

TO: CITY MANAGER

DATE: 2002/07/02

FROM: CITY CLERK

**SUBJECT: BOARD OF VARIANCE APPEAL
4111 YALE STREET**

PURPOSE: To provide Council with a response to correspondence received from Mr. Michael Chao regarding Board of Variance appeal for 4111 Yale Street, Burnaby, B.C.

RECOMMENDATIONS:

1. **THAT** Council receive this report for information.
2. **THAT** a copy of this report be sent to Mr. Michael Chao, 4103 Yale Street, Burnaby, B.C. V5C 1R2.

REPORT

1.0 **INTRODUCTION**

This report briefly describes the function of the Board of Variance and provides specific information with respect to the appeal in question.

2.0 **BACKGROUND**

The Local Government Act of BC requires that a local Board of Variance be established once a City Council has enacted a zoning bylaw. The Provincial Government appoints two members to the Board, the Municipality appoints two members and the four members appoint a fifth to act as Chair. Appointments are usually for a term of three years.

The Board of Variance functions as an avenue of appeal to the strict application of certain local government provisions and regulations in specific circumstances as defined in Provincial legislation. It functions separately from the local government that established it and has its own authority under Section 901 of the Local Government Act.

Minor variances may be granted respecting bylaw requirements for the siting, dimensions or size of buildings or structures that are designed to deal with the most common circumstances and to be applied universally to these situations. The application of general regulations to a particular site may create a hardship. A person experiencing such a hardship may then appeal to the Board of Variance for relaxation of those regulations. The Board is guided in making its decisions by requirements in the Local Government Act.

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3.0 THE APPEAL

4111 Yale Street

The Board of Variance heard the subject appeal on 2002 June 06 with the description of the appeal as communicated to the adjacent property owners and occupants reading as follows:

“An appeal for the relaxation of Section 105.6(1)(a) of the Burnaby Zoning Bylaw which, if permitted, will allow for construction of a rear addition and a new upper storey addition to the single family dwelling at 4111 Yale Street bringing the dwelling to a 3 storey height where a maximum 2^{1/2} storey height is permitted. Please note that the upper storey of 646 sq. ft. exceeds 50% of the 835 sq. ft. of the storey immediately below by 228.5 sq. ft.”

The proposed additions would not result in the subject dwelling exceeding the permitted dimensional height of 29.5 ft.

The appeal for 4111 Yale Street represented a revised proposal from previous appeals denied by the Board of Variance at Hearings held on 2002 April 04 and May 02. The June 06 appeal differed from the previous submissions in that the applicant dropped his previous request for a front yard variance. The veranda in the front had been eliminated and replaced with an at-grade patio. The revised submission showed a reduction in window size in the stairwell and a change from clear glass to opaque. The southwest upper bedroom window had also been reduced in size. In addition, the third storey was slightly reduced in size from 658 sq. ft. to 646 sq. ft. with a setback of the whole structure from the front reduced by approximately two feet.

The Board allowed the June 06 appeal after giving due consideration to all the available information which included the applicant's submission, the Planning and Building Department comment and the views of adjacent property owners and occupants. In accordance with Section 901(8) of the Local Government Act, a decision of the Board of Variance is final. The only avenue to challenge a Board of Variance decision is through the court system.

Mr. Michael Chao, the adjacent property owner at 4103 Yale Street, stated in his letter to Mayor and Council (*Attachment 1*) that the appeal to add an extra 228 sq. ft. to the third floor of the subject dwelling did not constitute a minor variance. The Local Government Act of B.C., however, does not define what constitutes a minor variance. Similarly, the Act does not define hardship. Both of these determinations are made by the Board of Variance.

Mr. Chao also stated in his letter that the decision by the Board of Variance defeated the intent of the bylaw and substantially affected the use and enjoyment of adjacent land. Section 901(2)(c) of the Local Government Act allows the Board of Variance to order that a minor variance be permitted from the requirements of the bylaw if the Board is of the opinion that the variance does not substantially affect the use and enjoyment of adjacent land or defeat the intent of the bylaw. The authority to make this determination again rests with the Board.

4.0 CONCLUSION

The Burnaby Board of Variance operates in accordance with the requirements of the Local Government Act. All affected parties, including Mr. Chao, were given an opportunity to be heard before the Board rendered a decision and the Board's deliberations and decisions were made in an 'Open' meeting. The Local Government Act does not give the City the power to change the Board's decision. Therefore, should Mr. Chao wish to pursue a challenge of the Board's decision his only recourse is to pursue legal action.

Respectfully submitted,



D.R. Comis
CITY CLERK

CC: -CITY MANAGER
-DEPUTY CITY MANAGER
-DIRECTOR PLANNING & BUILDING
-CITY SOLICITOR

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ATTACHMENT 1

To: Mayor Drummond and Members of the Council, City of Burnaby and
Patty Sahota; Richard Lee; John Nuraney; Harry Bloy; Burnaby MLAs, Province of BC
From: Michael Chao, 4103 Yale Street, Burnaby, BC, 604-291-9788
Re: Burnaby Board of Variance, BV No.5006
Date: June 13, 2002

I am submitting this letter of complaint because I am very upset with the way the Burnaby Board of Variance conducted themselves in making a decision on June 6, 2002 concerning BV No.5006, and I believe the Board contravened three sections of the Local Government Act, which governs the Board's operation.

The applicants, the owners of 4111 Yale Street, Burnaby appealed to the Board of Variance for permission to add an extra 228 ft² to their third floor to accommodate a full bath and three bedrooms. In order to limit the massing at the third floor, and to reduce the impact to its neighbours, the Burnaby Zoning Bylaw stipulates that the third-floor area can't be more than half of the area of the main floor. With a main floor area of 835 ft² the applicants' proposed third floor area was 646 ft².

1) As permitted under per Section 901 (2) of the Local Government Act, the Board may, in a case of hardship, make a **minor variance**. However, allowing development with **an excess area of 228 ft²** in a three-storey house is not minor. The approval means that a three-storey, and not a two-and-a-half-storey, house gets built. There are no three-storey buildings on our block and 56% of the owners or residents opposed the application.

2) As per Section 901 (2) (C) (iv) of the Local Government Act, the Board's decision should not contravene the intent of the Zoning Bylaw. With a large massing and out-of-place design, approving this application would have violated the intent of Section 105.5 (1) (2) of the Burnaby Zoning Bylaw. For that very reason, the Burnaby Planning Department has constantly opposed the application. (Please refer to *sketch enclosed)

3) As stipulated under Section 901 (2) (C) (ii) of the Local Government Act, the decision should not substantially affect the use and enjoyment of adjacent land. By allowing this application to proceed, all but one of our east-facing windows will no longer have direct sun light, view, or privacy, while the amount of indirect light and breeze will be reduced. The only remaining visual access out of these windows would be the neighbour's blank wall and their windows high above. To safeguard our privacy, it would be necessary to close all our blinds or curtains day and night. In short, **the liveability of our rooms will be substantially affected**. (Please see enclosed *photos)

4) At the hearing held on June 6, one Board member referred to a telephone conversation he had with the applicants. While the matter is before the Board, I believe this type of contact should not be allowed.

5) The Board failed to make a distinction between two related, but totally separate, issues: an add-on application, which requires Board permission to build the extra area, and a redevelopment, which is an automatic entitlement. One Board member said he supported the application because the impact would be less than if had the applicants chose to redevelop the property with the

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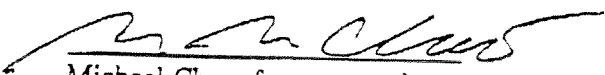
ATTACHMENT 1

maximum allowable GFA. The two forms of development should never be linked together. Also, redevelopment would require the basement to be built more into the ground and the overall building height to be lower. It is the excess amount, granted by the Board, with adverse effects that has prompted objections from the owners and residents of the 4100 block Yale Street.

- 6) The Board has mixed-up its priorities. The Board should consider whether an application should be allowed before studying the design aspect. At the hearing, the Board spent most of its time studying the design, rather than assessing the likely impact on adjacent properties. Apparently, there was little difference among the three submissions; they all have three-bedrooms plus a full bath, on the third floor.
- 7) The Board did not consider the views of opposing parties. The Board also doubted the seriousness of our objection, as one member indicated that all of us should have been present at the hearing. Despite having a petition signed by 17 owners/residents of the 4100-block Yale Street, the Board agreed with the applicants that those who signed the petition probably did so without the benefit of examining the applicants' plans. This requirement is not possible to fulfil because other than viewing the plans at the city hall, the law does not permit anyone to have possession of the plans. (Please refer to the letter and petition signatures)
- 8) The Board's acceptance of the applicants' plea of hardship was bewildering. The applicants indicated that it would be a hardship to sleep in the basement. When they bought their house six years ago, they knew that all the bedrooms were in the basement. Five years later, when they decided that sleeping in the basement was no longer suitable, they should have considered other options. The applicants were not even willing to reduce their proposal by one bedroom. For a couple with a toddler, wishing to add three more bedrooms and a full bath to an existing two-bedroom-plus-den house should not be a case of hardship, as the plea had been rejected by the City of Burnaby three times. **The applicants' hardship became our hardship.**

If my observations were correct, I sensed biases and a serious lack of judgement, and analytical skills. I question the Board's ability to make a fair and impartial decision. This is something I would like the City and provincial governments to take note of during the next Board appointments.

Finally, I believe the present Board of Variance appeal system is not fair and the Provincial government should amend the Community Charter in due course. Right now, applicants can submit their applications over and over again, but once the decision is made, whether it is right or wrong, with no review process, it is final. Although there is limited legal recourse, most of us simply do not have the financial resources to pursue that route.


Michael Chao, former member,
Advisory Planning Commission

Encl.

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