

**CITY OF VICTORIA  
BOARD OF VARIANCE  
MINUTES  
SEPTEMBER 22, 2020**

**Present:** Trevor Moat, Chair  
Margaret Eckenfelder  
Rosa Munzer

**Absent:** Jaime Hall  
Rus Collins

**Staff:** Thom Pebernat, Zoning Administrator  
Alena Hickman, Secretary

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The meeting was called to order at 12:30 pm.

**1. Appeals**

**1:30 Board of Variance Appeal #00854  
Walter and Karen Madro, Owners  
1980 Fairfield Place**

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Present Zoning: R1-G – Single Family Dwelling (Gonzales) District  
Present Use: Vacant

The proposal is to request an extension to the previously approved application #00731 that granted a variance to the rear yard setback of a new single-family dwelling.

**Bylaw Requirements**

**Relaxations Requested**

Part 1.6.5 (b) Reduce the rear yard setback from 14.01m to 7.08m (to the covered patio and deck) and 8.21m (to the building).

Walter and Karen Madro, Owners; Matthew Voell, BOV's lawyer; Michael Scherr, owners' counsel; Tom Zworski, City of Victoria Solicitor; neighbours Scott Chapman and Janya Freer of 330 Denison Road, Brad Atchison and Cheryl Shoji of 1968 Fairfield Place, Catherine and Philippe Doré (with son Graham Doré) of 1962 Fairfield Place, Arlene Lonergan of 388 Denison Place, Sheila Protti of 396 Denison Road, Karen Ayers of 613 Foul Bay Road, Cathy Armstrong of 302 Denison Road..

Correspondence regarding the application from the following was acknowledged: Michael Scherr of Pearlman Lindholm, Terry Johal of Terry Johal Developments, Cathy Armstrong, Executive Director of the Land Conservancy, Walt & Karen Madro, home owners, R. Steven Jones of 1541 Rockland Avenue, Kevin and Bev Dickson of 235 Denison Road, Karen Ayers of 613 Foul Bay Road, Virginia Errick of 615 Foul Bay Road, Janya Freer of 330 Denison Road, Scott Chapman of 330 Denison Road, Steve and Arlene Lonergan of 388 Denison Road, Sheila Protti of 396 Denison Place, Brad Atchison & Cheryl Shoji of 1968 Fairfield Place, Catherine and Philippe

Doré of 1962 Fairfield Place, Mary Doody Jones of 435 Kipling Street, as well as a petition from residents concerned about Gonzales Hill Regional Park from the following: Britta Bentz, Catherine and Philippe Doré, Sheila Protti, Scott Chapman, Janya Freer and City of Victoria correspondence from Chelsea Medd & Alison Meyer.

### Applicants

- The source of the Board of Variance's (BOV) jurisdiction to grant the extension requested is the Order of the Minister of Public Safety and Solicitor General No. M098 under the *Emergency Program Act*, RSBC, 1996, c.1996, c.111, s.10, dated April 8, 2020, repealing and replacing M086 issued March 26, 2020. This is a COVID-19 related measure designed to address potential harm related to delays in legal and administrative proceedings caused by the pandemic. The Purpose and Effect of the Order is outlined in further detail by the Minister in a document dated May 7, 2020. Among other things, it states that if there is a conflict between M098 and another enactment, M098 prevails.
- In this case, M098 prevails over subsection 542(3)(b) of the *Local Government Act*, which states that a permit or exemption ordered by the BOV terminates if construction is not substantially started within 2 years of the date the order was made, unless a different time period is established in the order. Thus the BOV has the authority to extend the variance despite the language in section 542, even though the variance expired on July 27, 2020.
- The building permit was issued on April 7, 2020, but turned out to be incomplete since there were no tree removal permits from the City Parks Department, as required. The owners were informed of this deficiency on June 23, 2020.
- The required tree assessment was completed on July 30, 2020 at which time City Parks was prepared to issue the tree removal permit.
- The owners were then advised their permits would not be issued since the variance had expired on July 27, 2020.
- The City's delays issuing permits prevented substantial initiation of construction on the site within the required 2 years.
- There was a letter on file from Zebra Design that stated all aspects of their business were being affected by the COVID related shutdown.
- The Madros are only asking for an extension to a variance that was already approved.

### Board (Questions with Applicants Response)

- Are you asking the Board to consider an extension on a site plan that has now changed, or is the Board to consider only what was proposed on the plan submitted in 2018?
  - As far as the application for the variance approved in July 2018, the site plan has not changed. We have since made an application for a garden suite.
- The Board would be interested in hearing your reasons why the variance can be extended when a different development is now being proposed.
  - The garden suite is an addition to the original development but does not change that development. If the house was already built and we made an application for the garden suite, it would be permitted under the same set of conditions as currently exist. To facilitate construction, we made the application for the garden suite now and we would like to construct both projects at the same time. We have not varied the application from the BOV's initial order. The house will be placed in the same location. We will comply with the variance that was permitted, and we are simply improving the property as allowed by the Zoning Bylaw.
- The plans do not show where the garden suite would be located nor whether it would affect the environmental report and shadow study that the BOV reviewed when it issued the

- variance. Can you please comment on the garden suite's impact on the whole property?
- There is a report. The arborist and the City of Victoria visited the site three times with the surveyor. There was also considerable coordination between the engineer, the arborist and City. The stormwater management system was also looked at and taken into consideration. We did an environmental impact study as well that indicates that the suite will be located on a rock out-cropping which is classified as low habitable space for vegetation. It is approximately 5m to the west of the house.
  - The Board does not have a clear picture of the entire context in which to consider extension of the variance as things have now changed. The new site plan including a garden suite has not been shared with the Board of Variance in advance of the meeting today. It is possible that if the Board had been provided with a complete plan of garden suite and house, the Board would have reached a different decision on the original variance request. We are now being asked to extend a variance that was granted a quite different context.
    - I suppose the variance was provided to the home and that home could have been constructed and perhaps later that garden suite could have been applied for as an improvement to the property. We are not sure it changes the reasoning for the variance for the home.
  - You outlined reasons for the delay and cited a number of adverse impacts caused by the City and Covid-19. The building permit was granted on April 7, 2020. Why wasn't the permit applied for right after the variance was granted in July of 2018?
    - I would say that is a non-issue. The consultant spent days, hours and weeks to try and coordinate with the City and its ever-changing garden suite guidelines in an effort to have a construction process that was less disruptive.
  - When was the decision made to build a garden suite?
    - 2018. We started the garden suite process on October 29, 2018. It was modified and resubmitted on December 20, 2018.
  - Would it be reasonable to assume some of the delays would have been caused by those changes you wanted to make that you have referred to?
    - Yes.
  - What sort of delay would you think that was? How long? And at what point was the garden suite plan finished and submitted to the city?
    - We do not have exact dates on hand. It took a long time to work through the number of issues that the City was concerned with resolving. Some had nothing to do with the garden suite.
  - At what point was the design for the garden suite finished and submitted to the City?
 

It really doesn't matter, because no one making decisions in 2018 anticipated the world shut down in March of 2020.
  - Was there a new environmental report done and why wasn't it provided to the BOV as part of the extension application?
    - The garden suite is proposed for a rocky area which does not support great habitat due to low vegetation so for that reason we did not complete a new report.
    - Owner stated that they did have an updated report completed, however, their current focus is on completion of the main house. They may not go ahead with the garden suite at all, in which case the report would not be relevant. They would have been well into construction if they had not been delayed by the City on account of Covid-19

### Neighbours/Interested Residents

- A neighbour stated the applicants failed to start construction within the two years and are trying blaming Covid-19 and that the plan for this site has changed from 2018 and disagreed with the Applicant's contention that the proposed garden suite complied with City bylaws.

- Another neighbour expressed concern about the environmental impact this development would have, especially with regard to ongoing climate emergencies. He also stated he eventually supported the expired variance because it moved the house away from his property. He agreed with comments already made about time delays.
- Neighbours suggested that some of the delays were of the Applicant's own making as they pursued variances and the garden suite, and asked why the applicants did not come to the Board to ask for an extension before the time limit ran out if they knew they had not substantially started construction?
  - Owner responded that they felt they had satisfied all requirements on the building permit by the end of 2019 but did not receive a building permit until April 2020. They would have started construction at that time but were delayed by tree permit requirements.
  - Owner's designer had asked a planning technician specifically if there were any time limits on the variance that was received and was advised that time would not run out as long as they had applied for a building permit.
- A neighbour also suggested that there was enough time to meet the substantial start of construction test, even in light of COVID-19, if there had been better communication between Applicants and the City and within the City. Another neighbour disagreed and suggested that the applicant was in no way on track to start construction, COVID-19 or not.
- Other concerns related to the loss of Garry Oak trees on the property were raised. It was noted that during the BOV hearing for the variance appl in July 2018, the applicants stated that they would enact a restrictive covenant to protect the property from further development. A concerned resident noted that this was a consideration that could have led to the variance being accepted by the Board. They expressed concern that the restricted covenant had not been enacted.
  - Owner responded that their commitment to the ecosystem is un-altered and they intend to keep the restrictive covenant and it is ready to go. That will take some time and they want to make sure things are done properly.
- An adjacent neighbour expressed two concerns: 1) that there had been a provision for a culvert as part of the driveway leading up to the house as part of a migration path for animals crossing both North and South; and there is no evidence of that in the construction drawings; and 2) that no shadow study ever provided to them.
  - Applicant replied that civil engineers did not support the culvert because it would accumulate water; Shadow studies were shown at the July BOV meeting, but hardcopies might not have been provided to neighbours.
- It was suggested that the Applicant should have known better than to rely on a city staff member's advice regarding expiration of the variance. Owner's counsel agreed that the staff member did not have any authority to "waive" the expiration; however, their advice created a false sense of expectation.
- A neighbour suggested that the BOV does not have the authority to extend an expired variance. It was also noted that decisions of the Board under section 542 are final. Other neighbours and interested residents agreed and noted that they had not heard from the City of Victoria. Counsel for the owners reiterated their view that M098 conveyed the necessary jurisdiction to the BOV.
- City of Victoria Solicitor outlined his opinion on M098. The City does not normally participate in BOV meetings, so there should be no adverse or other inference drawn from the lack of City participation or comments. The City has in this case expressed its opinion to the Board and Applicant that the BOV does not have the jurisdiction to grant this extension. He drew the Board's attention to the letter from the Minister to the Law Society and specifically to the 3 purposes of the order. The nature of this order is procedural only. The two-year limit on the order in question ended in July 2020 at which point the board became functus in the

matter. Order M098 does not give the Board jurisdiction to revive an expired order under the *Local Government Act*. The City takes no position on the merits of the variance; its concern is limited to the jurisdiction of the BOV.

- Counsel for the Applicant disagreed and reiterated that the Board does have jurisdiction, and this has been supported in similar cases at the Court of Appeal and the Supreme Court of Canada.
- BOV Chair asked for evidence supporting that claim. The applicants' Counsel referred to case law and the enactments relied on set out on pages 3-4 of the Applicant's written submission.
- City Solicitor noted that in none of the cases was there a statutory provision in question so it was difficult to treat them as precedents.
- Counsel for the Applicant indicated that this is a new situation.
- BOV Chair asked Applicant's Counsel to comment on a letter from the City Solicitor highlighting a BC Court of Appeal decision in the context of a similar deadline for commencement of construction on the Environmental Assessment Act. In that decision, the Court stated that the reason for the delay is not relevant to the question of whether or not the deadline has been met.
  - Applicant's Counsel suggested that decision should be considered in the context of the specific case – that case concerned an environmental decision with a 5-year certificate.

**Board:**

- The Board's usual practice is to render a decision at the hearing. However, this is not a typical application, given the complexity of the legal issues involved. Accordingly, the Board requires more time to assess and deliberate. As a result, it will not be possible to render a decision today.
- The Board proposes to render its decision in writing by 3:00 p.m., Friday, September 25, 2020.

**Motion:**

**Moved:** Rosa Munzer

**Seconded:** Margaret Eckenfelder

That the Board hearing be closed; and that the Board reserve its decision to allow for further deliberation to provide a written decision by Friday September 25th, 2020 at 3pm.

**Carried Unanimously**

Meeting Adjourned at 3:43 pm

The written decision was provided to the City of Victoria Planning Department on September 24, 2020, and is attached to these minutes.

## **Board of Variance for the City of Victoria**

### **DECISION**

regarding an Application to extend expired variance #00731  
re 1980 Fairfield Place, Victoria, BC

**Hearing Date:**

2020 September 22

**Applicants:**

Karen and Walter Madro (owners of 1980 Fairfield Place)

Louis Horvat and David Yamamoto (Zebra Design)

Michael Scheer (Perlman Lindholm, Solicitor for the Applicants)

**Members of the Board of Variance:**

Margaret Eckenfelder

Rosa Munzer

Trevor Moat (Board Chair)

It should be noted that the City of Victoria appointed Ms. Munzer to the Board of Variance on July 2<sup>nd</sup>, 2020 and she did not participate in the previous hearing of July 26, 2018 where the Board granted the variance in question.

**Application:**

The Application being considered is the Applicants' request for an extension to the previously approved variance application #00731, dated July 26, 2018, whereby the Board of Variance granted a variance to the rear yard setback of a new single family dwelling for the property at 1980 Fairfield Place, Victoria, BC. The current extension requested is made pursuant to the authority granted by Ministerial Order M098/2020, dated April 08, 2020, the *COVID-19 Related Measures Act*, SBC 2020, c. 8, and the *Local Government Act*, RSBC 2015, c. 1.

**Context:**

The Applicants have requested that the Board of Variance extend the variance granted for the subject property which expired on or about July 26, 2020, the second anniversary of the date on which the variance was first granted. The Applicants claim that the substantial start to their project was delayed, at least in part, by the COVID-19 pandemic and the state of emergency in British Columbia declared on March 18, 2020.

The Board received a large amount of correspondence and other submissions on this matter and reviewed those materials in advance of the hearing. The Board became aware that the Applicants did not receive the full correspondence file until the morning of the hearing. At the

hearing the Board offered the Applicants the opportunity to request an adjournment to provide more time for them to review the correspondence. The Applicants declined this offer and chose to proceed with the hearing.

It is not the Board's normal practice to provide written reasons for its decisions nor is it required to do so by the *Local Government Act* or the City of Victoria Board of Variance Bylaw No. 07-97. However, the Board has decided to provide brief written reasons in this case given the novelty and contentiousness of the issues arising in this application. We have tried to summarize the various positions taken before the Board in our reasoning, however we do not include reference to all of the submissions and correspondence. Accordingly, these reasons should be read in the context of the full record before the Board and the submissions made at the hearing.

**Issues:**

The Board considered, in particular, the following questions:

1. Does the Board of Variance have jurisdiction to grant an extension to variance #00731?
2. If so, should the Board agree to extend the deadline by which construction on the building subject to the variance must be substantially started, pursuant to the Applicants' request?

**Jurisdiction of the Board:**

The Board received evidence and submissions from the Applicants supporting the position that the Board has the jurisdiction to consider and grant the extension. The Applicants referred to Ministerial Order M098/2020, the *COVID-19 Related Measures Act* and the *Local Government Act*. The Applicants expressed the opinion that the Board has the "statutory power of decision to waive, suspend or extend a mandatory time period" relating to the exercise of its powers, including the two-year time limit imposed by section 542(3) of the *Local Government Act*. The Applicants stated that the substantial start to their project was delayed, at least in part, by the COVID-19 pandemic, and the state of emergency in British Columbia declared on March 18, 2020.

The Board received submissions from the solicitor for the City of Victoria, who advanced the position that the Board does not have jurisdiction to grant an extension to variance #00731. The City disagreed with the Applicants' position that Ministerial Order M098/2020 authorizes the Board to provide an extension in the circumstances, arguing that Ministerial Order M098/2020 refers to procedural, rather than substantive, requirements. The City's position is that the Board fulfilled its statutory role when it granted the variance on July 26, 2018, and that it held no further jurisdiction in the matter after that date.

The Board also received evidence and submissions on the question of jurisdiction from notified neighbours at 330 Denison Road and 1968 Fairfield Place, and from other members of the community, notably nearby neighbours at 1962 Fairfield Place and several other residents of Victoria. Some neighbours argued quite strongly that they felt the Board did not have jurisdiction to extend the variance for the following reasons:

1. Section 542 of the *Local Government Act* pertaining to the Board of Variance does not empower the board to over-rule decisions made by the City pertaining to the Applicants' Building Permit status;
2. The Board does not have the jurisdiction to modify a ruling it has made previously, and specifically that it does not have the power to extend a variance that has previously expired; and
3. Variance #00731 terminated irrevocably on or about July 26, 2020, two years after the variance was granted.

### Extension Request:

The Board reviewed the Applicants' submissions. Included in those submissions were the same site plans, shadow studies, and environmental report presented at the 2018 hearing. In addition, the Applicants, Zebra Design, Mr. Terry Johal (building contractor for the Applicants) and the Applicants' legal counsel provided written and oral submissions in support of their position that the Board should grant the extension. The Applicants were very clear that they were only seeking an extension of the variance that was issued in July 2018, and not a new variance based on any changes to the proposed development. The Applicants submitted that an extension should be granted as the substantial start to their project was delayed, at least in part, by the COVID-19 pandemic.

The Board also reviewed written and oral submissions from neighbours and other members of the community. All but one of those submissions expressed the opinion that the extension should be rejected for any of several reasons, including:

1. The Applicants chose to pursue a further variance to add a basement suite after being granted the variance in question, thus incurring 3-4 months of voluntary delay at the start of the two-year lifespan of the variance;
2. After the basement suite application was rejected by the Board of Variance, the Applicants subsequently chose to add a garden suite to their project. This addition to their plans raised issues that caused yet further delays to the project and appear to be still unresolved;
3. The COVID-19 pandemic was not declared until March 18, 2020, approximately 20 months after the variance was granted, and only four months prior to the expiry date of the 2018 variance; and
4. The COVID-19 pandemic caused varying degrees of disruption in different sectors of the economy. Community members noted that much development and construction activity continued through the state of emergency declaration, and therefore did not accept that the COVID-19 crisis caused significant delay to construction-related activities pertaining to this application.

Neighbours also commented on the toll that the granted variance, the Applicants' proposal for a basement suite, the proposed addition of a garden suite, and the consultation process generally, has taken on them over the last few years. Residents from 1968 Fairfield Place emphasized the hardships they believe they would face if the approved variance were to be

negated, as the allowable build area of the subject property would negatively affect their residence.

The Board heard from the Applicants that they intend to construct a garden suite on the property. The Board noted that none of the design documents provided to the Board in advance of this hearing indicated that intention. The Applicants took the position that the existence of a garden suite was beyond the scope of the Board of Variance, that no additional variances are being sought pertaining to the garden suite, and that any reference to delays in the permit process arising from the garden suite should therefore be considered a “red herring”. All but one of the neighbours to the project and members of the public strongly disagreed with the Applicants’ position.

One member of the community referred to the minutes of the July 26, 2018 hearing and noted that the Applicants had agreed to place a restrictive covenant on the property with the intention of protecting the property and ecosystem from further development. The following remarks are drawn from the approved minutes of that 2018 meeting:

***Owners:*** *If the variance is granted, the owners will also be placing a restrictive covenant on the lot to protect the trees from further development and to prevent subdivision of the property.*

***Environmental Consultant:*** *The proposed vehicle access allows for minimal disturbance to the urban forest. The owners will place a covenant on the band of trees, which will provide a wildlife corridor habitat. Without the requested variance, the driveway would be pushed to the border of the lot, which is the most ecologically valuable habitat.*

The Board does not have the jurisdiction to negotiate or enforce commitments to enter into covenants and did not consider any reference to covenants on the property when rendering its decision to grant the variance in 2018. Nonetheless, the record from 2018 shows that the Applicants committed to protecting trees and to prevent further development on the property. The Applicants stated in this hearing that the covenants were in process, but were unclear as to how, if at all, these commitments have changed.

#### **Decision:**

The Board has reviewed the evidence, submissions and correspondence presented and has reached the unanimous decision that it should consider the extension request despite conflicting submissions as to its jurisdiction to grant that extension.

For the reasons that follow the Board has unanimously decided that the extension should not be granted, and for that reason is of the view that it does not need to decide whether or not it has the jurisdiction to grant the extension pursuant to Ministerial Order M098/2020, the *COVID-19 Related Measures Act*, and the *Local Government Act*.

Section 542(1)(c) of the *Local Government Act* sets out factors that the Board must consider before exercising its discretion to issue a variance. These factors are not limited to consideration of only the specific building for which the variance is requested, but require the Board to consider the overall context of the proposed development, including the effect of the

requested variance on the development of the site as a whole, the natural environment and the use and enjoyment of adjacent land.

The original variance was granted based on evidence presented at the July 26, 2018 hearing, including site plans, shadow studies, and environmental reports. The technical documents submitted by the Applicants in support of their request for an extension to that variance at this hearing suggest to the Board that the development proposal has not changed.

The Board heard evidence from both the Applicants and other interested parties that the project now proposed does, in fact, differ from that considered by the Board in 2018. In particular, the Applicants have indicated that they now intend to build a garden suite on the property. There had been no mention that a garden suite was being contemplated prior to the grant of the variance in question on July 26, 2018.

In this hearing the Applicants acknowledged that the site plans for the Property have changed since they were considered by the Board in 2018, and that a new environmental plan has been completed. The Applicants did not provide any updated site plans, shadow studies, or environmental reports prior to this hearing for the Board to consider. The only site plans submitted to the Board in advance of this hearing expressly state "Issued for BOV V2 JUNE 28, 2018", and the environmental report is dated July 9, 2018. Although reference was made to additional work carried out by the environmental consultant with respect to the addition of the garden suite, no details of the consultant's findings were provided to the Board for consideration at the hearing.

Although the variance previously issued in this case, and the extension request under consideration here, are related to the principal building on the property, it is the Board's view that changes to the site plan since the variance was issued in July 2018 affect the context in which any extension request must be considered. Changes to the proposed development may alter the effect of the variance, for example, on the natural environment or use and enjoyment of adjacent land. Similarly, changes to the proposed development may affect the need for the variance and the degree or nature of the hardship suffered by the Applicants. In this case, the Board is unable to make a considered decision on these issues due to the absence of current plans, reports and information relating to the proposed development.

In summary, the Board has determined that it cannot extend the variance to the Applicants' development proposal because the context of the development proposal has been altered. The Applicants did not provide the materials the Board needs to consider the extension request in its current context. The Board expects and normally receives complete and current site plans prior to hearing variance applications and bases its decisions on the plans that are presented to the Board. In this case, the Board did not receive the information it needs to make a considered decision and to apply the factors listed in section 542 to the current development proposal. Accordingly, the Board declines to exercise its discretion to grant the extension requested to variance #00731.

On behalf of the Board of Variance:

Rosa Munzer

Margaret Eckenfelder

Trevor Moat

