

## DECISION AND ORDER

**Decision Issue Date**      Thursday, December 21, 2017

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

Appellant(s): SOUTH ARMOUR HEIGHTS RESIDENTS ASSOCIATION

Applicant: SHOSHI DOMB

Property Address/Description: 79 FELBRIGG AVE

Committee of Adjustment Case File Number: 17 158979 NNY 16 MV

TLAB Case File Number: 17 213453 S45 16 TLAB

**Hearing date:**      Thursday, December 07, 2017

**DECISION DELIVERED BY Laurie McPherson**

### INTRODUCTION

This is an appeal to the Toronto Local Appeal Body (the "TLAB") by the South Armour Heights Residents Association ("SAHRA") of the decision of the Committee of Adjustment ("Committee") for the City of Toronto ("City") to approve minor variances to construct a new third storey addition over the existing dwelling, a three-storey addition to the east portion of the dwelling in conjunction with two, three-storey additions to the rear of the existing dwelling at 79 Felbrigg Avenue ("the subject property").

The subject property is located on the south side of Felbrigg Avenue, between Yonge Street and Avenue Road, south of Wilson Avenue. The subject property is designated Neighbourhoods in the City of Toronto Official Plan ("Official Plan") and zoned RD (f9.0; a275) under Zoning By-law No. 569-2013 ("new City By-law") and R7 under North York Zoning Bylaw No. 7625 ("By-law 7625").

## **BACKGROUND**

The Committee approved the application on July 20, 2017 and SAHRA has appealed the decision. Other than the Applicant, there were no other Parties or Participants. SARHA was represented by Counsel who called a professional planner to provide evidence. In addition, SAHRA summoned a City of Toronto planner. The Applicant was not represented by Counsel and did not call any professional planning evidence. The variances sought by the Applicant are outlined below.

### **1. Chapter 10.20.40.10. (2), By-law No. 569-2013**

The maximum permitted height of all side exterior main walls facing a side lot line is 7.50m for 100% of the width of the wall.

The proposed east side exterior main wall facing a side lot line is 8.70m for 100.00% of the width of the wall.

### **2. Chapter 10.5.40.60. (7), By-law No. 569-2013**

Roof eaves may project a maximum of 0.90m provided that they are no closer than 0.30m to a lot line.

The proposed eaves project 0.25m and are 0.00m from the west lot line.

### **3. Chapter 10.20.40.20. (1), By-law No. 569-2013**

The maximum permitted building length is 17.00m.

The proposed building length is 17.82m.

### **4. Chapter 10.20.40.10. (2), By-law No. 569-2013**

The maximum permitted height of all side exterior main walls facing a side lot line is 7.50m for 100% of the width of the wall.

The proposed west side exterior main wall facing a side lot line is 8.70m for 100.00% of the width of the wall.

### **5. Chapter 10.10.40.70. (3), By-law No. 569-2013**

The minimum required side yard setback is 0.90m.

The proposed west side yard setback is 0.25m

### **6. Chapter 10.20.40.10. (3), By-law No. 569-2013**

The maximum number of storeys permitted is two (2).

The proposed number of storeys is three (3).

### **7. Section 6(24), By-law No. 7625**

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Unexcavated porches and decks shall be permitted to encroach in the rear yard setback but no closer to side lot line than the required side yard setback; in this case 1.20m.

The proposed deck is 0.95m from the west lot line.

**8. Section 14-B (5) b, By-law No. 7625**

The minimum required side yard setback is 1.20m.

The proposed west side yard setback is 0.25m.

**9. Section 14-B (8)b, By-law No. 7625**

The maximum number of storeys permitted is two (2).

The proposed number of storeys is three (3).

**10. Section 14-B (9) b, By-law No. 7625**

The maximum permitted building length is 15.30m.

The proposed building length is 17.82m

## **MATTERS IN ISSUE**

The key issue in this proceeding is whether the variances for three storeys (Variances 6 and 9) meet the tests set out in Section 45(1) of the Planning Act. Despite this focus, all variances are required to be addressed as the TLAB consideration is *de novo*.

## **JURISDICTION**

### **Provincial Policy – S. 3**

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the Growth Plan of the Greater Golden Horseshoe for the subject area ('Growth Plan').

### **Minor Variance – S. 45(1)**

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- are desirable for the appropriate development or use of the land; and

- are minor.

## **EVIDENCE**

It was agreed at the beginning of the hearing that the Appellant (SAHRA) would present their case first as the Applicant did not intend to call any evidence and would instead be presenting the information provided to the Committee supplemented with additional information filed and replying to the Appellant's case. The TLAB heard from SARAH's professional land use planner, Mr. Terry Mills. Mr. Mills was qualified to provide expert evidence (Exhibit 2 –Expert Duty Form). Mr. Mills was retained by SAHRA on September 8, 2017 to provide evidence on this matter.

Mr. Mills outlined his Study Area which mirrors the boundaries of the RD (f9.0;a275) zoning designation. Lands abutting to the south are in the former City of Toronto and those lands are zoned differently with a minimum frontage of 7.5 m whereas the subject property is in an area with a minimum frontage is 9.0m. Using the visual evidence in Exhibit 5 he described the area. The residential block pattern includes straight and curved streets with a mature tree canopy. The lot patterns are generally rectangular with relatively uniform lot depths. The lot widths vary with the generally smaller frontages in the south and west of the study area (where the subject lands are located) and wider frontages to the north and east of the study area. Single detached dwellings prevail throughout the entire area. The original development of the area included single storey, 1.5 storey and 2-storey houses. A pattern of reinvestment is evident from the number of renovations, additions and replacement houses that have taken place. A trend had been towards integral garages with reverse-slope driveways however recent approvals have no negative slope.

Mr. Mills explained that the zoning standards have played a significant role in the ongoing improvement process for both additions and replacement housing particularly in regards to maximum lot coverage (35%) and maximum number of stories (2). The zoning standards have resulted in house forms that align with each other along the streetscape. The character of the area has become a mix of old and new and the zoning standards have ensured that new developments respect and reinforce the existing physical character of the area. Within the Study Area there is a relatively even split between original house forms (many with additions) and replacement houses. In the south and east of the Study Area, there is a higher proportion of original house forms with additions, while replacement houses are more prevalent in the north, west and centre of the Study Area. The subject lands are located in the southern portion where there are a higher proportion of original house forms.

The north side of Felbrigg includes bungalows, a two-storey addition to a bungalow and 6 replacement houses with integral garages (only 1 of which is at grade). The south side of the street has a consistent pattern of 2-storey built form houses including bungalows that have been "topped up" to 2-storey dwellings. A number of the dwellings have 2-storey rear additions, including the subject property. The subject property is located midway along the block.

Mr. Mills noted that of the 315 properties in his Study Area (in the same zone), there are only 2 houses that have 3-storeys and both are only partial third floors (including one on Felbrigg Avenue). Mr. Mills referred to the Official Plan sidebar included in Section 3.1.2 which states, "The existing context of any given area refers to what is there now. The planned context refers to what is intended in the future. In stable areas, such as Neighbourhoods and Apartment Neighbourhoods, the planned context typically reinforces the existing context .... In instances of apparent inconsistency between existing and planned contexts when interpreting the built form policies as they relate to height and density, the planned context will prevail".

Mr. Mills reviewed the Committee's database of 71 applications within the Study Area since 2009 and notes that there are only 7 references to 3-storeys. He explained using a diagram the difference between a "Tall House" (a term used by the Applicant) and the subject application. A tall house as used in this context generally refers to a house with 2 living levels above a garage. These are often deemed to be technically 3 storeys when in fact they are 2 storeys with a raised finished first floor height to account for the at-grade garage. The determination relates to whether the basement's height is half out of the ground. He notes that the proposed dwelling does not have any garage as a result of it being a renovation-addition as opposed to a new house.

In terms of the variance for side main wall height (from 7.5 m to 8.7 m), Mr. Mill's opinion is that maintaining the existing provision is critical to the dwelling's ability to respect and fit within the built form of its surrounding context. The dwelling is within a stable area of 10, 2-storey house forms whose scale and massing maintain the original characteristics of the original 2-storey house form and are part of the appearance of the streetscape. He opined that the main wall height standard is intended to ensure harmony with adjacent house forms.

Regarding the building length variance, the proposed development would demolish a single storey addition and erect a 3-storey rear addition resulting in a building length of 17.82 m. Mr. Mills notes that this will exceed the rear additions of the neighbours to the east and west by 3 metres and the majority of the houses on the south side of the block do not extend beyond to 15.3 m length in By-law 7625. He acknowledges that the neighbours are not in attendance and did not object to the variances.

The roof eaves variance is for a 0.0 m setback from the west lot line vs. the 0.3 m setback required. Mr. Mills is concerned that an eaves trough attached to the fascia would infringe of the adjacent property.

The proposed west side yard setback variance is for 0.25 m from the west lot line. Mr. Mill's review of the drawings leads him to conclude that the setback request appears to be based on the existing chimneybreast's projection and not the actual main wall. He indicates the By-law provides an exception for the chimney projection. If approved, the dwelling could be built horizontally to the 0.25 m setback and when combined with 3-storeys, would have a visual impact. Since there is no condition put forward that the development be substantially in accordance with the plans, he has a concern with the difference between the plans and the variance requested.

The final variance relates to the rear deck's side yard setback from the west lot line. Mr. Mills again notes that the affected neighbor is not objecting to the variances at the TLAB.

With respect to the provincial policy framework, he notes that there would be no concern under the Provincial Policy Statement or the Growth Plan for the Greater Golden Horseshoe, as the documents do not deal with increasing the size of houses.

With respect to the Official Plan, Mr. Mills addressed Sections 2.3.1 of the Healthy Neighbourhoods chapter. The text states, "A cornerstone policy is to ensure that new development in our neighbourhoods respects the existing physical character of the area, reinforcing the stability of the neighbourhood." Policy 2.3.1.1 states "Neighbourhoods are considered to be physically stable areas. Development within Neighbourhoods will be consistent with this objective and will respect and reinforce the existing physical character of buildings, streetscapes and open space patterns in these areas." In his opinion the project does not meet this intent.

With respect to built form, he referred to the sidebar in Section 3.1.2 of the Official Plan which, for stable areas such as Neighbourhoods, refers to the existing context being what is there now. In terms of exterior design, the sidebar states, "The exterior design of a façade is the form, scale, proportion, pattern and materials of building elements including its doors, roofs, windows and decorative elements, such as cornices and belt-course. 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".

In terms of development criteria in Neighbourhoods, Section 4.1 states:

"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 Neighbourhood".

Policy 4.1.5 states "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;
- d) prevailing building type(s);...
- f) prevailing patterns of rear and side yard setbacks and landscaped open space;
- g) continuation of special landscape or built-form features that contribute to the unique physical character of a neighbourhood;...

No changes will be made through rezoning, minor variance, consent or other public action that are out of keeping with the physical character of the neighbourhood".

In terms of nearby residential properties, his block analysis demonstrates that the on the south side of Felbrigg Avenue, the subject lands are located within a block of 2-storey houses.

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Mr. Mills referenced Section 5.6.13 of the Official Plan which directs that where an application for rezoning or minor variance is received in a Neighbourhood and where no numeric height or density limit is specified in the Plan, a determination will be made to whether such limits implement the Plan. When it is determined that they implement the Plan, such limits will be considered to be an important element and point of reference in the assessment of the application. The policy states “Any increase beyond these limits will require appropriate planning justification consistent with the policies of the Plan”.

In terms of the 4 tests, it is his opinion that the proposed development does not maintain the general intent of the Official Plan. As noted, a cornerstone of the Plan is to respect and reinforce the existing physical character of buildings and streetscapes as stated in Policy 2.3.1.1. In his view, the proposal’s exterior does not establish a harmonious relationship with its surrounding. He notes that an appropriate justification has not been provided for the height variance.

With respect to the intent and purpose of the zoning by-law, it is Mr. Mill’s opinion that the intent is to ensure a desirable built form throughout the neighbourhood. As noted, the main concern is the request for a variance from the maximum of two-storey limit found in both zoning by-laws. Additions to existing house forms and replacement houses throughout the neighbourhood have observed this requirement with few exceptions.

In Mr. Mills’ opinion, the 2 -storey height limit has worked effectively in the neighbourhood and should not be breached. The main wall height standards are critical for harmonious relationship between existing houses and replacement houses. He believes it would be undesirable to permit additional building length as the established development along this block segment has generally been within the building length provisions. The 0.0m eaves setback is not appropriate in his opinion as it could involve problems associated with the neighbours’ property. The proposed side yard setback provides too much latitude and doesn’t reflect the drawings. In his opinion, the reduced rear yard deck setback is undesirable as it would reduce landscaping. In summary, it is his opinion that the variances are not desirable for the appropriate development of the site.

With respect to the test for minor, it is Mr. Mills’ opinion the proposed application is not minor as it overrides a cornerstone standard in both by-laws that has been respected throughout the substantial improvements that have taken place in the neighbourhood.

In conclusion, it is his opinion that the proposal does not represent good planning and should be refused.

Adam Preswick is an assistant Planner with the City of Toronto and appeared under summons by the Appellant. Mr. Preswick works in the North York District and is responsible for reviewing minor variance applications. He was qualified to provide expert land use planning opinion evidence. Mr. Preswick was assigned to the 79 Felbrigg file and wrote the staff report to the Committee (Exhibit 6). He reviewed the variances and also undertook a site visit. The variance of most concern is the third storey variance. He noted that not all 3 -storey dwellings are the same, and explained

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that, for example, some are technical 3-storeys and some have the 3<sup>rd</sup> storey contained within the roofline. Mr. Preswick referred to the proposed plans (Exhibit 7). He pointed out that the proposal is for a three-storey house with a full third storey which can be seen from all sides. From the front elevation, the third storey windows are apparent and in his opinion, there has been no attempt to mitigate the appearance of the third storey. Mr. Preswick also noted that the third storey could be seen on all elevations. He is also concerned with the small west side yard setback.

He advised the TLAB that he did not outright object to the 3-storey proposal until he understood the local context and undertook a site visit. In his opinion, the character of the street is that of 2 -storey dwellings, as both contained and maintained in the zoning by-laws. This context is important when evaluating the variances as there are no full 3 -storey dwellings. In his report he discusses the Official Plan and references Section 4.1 that states that development in Neighbourhoods must be sensitive, gradual, and generally “fit” the existing character of the neighbourhood, including in particular: c) height, massing, scale and dwelling type of nearby residential properties”.

After reviewing the Official Plan, the local context and the intent of the Neighbourhoods designation, it is his opinion that the proposed third storey does not fit or maintain the existing physical character of the neighbourhood and therefore the report recommends that the proposal be refused. In his opinion, the proposed third storey contemplates a significant change in the character from the established neighbourhood which the Official Plan says should be avoided.

Mr. Domb represented the owner/Applicant. Mr. Domb did not call any witnesses or provide a Witness Statement. He disclosed a number of items which were marked as Exhibits. He provided some background regarding the owners who have lived in the existing house for 15 years. The owner obtained 9 letters of support for the variance application from the direct neighbours before the Committee hearing. Subsequent to the Committee hearing, the owner obtained 51 letters of support for the proposal (Exhibit 8). The households who signed the letters of support had been shown the plans. Mr. Domb contrasted this to the petition that SAHRA provided (Exhibit 11) which was signed by 81 individuals (as opposed to households) and sent by email and did not include the plans. The petition and covering letter focused on the 3-storey aspect of the proposal. The examples of other applications that did not proceed that were referenced in the covering letter were not comparable to the proposed development in Mr. Domb’s opinion.

With regard to the west side yard setback, Mr. Domb referenced the plans (Exhibit 7) and indicated that the intent was to continue the existing setback vertically and not build out to the 0.25 m setback line identified in the variance. He noted that the neighbours had no issue with the plans, and neither did the majority of the street. He indicated that, other than the letter from SAHRA, there was no other opposition at the Committee hearing. SAHRA was not in attendance at the Committee meeting.

At the Committee hearing, the Applicant made the case that the house had been specifically designed to fit in with the area, even though it has 3-storeys. Referencing the drawings, Mr. Domb noted the triangular frames and smaller windows which were design elements intended to make the house fit within the existing physical character of



the neighbourhood and the replacement homes that have been developed. Regarding the side main wall height, as shown in the side elevation, he stated that the side walls at 16 Haddington Avenue (to the north of Felbrigg Avenue) are higher at 8.97 m. He noted that while the south side of Felbrigg Avenue currently is characterized by 2 storey houses with certain features, the area around Felbrigg Avenue is more varied. It was his opinion that the area context cannot be defined so narrowly as to only include the houses on south side of the street. He opined that the fact that the Committee refused the other 3 -storey applications in the area but approved the subject application is indicative that this situation is different. He noted that the Committee came to the conclusion, despite the negative staff report, that the proposal satisfied the 4 tests based on the current design.

SAHRA indicated in the letter that accompanied the petition that their issue is not how the project looks but the precedent of a 3–storey dwelling which is not in character with the neighbourhood. There were no other comments or concerns regarding the other variances. Mr. Domb’s opinion is the character of the area is in flux and the Committee judges each individual case on its own merits. Approving this application does not mean that other applications for 3-storey dwellings would be approved. He opined that the number of letters of support is indicative that the application a good fit.

Mr. Domb referred to Exhibit 12 showing photographs of “tall houses.” These include newer 2-storey houses which are taller and more substantial than adjacent smaller 2-storey houses. In this context it was his opinion that the proposed development would fit well within the character of the area. He also referenced Exhibit 13 showing the other 3-storey houses in the area including 54 Felbrigg Avenue which has a partial 3<sup>rd</sup>-storey. Exhibit 14 contains photographs of “faux” third storeys which in his opinion are not much different than the proposal in terms of visual impact from the street. It is noted that Mr. Domb did not provide the addresses or locations of these examples for context and relevance.

## **ANALYSIS, FINDINGS, REASONS**

The TLAB has very carefully considered the evidence of the Appellants and the submissions of the Applicant. Overall, I accept the evidence of the two professional planners that the proposed variances fail to meet the four tests under s. 45(1) of the Act, specifically the proposed variance for the increase in the number of storeys from 2 to 3.

As noted, the Applicant did not present any evidence through witnesses but relied on the materials that were presented to the Committee of Adjustment, additional information submitted and cross examination of the Appellant’s witnesses to present the case. While information was presented by Mr. Domb, no witness statement was proffered and there was no opportunity to test the information presented. The TLAB heard submissions of Mr. Domb in closing argument that, in his opinion, the variances met the 4 tests, but there was no evidence called in this regard to assist the Panel or contradict the evidence of the 2 professional planners.

On this matter, Mr. Roberts submitted two OMB decisions relating to the issue of evidence. In the OMB decision dated May 7, 2015 (PL141467), the Board states “it is

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the Applicant's responsibility to call a case that puts before the Board the evidence necessary to enable the Board to make the findings required by the Act that would result in a decision of the Board to authorize the variances. There is no requirement on the City to call any witnesses and put any evidence before the Board." The Board, hearing no evidence that variances would maintain the general intent and purpose of the Official Plan stated that that "As such, the Board is unable to make a finding that the variances would maintain the general intent and purpose of the official plan". The Board made the same finding regarding the zoning by-laws and therefore was "unable to make a finding that the variances are either desirable for the appropriate use of the land, building or structure or that the variances are minor".

In the OMB decision dated July 21, 2016 (PL160097) the Board dismissed the appeal of the Applicant/Appellant because the Applicant's agent did not address the tests of s. 45(1) of the Planning Act. The decision states "While making this decision, the Board was mindful that although the agent was not a professional planner, or a solicitor, preparations for a hearing before the Ontario Municipal Board do anticipate that those preparations are cognizant of the tests of the Act, (if not expertly known and practiced by individuals representing the application and /or the appeal) and are brought forward in testimony and in their general representations".

While these two matters are distinguishable from the matter before the TLAB, I agree Mr. Robert's submission that that the onus is on the Applicant to provide evidence or testimony to support the proposed variances. In this case, the TLAB must rely on the evidence of the two witnesses called by the Appellant in order to make a finding whether the variances meet the four tests of the Act.

Both parties recognize that the key issue in this matter is the height in storeys. The TLAB recognizes, as emphasized by Mr. Domb, that an overall height increase is not proposed. The issue is whether permitting 3 storeys would maintain the intent of the Official Plan and zoning by-laws and meets the other tests.

With regard to the height issue, the TLAB prefers the evidence of the City's planner, Mr. Preswick, who appeared under summons. The Planning staff report recommended refusal of the application as the third storey variance was not in keeping with the established character of the neighbourhood and is contrary to the intent of the Official Plan. In particular, he references Section 4.1 which indicates that "physical changes to established Neighbourhoods must be sensitive, gradual, and generally "fit" the existing character of the neighbourhood, including in particular: c) height, massing, scale and dwelling type of nearby residential properties". He noted that the building has been designed to look like a 3 -storey building with windows at the third floor facing the street. He acknowledged that the issue has to be looked at in context and there may be cases where a third storey is appropriate and can meet the tests. However, based on his assessment of the area context, this proposal did not meet the intent of the Official Plan.

The TLAB accepts the uncontradicted planning opinions of both planners that granting a third storey would a significant change in character for this neighbourhood, which has a predominant two-storey single detached dwelling character. The issue isn't the absolute height of the proposed dwelling, which is acknowledged to be within the by-law permissions, but the change in the number of stories and how that is presented to the

street. The Official Plan states that no changes will be made to the zoning by-law through minor variance that are not in keeping with the character of the neighbourhood. No evidence was provided as to why, given the context of the subject property, a 3-storey would meet the intent of the Official Plan or the by-laws. As noted in Mr. Mills's evidence, of the 315 properties in his Study Area, only 2 houses have a third-storey, and these are partial storeys.

It was the evidence of both planners that the 2-storey height limit reflects the existing character of the neighbourhood. The TLAB agrees that no appropriate planning justification was provided that was consistent with the policies of the Plan to justify the extra storey.

The Panel recognizes that the Applicant made an effort to create the third storey to be within the overall height limit and to address the visual impact of the third storey through architectural design and window size. However, this does not provide the TLAB with any evidence to make a finding that the third storey variance and the other variances meet the 4 tests of the Planning Act. In addition, the Panel acknowledges that there are a number of neighbours, including the adjacent neighbours, who support the proposal, however such support, in itself, does not mean the proposal addresses the applicable policy regime or meets the statutory tests.

Without any evidence to the contrary, the TLAB accepts the evidence of the professional planners that the variance for the third storey does not meet the intent and purpose of the Official Plan and zoning by-laws and is not desirable for the appropriate development of the land and is not minor. The variances for the exterior main wall height are related to the plans for the third storey. With respect to the other variances, the TLAB is less concerned with the building length, roof eaves and deck encroachment variances although as noted, no evidence was provided to dispute the evidence of Mr. Mills in this regard. I also agree with Mr. Mills concern that the variance for side yard setback was not tied to the proposed building plans and therefore a horizontal as well as vertical addition could occur although this could be remedied with a condition if the Panel approved the variances.

I have not discussed all of the authorities submitted by Mr. Robert's as I see no need to so in light of my findings on the merits.

## **DECISION AND ORDER**

The TLAB orders that:

1. The appeal is allowed
2. The variances to By-law 569-2013 are not authorized
3. The variances to By-law 7625 are not authorized.

X 

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L. McPherson

Panel Chair, Toronto Local Appeal Body