Indexed as:

Toronto (City) Zoning By-Law No. 902-88 (Re)

**IN THE MATTER OF Section 34 of the Planning Act, 1983
AND IN THE MATTER OF appeals by Marion Keigh, James E.P. Rogers, Terry Chow and others against Zoning By-law 902-88 of the Corporation of the City of Toronto
AND IN THE MATTER OF Section 34 of the Planning Act, 1983
AND IN THE MATTER OF an appeal by Katherine Parkinson against Zoning By-law No. 286-89 of the Corporation of the City of Toronto**

[1990] O.M.B.D. No. 846

File Nos. R 890325, R 880697

Ontario Municipal Board

A. Delfino, N.M. Katary

May 11, 1990

(42 pp.)

[Ed. note: Amending Decision, released May 22, 1990, appended and correction made to Decision.]

COUNSEL:

Karl D. Jaffary and Sebastian Laboga (Student-at-Law), for Katherine Parkinson.
A. Teresa Kowalishin and Kirk Cooper (Student-at-Law), for The City of Toronto.
John G. Parkinson, for Marion Keigh et al. and Lytton Park Residents Organization Inc.

DECISION OF THE BOARD delivered by N.M. KATARY:--

Ms. Katherine Ellen Parkinson, a lawyer, wants to legalize the existing residential use of a one-and-a-half storey building, formerly a warehouse, as a dwelling unit. On October 17, 1988, the Council of the City of Toronto passed a By-law to legalize the use. The residents of the neighbourhood appealed the By-law. On April 21, 1989, the Council repealed the By-law. Ms. K.E. Parkinson has appealed the repeal by-law. The Board is dealing with both matters at the same time.

There are three parties to this dispute. First, Ms. K.E. Parkinson, the applicant/appellant. Second, the residents of the neighbourhood, the objectors/appellants. Third, the City of Toronto which is also opposed to the applicant/appellant.

At the request of counsel, the following two facts are noted for the record:

1. Mr. Angelo Delfino, one of the panel members, was formerly a member of the City of Toronto, Committee of Adjustment. In his former capacity, he participated in the decision of the Committee of Adjustment on June 30, 1982 that dealt with an application by K.E. Parkinson/B.M. Zinman, for permission to make interior alterations to an accessory building, for garage and greenhouse purposes, located to the rear of dwelling house premises No. 28, Briar Hill Avenue. The chair of the panel asked if any of the counsel had any concerns about Mr. A. Delfino sitting on the panel in this case. Counsel expressed no objection and the panel continued with the hearing.
2. Mr. K.D. Jaffary, the counsel for the applicant/ appellant, expressed a serious concern about the City splitting its case with Mr. J.G. Parkinson, representing the objectors/appellants and Ms. T. Kowalishin representing the City. He said, "I do not mind taking on the weight of the State, but to deal with two counsel dealing with the same issues seems to be unfair." Under some questioning by the chair, it became clear that the City's case would focus on the impact on existing development. With that clarification, both Mr. K.D. Jaffary and the Board came to the conclusion that he did not need the strength of Atlas to take on the weight of the State, and the hearing resumed.

The applicant/appellant owns the subject property in the City of Toronto, which is municipally known as 28 Briar Hill Avenue. No. 28 Briar Hill Avenue is a 665.9 square metre (7,168 square foot) lot located four residential lots west of Yonge Street. It is occupied by a 2-1/2 storey single family detached dwelling unit with a gross floor area of approximately 272.4 square metres (9,620 square feet) and a 1-1/2 storey warehouse (subject building) converted into a dwelling unit, with a gross floor area of approximately 126 square metres (4,450 square feet), situated at the rear of the lot. The proposal is to legalize the residential use of the warehouse as a dwelling unit.

The subject property is in a district designated R1F Z.2 in the City's general Zoning By-law No. 438-86, in which only residential uses are permitted. Section 4(11) of the By-law prohibits the location of a house behind a house or the location of a residential building in the rear of another building on the same lot. Also, the By-law requires residential buildings to front or abut a public highway and to be located on defined lots which can be conveyed. Further, parking a motor vehicle in front of the main front wall of a dwelling, other than for casual purposes, such as loading or unloading, is prohibited.

On October 17, 1988, the City Council passed the Site Specific Zoning By-law No. 902-88 which permits the existing buildings on the lot at 28 Briar Hill Avenue to be used for the purposes of two private detached dwelling units provided no part of such dwellings above grade is located otherwise than as shown on the map attached to the By-law. Thus, 902-88 legalized the residential use of the warehouse as a dwelling unit. The residents of the Lytton Park neighbourhood are appealing the passing of By-law No. 902-88. On April

21, 1989, the City Council reversed itself and repealed By- law No. 902-88 with the By-law No. 286-89. The applicant/appellant is appealing the passing of By-law No. 286-89.

The three parties to this dispute presented a large body of evidence. In the following paragraphs, the central points are highlighted with a view to outlining the framework for an analysis of the issues.

The principal thrust of the case by the applicant/appellant, Ms. K.E. Parkinson, consisted of demonstrating that the proposal does not have an unacceptable adverse impact on the character of the area, and that the applicant has followed the due process to the best of her abilities in order to secure approvals by proper consent-granting authorities. She supports By-law 902-88. The following witnesses gave evidence in support of the thesis.

Ms. K.E. Parkinson maintains that most construction work on the accessory building/warehouse was undertaken by Mr. David Reeves in the summer and fall of 1982, and that she was unaware of any work done in contravention of the Committee of Adjustment decision to permit a garage and a greenhouse. She steadfastly maintains that the fact 28 Briar Hill Avenue was registered in her name, that she lived next door in 34 Briar Hill Avenue and the fact that she was engaged to marry Mr. D. Reeves did not in any way make her privy to the knowledge of the construction work going on at the warehouse, nor did she have any reason to suspect that anything improper was going on. She said that she obtained permission in 1985 for a curb-cut for a second driveway on the west side of the lot and rented the by now converted warehouse to a tenant in order to supplement her meagre income. In early November 1985, she applied for site specific rezoning of her property to legalize the dwelling unit in the warehouse. Her contention is that throughout the period she has acted in good faith and that she has not abused the process.

Mr. Matthew E.M. Lawson, a planning consultant retained by the applicant/appellant, maintains that By-law 902-88 should be upheld because the impact of the proposal on the character of the area is minimal. He is of the view that a house behind a house in this instance is similar to many conversions of buildings behind houses that have been going on in the City for the past 25 years or more. He contends that parking for the new dwelling is not a concern because a typical car is only 15-16 feet long and that the two dwellings should remain on the same lot to preserve the rental nature of the new dwelling unit in the back. His opinion is that the impact of a new type of activity in the backyard with its own intensity and rhythm does not impinge adversely upon the enjoyment of quiet and privacy by people in the immediate vicinity. He maintains that the proposal contributes to the provision of an affordable rental unit through infilling as envisioned in the Metro Housing Intensification Policy. Finally, it is his view that past illegal conversions of basements into dwelling units have not led to a general disrepute of zoning and this proposal is unlikely to do so.

Mr. William J. Dolan, a planning consultant subpoenaed by the applicant/appellant, outlined the circumstances that led up to being first retained by the City Solicitor and subsequently relieved of his responsibilities associated with a study of the proposal and preparation of a report to the Council of the City. He supports By-law 902-88 largely because he contends that the impact of the proposal on the character of the area is not significant. Messrs. Brian Milne and Angus M. Cranston, senior planners with the City of Toronto, testifying under subpoena, expressed support for the proposal. Mr. B. Milne expressed the view that a site plan agreement incorporating a condition with respect to landscaping is

necessary and that the agreement can be used to address impact concerns. Mr. A.M. Cranston expressed the view that the people who were objecting to the proposal were most concerned about the disregard for process.

Two people who live in the vicinity support By-law 902-88. Mr. John Freeman lives at 34 Briar Hill Avenue and bought the property from Ms. R.E. Parkinson in 1986. He contends that he has experienced no negative impact from either a person living in the subject building, or from the overview and light caused by the cathedral window in the building. Mrs. Elizabeth McAllister lives across the street at 31 Briar Hill Avenue and has lived there for 52 years. She expresses pleasure at the quality of rehabilitation work done on both the main house and the warehouse at 28 Briar Hill Avenue. While she states, "It would be a sin not to rent it out to tenants," she also says, "...I am concerned that a severance will lead to a sale and someone will pull down the house and build a new house."

The principal thrust of the case by the objectors/appellants consisted of demonstrating that the proposal has an unacceptable adverse impact on the character of the area. They support By-law 286-89. The following witnesses gave evidence in support of the thesis.

Mr. Alan G. Young, a planning consultant retained by the objectors/appellants, maintains that By-law 902-88 is contrary to the intent and purpose of the Official Plan of the City of Toronto as enunciated in Section 2.8(a) because the proposal is out of keeping with the character of the area and, therefore, destabilizes the area. His opinion is that the impact of a new type of activity in the backyard with its own intensity and rhythm impinges adversely upon the enjoyment of quiet and privacy by people in the immediate vicinity. He contends that parking for the new dwelling is a concern because the car would, out of necessity, have to be parked jutting out in front of the main wall of the main house. His view is that a house behind a house should be permitted only through a general study and review of official plans policy and not through a site specific by-law amendment.

Ms. Marion Keigh, a "back door" neighbour, so to speak, presents her evidence supported by a three-dimensional model of the buildings in the subject block and a set of 33 photographs showing various features of the subject building and surroundings. Her main concerns are with respect to loss of privacy and quiet enjoyment of her backyard due to the type, intensity and rhythm of activities associated with the warehouse becoming a new house. She is distressed in particular by people living in the warehouse with virtually no distance separating her back garden from the warehouse.

Ms. Mary Jewitt, chair, Residential South Zoning, Lytton Park Residents' Organization, is concerned about two things. First, if the subject building use is legalized, it would create a precedent for other similar accessory buildings in the backyards of houses in the neighbourhood. She pointed out four instances where there are barns in backyards which might experience similar conversions. Second, she is genuinely distressed that neither the applicant/appellant nor the City followed due process properly. Under cross-examination, she states with noticeable disciplined restraint, "We [Residents' Organization] did agree to take the position in principle in opposition to any development of residential use in any of the backyards."

Mrs. Thelma Jane May of 37 Albertus Avenue is seriously concerned about the subject building becoming a new house because the new activity would cause her loss of privacy and increase the noise in her backyard. Domestic noise generated by the present tenant

and future tenants appear to be her primary concern, although light seems to have bothered her at one time.

Mr. Alfredo Santoro of 39 Albertus and Mr. John C. Mowbray of 31 Albertus are both concerned about the domestic noise created by the person living in the subject building. They are troubled by the fact that the noise emanates from an unexpected source. They both contend that the very awareness of a person living in the subject building diminishes their privacy and enjoyment of their backyard.

The entire case of the City of Toronto is based upon demonstrating abuse of process by Ms. K.E. Parkinson who is alleged to have undertaken a series of actions which represent a pattern of creeping incrementalism in wilfully flouting the law. The City is also of the view that abuse of process, (i.e., invoking the machinery of legalization to rectify the applicant's own wrongful actions), in and of itself should be grounds for dismissing the appeal against By- law 286-89. The following witnesses gave evidence in support of the thesis.

Mr. Harish Chandra Ramrup, a building plans examiner with the City, describes the process of securing a permit and maintains that the decision on the issuance of a permit is based upon the information provided in the application. He states, "If (a) party room was shown on the application, it would be interpreted as residential use."

Ms. Zoe Holmstrom, a retired supervisor of permit applications with the City, maintains that Ms. K.E. Parkinson had a meeting with her on November 1, 1983 when the applicant/ appellant inquired as to whether she could install bathroom fixtures in the warehouse. The two of them proceeded to prepare an application, but when Ms. Z. Holmstrom realized that there was no justification in the Zoning By-law for a full set of bathroom fixtures, she discarded the application.

Mr. Angelo Fantozzi, a building inspector with the City, gives evidence which consists of outlining the contents of his worksheets, being a chronology of the notes of his visits to the subject building and the main house. He is most concerned about the partition wall erected in the garage portion of the warehouse. During several visits to the site, he did not ever see the garage door open and close, nor did he see the bathroom or kitchen sink and cupboard. On November 3, 1983, when he visited the main house to check the deck, he admits under cross-examination that he did not see the windows cut into the garage door of the warehouse, although the entire north elevation of the subject building was clearly visible from the deck.

Mr. Thomas Mason, the District Manager of the North Site Office with the City, outlines in some detail the chronology of events reproduced on pp. 69-70 of exhibit 2. He is disarmingly candid about the way his department functioned in dealing with people who have undertaken building conversion activities without securing appropriate permits. People are asked to bring their property into compliance and often that is done by making an application for a building permit. In this instance, once the application for a site specific re-zoning was put forward on November 6, 1985, his department withheld any action with respect to enforcement of by- law infractions.

Mr. Ralph R. Berger, a planning consultant retained by the City, outlines two major points. His primary contention is that the proposal should be turned down because of the manner in which it has come about, i.e., the abuse of process. It is best summed up in his report to the City Solicitor on p. 78 of exhibit 2, "Here is considerable evidence that area

residents would consider legalization of this use such an abuse of the planning process as to bring the Zoning By-law and its enforcement into disrepute." His second contention is that the proposal would not have an adverse impact on the character of the area.

Two central issues and only two emerge from the large body of evidence. First, does the site specific zoning by-law change contravene the intent and purpose of the Official Plan? Second, if there is demonstrable misuse of process, can misuse of process in and of itself be the basis for rejecting the proposal?

1. Misuse of Process

In analyzing misuse of process by Ms. K.E. Parkinson, it is necessary to examine the context in which such misuse is likely to have taken place. There are four principal actors in this drama, namely, Ms. K.E. Parkinson/Mr. D. Reeves, the Department of Buildings and Inspections, the Department of Planning and Development and the Council of the City of Toronto. The evidence presented is punctuated with numerous contradictions and is vigorously contested by the parties. The antediluvian, adversarial proceedings at the hearing are not of much assistance in distinguishing between testimony and fact. As Justice Jerome Frank pointed out in 1949, the fight theory of justice appears to work against the truth theory of justice, especially in a tribunal charged with the finding of facts. Therefore, what follows is an analysis arrived at after a good deal of anxious consideration.

Ms. Katherine E. Parkinson

On April 23, 1982 (p. 43, exhibit 2), the Department of Buildings and Inspections issued an Order to Comply to Ms. Parkinson, noting that unauthorized construction had been carried out on the subject building at 28 Briar Hill Avenue, consisting of the following operations: (1) an opening framed on the west side; (2) garage doors removed and replaced by windows; (3) openings in the roof framed for skylights; and (4) a loft created by making an opening in the ceiling. Since this construction was carried out without first obtaining a permit, Ms. Parkinson was notified that she must submit plans and obtain the necessary permits within the time specified and, in the interim, suspend further work until a permit is obtained. In this Order to Comply, the building inspector was in error in noting that the "garage doors have been removed and replaced by windows" when, in fact, the garage door had been bolted shut and windows cut into it of the approximate size as noted in the Order to Comply. On May 20, 1982, pictures of the subject building (southwest and south elevations) were taken by the building inspector showing the windows cut into the existing garage door.

On May 5, 1982, the Department of Buildings and Inspections rejected the application of Ms. Parkinson for (1) a residential building (located) behind another residential building; and (2) the maintenance of a parking facility in a garage on the lot (p. 7, exhibit 2) as contrary to Section 4(20)(a) and Section 4(13) of the Zoning By-law. This means that if a building has a gross floor area in excess of the maximum permitted, or the lot is deficient as to the landscaped open space, the gross floor area excess shall not be increased, nor shall the landscaped open space be reduced.

Following the rejection of her above-cited application, Ms. Parkinson submitted a new application to the Department of Buildings and inspections in which she proposed to "make interior alterations to existing detached garage and empty storage building for garage and greenhouse purposes". On May 26, 1982, the Department of Buildings and Inspections

rejected Ms. Parkinson's proposal on the grounds that the proposed detached garage and greenhouse building is over one storey in height and exceeds the maximum allowed height of 4 metres (12 feet). Subsequent to this decision, Ms. Parkinson applied to the Committee of Adjustment for permission to make the above alterations to the subject building, notwithstanding the fact that the building would contain two storeys and have a height of 6.7 metres (22 feet). On July 29, 1982, the Committee of Adjustment approved Ms. Parkinson's application on the condition that the subject building not be used for the purpose of human habitation.

On August 18, 1982, Ms. Parkinson was issued a building permit to "make interior alterations to existing detached building for detached garage and greenhouse purposes" (p. 13, exhibit 2). After the building permit was issued, no effort was undertaken to restore the bolted garage door into which windows had been out prior to the Order to Comply of April 23, 1982 to its original condition or to replace the garage door as would be in consonance with the stated intended use of the subject building as a garage and greenhouse. In fact, the previous condition of the garage was maintained with subsequent drywalling of the proposed garage such that it was virtually impossible to open the garage door which was already bolted shut. This situation casts serious doubt upon the intent of Ms. Parkinson to utilize the subject building for the permitted use of a garage and greenhouse.

Sometime during the summer and fall of 1982, Mr. D. Reeves completed the installation of a kitchen sink in the western part of the building as well as bathroom fixtures including a bathtub. While it may be possible to justify the installation of a sink and a shower in a building intended to serve as a garage and greenhouse, it strains all manner of credibility that a bathtub should be considered a necessary or even desirable feature in such a building. It is also very significant that Ms. Parkinson clearly states that the kitchen sink and bathroom fixtures were installed in 1982 by Mr. D. Reeves and yet, in a conversation held with Ms. Holmstrom on November 1, 1983, she enquired of Ms. Holmstrom whether she could, in fact, install bathroom fixtures. If the bathroom fixtures were already installed in 1982 as Ms. Parkinson testifies, the question must be asked why Ms. Parkinson would enquire about a permit to install bathroom fixtures a full year later.

As to the matter of the lack of proper plumbing permits for the installation of the bathroom fixtures in 1982, Reeves/ Parkinson made no enquiry as to the legality of proceeding with the installation of these fixtures before allowing the plumber to proceed with the installation. Ms. Parkinson's installation of air conditioning in the subject building in 1985 was without a permit. The same can also be said of various alterations to the main house at No. 28.

Another point which ought to be mentioned in an account of the irregularities in the execution of renovations to the subject building concerns the building permit Ms. Parkinson sought and received on November 1, 1983 to "cut window openings in rear elevation, repair partitions in existing coach house and remove attached storage shed" (p. 26, exhibit 2). Ms. Parkinson put on her permit application that she wanted to demolish the "attached storage shed" which in fact had already been demolished while work was being done on the rear deck of the main house. If the attached storage shed had already been demolished (without a permit), the question naturally arises why Ms. Parkinson in her application is requesting permission to remove the shed rather than requesting a permit to regularize the previous demolition of the shed.

On October 18, 1982, the subject building was inspected with plans by the city building inspector who noted a partition located within the proposed garage that was not indicated in the original building permit as it should have been. The existence of such a partition, regardless of whether or not it existed in situ prior to the commencement of work on the proposed garage and greenhouse, casts additional doubt upon the intent of Ms. Parkinson to utilize the space for a garage. The building inspector expressed concern that the partition seemed to make the garage too short to qualify as a garage (a car being 15-16 feet long, according to M.B.M. Lawson).

At the hearing, the city building inspector says that during his inspection on October 18, 1982, he noticed that the garage was elaborate with carpets: could not be used (as a garage) unless a Bricklin auto was ordered to store in the garage. Ms. Parkinson states however, that the floor in the garage was wood rather than carpeted as the city building inspector testifies. Although a wood floor is less inappropriate for a garage floor than a carpeted surface, the fact remains that a wood floor by modern standards is also unsuitable for a garage floor when oil and rust resistant flooring is customary for garage floors and is available at a reasonable cost. Notwithstanding the fact that Ms. Parkinson testifies that this area of the subject building was used as a general storage space until 1985 and never used to store an automobile, the fact remains that the proposed use for the area according to the building permit is that of a garage.

In April 1983, a settlement negotiated between Ms. Parkinson and Mr. Reeves resulted in a change in the boundary between No. 34 and No. 28 such that Ms. Parkinson, as the new owner of No. 28, could continue to own a large flower garden that originally belonged to No. 34. Although the justification for the severance in 1983 is stated to have been the retention by Ms. Parkinson of the flower garden originally belonging to No. 34, the fact remains that without this severance, it would not have been possible to build a separate driveway for the subject building since there would not have been sufficient space for it as the lot of No. 28 was originally plotted.

On March 20, 1985, Ms. Parkinson applied for and was subsequently granted (April 25, 1985) a curb-cut for a vehicular access to a proposed parking station on the east side of the main house which already had a driveway on the west side running alongside the flower garden added to No. 28 by the severance of April 1983. The new driveway, duplicating the purpose of the original and still functioning driveway, could not have been accommodated on Ms. Parkinson's lot, had she not acquired the additional 7 feet, 3-3/8 inch frontage provided by the strip of land obtained in the severance of April 1983. The additional frontage of 7 feet 3-3/8 inches provided by the April 1983 severance very closely approximates the usual width of a driveway (the original driveway being 8 feet in width, the proposed driveway being 8 feet, 6 inches in width). These facts put into question Ms. Parkinson's intent in adding the 7 feet, 3-3/8 inch wide strip of land originally belonging to No. 34 to the lot of No. 28 in her application for the severance she obtained in April 1983. It is interesting to note in this regard that the counsel for the applicant/appellant has himself linked "some strange severances that gave lot frontage" (to a plot of land) with "driveway access to the rear of a lot where an existing building stood." It is moreover significant that the 1983 severance gave No. 28 enough land to support residential density in the subject building.

It is also worth noting that Ms. Parkinson testifies that she was told that zoning regulations prohibited a building being used for a residential purpose unless it had its own sepa-

rate driveway and that she consequently assumed that the illegal use of the subject building for residential purposes could be regularized by having a separate driveway. Any claim that Ms. Parkinson acted in good faith on the basis of this belief is shaken by the May 5, 1982 rejection of Ms. Parkinson's application to the Department of Buildings and Inspections in part for the maintenance of a parking facility in a garage on the lot (page 7, exhibit 2). The rejection of her application on May 5, 1982 made clear to Ms. Parkinson that it was illegal to reduce the landscaped open space where the gross floor area of a building (main house and warehouse) is in excess of the maximum permitted under Zoning By-law Section 4(13).

All the above activities which constitute ten steps in renovating the subject building provide irrefutable evidence that Ms. Parkinson has not acted in a straightforward manner in these actions. It is, therefore, not possible to concur with her counsel that Ms. Parkinson behaved "in anything more than a mildly careless way" in going about the renovations to the subject building.

On top of the many irregularities which cast doubt upon Ms. Parkinson's intent in renovating the subject building, it is important to keep in mind that she allowed a tenant to occupy the subject building prior to the filing of the rezoning application she sought on November 6, 1985 to permit human habitation of said building. By housing a tenant in the subject structure prior to the filing of the rezoning application, Ms. Parkinson has forced the situation to the point where a tenant needing a place to live will be evicted if the decision upon the application goes against her, thereby invoking the sympathy of the Board. Moreover, it is questionable whether the applicant/appellant would have even filed a rezoning application had there not been an anonymous public complaint and subsequent enquiry by the City.

Buildings and Inspections Department

The city building inspector, Mr. Angelo Fantozzi, appears to have been at fault for failing to bring attention to work undertaken on the subject building which was not in consonance with the proposed use of the subject building as a garage and greenhouse over the course of his inspections of the premises from August 24, 1982 to October 31, 1983. While Mr. Fantozzi noted on August 24, 1982 the completion of the drywalling in the garage part of the subject building, he did not note that the drywall in the garage was placed in such a way as to make it impossible to open the garage door. Moreover, no note was taken of the fact that windows had been cut into the garage door and the door in fact bolted shut. In his inspection of October 18, 1982, Mr. Fantozzi also failed to make note of both the kitchen sink and bathroom fixtures (including bathtub) which Ms. Parkinson testifies had been installed by Mr. Reeves prior to Mr. Fantozzi's inspection of October 18, 1982.

The Department of Buildings and Inspections, having noted infractions of the building by-laws over the period April 23, 1982 to November 6, 1985, failed to take action against these violations other than to issue several orders to comply. This pattern of behaviour on the part of the Department of Buildings and Inspections gives the appearance of a willingness to overlook violations bordering upon negligence. It is also noteworthy that there has been considerable inconsistency and carelessness in the documentation of renovations at the subject building. In the Order to Comply of April 23, 1982, for example, the city building inspector notes that "garage doors have been removed and replaced by windows..." when in fact, windows were cut into the (one) garage door and the door bolted shut. Another

case in point is the discrepancy between Permit 200789 (page 26, exhibit 2) dated November 1, 1983, issued in part to "repair partitions in existing coach house" and the memorandum to Michael Nixon from Tom Mason dated August 29, 1989 (page 69, exhibit 2) which describes the same permit as "issued in part to repair coach house foundation."

Planning and Development Department

There are several steps taken by the staff at the apartment which are worthy of note because they epitomize the climate in which misuse of process may have taken on a life of their own.

Two actions by the staff on the substance of planning are dealt with later under Other Concerns on pp. 36-38. The first one deals with the implications of using the term "coach house" and the discussion of precedent that might be set by the subject building by treating it as if it were a "coach house". The second one deals with one of the reasons for recommending legalization of an existing illegal use. Both matters are in the report of the Planning Commissioner dated March 24, 1988. Both have a bearing on the atmospherics of misuse of process.

The two reports by the staff dated March 24, 1988 and August 29, 1988 do not address the matter of conformity of the proposal with the Official Plan. Nevertheless, the two reports recommend legalizing the illegal use. The question here is not one of a differing interpretation, it is one of either disregarding or being ignorant of a stated policy of the municipality at the time of making a recommendation to the Council. Either way, it raises questions about the use of due process. The doubts about wilfully overlooking are inadvertently confirmed by the testimony of Mr. A.M. Cranston, a senior planner with the City. Policy 2.8(a) of the Official Plan states:

> "Low Density Residence Areas and Medium Density Residence Areas will be regarded as stable. No changes will be made through zoning or other public action which are out of keeping with the character of such areas. Council will not redesignate any such area to any other land use category provided for in this Plan without first having considered a study of the area undertaken for the purpose of recommending policies for adoption in Part II of this Plan."

Under intense cross-examination, bordering on animated exchange, Mr. Cranston stated that the second sentence of the above policy applied only when a change in use is being considered. In doing so, he seems to have ignored the second sentence which is a clear policy in its own right, independent of any change in use. Mr. Cranston was calm and articulate throughout his testimony. His interpretation under the pressure of cross-examination demonstrates a selective interpretation of the policy. If he was so certain that the entire policy applied only when a change in use is contemplated, the question arises as to why he did not categorically say so in the report dated August 29, 1988 as the principal author of that report. The answer may lie in the fact that the interpretation of Section 2.8(a) must take into account the two separate eventualities which are two different things entirely. It is possible that he has known this potential for treating the two sentences as applying to two distinct situations and therefore has chosen not to deal with it. Whatever the reason, and the Board can do no more than hypothesize, the Council did not benefit from a thorough and rigorous analysis of all the facts.

The absence of concern for the Official Plan policy is put in an extraordinary light by the admission by Mr. A.M. Cranston that the sentence, "Such an abuse of process may be adequate reason for Council to refuse an application to amend the (parent) By-law and permit the property to be brought into a state of compliance," was put in the staff report dated August 29, 1988, under planning considerations at the insistence of the City Solicitor. His utter candour cannot transform an irrelevant proposition to a planning principle. Mr. R.R. Berger kept referring to the afore-cited sentence several times during his testimony without providing any evidence that it is an accepted planning principle or practice. It appears as though Mr. R.R. Berger is more influenced by the City Solicitor's suggestion than by a concern with his own planning principles. The emphasis placed upon the instructions of the City Solicitor by both planners once again goes to show the climate for misuse of process in this entire case.

The application for the rezoning of the subject property was received by the staff on November 6, 1985. The final report by the staff to the Land Use Committee is dated March 24, 1988. It took the staff approximately 29 months to process the application. Notwithstanding the criticism of undue delay, a time lapse of this duration is understandable. What is not at all clear is why it took so long in a matter where by-law infractions are so blatant. When authorities delay action for so long, it is bound to raise questions in the minds of the public at large with respect to the commitment of authorities to the maintenance of the integrity of laws and regulations.

The City Council

Under the Planning Act, a City Council is a legislative body and its acts require a hearing, the taking of evidence, the use of discretion in determining facts and the making of a decision based upon the facts. As such, a Council, by a legislative act, generally formulates a rule to be applied to all future cases. A Council does not simply apply an existing rule to a specific factual situation or parcel of land as the Board does. The legislative act of a Council usually declares a public purpose and makes provisions for the means of its achievement. Typical examples are the adoption or amendment of an Official Plan or a zoning by-law. Even though a zone change may be site specific, it is still a legislative act because its underlying effect is legislative in nature, regardless of the size or geographic scope of the property affected.

In this case, both the applicant and the objectors are challenging two separate legislative acts of the Council which pertain to the same property. The board can only use a standard of review, with deference, in order to determine if there is any misuse of process. The board can ask only these three questions:

1. whether the action was arbitrary, capricious or entirely lacking in evidentiary support;
2. whether the Council has failed to follow the procedures and give the notices required by law; and
3. whether there was any prejudicial abuse of discretion.

The answer to these questions depends upon whether the Council's findings support its two decisions, and whether the evidence supports the findings. To use the much quoted expression, councils must make findings in order to "bridge the analytical gap between the raw evidence and ultimate decision." Findings are relevant sub-conclusions which demon-

strate the Council's mode of analysis of facts, policies and regulations which establish complete links among data, analysis and final decision. Findings explain how decision makers progressed from the facts through established policies to the decision. The following are the five purposes for making findings. Findings should:

1. furnish a structure for making decisions rooted in principles, thereby enhancing the integrity of the planning and development process;
2. assist in making a rigorous analysis so as to minimize the potential of rapidly jumping from evidence to conclusions;
3. allow the parties to decide whether and on what grounds they should seek a review by this Board to seek a remedy;
4. inform anyone who reads the By-law of the basis for the Council's action; and
5. communicate effectively with the parties involved so that they consider decision-making by the Council to be a careful, reasoned and equitable process.

In light of the above clarifications, misuse of process by the Council would exist in the passing of two by-laws if and only if the evidence, taken on the basis of the entire record, substantially did not support the Council's findings or decisions. The entire record consists of letters to the Council, the Land Use Committee and the Committee of Adjustment, minutes of meetings, staff reports, consultant's report, oral presentations made at the meetings of the Council, the Land Use Committee and the committee of Adjustment and all other material submitted for consideration before or during the Council meeting. Substantial evidence cannot be merely any evidence.

In this case, there is no evidence to indicate that the Council acted in an improper way because its findings meet the five tests of the purposes of findings identified above. However, some of the steps undertaken might give the appearance to the people at large that somehow due process was either unused or misused. The Council may have acted on the basis of what appears to be incomplete evidence when it should have made an effort to more critically scrutinize the supportive documents presented by the two departments Specifically the Council should have checked the conformity of the Zoning By-law change recommended by the planning and Development Department in a more noticeably clear fashion. Similarly, the Council perhaps should have made an effort to familiarize itself more thoroughly in a demonstrable fashion with the infractions as well as the lack of enforcement of the bylaws. The lack of visible taking account of these two factors may have given the appearance to the public at large that the Council may have deliberately chosen to avoid the process.

This apparent unuse of the process is exacerbated by the fact that the Council first enacted By-law 902-88 to legalize the existing illegal residential use, and six months later, rescinded that By-law. In passing 902-88, the Council may have inadvertently created the impression that it was favouring someone by giving a Zoning By-law Amendment which might appear to be in conflict with its own established policy as stated in the Official Plan. Having realized that it might have created such an impression, the Council promptly went ahead to reverse itself, which is entirely within its prerogatives. By reversing itself, the Council may have once again inadvertently created the impression of having hastily corrected itself which, in turn, may give the appearance of decision-making without a rigorous

reconsideration of the facts. Therefore, while there is no evidence to suggest that the Council acted in an improper way, it cannot be denied that some people may be tempted to perceive that the Council itself may not have followed due process in both the spirit and the letter of its own procedures.

The integrity of decisions on processes is attained through a degree of certainty that accompanies them. Laws and regulations are decisions which are meant to apply to all future cases. A process is set out to amend or change laws and regulations when they prove inadequate. Integrity therefore means certainty. In the ultimate analysis, an action or a series of actions must not cause an unacceptable degree of uncertainty in laws and regulations. To do so, the action(s) should meet the following tests of integrity.

1. The action(s) by a proponent carried out knowingly or unknowingly, must not alter the original intent and purpose of laws and regulations either in one step or in a series of steps. In this case, the applicant/appellant has demonstrated a pattern of activity which casts doubt on her ability and willingness to abide by rules. Her actions have caused a good deal of uncertainty about the value of by-laws and regulations.
2. The action(s) or inaction(s) of regulatory authorities must not condone illegal activities either intentionally or unintentionally. In this case, the Buildings and Inspections Department, both through less than thorough documentation and through lack of enforcement, has caused uncertainty about the ability and willingness of authorities to give meaning and substance to by-laws and regulations.
3. The actions of policy formulating authorities must not condone illegal activities either intentionally or unintentionally. In this case, the Planning and Development Department, both through a less than rigorous analysis of facts and through a less than rigorous interpretation of the Official Plan, has caused uncertainty about the ability and willingness of authorities to apply by-laws and regulations with a reasonable degree of predictable consistency.
4. The action(s) or inaction(s) of policy-making authorities such as a municipal council must not condone illegal activities by failing to fulfil the five purposes for making findings. In this case, there is no evidence that the City Council has consciously caused uncertainty about the by-laws and regulations.

The aforementioned detailed analysis of evidence leads to an interesting conclusion. It may well be that the applicant/ appellant and the staff of the City have both misused the process. To use a much quoted phrase, it is "a level playing field" insofar as misuse of process is concerned. If so, institutional culpability is no different from individual culpability and neither one can be viewed differently no matter what the extenuating circumstances may have been in either case.

Misuse of due process, real and perceived, is a matter of law. Remedies for misuse of process must be sought in courts of law, not in administrative tribunals. This is especially so where both parties are culpable but only one party, namely, the applicant/appellant directly suffers the consequence of the decision by this Board. The Planning Act gives no

guidance either on potential remedy for misuse or on whether misuse of process can be a basis for decision on a planning matter.

In the absence of guidance from the Planning Act, the question must be asked whether there is any rationale in land use planning theory and/or practice to justify a decision on a planning matter based upon misuse of due process. The Board is familiar with the vast literature on planning in the English language, and has on occasion actually comprehended the material. Given the Consolidated Bathurst decision, an effort was made to seek guidance from the collective knowledge of the Board on this question. To the best knowledge of the Board, misuse of due process is not a planning principle that can be applied to make a finding on a substantive land use matter. As the learned counsel for the city admitted, following due process both in letter and spirit can lead to bad planning just as not following due process can lead to good planning.

Notwithstanding the fact that there is demonstrated misuse of process by the applicant/appellant, misuse of process in and of itself cannot be the basis for dismissing the appeal against By-law 286-89.

2. Conformity with the Official Plan

The Official Plan of the City of Toronto gives guidance on the matter of conformity of the proposal and the By-law 902-88 with the Plan. Section 2.8(a) of the Official Plan states:

> "Low Density Residence Areas and Medium Density Residence Areas will be regarded as stable. No changes will be made through zoning or other public action which are out of keeping with the character of such areas."

Therefore, conformity turns on the impact of the proposal on the character of existing development with due regard for how that character is likely to evolve in the foreseeable future. Since so much depends on character and area, an effort is made below to analyze the evidence to delineate area and character.

A good deal of evidence is available on the immediate vicinity, relevant neighbourhood and the appropriate area for assessment of impact. While the terms are used frequently, neither the neighbours nor the planners are of direct assistance in defining them. The counsel for the objecting neighbours, in what appears to be a plea out of resignation, states, "Nobody is helpful to you in defining these terms. The Board will have to find the 'area'." The plea needs to be answered.

This panel of the board considers that immediate vicinity is all abutting parcels of land and uses plus other parcels and uses which directly affect the use of the subject land and which in turn are affected by the use on the subject land. The aerial photograph, exhibit 25, shows that the residential properties on the north and south side of Albertus Avenue would affect and be affected by the proposal. Therefore, the Board considers all the residential properties in the two blocks bounded by Yonge Street in the east, St. Clements Avenue in the south, Duplex Avenue in the west and Albertus Avenue in the north constitute the immediate vicinity of the subject property.

Relevant neighbourhood is the neighbourhood of which the subject property and the immediate vicinity are an integral part. Neighbourhood is an identifiable geographic area within the larger urban area. Neighbourhood identity is an image, or quality of recognition,

associated with a residential enclave. It is the residents' perceptions of landmarks, boundaries, institutions and each other that create a neighbourhood. The identity of a neighbourhood emerges out of the particular physical character traits of the area and the distinct cultural qualities of population. Neighbourhoods provide a sense of place within cities and the social interaction and attitudes within neighbourhoods are one of the building blocks of urban life. Physical character traits may refer strictly to such things as streetscape, building types, styles, etc. Beyond physical traits, however, is a sociocultural identity related to common activities or traditions and lifestyles which define a neighbourhood.

If a significant number of people (households) living in an area perceive that they share common physical and social character traits and hold that belief strong enough to form a neighbourhood organization to preserve and promote the distinct character of the neighbourhood, then the geographic boundaries delineated by the voluntary organization can form the basis for defining the relevant neighbourhood. When such a voluntary organization taxes its households (membership fees) to carry on its activities, then the neighbourhood comes to be defined even more precisely. When such an organization is able to command resources (time, talent and money) from the larger municipality of which it is a part, then the neighbourhood has to be considered well-established.

Ms. Mary Jewitt of the Lytton Park residents' Organization indicates that the body was incorporated in 1987 and encompasses an area that includes approximately 2,000 households, of which 800 are members of the organization. The organization was able to secure intervenor funding in 1989 from the City of Toronto. Therefore, using the above three criteria, Lytton Park has to be treated as the relevant neighbourhood. Lytton Park, bounded by Yonge Street on the east, Roselawn Avenue on the south, Avenue Road on the west and Lawrence Avenue on the north constitutes the relevant neighbourhood of the subject property.

The Official Plan shows a number of areas designated Low Density Residence Areas in the City. The primary criterion for designation appears to be the density of residential dwellings. There is no evidence that all of the areas shown as low density have common physical and/or social character traits. The operative clause in Section 2.8(a) is "....which are out of keeping with the character of such areas." A careful reading of the policy shows that the plural "areas" among low density areas would apply only to areas which share common character traits and not to all low density areas which do not have much in common except density of dwelling units.

When so examined in a critical light, it becomes self-evident that the Official Plan's purpose is to maintain the stability of low and medium density residence areas where each one of them may have a distinct character, the stability of which is worthy preserving and promoting. The Lytton Park neighbourhood is clearly one such area. Under cross-examination, both Messrs. M.B.M. Lawson and B. Milne concede that, while the South Rosedale and Annex areas are comparable in some respects to Lytton Park, Lytton Park is different from both in terms of not having a house behind a house among character traits. Therefore, Lytton Park constitutes the appropriate "area" in assessing impact on character.

Character is the aggregate of the distinct features that serve to indicate the essential quality or nature of an area. Distinct features include traits, marks, signs, styles and peculiarities with respect to both the physical and social dimensions of an area.

Some of the physical traits that give a distinctive character to a residential area are the following: (a) land related - lot area; lot frontage; lot depth; front, side and rear yards associated with the building; topography of the lot; type of vegetation on the lot; fencing; number of driveways and walkways; type of landscaping; ratio of hard surfaces to landscaping; location of parking area; lot coverage by building; (b) building related - architectural style of building; size of building; construction materials; height of building (number of storeys); type of building; maintenance of exterior areas and building facades; floor area ratio; number of units per building; exterior lighting associated with building; and (c) neighbourhood related - availability, condition and location of communal hard services such as above and/or underground water, sewer, storm sewer, electricity, gas, telephone, cable, paved street, sidewalk, gutter and street lighting; volume of pedestrian and vehicular traffic; amount and location of parking on the street; density gradient formed by types of buildings such as highest density at the periphery and lowest density at the centre of a neighbourhood or vice versa; focal points such as a park; special features such as a skating rink or a fountain, etc.

Some of the social traits that give a distinctive character to a residential area are the following: household income; household size; age group of adults and children; occupations of adults; formal education level of adults and children; number of adults with jobs; religious affiliation; languages spoken in the household; ownership and intensity of use of cottage; hours per day spent in watching TV by adults and children; number and type of motorized vehicles; number and type of pets; interest in flower and/or vegetable gardening; interest in the maintenance of exterior areas and building facades; number of immigrants from the same urban area, from the rest of Canada, and from the rest of the world; rate of people moving in and out of the area (mobility index); number of family households and non-family households in the area; interest in maintaining the physical and social character of the area through active participation in a neighbourhood organization.

The listing of these traits does not mean that an area should exhibit rigid uniformity or even similarity of traits to give an area a distinctive character. Distinctive character can arise out of uniformity without monotony, similarity without repetitiveness or even coherence and unity amidst diversity. Explicit acknowledgement of traits merely helps in clarifying what is meant by character. Also, the listing of the traits assists in having regard for the relevant ones and taking account of the critical ones in assessing impact. An area would have a distinctive character if a combination of these traits indicates the essential quality of an area -- it should evoke a sense of "being there" when one arrives.

The character traits of the proposal must be compared with the character traits of existing development in order to determine the degree of compatibility and hence the impact - both positive and negative.

The immediate vicinity is part of an established low density residential area known as Lytton Park and is therefore regarded as stable. The area is characterized by a back-to-back lotting pattern in which the houses face the street. The lot areas, frontages, depths and yards (front, back and side) of the houses in the area are all very similar, the front and rear yards being reserved for open spaces and accessory buildings used for garages/storage sheds. The topography in the area is uniformly flat with vegetative covering consisting of mixed shrubs and mature trees. Some of the houses in the area are surrounded by fences, others by hedges. Each of the properties has a single driveway. All of the properties are characterized by well-maintained urban landscapes with very similar ra-

tios of hard surfaces to landscaping. The parking areas of houses in the area are either in a covered garage or on the driveway behind the front exterior wall of the house. The lot coverage of these buildings is very similar as are their architectural styles. Similar also are the construction materials, the heights of the houses, their floor area ratios and their exterior lighting. All the houses are single family detached dwelling units. Throughout the area, the maintenance of the exteriors of the houses is very good. Thus, as Mr. A. Young states: "While there is variety in terms of appearance of each individual property, the overall character is shaped by reasonably consistent standards of development which are addressed in the zoning by-law." As a resident of the area, Ms. M. Jewitt concurs with Mr. Young that Lytton Park as a whole is characterized by similar traits.

The subject property consisting of the main house and the subject building is at variance with the physical character traits of the established low density residential area in which it is located. The illegal conversion of the warehouse to a single detached residential unit has resulted in four major alterations to the character of the main house that are not in keeping with the built form in the Lytton Park area. First, while the main house has a standard front yard and adequate side yards, the back yard appears to be the front yard of the subject building (exhibit 40). Whereas the front and back yards of houses in the area are reserved for open areas and accessory buildings used for garage/storage shed purposes, the main house of the subject property has a largely paved backyard with an accessory building serving as a residential dwelling unit. The main house is flanked on each side by a driveway which results in a higher ratio of hard surfaces to landscaped open area than is the case with other houses in the area. It is also worthwhile noting that the main house itself is significantly larger in area than other houses in the area. When the area of the subject building presently being used for residential purposes is added to that of the main house, a significantly higher density of residential use results which is not in keeping with the existing residential density in the area.

The subject building is an anomaly in the backyard of the main house, in the backyards of the houses in the immediate vicinity and in the backyards of the houses throughout the Lytton Park area. Since the subject building is both presently being used as a dwelling unit and proposed for a continuation of this use, it must be treated as a single family detached house. The "house" has no frontyard, no backyard and no sideyard on the east side. In the absence of these, the "house" has no lot area as such. It has therefore no standard open spaces such as characterize the front and back yards of other houses in the area. Moreover, the "house" has no lot frontage whatsoever. It is also noteworthy that the cedar hedge planted against the north fence of the 'house' is very close to its north wall (exhibit 4J). This fence, moreover, exceeds the 1.5 metre height maximum of fences in the area. There is no driveway directly associated with the 'house' (exhibit 4A). The associated driveway on the east side of the lot is next to the main house. One walkway connects the associated driveway with the 'house'. Parking for the 'house' is on the associated driveway, but a car parked in this new driveway extends beyond the front exterior wall of the main house, thereby intruding into the front yard of the main house. A second car or visitor's car parked behind the resident's car would actually block the sidewalk in front of the main house.

The architectural style of the "house" is clearly that of a converted barn, albeit tastefully converted in a contemporary style which is neither the same as nor similar to the styles of the houses in the area.

Notwithstanding the tasteful conversion of the building, the configuration is still that of a barn such that the "house" is an anomaly in the area. Moreover, given the virtual absence of lot area, the floor area ratio is astonishingly high.

If the house-behind-a-house at 28 Briar Hill Avenue were to be approved, this action would countenance several additional instances of conversion in the area. As Ms. M. Jewitt has testified, there are four barns in the Lytton Park area which could be similarly converted. Such conversions would impact upon the character of the area. Once these barns are converted, there is potential for large garages in the rear of houses in the area to be converted into bungalow rental units. Once this phenomenon becomes an acceptable practice in the Lytton Park area, the leap from a house-behind-a-house on the same property to a house-behind-a-house on a separate property in its own right is very small indeed. This would be accomplished by severances of the new dwelling units from the parent property. Whether this scenario would unfold as set forth here or not, the concern is with the potential of such a scenario unfolding which would contravene the intent of the Official Plan policy of maintaining the stability of low density residential areas. Sketching a plausible scenario does not mean that in the future the Board is in any way bound by a previous decision of the Board. The Board can only decide each case on its merits.

The subject building or "house", as it is presently and in the future intended to be used, was at one time an anomaly as a building in the area. As a result of its illegal conversion to a dwelling unit, it has certainly become a more attractive building such that the anomalous physical character of the building has been minimized. In minimizing the physical anomaly of the building, however, a new anomaly has been created, i.e., an anomaly of use. This inappropriate residential use of the subject building at an inappropriate location on the property is a more serious anomaly than the previous physical anomaly.

The subject building impinges upon the enjoyment of the established amenities of the owners of adjacent properties. The domestic activities in the subject building with its 24 hour cycle and attendant intensity and rhythm is in stark contrast to the activities which characterize an accessory building used for purposes of a garage and greenhouse. Realizing that domestic activities from an inappropriate location on the lot would reduce the enjoyment of the established amenities of the owners of adjacent properties, the Department of Buildings and Inspections had rejected the application for a building permit to convert the subject building into a dwelling unit in May of 1982. Shortly thereafter, the Committee of Adjustment restricted the conversion of the building to a use as a garage and greenhouse in August 1982. Whereas the conversion of the subject building to a garage and greenhouse would have had no negative impact as perceived by the owners of adjacent properties, the conversion of the subject building to a dwelling unit constitutes, in their minds, a visual intrusion into the privacy of their backyards.

It is also noteworthy that while the applicant/appellant, with knowledge of the illegality of the conversion, tried to minimize the impact of overviews with a careful placement of windows in the subject building and also sought to ameliorate the threat to privacy with the planting of a cedar hedge. If this building is approved for residential use, there is no guarantee that future conversions in the area will be as carefully and considerately executed, as such conversions will, by then, have become an accepted practice.

It is reasonable to expect that the owners of properties in the Lytton Park area bought these properties on the basis of the character of the area at the time of purchase. They

were therefore buying into an area where the owners shared a certain set of socio-cultural values and lifestyles which set them apart from the property owners of other areas in the City. Such a distinct character of an area has an influence upon the value of the properties and the expectations and future benefits to be derived from the ownership of the properties. The illegal conversion of the subject building in the backyard of a house constitutes a significant alteration in the established physical character of the area. Such a departure creates a new set of expectations which were never envisioned by the property owners in the area at the time they purchased their homes. For example, the virtual absence of front, back and one sideyard creates a situation which may lead to the tolerance and eventual acceptance of very small lots, if indeed virtually no lots at all for a dwelling unit in the backyard of a main house. So too, the absence of lot frontage creates another character trait at variance with the established character of the area. The aggregate of such emerging character traits over a period of time becomes the new established character of the area. All the aforementioned character traits which are at variance with the current established traits of the Lytton Park area when legalized will project the image of an area in transition which will only hasten the actual transition from a low density residential area to an area of higher density where the inhabitants will share very different values and lifestyles.

In the Board's view, compatible means being mutually tolerant and capable of existing together in the same area. Being compatible with is not the same thing as being the same as. Being compatible with is not even the same thing as being similar to. Being similar to means having a resemblance to another thing; they are like one another, but not identical. Being compatible with means nothing more than being capable of coexisting in harmony. In the final analysis, a proposal should not cause unacceptable adverse impact on existing development. It should, in fact, meet the following seven tests of compatibility in this case. The first five apply where the proposed use is the same as the existing use. All seven apply when the proposed use is not the same as the existing use.

1. The proposal does not countenance other such actions in the area where similar proposals can be brought forward. In this case, the proposal has the potential of becoming the trigger of a domino effect of "invasion, domination and succession" as discussed above.
2. The proposal is not qualitatively so different as to virtually compel the others in the area to conform through expensive rehabilitation and/or redevelopment, or leave the area, even though the proposal meets all the requirements of by-laws and regulations. In this case, the proposal as it stands does not meet the requirements of by-laws and regulations. If approved, the proposal would encourage a "keeping down with the Joneses" effect.
3. The proposal in and of itself is not so singular compared with the existing development in the area that it is an anomaly, even when there is no potential for others to follow. In this case, what was at one time an anomalous building will become a permanent anomalous use with the attendant problems sketched above, creating a greater anomaly than was originally the case.
4. The proposal does not either diminish property values or decrease the rate of increase of property values in the area by increased activity which

reduces the enjoyment of established amenities such as views, sunlight, quiet and privacy. In this case, there is no evidence that the subject building either passes or fails the test.

5. The proposal does not impose psychic costs on the people in the area by increased activity which reduces the enjoyment of established amenities such as views, sunlight, quiet and privacy. In this case, there is a diminution of privacy and quiet with the introduction of an inappropriate use in an inappropriate location with an intensity and rhythm of its own different from those of a garage and greenhouse.
6. The proposal fills in a gap and completes the full expression of the prevailing character of the area. In this case, there are no gaps to fill.
7. The proposal remedies a deficiency in existing development (for example, lack of a parking space) in order to make the existing development complete. Where there is a deficiency in the proposal, existing development may remedy that deficiency. In either case, the proposal and existing development mutually complete each other. In this case, the proposal neither remedies a deficiency in the existing development, nor does existing development remedy the deficiencies of the proposal. In fact, not only does the proposal exacerbate its own deficiencies, it also contributes to the deficiencies in the subject property.

For all of the above reasons, the proposal is not compatible with the existing development. Therefore, the By-law 902-88 does not conform to the intent and purpose of the Official Plan.

3. Other Concerns

The final report by the planning Commissioner, dated March 24, 1988, recommends approval of the conversion of the warehouse into a dwelling unit. One of the three main reasons given is (that), "The legalization of the residential use of the barn will allow the rental unit to be maintained." The clear objective here seems to be the legalization of an illegal use because it is there.

The principle involved here is whether one legalizes an existing illegal use merely because it is already there. In answering the question, one must weigh the new individual need against the larger public need for established rights guaranteed by laws, regulations and customs. To paraphrase Thomas Babington Macaulay, laws are meant to assure uniformity where possible, diversity where necessary, but certainty at all times. While zoning laws are not sacrosanct in themselves, they provide a degree of certainty about what is to be expected. Also, there is a process set out that is available to everyone to change the law. A request to change the law to suit a particular instance solely on the basis that a violation of that law already exists, is tantamount to bypassing due process in changing the law. Such a by-pass operation is justified only under extraordinary circumstances such as when the remedy through due process would cause an inordinate delay or result in an irreversible damage to the individual involved. In this instance, there is no such demonstrated compelling individual need. Moreover, income supplementation by renting a dwelling unit for a person with marketable professional expertise does not constitute a compelling need. It may represent a want. Therefore, the argument that financial hardship should form a basis for legitimizing an illegal use merely because it now exists should be set

aside. The best way to deal with the proposal is to treat it as if it were a new application to convert a warehouse into a dwelling unit or to create a house-behind-a-house.

The term "coach house" appears in the documents prepared by Ms. Parkinson, the staff of the Department of Buildings and Inspections, and the Planning and Development Department, the clear inference being that the subject building was indeed a traditional coach house. Therefore, a conversion here would seem to be similar to coach house conversions elsewhere in the City.

A coach house is a free-standing building adjacent to the main residence used for the storage of a coach or coaches on the first floor, having a dwelling unit on the second floor for the coachman and his family. Some coach houses act as a sort of "semi" with the coach and coachman sharing the same floor. As a rule, the architectural style and construction materials used in the building of a coach house match those of the more opulent main residence. The City of Toronto has a number of examples of coach houses.

In the case of the subject building, there is no evidence that a coach was ever stored in the building, or that a coachman ever lived in the building. The architectural style is that of a barn and the construction materials do not match that of the main residence. The evidence is that the subject building has been in the current location for about 80 years and was used at one time as a warehouse for storing unpainted furniture. At some point, the warehouse use ceased -- no one knows when. Between 1982 and 1985, the building was rehabilitated to its present condition, such that it is being used as a dwelling unit. Therefore, the use of the term "coach house" confers upon the building a class status wholly unworthy of its modest origins. If calling it a "coach house" merely elevated its class status, it would simply be humorous and harmless. Calling it a coach house, however, implies that it is similar to numerous authentic coach houses which have undergone conversions in the City. This building is neither the same as nor similar to a coach house. Just like a rose, a warehouse by any other name is still a warehouse.

Mr. M.B.M. Lawson, the planner retained by the applicant/ appellant, contends that the residential use of the subject building will create one additional rental unit in the Metropolitan Toronto Housing Market. He therefore believes that this use would constitute "infill" and thus be in consonance with both the Provincial Housing Policy Statement and the Metro Toronto Housing Intensification Policy. In light of this degree of conformity with public policies, it is Mr. Lawson's opinion that it is in the public interest to legalize the residential use of the warehouse.

In this case, public interest includes a consideration of the immediate public, the relevant public and the Metropolitan public. Introducing a house-behind-a-house impinges on the enjoyment of privacy and quiet with a certain type, intensity and rhythm of activities. Therefore, it is not in the interest of the immediate public. Similarly, the new use impinges on the character of the relevant neighbourhood to the extent of countenancing other similar conversions that may permanently alter its character. Finally, it is not at all certain that creating one additional rental unit in Metropolitan Toronto will contribute in any meaningful way to the significant shortage of affordable housing in Metro. In assessing the interest of the Metropolitan public, a project with a large number of dwellings would at least have the redeeming quality of contributing in a meaningful way to the mitigation of the problem of affordable housing, notwithstanding its potential adverse impact on the immediate vicinity and the relevant neighbourhood. In this case, the proposal is neither small enough to have

no adverse impact on the relevant neighbourhood, nor is it large enough to make a meaningful contribution to the amelioration of a serious problem. Therefore, the proposal is not in the interest of any of the three publics involved.

At the heart of the matter is the perennial conflict between the property rights of the individual involved vs. the property rights of the people in the relevant neighbourhood. Every time an official plan or a zoning by-law is upheld, utilitarian justice in the sense of maximizing the greatest good of the greatest number is dispensed. On the other hand, every time an amendment to an official plan or a zoning by-law is allowed, fairness as justice in the sense of maximizing the advantage of the most disadvantaged is dispensed. In both kinds of justice, planning is viewed as an inherently discriminatory activity carried out to advance some explicitly stated aspect of the interests of the different publics involved. As such, in order to go beyond discrimination of land uses, one has to first take account of the basis for such discrimination. In order to treat all land uses equally, one has to treat some land uses differently. It is in this spirit that one has to recognize the established character of the relevant neighbourhood and treat it differently by not imposing an unacceptable adverse impact upon the neighbourhood. There is no demonstrable evidence to show that by not allowing the appeal by Ms. K. Parkinson and thereby not amending the parent Zoning By-law, Ms. Parkinson is in any manner deprived of the enjoyment of her property rights in full. On the other hand, introducing a site specific amendment to the By-law has the effect of diminishing the enjoyment of property rights by people in the immediate vicinity. Therefore, utilitarian justice must prevail and the Zoning By-law 286-89 must be upheld.

For all of the above reasons, the appeal against By-law 902-88 is allowed and the appeal against By-law 286-89 is dismissed.

A. DELFINO, Member
N.M. KATARY, Member

* * * * *

Amending Decision

Released: May 22, 1990

AMENDING DECISION OF THE BOARD delivered by N.M. KATARY:--

The decision of the Board dated May 11, 1990 is hereby amended.

1) On Page 18

Second paragraph, first sentence, should read, "Two actions by the staff on the substance of planning are dealt with later under Other Concerns on pp. 36-38."

2) On Page 36

Final paragraph, after point 7, second sentence should read, "Therefore, the By-law 902-88 does not conform to the intent and purpose of the Official Plan."

DATED at TORONTO this 22nd day of May, 1990.

N.M. KATARY, Member

---- End of Request ----
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Time Of Request: Wednesday, November 02, 2011 14:25:21