

DECISION AND ORDER

Decision Issue Date Wednesday, December 20, 2017

PROCEEDING COMMENCED UNDER subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): SIROUS BOZORG-GRAYELI

Applicant: GREEN DOT ARCHITECTS

Property Address/Description: 105 Binswood Ave

Committee of Adjustment Case File Number: 17 126229 STE 31 MV (A0271/17TEY)

TLAB Case File Number: 17 208623 S45 31

Hearing date: Friday, November 17, 2017

DECISION DELIVERED BY G. BURTON

Parties

Sirous Borzog Grayeli

Bill Fullerton

Participants

George Leblanc

Shelly Oleksuik

Michelle Dawn James

Donald Kawasaki

Mario Misasi

Counsel

John Alati

Kate Fairbrother

Robert Brown (agent)

INTRODUCTION

This was an appeal to the Toronto Local Appeal Body (“TLAB”) by the landowner (the “appellant”) from a decision of the Committee of Adjustment (“COA”) that refused his application (brought by Green Dot Architects) for minor variances required to construct a new dwelling at 105 Binswood Avenue (the “subject property”) in the former East York portion of the City of Toronto. The COA’s amended decision issued August 9, 2017.

The proposal is for a two-storey, flat roofed, single detached dwelling with an integral garage in a block of Binswood located just south of O’Connor Drive, in East York. This would replace the existing one-storey home.

Mr. Bill Fullerton filed an election to be a Party as permitted by the TLAB’s Rules 12.1 and 12.2. Many of the neighbours expressed an interest in the appeal, and 28 individuals filed with the TLAB their intention to be a Participant in the hearing. In the end, many attended and six of them did testify.

The appellant engaged Mr. Michael Goldberg to provide professional land use planning evidence in support of the application. The opposition of Mr. Fullerton and the other neighbours was presented by him and by Mr. Robert Brown.

BACKGROUND

The subject property is designated “Neighbourhoods” in the City of Toronto Official Plan (the “OP”), and is zoned RD (f9.0; a280; d0.45) under the comprehensive City By-law No. 569-2013 (the “new By-law”, currently under appeal), and R1A under East York By-law No. 6752 (the “East York By-law”).

The existing lot frontage is 11.07 m. or 36.32 ft. The lot depth is 33.53 m. or 110 ft. Its area is 371.3 sq. m. or 3,996.77 sq. ft.

These are the variances sought at the COA, and again before the TLAB:

1. Chapter 10.20.30.40.(1)(A), By-law 569-2013

The maximum permitted lot coverage is 35% of the lot area (129.91 m²).
The lot coverage will be equal to 36.9% of the lot area (137.06 m²).

2. Chapter 10.20.40.10.(4)(A), By-law 569-2013

The maximum permitted height is 7.2 m.
The new dwelling will have a height of 8.2 m.

3. Chapter 10.20.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index is 0.45 times the area of the lot (167.02 m²).
The new dwelling will have a floor space index equal to 0.72 times the area of the lot (268.76 m²).

4. Section 7.2.3, By-law 6752

The maximum permitted floor space index is 0.45 times the area of the lot (167.02 m²).
The new dwelling will have a floor space index equal to 0.70 times the area of the lot (261.04 m²).

5. Section 7.2.3, By-law 6752

The minimum required front yard setback is 6.0 m.

The new dwelling will be located 3.66 m from the front lot line.

6. Section 7.2.3, By-law 6752

The maximum permitted lot coverage is 35% of the lot area (129.91 m²).

The lot coverage will be equal to 36.9% of the lot area (137.06 m²).

JURISDICTION AND MATTERS IN ISSUE

On an appeal, the TLAB must be satisfied that each of the variances sought meets the tests in subsection 45(1) of the Act. This involves a reconsideration of all the variances considered by the Committee, in the physical and planning context. The subsection requires a conclusion that each of the variances, individually and cumulatively:

- is desirable for the appropriate development or use of the land, building or structure;
- maintains the general intent and purpose of the official plan;
- maintains the general intent and purpose of the zoning by-law; and
- is minor.

These are usually expressed as the “four tests”, and all must be satisfied for each variance. In addition, TLAB must have regard to matters of provincial interest as set out in section 2 of the Act, the variances must be consistent with provincial policy statements and conform with provincial plans, as set out in s. 3 of the Act. A decision of the TLAB must therefore be consistent with the 2014 Provincial Policy Statement (‘PPS’) and conform to (or not conflict with) any provincial plan such as the 2017 Growth Plan for the Greater Golden Horseshoe (‘Growth Plan’) for the subject area.

Under s. 2.1 of the Planning Act, TLAB is also to have regard for the earlier Committee decision and the materials that were before that body.

EVIDENCE

Mr. Michael Goldberg, a very experienced land use planner, was qualified to provide expert opinion evidence on the merits of the application.

Mr. Goldberg testified that the existing home is much smaller than the present by-laws would allow. The existing one-story dwelling is about 11.5 m. deep, versus the much larger permitted depth standards of 16.75 m. (East York By-law) and 17 m plus 2 m. (new By-law). Similarly, the existing lot coverage is approximately 23.6% of the lot area, versus the 35% permitted under the By-law. To the north, beside Mr. Fullerton at 107, the existing side yard setback is now only 0.44 m, versus the larger By-law requirement of 0.90 m. Under the East York By-law, the permitted height is 8.5 m., no matter whether the roof style is flat or pitched. There was a change made under the new By-law which limits a flat roof to 7.2 m in height. This limitation has been appealed to the Ontario Municipal Board (the “OMB”), with a decision to issue in which Mr. Goldberg, having participated in the appeal, believes that this limitation will be increased. However, the requested height variance of 8.2 m. is only for a small segment of the roof, at the south side of the new structure. The remainder complies with the 7.2 m. standard. Were it a peaked roof design, the new By-law would permit a 9 m. height.

While variances are required under both the new By-law and the East York By-law, there are two duplicated categories – lot coverage, and floor space index (“FSI”). In addition, the projected build requires both a height variance and a reduced front yard setback. This would enable the building fronts to line up along the street. If the new home were to meet the required front yard setback it would extend further to the rear, and further annoy the neighbours. There are no side yard or rear yard setback variances required.

Mr. Goldberg presented his study area entitled Property Data Map (Exhibit 2) as the appropriate area context plan for assessing OP compliance. This consisted of approximately a four-block segment in the O’Connor and Coxwell area of the former East York, represented by a dashed line on Exhibit 2. This is in satisfaction of the Official Plan policy to consider the “existing physical character of the area” – to be discussed below. It represents the general comings and goings of a person living on the subject site, and comprises about a three or four block area rather than his usual two or three. Mr. Goldberg utilized this area in performing physical investigations as well as to gather data about COA and OMB decisions relevant to this site. He chose a 17-year sample to illustrate, quantitatively and qualitatively, the developments that had occurred in this study area.

He testified that the proposed dwelling is similar to many others on nearby streets, which are replacements for the existing one to one-and-a-half storey homes constructed in the post Second World War period. There is significant reinvestment in this area, with dwellings of differing architectural and roof styles, some including integral garages. Because the existing dwelling is small, in Mr. Goldberg’s opinion the subject site is underutilized. There are no constraints mitigating against construction of a larger home.

Floor Space Index and Lot Coverage

He provided updated photos of homes in his study area in Exhibit 3. Many rebuilds have been approved at a higher FSI – number 60 Binswood at 0.88 times the area of the lot, 78 Binswood at 0.76, and a recent build at 112 Binswood has an FSI at 0.73 and coverage of 39%. The present application is for 0.70, while 0.45 is permitted under both By-laws. Many properties on Glebemount have been approved for increased lot coverage – at 0.37, 0.40, and at 38 Roblin, 0.41 %. The present seeks only 36.9 % of the lot area, while 35% is permitted. He described many of the rebuilt homes as taller, bigger and longer. He included homes on Woodmount, four streets to the east, in a more southerly block, that are indicative of even higher size increases.

Mr. Goldberg explained how certain elements of this design added to the required FSI for this structure, in a technical sense. Looking at Exhibit 5, Drawing A-4, First Floor Plan, it can be seen that there is a front porch area. While it is completely outside, it would have walls on three sides. The City inspector added this area of 2.82 sq. m to the FSI, one that Mr. Goldberg termed a technical increase only. Similarly there is a balcony at the second level on Drawing A-5 that, while again having only three walls, and is open at the north, has added 4.91 sq. m. to the FSI. Also increasing the FSI variances is an area of the garage (on A-4), beyond that required to park a car, which added 3.43 sq. m. to the FSI. Mr. Goldberg called these additions technical variances, as they purport to add to the structure’s FSI but do not increase its utility. They cannot be avoided, as they were calculated by City staff.

The architectural presentations of the proposed design here would in fact create a new streetscape for the neighbourhood. He testified that once approved, it is deemed to comply with the Official Plan. One of the main arguments that Mr. Goldberg noted in the neighbours’ filed materials is that they are opposed to the proposed architectural style and the integral garage. They call it an improper use of the OP’s term “building type”. However, he pointed out that this OP term refers only to the distinction between a detached or semi-detached structure, and not

to any feature such as an integral garage. The integral garage is included here because the City requires parking to be behind the front main wall. This, together with a side yard setback of only .09 m. under the East York By-law, leaves only the possibility of an integral garage. In his opinion this design actually implements the OP, and is a modern response to it. There are no Official Plan policies preventing integral garages; in fact, the opposite is true. The zoning by-laws allow this design so that a landowner can build out to the standards set out therein. The evolution of nearby redeveloped properties has in fact been in compliance with the Built Form policies in the OP. The policy requires that new builds reflect or be compatible with the existing or planned context. Integral garages already constructed in the neighbourhood are part of the planned context, and are permitted.

The neighbours raise the new construction at 38 Roblin (his Photo 34, Ex. 3) as an example of undesirable development in the neighbourhood. Mr. Goldberg testified that it is now “plugged into” the diverse nature of the streets nearby. The neighbourhood is evolving into something different, even though it is at an early stage of the metamorphosis. At present, there are more original structures than new, but the new structures are noticeable on every street. They are thus part of the fabric of the neighbourhood, as illustrated in his photos in Exhibit 3, Revised Site Photos.

Mr. Goldberg tendered a COA Decision Analysis (Ex. 4), providing 17 years of decisions, together with the purpose of the applications. Appeals to the OMB are included. He used this chart only as a quantitative guide, to illustrate the range of approvals granted by way of variance from the zoning standards. Recalling that the variances sought here are for 0.70 and 0.72 FSI (0.45 is permitted) and 36.9 lot coverage (35% permitted), he pointed to several approvals on Binswood alone at 0.88, 0.672, 0.76 and 0.73 FSI; as well as coverages of 35.3%, 36.35, and 39%. His conclusion is that this proposal is well within the range of approvals for a 17-year period. The FSI and lot coverages in the chart and in his photos are similar to many already forming part of the neighbourhood. The height, coverage and massing are compatible with others of the same lot size, and are not large from the s. 45 tests perspective.

He referred to the coloured site plan, Exhibit 6, to illustrate the location of the present home and the size of the proposed. The existing street tree would be retained, but one tree would have to be removed, subject to Urban Forestry's condition. The length of the new structure would be 16.75 m. This would not require a variance. The side yard setback closest to Mr. Fullerton at no. 107 would be 1.2 m, stepping back somewhat to 1.8 m., again not triggering a variance. Similarly, the side yard setback to the south next to no. 103 owned by Mr. Leblanc, would be .9 m. stepping back somewhat, again not needing a variance, as .9 m. is the required setback to the south. The only setback variance requested is for the front yard, but this just permits the house to align with those of the neighbours', as is required by the East York By-law. The rear yard setback in the By-laws is met easily by the proposed, at 13.1 m.

Height

Respecting the height variance, Mr. Goldberg pointed out that it is required for only part of the roof under the new By-law, to meet the limit for a flat roof of 7.2 m. The proposed height of the roof complies with the 8.5 m standard of the East York by-law, so no variance is requested from it. He referred to drawings A-8 to A-10 of Exhibit 5, the Plans (as filed by Mr. Fullerton, but without any change to them in the end.) It can be seen there that most of the new flat roof will respect the height limit in the new By-law, at 7.20 m. Only a smaller elevated portion requires a variance to a height of 8.2 m. This would be on the second floor to the south and west. It would provide for a bedroom space and a stair for access. The size of the space is shown on Drawing A-6. It does not extend to the rear. In Mr. Goldberg's view, it is a clever design with all of its height presentation to the street.

Note on Lot Coverage

Variances 1 and 6 seek a lot coverage variance of 36.9%, versus 35% as permitted. The front porch has been added to the FSI measurement, but it also adds to the required lot coverage. This is the result of a foundation wall beneath it. There is no massing above the porch floor, but nonetheless it contributes 1.9% to the lot coverage calculation. This is a highly technical addition, one that Mr. Goldberg termed “without planning meaning.”

Mr. Goldberg summed up his comments by stressing that this is a conventional design and presentation, with a one-car driveway and garage, with no landscape, length, side yard setback or rear yard setback variances, in fact some generous exceedances. He had not conducted a shadow study, as the only variance is for a slight height increase at the south portion of the structure, Shadowing would not really occur to the north on No. 107, but only on the roof of the subject property. The length is not exceeded so no additional shadow would occur. It is virtually an as-of-right footprint, and thus the only incremental shadow would be from an as-of-right rebuild.

The Four Tests

Mr. Goldberg then addressed the four tests which the TLAB must find satisfied for each of the variances if they are to be approved.

The Official Plan

The proposal must be found to maintain the intent and purpose of the Official Plan. His conclusion is that individually and cumulatively, the variances requested meet this test.

Respecting the “Neighbourhoods” designation, he pointed to section 2.3.1, the Healthy Neighbourhoods discussion, as supporting his choice of a wider study area than the immediate streets. Neighbourhoods are not merely homes, but include other amenities. There is no special enclave here, as with Wychwood Park or other such segregated communities. The OP encourages new development that permits neighbourhoods to be stable, but not static. He emphasized that what makes up a neighbourhood includes what is planned and approved to be there. His photos (Ex. 3) illustrate the sorts of development that have been approved. Once built, it becomes part of the planned neighbourhood context, and does not contravene the OP.

He also addressed the neighbours’ claim that a recent Council amendment to the OP, OPA 320, should be considered in this appeal as adding to the policies the qualifier of “prevailing” building types in the area. However, OPA 320 has been appealed and is not yet in force. It should not be considered as applicable (see discussion below.)

Different styles can respect the existing physical character, as the OP requires. The test is not consistency with, but respect for what exists. As he expressed it, the OP requires “nothing unsuitable or novel, but merely to plug into a dynamic that has already started.”

The Built Form section, 3.1.2.1 of the Plan, states that new development will be located and organized to fit with its existing and/or planned context. The explanation in the sidebar to this section is important for this design: “The harmonious relationship of a new façade to its context can be achieved with contemporary expression provided that the existing context, proportions, forms, sizes and scale are fully respected and appropriate materials are used. A new façade need not be a simple replication of adjacent building facades.” A flat roof design with an integral garage is acceptable in this case.

Respecting section 4.1, Neighbourhoods, Mr. Goldberg again emphasized a misconception he found in the objectors' materials. The sidebar here, entitled "Prevailing Building Types", does not make a distinction between single family homes with integral garages; and single family homes without integral garages, so as to favour the latter. The "prevailing building type" is merely a single family home.

"Development Criteria in Neighbourhoods" introduces the policies for developments within the designation. It states:

"While communities experience constant social and demographic change, the general physical character of Toronto's residential *Neighbourhoods* endures. Physical changes to our established *Neighbourhoods* must be sensitive, gradual and generally "fit" the existing physical character. A key objective of this Plan is that new development respect and reinforce the general physical patterns in a *Neighbourhoods*" Mr. Goldberg stated that the OP is accepting of change, but directs that it should not be jarring. Contemporary designs are acceptable, if they "fit" within what is present or planned. In his opinion this proposal maintains the intent of the OP.

Specifically, with respect to the requirements of section 4.1.5 which says that development in established *Neighbourhoods* will respect and reinforce the existing physical character of the neighbourhood, including in particular:

c) heights, massing, scale and dwelling type of nearby residential properties;...

Mr. Goldberg's opinion is that the proposal virtually complies with this policy. It could almost be built as of right, except for the small height variance. It is not unusual in the neighbourhood.

Also, respecting e) setbacks of buildings from the street or streets; - the structure requires a front yard setback variance so as to meet the setbacks of its two neighbours.

And f) prevailing patterns of rear and side yard setbacks and landscaped open space; while the new building would be set back further than the neighbours, other new buildings in the area are similar, and the home meets the length requirement of the zoning by-laws. The by-law permits an even greater rear yard setback. He emphasizes that if the applicant had not requested a reduced front yard setback, and had built the fully permissible length of 16.75 m., the building would penetrate into the rear yard even more.

Mr. Goldberg referred to section 4.1.8, relied on by the neighbours in this matter, and disagreed with their views. It reads:

4.1.8 Zoning by-laws will contain numerical site standards for matters such as building type and height, density, lot sizes, lot depths, lot frontages, parking, building setbacks from lot lines, landscaped open space and any other performance standards to ensure that new development will be compatible with the physical character of established residential *Neighbourhoods*.

He stressed that the existing approved by-laws implement the OP, so that once the zoning requirements are met or altered on appeal, they ensure that new development is consistent with the character of established residential neighbourhoods. If zoning rights are met or extended for a new development, the result is in fact deemed to be compatible by the OP.

He pointed to a long line of decisions interpreting the phrase "compatible with", as meaning "capable of coexisting in harmony with" the surrounding neighbourhood. It does not mean "the same as", or even "similar to". Differences can be tolerated.

The Zoning By-laws

The next test is whether the proposal maintains the intent and purpose of the zoning by-law(s).

Because there are so few variances and those requested are indeed minor in nature, his opinion is that this test is also met. He reiterated that once an approved proposal is built on a site, the structure will implement the OP, will not have an adverse impact, and will be a compatible built form in the context of the neighbourhood. The objectors must provide evidence of an adverse impact and that the proposal is incompatible, before it can be rejected as against the intent of the zoning by-laws.

Minor

There are two aspects to this determination, Mr. Goldberg testified. One is order of magnitude, and the other is adverse impact. His chart of variance approvals (Ex. 4) shows that the requested variances here are within the numeric range for acceptance.

Respecting adverse impact, he disagrees with Mr. Fullerton's diagram showing a blocked rear yard, as it is wrongly conceived. The existing by-laws would in fact permit an extended wall for this new home – there is no depth or length variance required. If no front yard setback variance were requested, the impact would be greater. (Variance 5).

The structure will be visible in the rear yard, but this does not mean that from a planning perspective, the massing is inappropriate. As the depth meets the zoning limitation it is compatible with the OP, as approved zoning by-laws are deemed to be compatible. This conclusion derives also from the wording of section 4.1.8 above, "...performance standards to ensure that new development will be compatible with the physical character of established residential *Neighbourhoods*."

Desirable for the appropriate development or use of the land, building or structure

Mr. Goldberg pointed out that section 45 of the Act **permits** an owner to apply for variances. Many of the Participants' comments appeared to advocate exact adherence to the established zoning standards. This is contrary to the Act's clear intent to allow for proper deviation from these standards. This permits reinvestment in an older area, with zoning standards as a base for the reconsideration of expansions. The standards, in his opinion, especially the FSI limits, are a development control mechanism. If a higher figure is sought, the Act requires that there be a public process – circulation to City Departments, and public hearings. It is accepted City protocol that if the Planning Department, for example, offers no comment or report on a variance application, it means that it has no objection to the application. Here, no department except Urban Forestry offered a comment (and this was just a request for its standard conditions.)

He was also critical of the objectors for using percentages to express how large a requested increase was over the by-law requirement. It is essentially meaningless, as one must consider the context – 100% or 150% over a by-law requirement might be appropriate in the context of a specific variance request, and might still meet the four tests.

If approved, he recommended that the decision be subject to only the site plan, Drawing A-1, Ex. 5, and elevations at A-8, A-9, A-10 and A-11. As well, the conditions requested by Urban Forestry should be imposed.

Mr. Fullerton conducted a fulsome cross examination of Mr. Goldberg. Mr. Goldberg firmly rejected the use of the term "geographic neighbourhood" to describe his study area, as this is a

reference from the already-rejected OPA 320, not yet in force. Mr. Fullerton then referred to a distinction made in the East York by-laws among four zones with differing density standards. Mr. Goldberg explained that any such division was just to provide a development control mechanism for the zones, creating as-of-right permissions, with the opportunity for a public process for seeking variances for proposals above the standards. A variance above the standard is not necessarily an undesirable thing. In his view, by-law figures are not fixed, and approvals above them have been granted by both the COA and appeal bodies for all neighbourhoods. The FSI figure is artificially low, he opined, as it is a development control tool, set with the understanding that it may be exceeded following study.

Mr. Fullerton focused on the size of Mr. Goldberg's study area, stating it was approximately 350 to 400 homes. Mr. Goldberg replied that he had included as many as 800 in the past; that it depends on what constitutes a "neighbourhood", which is the OP test. He considers his to be a good sample of the broader neighbourhood here. It is not useful to focus on the mere numbers in his Decision Analysis (Ex. 4) for approvals for FSI over those sought. The question is what the by-laws permit as-of-right. Once a variance is approved, it is deemed to comply with the OP policies. Addressing the integral garage here, as an example, it is required in the design because of the by-law forbidding parking except behind the front wall. This form of design is an accepted part of building expression in this part of the City.

Mr. Fullerton questioned each of the variances, stressing each design element. Mr. Goldberg's responses were the same as in his original testimony. He rejected the argument that large percentages of the decisions cited did not permit such variances. Percentages were not a valid way to evaluate planning decisions, he testified again. Asked if the integral garage increased the massing, he responded that it added space, but not mass. There would not be less mass without the integral garage. He rejected the suggestion that the better way to redevelop here would be to "top up" the existing structure (as other owners such as at 106 had done.) There is no OP or zoning requirement favouring one method of redevelopment over another. To merely top up would not better integrate the new with the immediate neighbourhood.

Although this would be the first flat roof in the immediate area, it requires a height increase for a very small area only. Mr. Fullerton raised a privacy issue with the north-facing balcony – however, Mr. Goldberg responded, the proposed setback there would be double the permitted (1.8 m. versus 0.9 m.) The reduced side yard setback to the south, eliminating the present driveway space, did not require a variance. He rejected what he described as Mr. Fullerton's (and other objectors') personal judgement on what would be detrimental to the area. There would be no adverse impacts by this change – the by-laws are the benchmark for assessing incremental increases over what would otherwise be permitted as of right. They are mostly met here. He rejected the statement that in general, a rebuild should meet the zoning by-law standards.

Mr. Goldberg pointed out to Mr. Fullerton that his home, as well as the existing home on the subject property, greatly underutilize the potential available under the existing zoning standards. They could be much larger as of right. There was no public interest argument against these small increases.

Mr. Goldberg rejected the argument from several objectors that there was no real "need" for such a large house to accommodate a modern family. There is no test of need at all, he stated. Applications must be evaluated on the planning merits alone.

Mr. Robert Brown registered with TLAB as an expert planning witness on behalf of Mr. Fullerton and the other objectors. Mr. Alati challenged this, stating that Mr. Brown had no formal planning degrees or memberships, nor did he have equivalent working experience (as was accepted in

some OMB cases in the past.) He was a member and Chair of the COA Toronto and East York panel for 9 years, but was an adjudicator there, not a planner. He argued that Mr. Brown was entitled to provide lay evidence on the planning merits, but not opinion evidence as qualified planners are entitled to do. Mr. Fullerton clarified that Mr. Brown had been engaged only “to give evidence on the minor variances as they relate to the zoning by-laws”.

I ruled that Mr. Brown was not yet a qualified professional planner, and thus was not entitled to provide expert opinion evidence, although he has registered to obtain the necessary designation based on his experience. The Chair of the TLAB had ruled, in a similar manner a few weeks before this hearing.

Mr. Brown outlined his familiarity with this area, the relevant planning documents, and his choice of study area. It is similar to Mr. Goldberg’s but slightly larger, and he adjusted his data analysis to match the smaller area. He disagreed respecting the application of OPA 320; he did consider it in his analysis as it “affirmed” the policy direction of Council when it was adopted. He therefore considered the “prevailing character of the neighbourhood” in his analysis, as well as the addition of “prevailing” to section 4.1 5 e). This proposal does not meet the s. 45 test of the intent of the OP, as the prevailing character of the neighbourhood is not respected or reinforced.

His view of the divisions with different densities in the East York By-law, as outlined by Mr. Fullerton, was that the FSI limits of 0.5, 0.6, and .75, etc, times the area of the lots were intended to clearly differentiate neighbourhoods, in East York. Here the limit is only 0.45, and it should be respected, as it was carried forward into the new By-law in 2013. Homes in this immediate area should not be granted a higher density.

Mr. Brown admitted that in his lay opinion, the variance for lot coverage (36.9 % versus 35 %) would not make a material difference. He noted that there were no side yard setbacks requested, and he believes that the front yard setback is appropriate so that the home maintains the street wall with its neighbours. However, the height of 8.2 m. does not meet the built form character of those abutting, or others on Binswood or Roblin. He testified that the “skeleton” of the structure, including as it does the garage, represents one that is significantly out of character within its block. The only exception is 112 Roblin, a recent rebuild. This proposal would present itself to the street as “overwhelming”, being about double the size of the existing home. Therefore the proposal fails the test of “desirable for the appropriate development of ...the land” in section 45 as well.

He introduced a “Clustered GFA Chart” (Exhibit 8), from which he concluded that the proposed would be in a cluster of GFA at less than 5% of those in his study area, and thus is too great a number. A home of 150 to 175 sq. m. should be sufficient, in his view, in which to raise a family, even with a slight increase in FSI. While change is to be expected, it is a question of the appropriate degree of change. He stated that it is too much house for the property, “well beyond the pale”, and that the variances were not merely technical ones if viewed from across the street.

In cross examination Mr. Alati referred to the fact that no side yard or rear yard variances are required for the design, and thus he questioned any objections to the massing or the FSI. Mr. Brown still expressed concern about Mr. Fullerton’s view from his backyard of the “solid wall” of the new home, and Mr. Leblanc’s loss of the driveway next to his home at 103. These would cause concern, Mr. Brown maintained, even though the Planning Department had not objected to the proposal. He acknowledged that if a peaked roof were chosen, the home could be much higher as of right.

Mr. Alati asked if Mr. Brown had any pictorial evidence to provide a qualitative analysis to support the figures given in his Chart (Ex. 8). He replied that there would be another spread sheet behind this one to back it up. He believes that consulting Mr. Goldberg's pictures will lead to the conclusion that the newer constructions stand out and overwhelm abutting properties. Mr. Fullerton later confirmed that his own photos provide graphic evidence that enables a quantitative evaluation. Mr. Alati raised 78 Binswood, approved at 0.76 FSI and recently constructed. Mr. Brown concluded that it was large compared to the prevailing built form. The few examples of larger FSI measurements were anomalies, he testified, saying that a modern family could enjoy a 1600-1700 sq. ft. home. The proposed would be 2690 sq. ft.

Participants

Mr. Leo Leblanc resides next door to the south, at 103 Binswood. His main concern is viewing the garage wall next door, and the resultant lack of light. Presently a driveway separates the two lots. He prefers a "normal size" of structure, like the two built across the street.

Ms. Shelly Oleksuk lives at number 106. She has rebuilt her home but respected the existing by-law requirements. She might favour some increases, but only reasonable ones. In her opinion the proposal cannot coexist in harmony with the neighbourhood; it is too large for this. She strongly disagrees that it represents a modest reconstruction.

Michelle Dawn James resides at number 91 Binswood. She knows that area well, and considers that while 14 of the 77 approvals in Mr. Goldberg's chart might be increases, the vast majority have not been above the by-laws. The two blocks surrounding this property are unique, as they are almost all the smaller one-storey style. There is a community feel to the physical neighbourhood, breached to a significant degree by the 2016 rebuild at 38 Roblin behind her. This affects neighbours' views and light, even though she acknowledges that there is no right to either. She agrees that reinvestment in the neighbourhood is at early stages, and thinks that the 14 increases should be the only ones approved. A one- and one-half storey suffices for a five-person family.

Mr. Donald Kawasaki owns 106 Binswood, across the street from the subject. He has reconstructed his home by topping it up. While he does not oppose modernization, the neighbourhood for him is comprised of only these few blocks. He too thinks that one should not exceed existing by-law standards. He wishes to retain driveways separating the homes nearby, as they contribute to privacy and to the neighbourhood's charm. The proposal would eliminate the driveway on the south of the lot. Evolution is acceptable, but variances that differ from this pattern ought not to be approved.

Mr. Brendan O'Leary at number 104 agrees with his sentiments.

Mr. Mario Misasi lives at no. 101 Binswood. He testified that he is not directly affected, but he believes that both compatibility and quality of life are subjective tests. This much larger home will set a precedent. One should not have an extra 1000 square feet of building looming over nearby gardens.

Mr. Alati submitted many OMB cases on various issues raised by this application. I will not mention all, but they support some of the matters he raised. Critical among these are those that stand for the proposition that the FSI permitted in zoning by-laws is kept to an artificially low number as a planning tool for assessing proposed development. In Ferguson v. Toronto (City) 2016 CarswellOnt 12729, the applicant had sought an FSI of 0.599 % while the by-law permitted only 0.45, as in this matter. The panel pointed out that the intent of the new By-law of 2013 was to ensure that planning officials have an opportunity to review significant development

proposals. It goes on: “One of the most important tools available to planning officials, in this regard, is what often amounts to an artificially low permitted FSI.” (para. 21). The thought is that the by-law’s standard could be reasonably increased following a planning review, and not strictly adhered to. There are similar statements in other cases. Reinforcing this view are Chegini v. Toronto 2017 CarswellOnt 9939, para. 16, from April of 2017, and Al Qshat v. Toronto (City) 2017 CarswellOnt 6535, 93 O.M.B.R. 286, at para. 39.

Respecting impact, in Re Kauffman, 2008 CarswellOnt 3037, the Board found no professional evidence on the perceived negative impacts raised by either the City’s planning witness or the neighbours. This was a similar proposal to the subject, made in 2008, in an area of dwellings constructed about the same time as 105 Binswood. The neighbours termed the proposal for a 0.68 FSI and 38% coverage (where 0.60 and 35% were required), “not compatible...overwhelming...too big for the lot...causing shadow, loss of view and privacy...overbuilt, undesirable precedent...excessive footprint and massing.” The Board approved it, finding that change is inevitable. The impact was acceptable, and a reasonable balance was provided by the requested variances.

In Mr. Alati’s final submissions, no negative impact has been proven here, and this desirable neighbourhood would not be destabilized by this rebuild. There are or will be similar homes nearby. In Chowdhury v. Toronto (City), 2016 CarswellOnt 10383, a 2016 case considering 29 Machockie Rd. one street to the west, (also in the first block below O’Connor as is the subject), the OMB approved an FSI of 0.752, a coverage of 37%, and a height of 8.27 m. The OP does not require a duplicate structure to the present when a replacement is built.

On the subject of the admissibility of OPA 320, Mr. Alati submitted the recent OMB case of Nema v. Toronto (City) 2017 CarswellOnt 12310. Here the Board stated: “The Board also notes that while the Board had before it OPA 320, it is under appeal and not in force. Accordingly the Board gives it no weight.” (para. 65, p. 10).

Mr. Fullerton emphasized in summation that the Official Plan’s early sections required that the Plan be read as a whole, so that a part cannot be selected without considering others. Since section 4.8 of the OP required consideration of the zoning site standards, he is of the opinion that the proposal is “way too much for this area,” when the existing homes are only about 1200 – 1300 sq. ft. He said that a home with an FSI of 0.55 behind (he did not say where) had a cantilevered roof, and a design that took the neighbourhood into consideration. He believes that the COA got it right in refusing this application, as the by-law limit of 0.45 FSI should not be exceeded. He thinks that the larger homes nearby should not be present, as they do not comply with the by-law limits, and their impact is dramatic.

ANALYSIS, FINDINGS, REASONS

The TLAB has closely considered the opinion evidence of the expert planning witness, as well as that of Mr. Brown and the neighbours. It accepts Mr. Goldberg’s conclusion that the four tests under s. 45(1) of the Act are met for the requested variances.

In resolving this matter, it is critical to appreciate Mr. Goldberg’s oft-repeated statement about the purpose of zoning by-laws, and of variances from these standards. The question, as Mr. Alati expressed it, is not whether one could build a nice home that is acceptable on this site, but rather, whether the proposed home meets the four tests in the Act. For the reasons given below, I find that this proposal meets these tests.

Respecting the test of “minor”, the variances must be found to be minor in measurement as well as in impact for them to be approved. Numerically and practically these variances are minor, even the seemingly large FSI variance of 0.70 and 0.72 times the lot area, versus the By-law requirements of 0.45. There have been approvals on Binswood itself of up to 0.88, 0.672, 0.76 and 0.73 times the lot area. Mr. Goldberg’s uncontradicted professional opinion is that this proposal is well within the range of approvals for a 17-year period. Therefore I find these variances to meet the numeric test of “minor”. It is more difficult to conclude that they will not have an adverse impact, in that the neighbours have testified to the opposite conclusion. Any change to this once-monolithic few blocks will initially seem to have an impact. However, a structure that meets almost all of the zoning restrictions would not in my view unduly impact the neighbours from a planning perspective.

The City of Toronto departments made no comments after the application was circulated (except Urban Forestry for their usual conditions.) While this fact may indicate no objections, it is not definitive on this point.

On the test of maintaining the general intent and purpose of the Official Plan and the zoning by-laws, the FSI variance appears large from the figure sought. However, when considered in the context of the other variances, and within the neighbourhood, the proposed home is not excessive. While subjectively the neighbours believe the structure will be large, objectively it will not. Numerical deviations from the size of some of the surrounding properties might seem large when seen on a chart such as Mr. Brown’s (Ex. 8.) The test is rather whether the proposal is appropriate in the neighbourhood built context. 78 Binswood, for example, was granted an FSI of about 0.76, and was not appealed (Ex. 4, photo at p. 3 of Ex. 3). There is no variance for side yard or rear yard setbacks in the present application, and these are usually an objective sign of a large build. In fact there would be an improvement of the side yard setback next to Mr. Fullerton’s home of 1.2 m. and 1.8 m. at the rear, versus the existing setback of 0.44 m.

The home would be 16.75 m. deep, meeting the requirements of both the East York By-law 6752 and the new By-law 569-2013. An integral garage is permitted as of right. The height variance is for a small portion of the roof only, providing no unacceptable increase in shadowing of neighbours’ properties.

I think that it is telling that in one communication with the owner’s representative prior to the COA hearing, Mr. Fullerton had said that the “number one issue” was the length of the structure. If this issue could be resolved, he said, the neighbours would not attend the COA hearing and oppose the other variances (e-mail to Saied Mahboubi, June 24, 2017, filed at the TLAB by Mr. Alati on Sept. 7, 2017.) This seems to indicate that, despite the many statements of concern about the proposal, the some neighbours are may not be completely in opposition to it, nor concerned about negative impact.

It is accepted law that there is no right to an unobstructed view through backyards, or to be free from shadowing, or a claim that privacy should be paramount where there might be overlook. The case of Re Randhawa, 2007 CarswellOnt 5335, 57 O.M.B.R. 203, concludes: “6. The Appellants’ concerns relate to the impact the proposed gazebo will have on the view from their properties. The planner explained that the proposal will not have any adverse impact and represents good planning principles. In his opinion, right to a view is not a legitimate impact. He also explained that shadow would be cast on the subject property and not that of the neighbours. 7. The Board agrees with the submission of Town counsel that there is no right to a view.” It dismissed the neighbours’ appeals.

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This home will fit within the existing and planned context, which, in Mr. Goldberg's uncontradicted testimony, equates to what is permitted as of right. This is a single detached structure, as permitted.

It was suggested by several neighbours that the existing by-laws should be sacrosanct, and never exceeded. The TLAB cannot agree. Section 45 of the Act allows applications for minor variances to be made for measurements above the zoning by-law requirements. Neighbours should accept that they have the right to be heard and considered on the application, as they share this right. Otherwise, the possibility afforded a landowner in section 45 has no meaning.

In the end, Mr. Brown resiled somewhat from his opinion that 112 Roblin does not "fit in" and thus meet the neighbourhood policies. I agree with Mr. Alati's submission that since it and other larger structures have already been built, it is in fact part of the existing neighbourhood fabric. The neighbourhood for purposes of considering compliance with the OP tests is much larger than this one block. I cannot accept Mr. Brown's view that this area should be preserved for an "entry-level" size of home; such would require a policy direction from City Council. Therefore I think that the proposal satisfies the tests of maintaining the general intent and purpose of the official plan and zoning by-law.

I accept Mr. Goldberg's conclusion: zoning standards permit uses and building types which, once a building is approved, result in a project for that property alone that implements the official plan. It is compatible with others, as it can coexist in harmony. It is not the same as other designs nearby, but it does not create a nuisance or adverse impact. It results in a fitting land use planning solution.

This is important because of the argument by the neighbours that the proposal will greatly interfere with the views and space at the rear of their properties. From the site plan it can be seen that it is longer than the neighbours' homes, no doubt. However the design is not breaching the by-law standards for depth or length or rear yard setbacks. If it were placed so that it interfered with the front alignment of the homes, just so that it did not extend so far in the rear, I doubt that this would be more acceptable to the neighbours. In addition, Policy 3.1.2.1 a) of the OP refers to a consistent front yard setback as a goal.

I reject the neighbours' submission that that a recent Council amendment to the OP, OPA 320, must be adhered to in this appeal on the subject of the "prevailing" building types in the area. It is still technically under appeal. However, I reject Mr. Alati's counter argument that an OP amendment under appeal cannot even be received into evidence, while a zoning by-law under appeal must be considered. His reason is that the Act provides that if a zoning by-law is subsequently upheld on appeal, it is deemed to have come into force when it was first enacted by Council. There is no such provision for amendments to the OP. Since OPA 320 is still under appeal, it can only be considered. It is not irrelevant; it just cannot be determinative of issues in the appeal.

Nevertheless, I consider that the neighbours have not proven that the test of "prevailing" should apply here. Mr. Goldberg's photos alone indicate that there are exceptions to the building form that the neighbours argue is prevailing in this neighbourhood. The proposal is for a different and newer architectural form, but the OP provides for such changes so long as they are appropriate in the neighbourhood built context.

The fourth test in subsection 45(1) is also met. The development is desirable for the appropriate development or use of the land. It will be a modern interpretation of a permitted structure, to be sure, but one that meets the test of "fit" for this expanding neighbourhood. I

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conclude that even if the neighbours have serious objections this does not mean that they have a valid land use planning concern. A new proposal, well within the expression of the standards in other approvals, will also be deemed to comply with the Plan.

This panel likewise finds that the development, being compatible with the City's Official Plan and Zoning, properly addresses matters of provincial interest as set out in section 2 of the Act, and that the variances are consistent with provincial policy statements and conform with provincial plans (s. 3 of the Act). It therefore is consistent with the 2014 Provincial Policy Statement (and conforms to the Growth Plan for the Greater Golden Horseshoe).

A replacement single detached dwelling on the subject property, as proposed, is a desirable contribution, with reasonable and minor variations to both by-laws.

DECISION AND ORDER

The TLAB orders that:

1. The appeal is allowed and the variances to the East York By-law No. 6752 listed above as numbers 4 to 6, are authorized and approved.
2. The variances to Zoning By-law No. 569-2013 listed above as 1 through 3, are authorized, contingent upon the relevant provisions of this By-law coming into force and effect.
3. The new two-storey detached dwelling shall be constructed substantially in accordance with the Plans filed as Exhibit 5, specifically, those shown as Drawings A-1 and the elevations identified as A-8, A-9, A-10 and A-11, attached hereto and forming part of this order. Any other variances that may appear on these plans that are not listed in this decision are not approved.

The approval in paragraphs 1 to 3 above, are subject to the following conditions:

4. Submission of complete application for permit to injure or remove privately owned trees under Municipal Chapter 813 Article III, Private trees.
5. Submission of complete application for permit to injure or remove City owned trees under Municipal Chapter 813 Article II, Street trees.



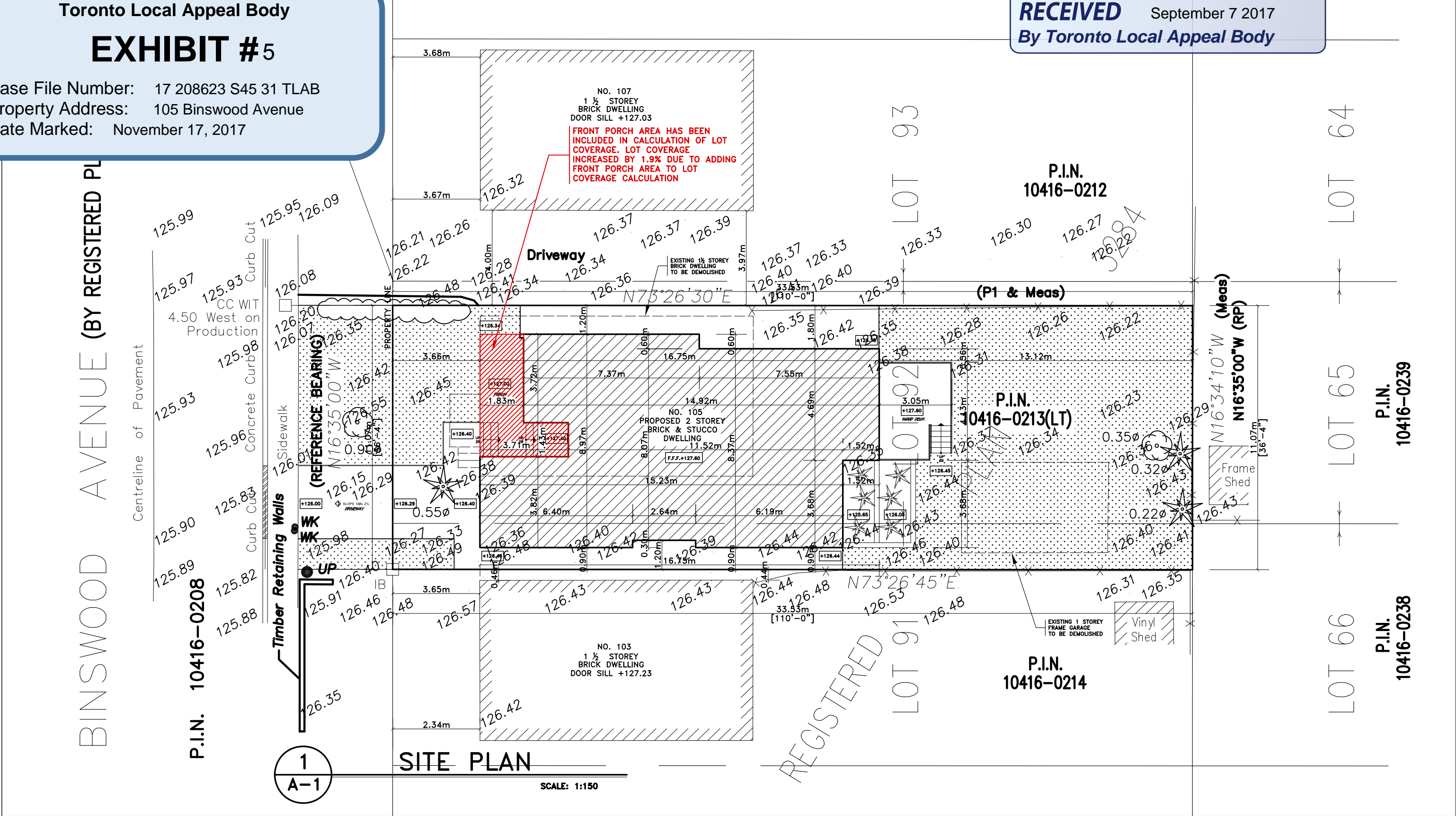
G. Burton

Panel Chair, Toronto Local Appeal Body

EXHIBIT #5

Case File Number: 17 208623 S45 31 TLAB
Property Address: 105 Binswood Avenue
Date Marked: November 17, 2017

RECEIVED September 7 2017
By Toronto Local Appeal Body



GREEN DOT ARCHITECTS INC.
1670 BAYVIEW AVENUE, SUITE 302, TORONTO, ON, M4G 3C2
Tel: 416.488.6070 Fax: 416.488.3351

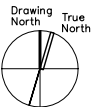
Project Name
105 BINSWOOD AVENUE
TORONTO, ON, M4C 3P1

Drawing Title		
SITE PLAN		
A	ISSUED FOR COMMITTEE OF ADJUSTMENT	MAR. 06, 2017
No.	Description	Date

CAD File No.
105 Binswood-17-04-11
Committee
Date
JANUARY 06, 2017

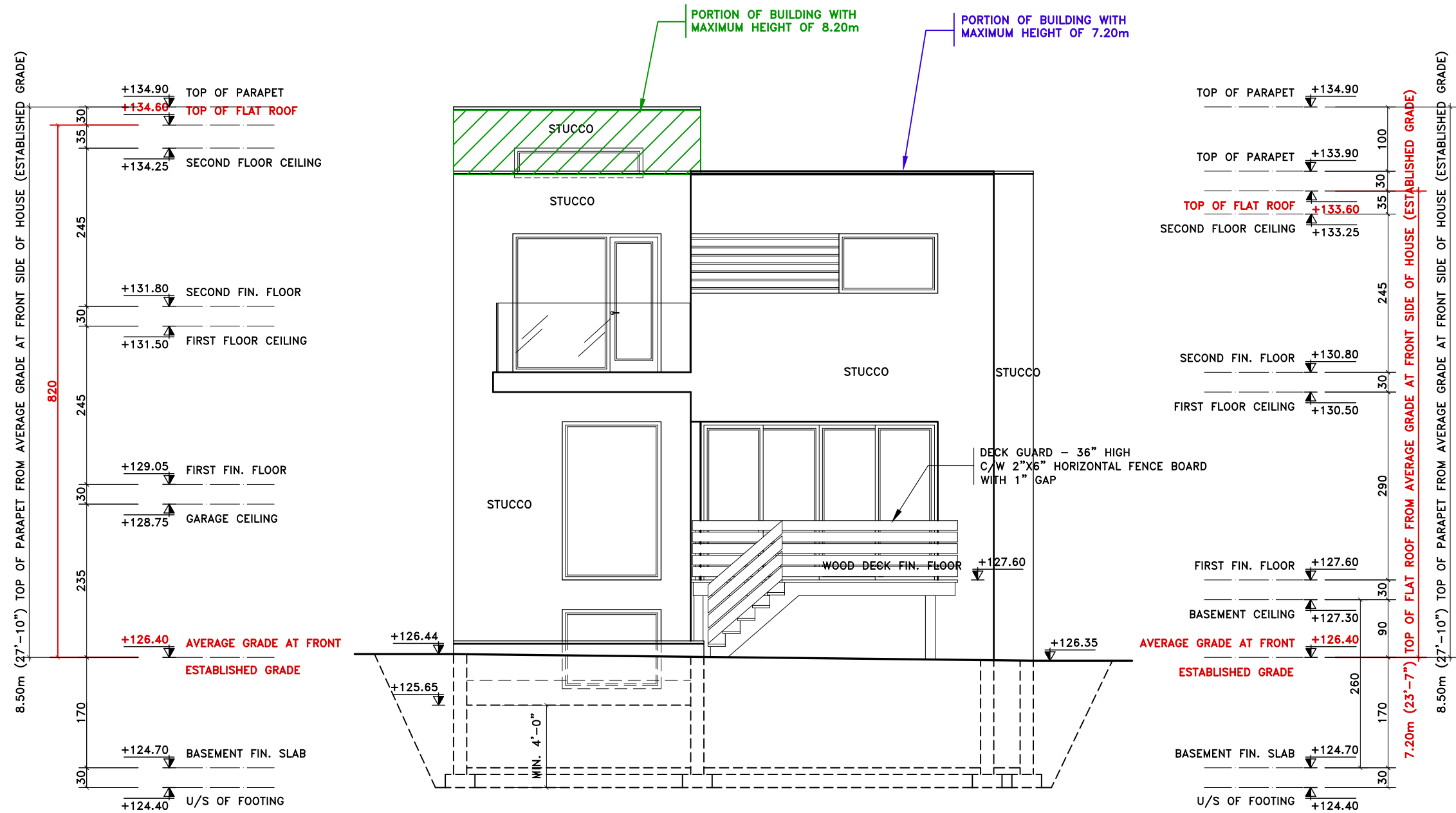
Scale
1:150
Project No.
17-102

A-1





17-102



1
A-9

EAST ELEVATION

SCALE: 1:75

GREEN DOT ARCHITECTS INC.

1670 BAYVIEW AVENUE, SUITE 302, TORONTO, ON, M4G 3C2
Tel: 416.488.6070 Fax: 416.488.3351

Project Name

105 BINSWOOD AVENUE
TORONTO, ON, M4C 3P1

Drawing Title

EAST ELEVATION

CAD File No.

105 Binswood-17-04-11
Committee

Scale

1: 75

A-9

Date

JANUARY 06, 2017

Project No.

17-102

A

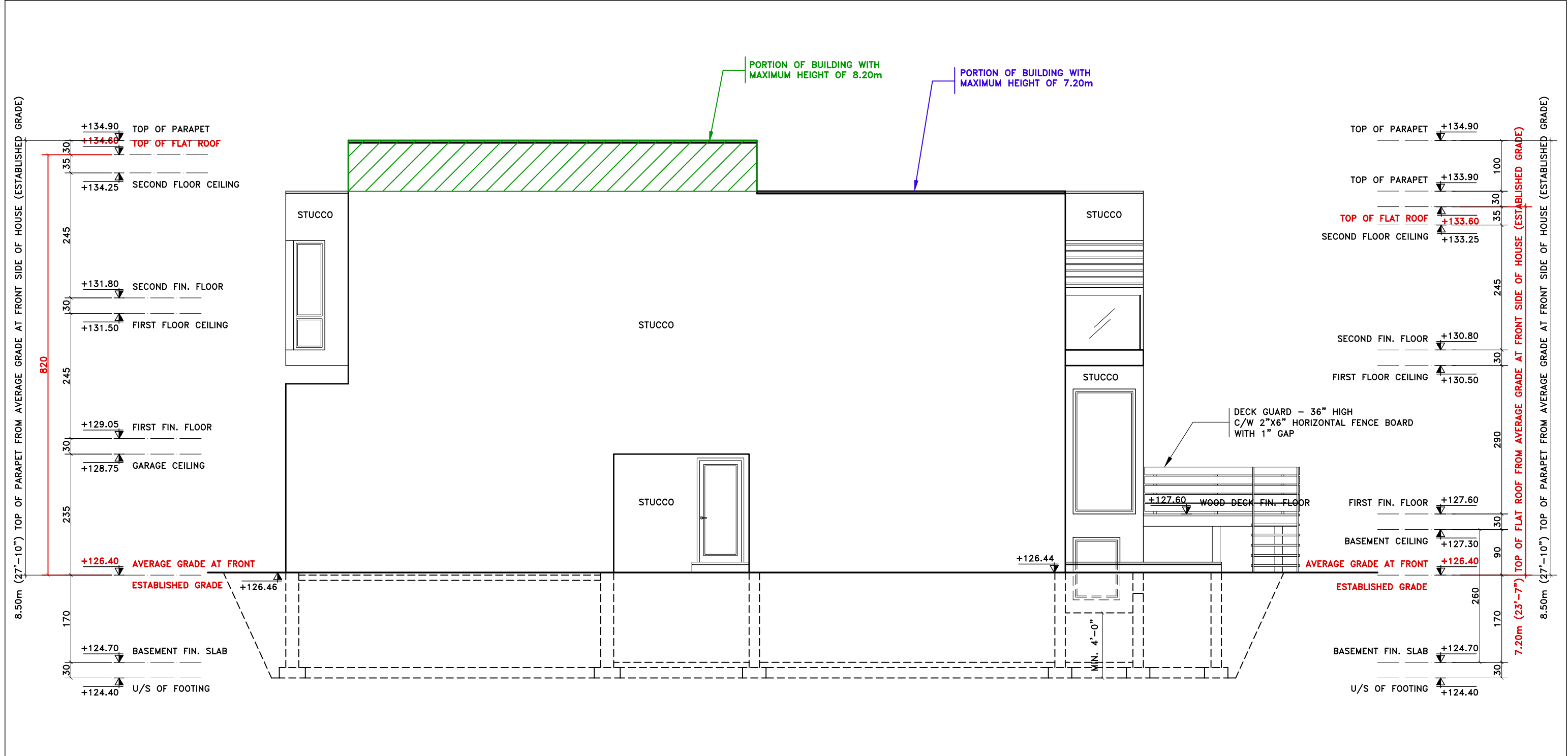
ISSUED FOR COMMITTEE OF ADJUSTMENT

MAR. 06, 2017

No.

Description

Date



1 SOUTH ELEVATION
A-10
SCALE: 1:75

GREEN DOT ARCHITECTS INC.
1670 BAYVIEW AVENUE, SUITE 302, TORONTO, ON, M4G 3C2
Tel: 416.488.6070 Fax: 416.488.3351

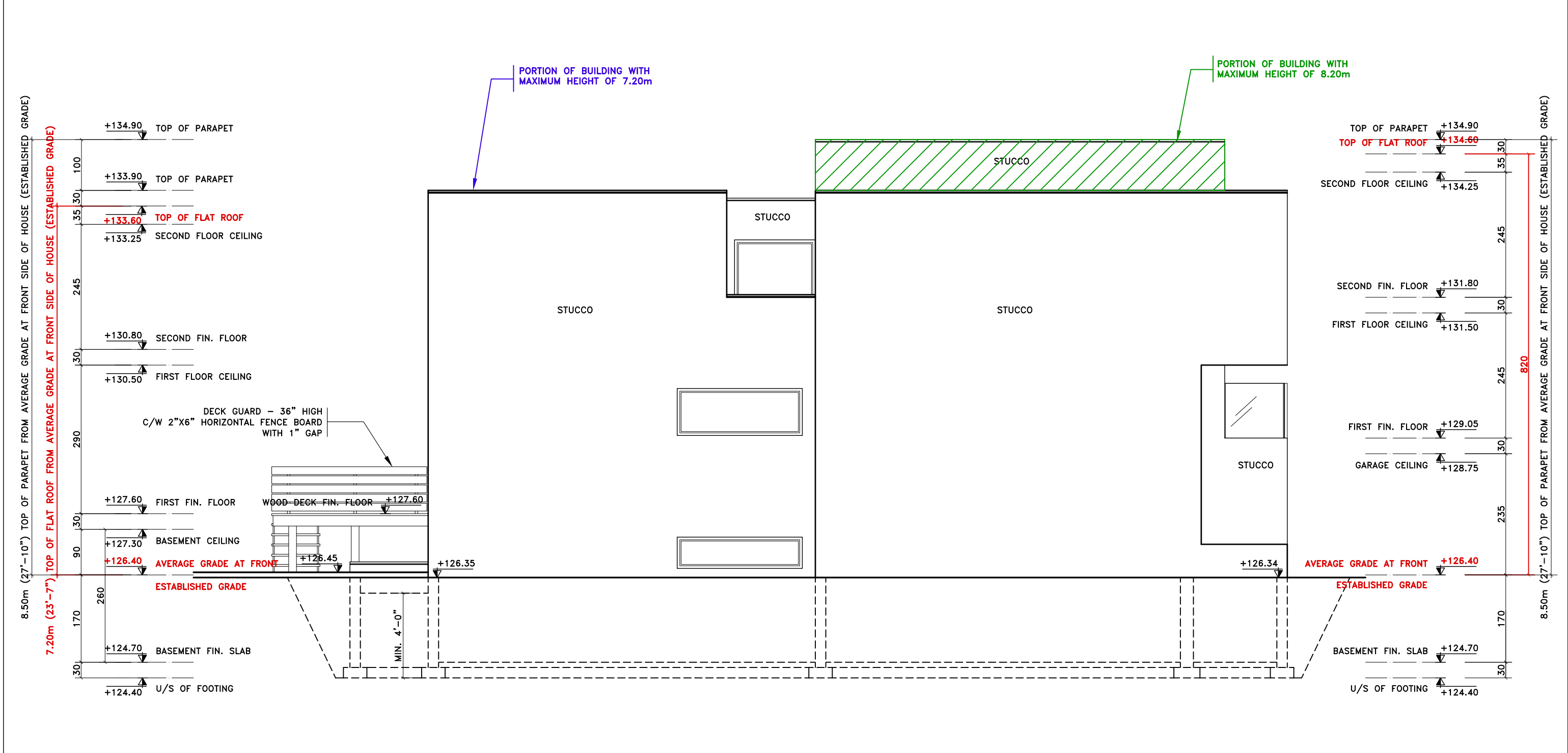
Project Name
105 BINSWOOD AVENUE
TORONTO, ON, M4C 3P1

Drawing Title		
SOUTH ELEVATION		
A	ISSUED FOR COMMITTEE OF ADJUSTMENT	MAR. 06, 2017
No.	Description	Date

CAD File No.
105 Binswood-17-04-11
Committee
Date
JANUARY 06, 2017

Scale
1: 75
Project No.
17-102

A-10



1 NORTH ELEVATION
A-11
SCALE: 1:75

GREEN DOT ARCHITECTS INC.

1670 BAYVIEW AVENUE, SUITE 302, TORONTO, ON, M4G 3C2
Tel: 416.488.6070 Fax: 416.488.3351

Project Name

105 BINSWOOD AVENUE
TORONTO, ON, M4C 3P1

Drawing Title

NORTH ELEVATION

CAD File No.

105 Binswood-17-04-11
Committee

Scale

1: 75

A-11

A

ISSUED FOR COMMITTEE OF ADJUSTMENT

MAR. 06, 2017

Date

JANUARY 06, 2017

Project No.

17-102

No.

Description

Date