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Bylaw breach turns costly

When Igor and Marina Lazarev decided to add a second storey to their East York bungalow, they probably never expected that they would wind up in a courtroom arguing about whether the height of the roof was almost half a metre (18 inches) too tall.

The Lazarevs are the owners of a house on Divadale Dr. In May, 2005, Glen Rubinoff of Rubinoff Design Group submitted building plans to the City of Toronto for review.

The plans were to be used to obtain a building permit for a second storey addition and a two-storey rear addition to the existing house.

That summer, the plans were approved showing that the height of the construction could not exceed 8.5 metres (27.88 feet) from the "established grade" of the lot to the peak of the roof. A building permit was issued and construction started.

In October, 2005, city building inspector Dan Bogden came to inspect the house and concluded that the height of the roof was 9.45 metres (31 feet) and this exceeded what was permitted under the zoning bylaw by about .95 metre.

Rather than comply, the Lazarevs applied to the Committee of Adjustment for a minor variance to permit the taller roof, but they were turned down.

They appealed to the Ontario Municipal Board, and in May of last year, the O.M.B. granted a zoning variance to permit construction to a maximum height of 9.0 metres.

Based on the city's interpretation of the bylaw, the minor variance fell short of what the Lazarevs needed to legalize the height of their already built home.

Even with the variance, the height of the home exceeded what was permitted by about 0.45 metre (almost 18 inches).

Rather than lower the roof, the Lazarevs came up with what a judge later called "a new clever idea." I would even call it brilliant.

If you don't want to lower the height of the house, they reasoned, you can always raise the level of the surrounding land. And that's exactly what they did.

They had a retaining wall constructed, brought in some fill, and raised the level or grade of the land in the front of the house.

They then went back to the city and submitted their surveyor's measurement showing that the peak of the roof was only 8.94 metres above the newly raised grade of the land.

Their position was that they were entitled to a building permit for the house as constructed, and that its new height complied with the bylaw. They were supported by the opinion of Martin Rendl, former commissioner of planning and development for the old borough of East York.

According to the Toronto bylaw, the height of a house is measured from the "established grade" of the land to the peak of the roof.

Rendl's opinion on behalf of the owners was that established grade refers to the post-construction condition of the surrounding land where it meets the outside wall of the house.

The city and its chief building official, on the other hand, said that established grade refers to the grade of the land as it existed before construction and not after construction. As a result, the city refused to approve the plans and issue the building permit, and issued an order to comply against the owners of the property. Lazarev then appealed to the Superior Court under the Building Code Act, and the city brought a counter-application to require the Lazarevs to bring the house into compliance with the legislation.

Justice Paul M. Perell heard arguments from the parties last August, and released his decision on Sept. 6.

He began his ruling by saying, "Igor and Marina Lazarev have gotten themselves into a predicament because of how their home builder measured and constructed the front elevation of their home, which the City of Toronto and its Chief Building Official submit breaches the height limit of the City's zoning bylaw.

"Or, the Lazarevs have cleverly gotten themselves out of their predicament (that would require them to reduce the height of their newly renovated home) by the expedient of raising the height of the ground in front of their home."

Ultimately, Justice Perell ruled that there is no ambiguity in the bylaw, and the term "established grade" refers to the pre-existing natural grade of the land before construction and not to the grade as altered after the building permit has been issued.

"The facts of the present case," the judge wrote, "demonstrate that the Lazarevs' definition yields unpredictability and unconformity.

``The Lazarevs manipulated the grade of their land so that they would not have to reduce their roof, but if they are correct in their interpretation of the bylaw, then they could have been able to build an even taller house had they thought of their interpretation during the course of construction. Their interpretation cannot be read harmoniously with the scheme of the bylaw, the object of the bylaw, and the intention of the legislator."

I have no doubt of the wisdom of the judge's decision. In law, it was the correct answer. But it seems to me that a great deal of time and money was wasted on a roof which was not even a half metre taller than it should have been.

I know it's important that we all obey the law, but permission had been given by the Ontario Municipal Board for a roof that reached nine metres. I'm not sure how much harm was inflicted on the public with a roof that was 9.45 metres.

In any event, the court has now required the Lazarevs to rebuild their roof to reduce its height by less than half a metre.

I shudder to think of the costs of the application to the Committee of Adjustments, the Ontario Municipal Board, and the Superior Court, not to mention the unnecessary retaining wall and rebuilding the roof.

The lesson is that it can be risky and expensive to incur the wrath of the city's bylaw police.

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Court ruling, from http://www.canlii.org/

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DATE: 20060906

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

IGOR LAZAREV

Applicant

- and -

CITY OF TORONTO and
CHIEF BUILDING OFFICIAL

Respondents

COURT FILE NO.: 06-CV-314782PD3

AND BETWEEN:

CITY OF TORONTO and
ANN BOROOAH, CHIEF BUILDING OFFICIAL FOR CITY OF TORONTO

Applicants

- and -

IGOR LAZAREV and MARINA LAZAREVA

Respondents

COUNSEL:

Harold Elston and Wendy Ekins, for Igor and Marina Lazareva
Naomi Brown for the City of Toronto and the Chief Building Official

HEARING DATE: August 25, 2006

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] Igor and Marina Lazarev have gotten themselves into a predicament because of how their homebuilder measured and constructed the front elevation of their home, which the City of Toronto and its Chief Building Official submit breaches the height limit of the City s zoning by-law.

[2] Or, the Lazarevs have cleverly gotten themselves out of their predicament (that would require them to reduce the height of their newly renovated home) by the expedient of raising the height of the ground in front of their home.

[3] Whether the Lazeravs are breaching or complying with the zoning by-law is the issue I must decide in the application and counter-application that are now before the court.

[4] Although the background facts are interesting and add colour, ultimately, it is just a matter of interpreting a municipal zoning by-law that will determine whether the Lazarevs have found a way to solve a problem about the height of their renovated home or whether they are breaching the zoning by-law and must reduce the height of their home.

[5] Unfortunately for them and their clever argument, my conclusion is that the City and its Chief Building Official are correct and the construction of the Lazarev home deviates from the permit plans approved by the City and it does not comply with the regulation of the maximum allowable height under Leaside Zoning By-law No. 1916. Accordingly, for the reasons set out below, I dismiss the Lazarevs application and allow the counter-application of the City and the Chief Building Official.

Factual Background

[6] The Lazarevs are the registered owners of the property municipally known as 139 Divadale Drive (formerly 303 Laird Drive).

[7] In May 2005, Glen Rubinoff of Rubinoff Design Group submitted building plans to the City of Toronto for review. The plans were to be used to obtain a permit for the Lazarevs to build a second storey addition and a two-storey rear addition to their existing one-storey house at 139 Divadale Drive.

[8] Although it is the matter of interpretative controversy that is the focal point of the current proceedings, the plans were meant to show that the height of the proposed construction would be 8.5 m measured from the established grade to the mid-point of the roof. The City s plan examiner, however, pointed out to Mr. Rubinoff that the measurement must be made to the highest point of the structure. Apparently, the examiner was assured that the home would be built in compliance with the maximum height allowed under the by-law; that is, 8.5 m.

[9] On July 22, 2005 an application for a building permit was submitted. The City s plan examiner marked up the plans clearly indicating that the height of the construction was not to exceed 8.5 m measured to the peak of the roof. The plans were approved on this basis, and Permit No. 05-163641 was issued on July 29, 2005.

[10] On October 20, 2005, the City s Building Inspector Dan Bogden attended at the property to inspect the construction. Based on his interpretation of the by-law, which is the interpretation advanced by the City in these proceedings, Inspector Bogden concluded that height of the home was 9.45 m. and this exceeded what was permitted under the zoning by-law by approximately 0.95 m. An order to comply was issued by the City on October 26, 2005.

[11] Rather than comply, the Lazarevs applied to the Committee of Adjustment for a minor variance of the zoning by-law. The Committee, however, refused their application, and they appealed to the Ontario Municipal Board.

[12] On May 3, 2006, by Decision No. 1297, the Ontario Municipal Board granted a variance from the zoning by-law to permit construction to a maximum height of 9.0 m. Based on the City s interpretation of the zoning by-law, this minor variance fell short of what the Lazarevs needed to make their already-built home compliant with the zoning by-law. Even with the variance, the height of the home exceeded what was permitted under the zoning by-law by approximately 0.45 m. (approximately 18 inches).

[13] Rather than lower their roof, the Lazarevs came up with a new clever idea. They had a retaining wall constructed, and they raised the grade of the land in front of the front

elevation, and on May 15, 2006, they submitted an application for revision to Building Permit No. 05-163641 with plans that they say complied with the minor variance granted by the Ontario Municipal Board. The City disagreed that there was compliance, and with a slight revision the Lazarevs submitted another set of plans and persisted in their position that the height measured from the newly altered grade of the land to the peak of the roof measured 8.94 m. It is their position that their surveyor has measured the height of the building in accordance with the requirements of the zoning by-law and they are entitled to a building permit.

[14] The Lazarevs submit, backed by the opinion of Martin Rendl, a professional land use planner and the former Commissioner of Planning and Development for the former Borough of East York, that established grade refers to the post-construction condition where the ground elevation and grade adjoin a constructed wall of a building. Their argument will become clearer below where I set out the text of the by-law, but it involves the premise that the definition of established grade relies for its meaning on a relationship to a constructed wall and, accordingly, established grade denotes the grade post construction.

[15] The City and its Chief Building Official do not agree that the house is compliant with the zoning by-law. They interpret established grade in the zoning by-law, which is one terminus of the measurement, to refer to the grade of the land as it existed before construction and not to the grade as it exists after construction. The City says that the established grade was shown on the originally approved permit plans and the newly altered grade of the Lazarev property is what the zoning by-law defines as the finished grade .

[16] Because in its view, the height shown on the plans did not comply with the Ontario Municipal Board decision, the City refused to approve the plans and to issue the permit. The City issued a notice to this affect, and Mr. Lazarev now brings an application by way of appeal pursuant to s. 25 of the *Building Code Act*, 1992, S.O. 1992, c. 23.

[17] Under s. 25 (4), on an appeal, a judge may affirm or rescind the order or decision and take any other action that the judge considers the chief building official ought to take in accordance with the Act and the regulations. The judge may substitute his opinion for that of the chief building official. Under s. 25, if the appellant establishes that the statutory conditions for the issuance of a building permit have been satisfied, the court must do what the Chief Building Official ought to have done and order that the permit be issued: *Albert Bloom Ltd. v. Bentinck (Township) Chief Building Official* (1996), 29 O.R. (3d) 681 (Gen. Div.), aff d. 1996 CanLII 522 (ON C.A.), (1996) 31 O.R. (3d) 317 (C.A.); *Alaimo v. York (City) (Chief Building Official)*, [1995] O.J. No. 862 (Gen. Div.); *Friends of Toronto Parkland v. Toronto (City)* [1991] O.J. No. 2205 (Ont. Div. Ct.); *Shell Canada Products Ltd. v. Barrie (City) Chief Building Official*, [1992] O.J. No. 1572 (Gen. Div.); *1218897 Ontario Ltd. (c.o.b. Castle Auto Collision and Mechanical Service) v. Toronto (City) Chief Building Official*, [2005] O.J. No. 4607 (S.C.J.).

[18] The City issued a second order to comply with its zoning by-law, and it brings a counter-application pursuant to s. 38 of the *Building Code Act*. Under s. 38, the chief building official may apply to the court for an order directing a person to comply with the Act. Upon such application, the judge may make the order or such other order as the judge thinks fit. The City seeks an order requiring the Lazarevs to bring their home into compliance with the Ontario Municipal Board decision by obtaining a building permit and by reducing the height of the home to 9.0 m, as the City would have it measured; that is, from what the City says is the established grade to the peak of the roof.

By-law 1916

[19] The Lazarevs application and the counter-application of the City and its Chief Building Official depend upon the interpretation of By-law 1916. The contentious issue is the meaning of established grade but that term is referred to in other definitions; namely: cellar, first floor, bay window, lot coverage, building height, It is also referred to in the section with respect to permitted projections or encroachments into yards. The following provisions of the By-law fall to be considered:

Section 2.12 Cellar

> Cellar shall mean that portion of a building between two floors which is partly or wholly underground and which has more than one-half of its height from finished floor to finished ceiling below the established grade.

Section 2.4 Established Grade

> Established Grade in a residential district shall mean the average elevation of the ground adjoining the front wall of a building, exclusive of any embankment in lieu of steps; and, in a commercial district shall mean the average elevation of the sidewalk of the road in front of the lot on which the building stands.

Section 2.42.C Finished Grade

> Finished Grade shall mean the finished ground level at any point adjacent to the main wall of a Building exclusive of any embankment, berm or driveway ramp.

Section 2.43 First Floor

> First Floor shall mean the floor of a building approximately at or immediately above the established grade.

Section 2.5.1 Bay Window

> Bay Window shall mean a projecting window which is glazed on all sides and is located on any one Storey above Established Grade but is not an atrium or projection covering or annexed to more than one Storey.

Section 2.58 Front Lot Line

> Front Lot Line shall mean the line that divides a lot from the street provided that in the case of a corner lot the shorter lot line that abuts a street shall be deemed to be the front lot line and the longer lot line that so abuts shall be termed the Flank of the lots.

Section 2.60 Lot Coverage

> Lot Coverage shall mean the combined areas of all the buildings on the lot measured at the level of the lowest floor above the established grade in relation to the area of the lot.

Section 2.7.1 Building

> Building shall mean any Structure, whether temporary or permanent consisting of a wall, roof and floor, or any one or more of them, or a structural system serving the function thereof, and shall include all projections and attachments.

Section 2.8 Building Height

> Building Height shall mean the vertical distance measured from established grade to the highest point of a building or structure.

Section 2.87.1 Wall- Main Front

> Main Front Wall shall mean that part of a Building being the exterior face of any part of the wall closest to the Front Lot Line, but shall not include any permitted projections.

Section 5.7 Permitted Projections or Encroachments Into Yards

> In any Residential Zone:
>
> (c) Balconies, canopies, unenclosed porches, platforms, and decks which do not exceed 1.25 metres in height above Established Grade may project to a maximum of 2.5 metres into any required Front Yard or required Rear Yard, but in no event shall any part thereof be closer than 4.5 metres to the Front Lot Line.

The Interpretation of Established Grade - The Position of the Parties

[20] The Lazarevs have a three-pronged interpretative argument with respect to the meaning of the term established grade. For the first prong, they rely on s. 4 of the *Interpretation Act*, R.S.O. 1990, c. I.11 which states that the law is considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning.

[21] Relying on s. 4, the Lazarevs submit that the established grade has a spatial definition in relation to a constructed wall and not a temporal definition. This means that the definition of established grade is dynamic in terms of time and that building height is measured post construction. They stated in their factum:

> 25. It is submitted that, in defining *Established Grade* and *Building Height*, Zoning By-law 1916 does not fix a point of time, or period from which, the measurement must be taken. On the other hand, because the definition of *Established Grade* specifically relies on the relationship of the ground elevation to the front wall of a building to derive meaning, the definition of *Established Grade* necessarily refers to grade, post construction.
>
> 26. Were the definition of *Established Grade* to refer to the grade pre-construction, it is submitted that the definition would made no mention of the relationship between the ground elevation and the wall, but would, instead, derived its meaning intrinsically and without reference to any sort of relationship between the ground and any constructed or erected element.
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> 27. As the law is considered always speaking, it is submitted that Zoning By-law 1916 and the definition of *Established Grade* cannot be considered to be static.

[22] The second-prong of the Lazarev argument is that words should be given their plain meaning and the WordWeb Online Dictionary definition of established has the meaning brought about or set up. Applying this plain meaning, it is submitted that established grade refers to the elevation of the ground as brought about or set up by the construction or building process. Therefore, the Lazarevs submit that building height can only be determined by calculating the site s grade, following the completion of any construction or building process.

[23] The third-prong of the Lazarev argument relies on the principles that by-laws restricting a person s right to use land must be construed strictly: *Wilson v. Jones*, [1968] S.C.R. 554; *Bayshore Shopping Centre Ltd. v. Nepean (Township)*, [1972] S.C.R. 755 and that any doubt or ambiguity in a by-law that restricts a persons right to use their land should be resolved in favour of the landowner: *Re Caldwell and City of Toronto*, [1935] O.R. 255 (Ont. C.A.); *City of Thunder Bay v. Potts* (1982), 39 O.R. (2d) 725 (H.C.J.); *Toronto (City) Chief Official v. Beauregard*, [1990] O.J. No. 1950 (Gen. Div.). The Lazarevs submit that if the court finds ambiguity in the meaning of established grade, then the ambiguity must be resolved in favour of the Lazarevs.

[24] For their part, the City and the Chief Building Official have a four-pronged argument with respect to the meaning of the term established grade. First, they argue that the plain meaning of the word established in the *Oxford English Dictionary* is to set up on a permanent basis and be established means to be settled or accepted in a particular place or role and similarly, the *Merriam-Webster OnLine Dictionary* defines establish to mean, amongst other things, to bring into existence such that the adjective established would describe something already in existence. According, the City and the Chief Building Official submit that established grade means a grade already in existence.

[25] Second, the City and the Chief Building Official submit that the Lazarevs interpretation of established grade would yield the absurd result that a property owner could manipulate compliance with the zoning by-law after issuance of a permit by altering the grade and thereby render the review process useless and ineffective for regulating zoning compliance. They say that an interpretation that yields an absurdity should be rejected.

[26] Third, the City and the Chief Building Official submit that the term established grade must be compared and contrasted with the term finished grade and that the newly altered raised grade constitutes finished grade and it cannot be used to calculated the building height.

[27] Fourth, the City and the Chief Building Official submit that the court may have regard to the interpretation placed upon the by-laws by the authorities responsible for its implementation and enforcement: *Runnymede Development Corp. v. 1201262 Ontario Inc.*, [2000] O.J. No. 981 (S.C.J.); *IPCF Properties Inc. and Loblaws Supermarkets Limited v. Svendon Holdings Limited*, [1993] O.J. No. 3206 (Gen. Div.); *Bayshore Shopping Centre Ltd. v. Township of Nepean* (1972), 25 D.L.R. (3d) 443 (S.C.C.). In the case at bar, those authorities have treated established grade as meaning the grade prior to construction, and the City and the Chief Building Official submit that this interpretation is logical, reasonable, correct and reflective of the intent of the by-law. Accordingly, they submit that their interpretation ought to be adopted by the court.

Analysis The Interpretation of Established Grade

[28] With an exception for the argument based on comparing established grade with finished grade which I do not find helpful, I agree with the arguments of the City and the Chief Building Official, and I disagree with the arguments submitted by the Lazarevs.

[29] I my opinion, applying the proper principles of statutory interpretation, there is no ambiguity and established grade refers to the pre-existing natural grade of the land before construction and not to the grade as altered after the building permit has been issued.

[30] In *Rizzo v. Rizzo Shoes Ltd.*, [1998] S.C.R. 27, Iacobucci, J. remarked for a unanimous court at para. 21 that although much has been written about the interpretation of legislation, in contemporary times, courts have adopted the approach suggested by Elmer Driedger that the words of an enactment are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the enactment, the object of the enactment, and the intention of the legislator.

[31] In their submissions, both parties focused on the definition of established grade in the context of a residential district, but I believe that the first interpretative clue to discern the meaning of the words established grade (in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the by-law, the object of the by-law, and the intention of the legislator) is to note that the definition of established grade also refers to the context of a commercial district. For convenience, I set out again, the definition of established grade.

> Section 2.4 Established Grade
>
> Established Grade in a residential district shall mean the average elevation of the ground adjoining the front wall of a building, exclusive of any embankment in lieu of steps; and, in a commercial district shall mean the average elevation of the sidewalk of the road in front of the lot on which the building stands.

[32] In the context of a commercial district, the established grade is the average elevation of the sidewalk in front of the lot on which the building stands. It seems obvious to me that whether the building in the commercial district that is the subject matter of the measurement exists or is to be constructed, the measurement of its height is in relationship to the elevation of a pre-existing monument; namely, the sidewalk. The elevation of the sidewalk is not something that the landowner can manipulate, and, in my opinion, the elevation of the sidewalk establishes a pre-existing and fixed or static terminus for the measurement of the building in the commercial zone.

[33] In my opinion, the definition of established grade in the context of a residential district must have a similar meaning and it must refer to a pre-existing and fixed or static terminus for measurement. In the context of a residential zone, the pre-existing terminus for measurement is the natural elevation of the land in front of a building that already exists or, if the land has no improvements, the pre-existing terminus is the natural elevation of the land in front of the building that is to be constructed.

[34] In the phrase established grade, the word established is an adjective modifying the word grade and as an adjective it is derived from the past particle of the verb to establish. In other words, as a matter of grammar, established has a temporal dimension of being a pre-existing state, and, in my opinion, this is how the phrase should be interpreted in the context of the definition of building height, which again for convenience, I repeat: building height shall mean the vertical distance measured from established grade to the highest point of a building or structure. The interpretation advanced by the Lazarevs would seem to define building height as the vertical distance measured from the grade to be established rather than from the established grade.

[35] The Lazarevs argument actually concedes that there is temporal dimension to the definition of established grade because they concede that the established grade is something that is brought about (past tense). However, they would fix the past state as that of the land brought about by the construction or building process. In my opinion, the past state is rather the pre-construction, not the post-construction, state of the land.

[36] Zoning by-laws, like By-law 1916, are authorized by s. 34 (1) of the *Planning Act*, R.S.O. 1990, c. P.13, and the Act is obviously part of the interpretative context of a zoning by-law. One purpose of a zoning by-law is to provide conformity and predictability about the construction of buildings or structures. Paragraph 4 of s. 34 (1) states:

> 34 (1) Zoning by-laws may be passed by the councils of local municipalities:

4. For regulating the type of construction and the height, bulk, location, size, floor area, spacing character and use of buildings or structures to be erected or located within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.

I agree with the City s submission that the interpretation being advanced by the Lazarevs would be inimical to the zoning and building permit process and would introduce a considerable degree of uncertainty.

[37] Apart from the implications of the Lazarevs interpretation to the practical application of other definitions in the zoning by-law, the facts of the present case demonstrate that the Lazarevs definition yields unpredictability and unconformity. The Lazarevs manipulated the grade of their land so that they would not have to reduce their roof, but if they are correct in their interpretation of the by-law, then they could have been able to build an even taller house had they thought of their interpretation during the course of construction. Their interpretation cannot be read harmoniously with the scheme of the by-law, the object of the by-law, and the intention of the legislator.

Conclusion

[38] For these reasons I dismiss the Lazarevs application and grant the counter-application of the City and the Chief Building Official.

[39] If the parties cannot agree as to the matter of costs, then they may make submissions in writing, beginning with the City and the Chief Building Official within 30 days of the release of these Reasons for Decision to be followed by the Lazarevs submissions within 10 days thereafter.

Perell, J.

Released: September 06, 2006

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REASONS FOR DECISION

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