change to the existing and/or permit use requires a Zoning By-Law Amendment (ZBLA) and not a Minor Variance (MV). It is an established Board jurisprudence that MVs deal with regulations and meeting the specific requirements of the said regulations. This is in contrasted to a ZBLA, which represents a more involved process (as compared to a MV) and there are different notice requirements, increased public participation, additional reports and studies, localized issues, servicing issues, etc. A ZBLA is normally the mechanism required to obtain a change in use. The Board finds that the Applicant’s use of a MV to obtain a change in use is not appropriate.

In *Romlek Enterprises v. Toronto (City) (Ont. Div. Ct.)*, 2009 CarswellOnt 3108, at paragraph 41, Swinton J. states:

This is not a case where a type of use has arisen not previously contemplated and for which some categorization needs to be found. Where residential use is intended to be permitted by the zoning by-law, the by-law permits the residential use in clear and unambiguous language.

This is the case here; the Board finds that the only permitted use is multiple-attached dwelling, while the requested use is for an apartment house. The by-law is very clear that only a multiple-attached dwelling is permitted. Therefore, Variance 1 which seeks change in use from multiple-attached dwelling to apartment building/house does not represent an appropriate development because it seeks to introduce a use that is not permitted. Furthermore, the apartment building/house use does not meet the intent and purpose of the zoning by-law because the proposed use is not the permitted use. While, the underlying zoning is Residential, the presence of SP 51 narrows the uses so that only a “multiple attached dwelling” is permitted.

The Board notes that Mr. McConnell’s evidence indicated that the two existing apartment buildings on the south side of Robinson Street were developed in conjunction

with site specific ZBLAs used to implement and achieve conformity with the OP. The Board is unable to approve a MV as ZBLA.

Variance 1 seeks a change in use and in the corresponding regulations (from multiple-attached dwelling to apartment house). The OP designates the use and the applicable zoning standards that correspond to the permitted use. A change in use is not achieved through a minor variance. The use must be a permitted use in the zoning before it can be the subject of a minor variance. It is established in Board's jurisprudence that a minor variance seeks to vary the zoning by-law standards or regulations not the specific zoning or use. In the Board's opinion, a minor variance is not the appropriate mechanism to seek a change in the permitted use. Furthermore, it would not be good planning to permit a change of use through a minor variance. In this instance, the Applicant is seeking a change to the designated use, which is properly the subject of a ZBLA and not a minor variance.

A change in the permitted use requires a rezoning application and therefore, this variance does not represent an appropriate development of the land. In this instance, the Applicant is seeking a change to the designated use, which is properly the subject of a ZBLA and not a minor variance application.

The Board finds that all the remaining Variances 2-8, seek to vary the regulations for an apartment house, a use that is not permitted in the applicable zoning; therefore, the variances do not meet the intent and purpose of the zoning by-law. Furthermore, the Variances 2-8 seek to vary the specific R8 apartment houses standards that the Board has determined are not applicable here, and therefore, the proposed variances do not represent an appropriate development of the land.

The Board acknowledges that individually, certain of the Variances such as the side yard setback may represent an improvement over the existing condition; however, they represent an inappropriate development because it is for a use that is not permitted. Variances cannot be authorized unless they meet all four tests of subsection 45(1) of the *Planning Act*. They must maintain the general purpose and intent of the operative Official Plan; they must maintain the general purpose and intent of the applicable zoning by-law; be desirable for the appropriate development of the land; and they must be minor.

The Board finds that each of the Variances 1-8 fails one or more of the four tests in subsection 45(1) of the *Planning Act* and therefore they are not approved. As a result of the failure of all of Variances, it is not necessary to discuss the related site plan appeal.

**THE BOARD ORDERS** that the appeals are dismissed; the variances and the site plan are not authorized.

This is the Order of the Board.

“J. G. Wong”

J. G. WONG  
MEMBER