

DECISION AND ORDER

Decision Issue Date Thursday, January 04, 2018

PROCEEDING COMMENCED UNDER subsection 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant(s): EDITH EYLOTT, MALCOLM EYLOTT

Applicant: ANTHONY GREENBERG

Property Address/Description: 64 AVONDALE AVE

Committee of Adjustment Case File Number: 17 139076 NNY 23 MV

TLAB Case File Number: **17 212585 S45 23 TLAB**

Hearing date: Thursday, December 21, 2017

DECISION DELIVERED BY T. Yao

INTRODUCTION

The Eylotts' plan to demolish their mid-1950s home and, in their lawyer, Mr. Laskin's words, "replace it with one in which they will grow old, and which will reflect their passion for environmental sustainability".

BACKGROUND

The proposed new house would require the following variances:

Table 1. Variances required under Zoning By-law No. 7625			
and forming part of this decision			
		Required	Proposed
1.	Maximum permitted lot coverage	30%	36.5%
2.	Maximum length of dwelling	15.3 m	19.5 m
3.	Maximum building height	8 m	11 m
4.	Maximum no. of stories	2	4
5.	Maximum permitted area for front balcony, i.e. porch	3.8 m ²	6.2 m ²
6.	Maximum permitted area second floor rear balcony	3.8 m ²	26 m ²
7.	Maximum permitted area third floor rear balcony	3.8 m ²	14.1 m ²
8.	Maximum permitted area roof top balcony	3.8 m ²	44.13 m ²
9.		Balconies must be located front and each of two sides	Balconies are located front, rear and roof top

Mr. Greenberg (the Eylotts' planner, who was qualified to give opinion evidence in land use planning), explained the context as follows:

The segment of Avondale Avenue on which the property is located consists of a mix of built forms. The north side of the street consists of single-detached homes (a mix of heights generally under 9.5 metres). The "Flo" condominiums (28 Avondale Avenue) located at Bales Avenue, is a multi-residential building 40 metres in height. On the south side of street is "The Carriage Homes of Avondale," a multi-building townhome complex approximately 12.5 metres in height.

The north-south streets to the east are Yonge, Bales, and Tradewind Ave; No. 64 is midblock between Bales and Tradewind; Avondale is four streets south of Sheppard and thus the Eylotts are within easy walking distance of the Sheppard subway station.

**Decision of Toronto Local Appeal Body Panel Member: T. Yao
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The policy context is complex. Unlike most of the applications that generally come before this tribunal, the site is not designated “Neighbourhood”, but “Mixed Use D” under the City’s Official Plan and the North York Secondary Plan. Secondary plans are detailed policies for a small area of the City, in this case the spine of Yonge Street from Cummer Avenue south to the 401, extending about one to two blocks on either side of Yonge St.

The Provincial Policy Statement states that “settlement areas shall be the focus of growth and development” (1.1.3.1) and that “planning authorities shall identify appropriate locations and promote opportunities for intensification and redevelopment...” (1.1.3.3)¹. North York Centre is designated as an “Urban Growth Area” in the Growth Plan and has specific population and job targets for the year 2031, which it has already achieved.² Toronto’s Official Plan designates the North York Secondary Plan area as one of four “Centres”, in which a “large resident population is envisaged’, with a full range of housing opportunities (2.2.2.2.e).³ “Mixed Use D” is “made up of a broad range of commercial, residential and institutional uses either in single or mixed use buildings” (4.5.1).⁴ The intention of the Secondary Plan is to provide a transition from the high density area along Yonge to the stable residential areas to either side of Yonge Street “to ensure the stability of the existing low density residential communities outside the North York Centre South boundary” (2.1.4.c).

North York Centre Secondary Plan

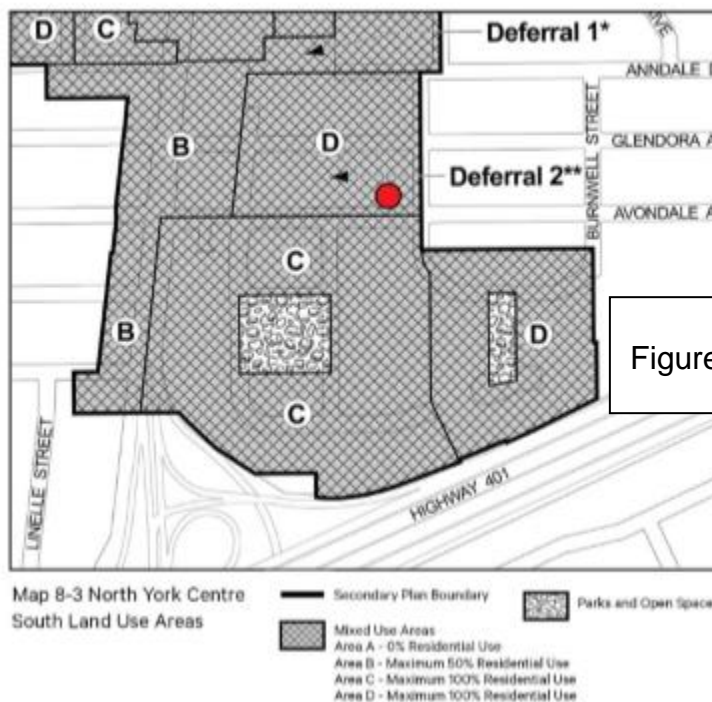


Figure 1 Mixed Use D Area

¹ Greenberg Witness Statement para 47
² Greenberg Witness Statement para 48
³ Greenberg Witness Statement para 51
⁴ Greenberg Witness Statement para 52

In the Secondary Plan map above, Yonge St is not marked, but is the north-south street just east of Linelle Street. The policy envisages that in Mixed Use zones, there will be a transition in both density and land use; Yonge Street enjoying more commercial and less residential and the transition areas the opposite.

The Secondary Plan envisages the highest heights and density along Yonge St., controlled by height limits. Mr. Greenberg prepared a map that illustrates this.

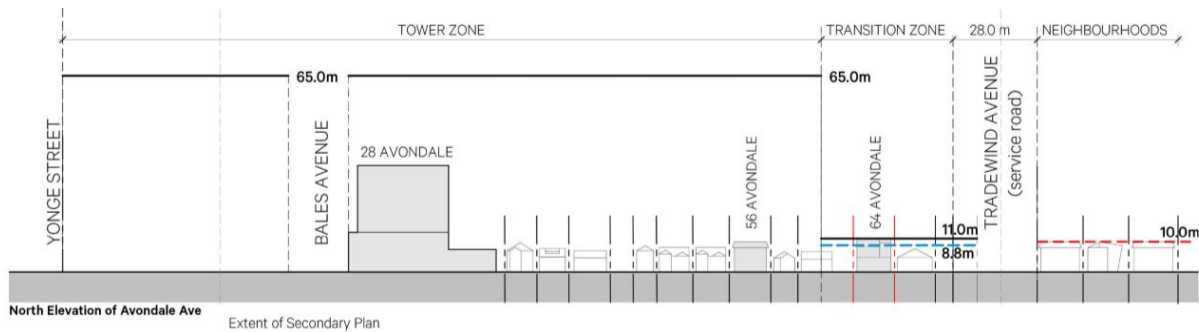


Figure 2 Cross section of height limits along Avondale Ave. under North York Secondary Plan

Number 64 Avondale is between the “Tower zone” to the left (west) and the “Neighbourhood” area to the right (east of 64 Avondale). The height limits established in the secondary plan are 65 m, 11m, and 10 m. The 11 m height limit transition area is only about three or four properties wide and Mr. Greenberg stated that because of the difference in the way the old and new by-laws measure height, the functional height limit for transition properties is only 10.5 m. The height limit in the Neighbourhood area east of Tradewind is 10 m.

MATTERS IN ISSUE

The Eyllotts must satisfactorily demonstrate the variances meet the four tests⁵ and conform to and be consistent with respectively, applicable higher-level plans and Policies. There are sub-issues such as how to deal with a proposed settlement and how to interpret zoning intent when the applicable zoning by-law has not yet been amended to accord with the Secondary Plan.

⁵ That the variances individually and collectively maintain the intent and purpose of the Official Plan (including the North York Secondary Plan) and zoning by-law; are minor; and, are desirable for the appropriate development of the land.

EVIDENCE AND AGREED FACTS

The Eylotts' lawyer was Max Laskin. I heard evidence from Anthony Greenberg, Registered Professional Planner with SvN Architects + Planners in support of the Eylotts' case and in support of the settlement. I qualified him as able to give opinion evidence in land use planning. The City's lawyer Kasia Czajkowski and Laura K. Bissett, co-counsel, were in attendance to implement the settlement between the City and the Eylotts. The City of Toronto planner, Adam Pressick, attended but did not testify. I thank the representatives from the City for their attendance to ensure that the City's interests were protected.

The City and the Eylotts, through their respective counsel, agreed to the following fact:

Authorizing the requested variances to permit this development in the North York Centre Secondary Plan Area, in the *Mixed Use* designation, will not provide a precedent for development on nearby lands designated as *Neighbourhoods*, as lands in the *Neighbourhoods* designation are subject to a different policy framework that promotes the reinforcement of existing character; and a different zoning context that provides for different performance standards.

The other party is a group of three corporations: GlenO Ltd., 1350728 Ontario Limited and 2107253 Ontario Inc., represented by an officer, Jeff Oulahen. Mr. Oulahen appeared at the hearing but did not take part. Mr. Oulahen and the Eylotts agreed to the following fact:

The Eylotts are aware that the Oulahen group is assembling properties in the area with the intention of erecting a building in accordance with the Secondary Plan. The Eylotts do not waive their right to oppose such building.

ANALYSIS, FINDINGS, REASONS

The settlement

This is a settlement between the City and the Eylotts reached the day before the hearing. The Eylotts have agreed to the installation of privacy screens and to move certain balconies away from the east lot line. In return the City has agreed to support the variances sought.

In *263 Gamble Ave* (Oct 3, 2017), I set out what I thought was the proper way to approach a settlement between the City and a landowner based on the Law Society Appeal Tribunal case of *Stephen Alexander Cooper 2009 ONLSAP 7* (CanLII). Briefly, that case

1. Recognizes that the decision maker is always entitled to reject a settlement.
2. Recognizes that settlements are to be encouraged and therefore suggests that settlements should be presumptively accepted.
3. If the settlement is to be rejected, the decision maker should give reasons.

4. The decision-maker should not “tinker” with the joint submissions, as long as it is not contrary to the public interest.
5. If the decision maker is not going to accept the settlement it should allow parties to reopen their case. The *Cooper* panel said:

[If the panel] is seriously contemplating a departure from the joint submission, the parties should not learn about it for the first time when the decision is rendered or reasons are delivered. Given the presumed acceptability of a joint submission, the panel should indicate to the parties that it recognizes the high threshold for rejecting a joint submission, inform the parties that the panel may be disinclined to accept the joint submission and afford them an opportunity to make further submissions on the matter. The parties may even be permitted in the panel’s discretion (if they initiate a request) to re-open the evidence to call additional penalty evidence (such as from the licensee) to support the joint submission. (para 20)

My citing of the *Cooper* case is not binding on anyone. However, *263 Gamble Ave* has common facts with this situation; the City was a party to both settlements and the City obtained tangible design changes that were in the public interest (here, the erection of privacy barriers and the moving of a balcony from the east lot line).

Only Zoning By-law 7625 applies

This application is unusual in that By-law 569-2013, the new comprehensive City-wide by-law is not applicable, and no variances are sought from it. The Secondary Plan is part of the Official Plan, approved by the OMB in 2006 and 2011. According to s. 27(9) of the *Planning Act* a municipality is to amend its zoning by-law three years after any revision of an official plan, or by 2014 here. Some hint of the rarity of this occurrence is found in s. 27(10), which gives the Minister authority to request that the municipality amend a non-conforming zoning by-law. The Implementation Section 10.1 of the North York Secondary Plan states that permissions in By-law 7625 “will continue to apply”.⁶ It is not superseded by 569-2013, and thus the zoning examiner has only flagged variances from 7625.

The Secondary Plan reaches deep into matters that are usually the subject of the zoning by-law, for example, height. Thus, when they conflict, such as the application for an 11 m high dwelling, when By-law 7625 only permits 8 m, the variance must be granted because the Implementation Section 10.1 has already acknowledged that there is prior zoning by-law, which is not being amended even though it is not reflective of Secondary Plan policies.

Do the variances meet the four tests?

⁶ 10.1 Exceptions for Existing Zoning

Where a zoning by-law has been enacted prior to September 17, 1997, and the by-law does not meet the requirements of the Secondary Plan, the present zoning permissions will continue to apply. Minor adjustments to such by-laws may be permitted without amendment to this Secondary Plan.

In my opinion, most of the variances are “technical” (copying Mr. Greenberg’s words). The lot coverage might be an exception; (36.5% sought, 30% permitted). Mr. Greenberg said similarly sited properties consisted of:

“single-detached homes, low-rise apartment buildings, townhomes, and “back-of-house” uses for adjacent high-rise development such as loading areas and surface parking lots within the 10 – 12 metre height range”.

Thus, in my opinion, given the diversity of uses and heights, and given that the property does not seek any side, front or rear yard variances, the lot coverage is reasonable and meets the four tests.

Four stories. “Technical” means that a variance is required, even though the design does what zoning intends it to do. For example, the reader may envisage four stories, each of which is habitable; in fact, the Eylotts propose three habitable stories plus a basement. The fourth floor is a flat “green roof”, consisting of three solar panels and plantings to reduce the heat island effect and has a landing less than 2 m² in area leading out to the green roof. It is this landing, which is enclosed and thus makes the fourth floor area “habitable space” and triggers the need for a fourth storey variance. I find this variance to minor and meets the other three tests.



Figure 3. Balconies shaded; left to right: ground floor, third floor, green roof

The balconies. The architect has chosen to make the grade (i.e. the level of the floor) of the garage equal to the crown of the road; thus, the garage and habitable space on that level become the “first storey”. The “ground” floor shown in Figure 3 at the extreme left, containing the kitchen and living room, and to which one gains entry by going up 10 -12 steps to a porch (small shaded square at the bottom), in the examiner’s eyes becomes the “second storey”. The next level containing bedrooms becomes the “third” storey. Up from this storey is a stairway to the landing already described.

Except for the fact that the examiner considers the front ground floor balcony to be on the second floor, it is otherwise an unremarkable front porch. The rear balcony (26 m²), as far as I can tell, would be the only construction subject to the rear yard setback of 9.5 m and 1.2 m, so it would meet all zoning requirements if it were not at the “second” floor. The third floor balcony (14.1 m²) leads from a bedroom and so is not intended to a “party balcony” (Mr. Greenberg’s words). It is here that the City has requested 1.8 m privacy walls and that the east side be relocated slightly back from the lot line. The 44.1 m² area, dark shaded, of the green roof will be planted; the small white area at the rear will contain three solar panels. I find that all the balcony variances meet the four tests, particularly since the City has agreed to the design with the changes it has negotiated.

Building length. By-law 7625 measures building length to the edge of the balcony when it is on the second floor or higher and this causes the need for a building length variance of 19.5 m (15.3 m permitted). I find that this falls in the same category as the balcony variances, being “technical” and supported by the settlement.

I find the four tests and applicable provincial policy are met for all the variances. The reasons are that: first, this is a settlement with discernable public interest benefits; second, because the Secondary Plan envisages this to be a transition area between extremely tall buildings and a stable low rise Neighbourhood, and third because most of the variances are required because of technical requirements of the zoning that are designed to guard against land use impacts that this proposal does not create.

The green roof

Section 2(s) of the *Planning Act* requires this Board to have regard to matters of provincial interest including the mitigation of greenhouse gas emissions and adaptation to a changing climate. The sixth paragraph of the Toronto Official Plan reads:

Building a successful Toronto means that we have to make sustainable choices about how we grow. We have to see connections and understand the consequences of our choices

The City’s Official Plan web site also has a link to “Green Roofs”, indicating Toronto’s leadership in this area:

Since 2006, the City of Toronto has been a leader in municipal green roof policy. Toronto’s Green Roof Strategy and Green Roof Bylaw have stimulated a local green roof industry and created a new roofscape for the City. In 2016, Toronto was recognized for the first time as having the most green roof area installed of all North American cities according to the 13th Annual Green Roof Industry Survey

In the initial stages of this application, there was some opposition. However, the Eylotts persevered and in my view Toronto is fortunate to have residents like the Eylotts who are willing to make sustainable choices and advocate for them.

DECISION AND ORDER

The variances set out in Table 1, above are authorized, subject to the following:

Conditions of Approval

1. The dwelling shall be constructed in substantial accordance with the site plan in drawing A0.03 of the architectural plans dated December 20, 2017.
2. Except to the extent shown on drawing A2.12 of the architectural plans dated December 20, 201, the fourth storey of the dwelling shall not contain habitable space.
3. The height of the front main wall of the dwelling shall be a maximum of 10.1 metres and will gradually slope upwards to a maximum building height of 11 metres. The maximum building height of 11 metres will be reached at a distance of no less than 8.9 m from the front wall of the dwelling

X

Ted Yao

Ted Yao
Panel Chair, Toronto Local Appeal Body
Signed by: Ted Yao