Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, May 25, 2018

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

Appellant(s): SOUTH ARMOUR HEIGHTS RESIDENTS ASSOCIATION

Applicant: ABBOTT DESIGN LTD

Property Address/Description: 8 HADDINGTON AVE

Committee of Adjustment Case File Number: 17 226750 NNY 16 MV (A0803/17NY)

TLAB Case File Number: **17 268151 S45 16 TLAB**

Motion Hearing date: Monday, April 23, 2018

DECISION DELIVERED BY G. BURTON

APPEARANCES

Parties	**Representative**
Sharon Lee	Paul Abbott (Abbott Design)
South Armour Heights Residents Association	William Roberts

INTRODUCTION

This is an appeal by the South Armour Heights Residents Association (“SAHRA”) from the decision of the Committee of Adjustment (“COA”) dated November 9, 2017 which granted the homeowner Ms. Lee and her husband Mr. Andrew Pushalik variances for an addition to their new home at 8 Haddington Avenue in North York.

BACKGROUND

The purpose for the variances sought from the COA as set out in its decision was "to construct a two-storey addition to the rear of the existing dwelling, in conjunction with other interior and exterior alterations." Variances were granted under both former North York By-law No. 7625 (the "Old By-law") and By-law No. 569-2013 (the "New By-law", not yet entirely in force). The one most in contention was described as follows:

"The maximum number of storeys permitted is two (2).
The proposed number of storeys is three (3)." (Variances 1 and 6 in the decision.)

This approval attracted much attention. SAHRA, the neighbourhood association, has long defended the by-law requirement of a two storey limit for additions or new builds in this neighbourhood. They launched an appeal to TLAB, based essentially on the "three-storey" proposal as the variance was expressed. It had been defined as such by the Zoning Examiner in a Zoning Notice of August 28, 2017 prior to the COA hearing (Exhibit 3). City Planning staff had opposed the variance for the addition of a third storey. It would constitute a significant change from the established neighbourhood character, and thus would not meet the intent of the Official Plan.

The property is on the north side of Haddington Ave. in the former North York. It is designated Neighbourhoods under the Official Plan ("OP"). It is zoned RD (f9; a275) under the new By-law, and R7 (16) under the Old By-law, located in Neighbourhood Ridley (Schedule Q) in District No. 9 (Schedule A). Both by-laws require a frontage of 9 m minimum, a lot area of 275 sq. m, 1.2 m side yard setbacks, and a maximum of two storeys. The owners' design includes a new two-storey rear addition (replacing an existing partial one-storey rear addition), and an area above the second floor that was in dispute in this hearing.

MATTERS IN ISSUE

The only real matter in issue is whether a so-called "three-storey" structure is permitted in this North Toronto neighbourhood, under policies in both the Official Plan and the applicable zoning by-laws. The other variances were not seriously disputed by SAHRA. Despite this, the TLAB must consider all of the variances anew under the applicable tests, as it is a hearing *de novo*.

JURISDICTION

For variance appeals, the TLAB must ensure that all of the variances sought meet the tests in subsection 45(1) of the Planning Act (the "Act"). This involves a reconsideration of 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 the TLAB must have regard to matters of provincial interest as set out in section 2 of the Act, and the variances must be consistent with provincial policy statements and conform with provincial plans (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 Growth Plan for the Greater Golden Horseshoe ('Growth Plan') for the subject area.

Under s. 2.1 (1) of the Act, TLAB is also to have regard for the earlier Committee decision and the materials that were before that body.

EVIDENCE

The owners

The owners, Ms. Sharon Lee and her husband Mr. Andrew Pushalik, mounted a spirited and impassioned day-long defense of the design for their proposed addition at the rear of the existing dwelling. I will deal with Ms. Lee's procedural motions in a separate section below.

In an opening statement Ms. Lee described the project as a two-storey partial width rear addition. It would keep the façade and the general footprint of the existing home, and align with the existing first storey in the rear. It would merely "open up the attic" to utilize unused space under the roof as a loft. There had been extensive consultations with neighbours, six of whom toured the property with Mr. Abbott, and none had had objections. The previous owner was very enthusiastic about retention of the present home. The neighbours felt relief that they were not proposing a completely new structure.

Ms. Lee outlined the variances sought, stating that the proposal would be the conversion of the attic to habitable space within the existing roof line. She did not understand the opposition of the appellant SAHRA, as the proposal was for only 240 sq. ft. of space in the attic, which in her mind was not a third storey as feared. There was no appreciable impact – no variances for height, massing, scale, gross floor area or floor space index ("GFA/FSI"), or coverage – and so, no real change to the appearance or the character of the structure. (Coverage would in fact be improved, as the old garage would be demolished.) From the front the façade would appear just the same. The neighbourhood was in transition, and this fact should be considered. The requested

variances are indeed minor, so that the TLAB should uphold the COA decision and make this determination.

These were the variances approved by the COA:

1. 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).

2. Chapter 10.20.40.70.(3), By-law No. 569-2013
The minimum required side yard setback is 1.20m.
The existing and proposed west side yard setback is 0.91m.
3. Chapter 200.5.10.1(1), By-law No. 569-2013
The required minimum number of parking space(s) is one (1) space.
The proposed number of parking space(s) is zero (0).

4. Section 14-B(5)b, By-law No. 7625
The minimum required side yard setback is 1.20m.
The existing and proposed west side yard setback is 0.91m.

5. Section 14-B(5)c, By-law No. 7625
The minimum required rear yard setback is 9.50m.
The proposed rear yard setback is 8.67m.

6. Section 14-B(8), By-law No. 7625
The maximum number of storeys permitted is two (2).
The proposed number of storeys is three (3).

7. Section 6A(2)a, By-law No. 7625
The required minimum number of parking space(s) is two (2) space.
The proposed number of parking space(s) is zero (0).

(It can be seen that the two storey restriction exists in both the former and new By-laws.)

Ms. Lee called Mr. Brad Abbott of Abbott Design Ltd. to outline the proposal. He is an experienced architectural graduate who has designed many infill structures in this "Cricket Club area", as he called it. He was not qualified at the hearing to provide expert opinion evidence as a planner, but his evidence was given a great deal of weight in any event.

He usually uses the term "infill" to denote replacement of or dramatic alteration to an existing dwelling. He stated that about 90% of these alterations required variances, as this one did. He called this a "small scale renovation", and had worked on it for some time, including making the presentation at the COA. He provided a useful chart of the existing measurements and those proposed as variances under the two By-laws (Exhibit 1.) Mr. Roberts objected that this chart should have been prefiled as evidence under the TLAB rules. I ruled that it was merely being used as an aide-mémoire, and was thus not new evidence, as we were all familiar with the COA decision. Mr. Abbott then used the Zoning Notice (Exhibit 3) to highlight the required variances.

He had filed a detailed letter to the COA on Nov. 6, 2017, which was entered as Exhibit 4 to this TLAB hearing. In it he described the addition in the following terms:

"Number of Storeys- a 3rd storey loft addition within the existing roof line is proposed in a zone that allows only 2 storeys. Due to the irregular shape of the lot it is difficult to add additional space for this young family without building up. We are proposing to add third floor space within the existing roof line of the house. We are not adding any extra height nor are we adding windows or dormers that would suggest a third floor. We will have three skylights facing the rear yard. Apart from these rear facing skylights the house will look exactly the same from the outside whether the third floor is granted or not. (see Fig 3.A &B)"
and later:
"…the design is a renovation and two storey rear addition with a room in the attic that is technically defined as a third storey.' (ibid.)

He attached the proposed plans to this letter. He relied especially on the existing and proposed elevations therein to state that "….it is impossible to tell that a third floor exists when viewed from the street or the rear. (see Fig 2. A & B & Fig. 3. A & B)."

In the TLAB hearing he outlined the other variances requested. On the west side the variance required was for the extension of the existing non-conforming setback of .91 m, where the by-law required 1.2 m. There is no coverage variance (at 26.05 % it would be well under the 35% of the lot area permitted.) The existing garage would be removed and a car parked at the east side on the existing driveway. It is 2.7 m wide, and an obstructed parking space must be 2.9 m wide. Thus a variance for zero parking was sought, and this is agreeable to the Transportation Department. GFA is not regulated in the applicable by-laws here, although it would increase from 0.4 to 0.62 times the lot area. The third floor addition would be 383 sq. ft., including the access stairs.

The rear lot line extends on a sharp northerly angle from east to west. Thus there is very little room on the parcel to create the desired extension. It cannot be by way of a front addition as the present aligns with the neighbouring properties. It could only go upwards. Mr. Abbott emphasized that it was done without adding extra height, or windows or dormers that would suggest a third floor. He stated:
"….we introduced skylights in lieu of windows and dormers to disguise the fact that we have a third floor by keeping the scale down." He did note the presence of a window in the east wall, but opined that it did not necessarily denote the presence of an extra storey.

The proposed construction requires a minor variance under only the Old By-law to the rear yard setback, at 8.67 proposed compared to the .83 m standard. This would account for just the extreme northeast corner of the house. Fig. 1, A and B of Ex. 4 shows that only 1.2% of the building footprint would not meet this required rear yard setback.

The drawings showing the proposed roofline at the front, Fig. 2 A and B of Exhibit 4, illustrate the slight slope required to accommodate the addition. This resulted from the requirement that the roof be capable of drainage. Mr. Abbott stressed that there was no

height variance here. He wished to copy the pitch of the roof at the front when designing the back extension, so his only choice was to create a flat portion of the roof at the top. He then realized the opportunity to "capture some space" in that roof.

Mr. Abbott drew particular attention to the drawings for the east and west side elevations (Ex. 4.) The existing structure is outlined there in dotted lines. The goal for the renovation was to add square footage without visible massing from the street. Thus he took the design straight backward, filling in the rear second floor and the remainder of the first floor not yet built out. Three dormers were introduced at the rear to minimize the scale and keep it in conformity with the neighbours. He testified that visually the envelope would be the same, whether or not there was a loft included in his design, since the roofline would be the same. It could also contain just a cathedral ceiling, or unheated attic space. Respecting the skylights seen at Figure 3A of Ex. 4, he said that the presence of skylights does not necessarily denote a third floor, but can be used on second floor designs as well.

Mr. Abbott stressed that while there was much opposition at the COA, and many expressions of it, it was only SAHRA that appealed the approval and appeared at TLAB. During cross examination Mr. Roberts asked about the provisions in the by-laws that control GFA/FSI in the zones here. He stated that some by-law provisions control size by a combination of FSI and lot area. Others use coverage and height, and the latter by restricting the number of storeys. Some RD areas nearby are located in the former City of Toronto, with FSI controls. The subject street and others nearby are within a zoning category that controls height by the number of storeys. Of the many dwelling types in the RD zone around the Cricket Club area, Mr. Abbott had found only 5 three-storey homes. Thus he could not make the claim, Mr. Roberts put it to him, that this proposal "fits" within the neighbourhood here as he had said in his letter to the COA (Ex. 4). Mr. Roberts stated that this was not compliant with the OP policies, but Mr. Abbott disagreed.

The Appellant Association

Mr. Terry Mills was qualified as an expert planning witness and provided what was effectively the only such evidence concerning this proposal. He has an architectural degree and extensive experience in planning, and a background as a builder.

Mr. Mills expressed the Association's basic objection to this proposal. It would result in a three-storey house plus a basement level, whereas the maximum number of storeys permitted here is two plus a basement level.

He presented visuals of his chosen study area in his Witness Statement, Ex. 7. It is primarily the nearby RD residential area having the same zoning limitations. He provided the broader historical background and the exterior road structure. The general area extends from Wilson Avenue east to Yonge Street, south to just south of Brooke Avenue, then west to Avenue Road. The Broad Area Urban Structure can be seen in his visual displays (Exhibit 7, Visuals) and he describes his Study Area as primarily echoing the local grid pattern of the former City of Toronto to the south. However, his area is pocketed within the unique road structure surrounding it. The angle of the Yonge Boulevard corridor reflects the crest of the Don Valley and the curvature of the Ridley-

Joicey Boulevard corridor. These major streets are then interlaced with a pattern of bent streets which traverse them (Visuals, p. 6).

He chose as his Study Area the zoning category surrounding the subject lands, which provides for lot frontages of 9 m., terming it the Main Character Area. He then expanded it somewhat to include portions of the streets to the north and east of the subject. These portions were included because the rear lot line of the subject lot abuts this area. However, the property to the rear has an 18 m frontage requirement and a different area of 690 sq. m. This area he called the "Immediately Adjacent Character Area Neighbourhood" This is how he explained the context here:

"The majority of the Neighbourhood designation is zoned RD (f18.0; a690). The southwestern portion is zoned RD (f9.0; a275). Between these two principal zoning districts there are two smaller RD (f12.0; a370) districts. The overall Neighbourhood designation within this Broad Area has a consistent maximum height requirement of 10m and stipulates a maximum of no more than two-storeys. Furthermore, there is a consistent maximum permitted lot coverage of 35%." (Ex. 7, para. 28)

Further:
"A) To the north is the large RD (f18) zone which crosses Joicey Boulevard in parts.
B) To the south of the former City of Toronto limit, where By-law 7625 never applied, is a former City of Toronto neighbourhood zoned R (f7.5; d0.6) under By-law 569-2013, which permits a broader range of housing types than the Main Character Area Neighbourhood." (para. 30).

And for the specifics:

" [32] The Main Character Area Neighbourhood was determined within the Broad Area **by applying the Official Plan Policy 5.6.5 guidelines to determine its boundaries after reviewing existing zoning by-laws, prevailing lot depths, lot patterns, and use patterns. The selected Main Character Area Neighbourhood matches the local RD (f9.0) district's boundaries.** *(emphasis added).*

[33] Within this Main Character Area Neighbourhood are 315 properties, whose lot frontages are for the most part 9m wide, with some lots frontages ranging up to and around the 12m range, and in one instance a 24m lot width."

His Main Character Area Neighbourhood ("MCA") extends from Joicey Boulevard at the North, down the east side of Esgore Drive to behind some properties on Haddington, down Greer Road to the south side of Brooke Avenue, then west to the properties behind the east side of Avenue Road. This is best seen in Exhibit 7, Visuals, p. 5. He explained that the lands to the south from Brooke Avenue down are subject to present City of Toronto requirements, while the subject property is located in the former North York. This is important because of the differing methods used in the two areas to control building size, explained at para. 10 to 12, Ex. 7:

"10. There are two basic methods for describing a building's permitted mass
A) Coverage-x-Storeys = (lot coverage) x (permitted storeys)
B) FSI = floor space index = (gross floor area) / (lot area)

[11] The Coverage-x-Storeys method essentially envisions the magnitude of permitted development in fundamental built form terms. It can be readily deduced that a two-storey building form permits twice the magnitude of a one-storey structure, and a third-storey would permit an additional increment of magnitude. This is the method applied in this Neighbourhood, and it has proven an effective instrument with the high degree of improvement activity involved.

[12] The FSI method was applied originally in the former City of Toronto, because it was dealing with the legacy condition of preexisting houses and generally a narrower 6m lottage pattern. The FSI method is exacting in numeric terms, but it remains silent on the subject of built form expectations, relying instead upon other provisions in the zoning by-law to shape massing."

He explained that if this proposal proceeds, it would result in a three-storey house plus a basement level, whereas the maximum number of storeys permitted at this location is two plus a basement level.

Original building types in this area of single detached dwellings were mainly bungalows and 1 ½ storey "salt boxes" and what he termed as a "North Toronto special", two storeys with side hall with a hip roof. While there is substantial reinvestment in the immediate area, the storey limitation has been met even for rebuilds and two-storey rear additions. He found only two examples of third storeys out of 315 properties in his MCA (again, the area was chosen because the frontage requirements are the same.) The area even included some sites permitted a 12 m frontage, and one has a frontage of 24 m., all built at only two storeys. He reviewed 10 years of COA and OMB data, as well as the recent TLAB decision for 79 Felbrigg Avenue (Dec. 21, 2017). The two storey limit is the almost universal development pattern in the neighbourhood.

In his opinion it is important to keep to the zoning formula of two storeys and a coverage limitation, it "keeps the lid on" better than a GFA limit. When renovating, owners should not go in a completely different direction. Even on Haddington itself complete renovations have adhered to this two storey limit. Due to an historic anomaly, certain structures such as 52 Esgore, a one storey addition to an existing three-storey dwelling, were approved, but other applications were refused (444 Elm Road, 16 Haddington Ave., and 79 Felbrigg). He perceives a high degree of development activity in the entire area, but mainly at the north and west portions of the MCA (Ex.7, Visuals, p. 11 – 52 Esgore, and p. 9).

Looking closely at the subject lot, he pointed out that the lot depths become shallower at the east end as numbers 6 and 8 Haddington are reached, because of the curve of Ridley Boulevard behind them. Lots on Joicey and Ridley are larger, at 12 or 18 m frontages. In order to illustrate what massing could be achieved on a lot of the size of the subject, he compared the lot size at 79 Felbrigg Ave. to the subject (see p. 19 of Ex. 7, Visuals). The lot sizes are almost identical in square footage, with a 35% coverage maximum at both. The 8 Haddington lot frontage is greater, but it is not as deep. He suggested that a different design placed appropriately on this shallow/wide lot could achieve the desired space for the owners and their family. There was opportunity in the driveway area to expand laterally as well. The surrounding context on Haddington is consistently two storeys.

At p. 20 of Ex. 7, Visuals, he did an “indicative sketch” illustrating the proposed structure, with the window proposed in the east attic area. He stated that if the flat portion of the roof is constructed as proposed, together with the rear extension and window in the attic, it would be a very different kind of house. This would be so even if it appears to be the same from the front.

For visual comparison, he included in the Visuals some old and rebuilt dwellings within the nearby 18 m frontage areas. Even if the lots are more substantial, the two storey limitation is still met (p. 21). He showed some large two-storey houses, “whose extra breadth results in substantial roof configurations”. Even at the intersection of three streets where three different frontage requirements apply, all designs are only two storeys, although of varied appearances (p. 22). Even 1 Haddington, with a similar frontage of 9 m, is only two storeys although it appears to be very large.

Respecting the specific proposal by the owners, he opined that the plans clearly showed a structural third storey addition. He challenged the assertion by Mr. Abbott that the addition would not be visible from the street or the rear of the property. He pointed to the “indicative drawing” in his Visuals as proof (p. 20, A). The result is the creation of a volume of unused space that needs a structural floor. Calling the attic room a ”technical third storey” is not correct, he stated, it IS a third storey. The New By-law created a standard that if there is space accessible by stairs or elevator, and there is headroom envisaged, it is habitable space, and the floor level therefore exists (unless it is for the mechanicals). This attic would be 5% of the GFA here (should this standard come to apply), but it would not be permitted as habitable space, only for mechanicals. If the variance was approved, it would also be a matter of record that it is a three-storey house, one that has deviated from the permitted two-storey standard. The proposed “attic” is truly a third storey. It has a large area compared to the proposed second floor master bedroom suite, including bathroom and walk-in closet area. The floor area of the third level would be 61% of the second, thus it would be a substantial space under the extended flat portion of the roof, a new “built box.” It is not just a fill-in use of existing attic space, as suggested, but new habitable space of a significant size.

He feared it would become a precedent for future building initiatives. The other variances gave him little difficulty, but this one would “wear down” the planning framework for the area. It constitutes a full three storeys with the basement below grade. For a three year period (2010 to 2013, when the New By-law was passed, the storey definition differed because of integral garages at grade. The COA had said in its hearing notices that proposals were “deemed to be three storeys when two storeys, to account for the at-grade garage”. Many were approved as such, but after the New By-law in 2013, only three applications were made (the aforementioned 16 Haddington, 444 Elm, and 79 Felbrigg) and were refused.

Mr. Mills provided his opinion on how the desired additional space could be achieved by building out rather than up. On the subject of zoning controls, he opined that a 35% coverage and a two storey limit gives designers a rough block in which they can work. In his opinion FSI and setbacks as a control mechanism fails to set out an indicative construct of how the design should be placed on the site. However, any alteration to

the present zoning should be made by a zoning amendment and not by a variance, following a planning exercise for the entire area.

Respecting compliance with the Official Plan, Mr. Mills offered the following:

In Policy 2.3.1 concerning Healthy Neighbourhoods, the Commentary states:

"However, these neighbourhoods will not stay frozen in time. …… Some physical change will occur over time as enhancements, additions and infill housing occurs on individual sites. 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. "

and in Policy 2.3.1.1:

*"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."

He testified that over time, his MCA neighbourhood's existing context has become an admixture of old and new, of the original legacy building stock, two-storey additions and replacement houses. The merging of all these building forms has created a dynamic existing fabric that is not frozen in time. From today's vantage point, the future 'planned context' can be clearly envisioned, and reinforces the existing context (see his Visuals, Ex. 7, p.13). The "planned context' is explained in the sidebar to Policy 3.1.2, Built Form:

"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…..* the planned context typically reinforces the existing context."

Mr. Mills stated that this three storey proposal contradicts the very fundamentals of the development criteria here, contrary to the requirement in the OP that "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"*

In Policy 4.1.5:

"Development in established *Neighbourhoods* will respect and reinforce the existing physical character of the neighbourhood, including in particular:

a) patterns of streets, blocks and lanes, parks and public building sites;
b) size and configuration of lots;
c) heights, massing, scale and dwelling type of nearby residential properties;
d) prevailing building type(s);
e) setbacks of buildings from the street or streets;
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; and
h) conservation of heritage buildings, structures and landscapes.

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.

The prevailing building type will be the predominant form of development in the neighbourhood."

And 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 testified that zoning standards in both By-law 7625 and By-law 569-2013 have directed house forms to align along the streets, and to observe standards for heights, depths and setbacks, and thus establish and maintain the physical character of the neighbourhood's streetscapes. Legacy and contemporary building forms have appeared over the years, under zoning standards that inform, guide and – when necessary, regulate – developments. This ensures that new development in the neighbourhood respects the existing physical character of the area, reinforcing the stability of the neighbourhood, as the OP requires.

The proposal would be out of keeping with the existing physical context. Even though there is no height variance here, the height limitation is found in the number of storeys allowed in this area. There is no planning justification for a third that is consistent with the OP policies. The addition will bring the structure to three storeys, and it will not be invisible as claimed. The New By-law retained the two storey limit. This third storey cannot be looked at in isolation as it challenges the intent of the By-law, potentially affecting the entire neighbourhood in the future.

Mr. Mills had no objection to the variances for the west side yard setback (Nos. 2 and 4) as it appeared to work as a vertical and horizontal projection from the existing wall. The rear projection would also be reasonable as it complies with the New By-law requirement. He also believed that the variance in the parking requirement would be acceptable, as the proposed space width would be reasonable. All of these have secondary importance, however, to the overriding necessity to retain a two storey structure. He said that it would be "inflicted on the whole area."

The proposal therefore did not meet either of the tests requiring that the variances meet the general intent and purpose of the OP or the zoning by-laws.

In her cross examination, Ms. Lee questioned Mr. Mills closely about his past association with his present and past clients. While he was contacted by this Association, he testified that he has occasionally acted for others. He has belonged to the umbrella group FONTRA, or Federation of North Toronto Ratepayers Associations (28 groups), but is not currently an executive member. He is occasionally asked for his opinion on planning proposals or proposed municipal by-laws at their meetings. Respecting this current assignment, he accepted it after being requested and after submitting a fee proposal to SAHRA. No specific instructions were needed here, as he has been aware of the longstanding opposition in the neighbourhood to any applications for third storeys, and has prepared studies on this subject before. Ms. Lee asked about

the nature of his instructions, and how he selected his study area, but his responses never varied. He was also questioned about how he selected and received the documents he studied. He replied that they are all available on public websites, or upon request of the City, as were the statistics on appeals that he provided. He gave little weight, he said, to petitions supplied to the COA.

He was also questioned on the inclusion in his lot study of the recent refusal of an appeal concerning 79 Felbrigg Ave. It is in the same area, he responded, and involved a third storey proposal. He was familiar with the lot, and had included it merely to demonstrate that it had approximately the same area as the subject. It was to illustrate what size of structure could be built on the subject 8 Haddington by way of square footage, but without a third storey. It was not mentioned merely to point out the refusal of a third storey design. He was questioned about all of the examples provided in his Visuals, and explained that they illustrated the character of the neighbourhood, as part of the test for OP compliance. The job of a planning witness was to study the area, create appropriate boundaries, and demonstrate familiarity with the area. Elected boundaries are set on a reasonable planning basis, as here, such as the zoning limits. In this area a study area could not be a typical rectangular shape because of the varying road curvatures and zoning boundaries. He settled on his Major Character Area because of the 9 m frontage requirement and 275 sq. m. minimum lots. This made sense, as above this area the frontage requirement is different.

He then had added the area to the northeast as the “Immediately Adjacent Character Area Neighbourhood”, as mentioned. The properties there have an 18 m frontage requirement and a different area requirement of 690 sq. m. However, he included it as it abutted the subject property.

He was asked about his references to the need for a comprehensive study before exceptions were made to the two storey limit here (Ex. 7, para. 13, 14 and 60). He said that no exceptions should be made in isolation, or the entire planned structure of this area would be undermined. This is of great concern to his client SAHRA, who has constantly upheld the zoning standards. He was asked again if he acted for developers, and he said not as a rule, but outlined his extensive involvement as a builder. Then the question was asked whether he had run for office for a council seat as an “activist planner” as a local paper had stated. He objected to both the appellation and the source.

Next he was taken to the Zoning Notice, and asked to explain which variances were objectionable. Section 4.1.5 of the OP was carefully parsed. He responded that in general it had to be considered as a whole, yet responded to each term mentioned. There was no height variance, but he again explained that the two storey limit in the zoning by-law was intended to be a height control mechanism. Massing is controlled here by the setback requirements. He calculated the additional habitable floor space proposed in the attic at 237 sq. ft., which contributed substantially to the massing. Ms. Lee asked if his Statement had suggested an appropriate “range” of massing for the subject property, and he responded that the 1 ½ storey dwelling at number 6 Haddington would be an example. A range of suggested heights was not even a factor, as (he reiterated) the height limitation consisted of the two storey requirement. If the

"third floor" were added, it would increase the massing but not the coverage. He did not use the term "partial" third floor in his Witness Statement as he had in describing the Felbrigg appeal, as the two designs were not at all comparable. There were many add-ons proposed for the Felbrigg property. He mentioned it only as an example of a property nearby zoned alike and having an equivalent area, on which a dwelling the size of the proposed home could be constructed, and within the by-laws.

We examined many applications in the area which appeared to mention three storeys. The COA approved 12 Dunblaine Ave in 2010, where the explanatory text set out why it was termed only technically as three (this text appeared only between 2010 and 2013 when the New By-law was enacted, and is no longer relevant).

Respecting 396 Elm Rd., which was granted by the COA on March 14, 2012 but was not among his City-supplied decisions, he responded that he must have missed this one, but that it was on the edge of his MCA in any event. This led to a repetition of his method for choosing his study area, and why he included the portion of Ridley Blvd though it was in the 18 m frontage zone where three storeys are permitted. Although 169 Ridley was apparently three storey, as were many others outside his MCA, they were not valid comparisons, as the 9 m frontage did not apply to them. Others on Ridley – 123, 115, 117 – had sought variances for 2 ½ or 3 storeys.

Many other dwellings cited as examples were all outside the 9 m area – 83 and 94 Brooke Ave. and 52 Esgore were all within other zoning areas. Mr. Mills had tried to be fair, he stated, and asked to receive more COA decisions than just his chosen area. (He knew that the owners would want to ask about any approvals that seemed to be close by.) He objected to the continuing challenge of his selections, as the explanation for them had been given repeatedly. He said that the owners knew how and why he chose as he did. When they could not find sufficient examples in his area, he stated, they "went shopping in the 18 m area" to find some. Having walked the area, he was aware of some three storey designs outside of the 9 m limit, but the neighborhood character there was not the same.

Taken back to where he had discussed "scale" in his Report, he said that the discussion of clause c) of OP Policy 4.1.5, "c) heights, massing, scale and dwelling type of nearby residential properties", dealt with the issue of scale, or magnitude or intensity. He was again asked about a range of such factors, and whether height is limited.

Respecting whether there would be any impact on nearby neighbours from the proposed addition, Mr. Mills sees visual impact from a sizable addition and a "hump" on the roof. He testified also that the substantial and visible window in the east side of the proposed design indicated proof of a third storey. A faux dormer would have no space behind it, while the proposed did. While this may not have direct adverse impact, the third storey aspect would change the character of the neighbourhood, and have significant impact in this way.

Mr. Mills clarified that the proposed addition was merely an enlargement, and so was not "intensification" or "infill" as promoted by the PPS and the Growth Plan.

Summation by Mr. Pushalik

Mr. Pushalik reviewed the variances. He stated that the real issue here was not the other variances, but the one related to the 'existing attic" which was proposed as habitable loft space. There was no significant increase in height, mass, scale, or FSI, nor material change to the front exterior of the house. Thus the tests for a minor variance have been met. He considers that on a common sense test this fits within the character of the neighbourhood, and he rejects the "alleged" concern with preserving its character. It was in transition, with a mix of old and new, but there is a reluctance to see modern builds. It is unrealistic to have a "ban" on third storeys. They had worked with all of the neighbours to smooth the way for this proposal. Only SAHRA objected. The COA had nonetheless approved it. There would be no change to the front, and the back would be virtually identical except for a few skylight windows. The only other change to the exterior would be the single window on the east side.

This would not constitute a precedent, as the TLAB's function is to consider applications for minor proposals such as this. He referred to the 2014 OMB decision on a similar application at 77 Mason Boulevard east of Yonge Blvd. (PL130868). There the application to merely fill in the attic was approved as there were a number of existing three storey houses in the area, as well as some having architectural features of three storeys.

He objected to Mr. Mills' reference to the TLAB decision at 59 Felbrigg, as it is not relevant to the subject application. It was for a third storey above the existing second, he said, unlike a mere fill in of existing space. There was no attempt there to mitigate its appearance as a third storey.

Mr. Pushalik argued that the Witness Statement of Mr. Mills should be excluded entirely, or that little weight should be given to it, as he is an advocate and thus not neutral. He had recommended a policy discussion leading to a by-law amendment, rather than a minor variance. His Statement had omitted discussion of key elements in the OP – height, massing, scale, impact, exterior design. The proposed is the type of design that should be supported, not the "box" at 54 Felbrigg or the modern one at 52 Esgore. The owners' 10 examples were not far away from the subject study area, but very close to it.

Mr. Pushalik went on to argue that there should be no outright ban on third storeys, that the minor variance process would and should encompass this proposal. It involved no change to its general appearance, or in its height or footprint. It was contained within the roofline, and therefore was really a two and one half storey addition. One would not see the addition from the street. It would not disrupt the neighbourhood character as claimed, and therefore did not offend the intent and purpose of the OP. All of the neighbours consulted gave their approval. He compared this proposal with the possibility of constructing a new box-like structure within all of the by-laws, that would "fit" less well within the character of the neighbourhood.

On the subject of the four tests, in the case of *DeGasperis v. Toronto (City) Committee of Adjustment* 2005 CarswellOnt 2913 the OMB addressed the "minor" test, finding that it was to include not only an adverse impact component, but also a numeric one. A variance can be just too large to be acceptable, even if it has no discernable adverse impact. This was not the case here; he stated that there is no adverse impact and the variances are small. The test accepted by the OMB in *Re Yang* 2015 CarswellOnt 7144, was that the experience one derives from a street view is an important component of any decision about the neighbourhood character. (p. 4). He submitted other decisions, but I find them of little relevance.

Mr. Roberts

Mr. Roberts submitted that the applicant had the onus to prove that the proposal met the four tests, and that this onus had not been met here. Mr. Mills had not misquoted the tests in the OP, even though he was challenged on their application. Mr. Abbott had claimed that the proposal "fit", but the test in Policy 4.1.5 c) is not "fitness", but respecting and reinforcing the existing physical character of the neighbourhood, including in particular: c) heights, massing, scale and dwelling type of nearby residential properties. This did not meet this requirement. Mr. Abbott had not prepared an area study or a witness statement with planning opinions. Thus it was not sufficient merely to challenge Mr. Mills' chosen area, selected in the usual way and on a rational standard. Mr. Mills did not include in his area certain locations where several three storey examples are indeed present, because the by-law requirements are different. The two anomalies found within his area are probably older than 10 years. Questions directed to Mr. Mills might have had merit if the area on Ridley Boulevard to the northeast had the same frontage requirement as 8 Haddington.

Mr. Roberts stated that the critical point here is that the proposal is not for an attic within an existing roof. It does not amount to "there has always been an attic there." The roof is in fact being extended as part of the addition. There is new space here.

Motions by Ms. Lee

1. Before the proceeding commenced, Ms. Lee made a motion to exclude the only witness for the appellant SAHRA, Mr. Mills, while Mr. Abbott was testifying, and indeed until the evidence was closed. The rationale was somewhat obscure, but appeared to be based on Mr. Mills' detailed questioning of Mr. Abbott's explanatory letter (Exhibit 4) at the COA Hearing. Ms. Lee considered it to be somewhat aggressive. Mr. Roberts objected that this should have been brought by formal motion in accord with TLAB rules for prefiling. He also argued that Mr. Mills had to hear the evidence so as to provide his professional planning opinion and response to it.

I held that I agreed with Mr. Roberts that this was not a *lis inter partes,* but an administrative hearing with a significant public interest component. Planning issues almost always involve interests beyond the immediate parties. Mr. Roberts argued that one could win on all of the points made in favour of the variances, but still lose on public policy grounds. I held that I would consider Ms. Lee's motion at the time (making an exception to the TLAB rules, as permitted under Rule 2.10), but would rule against it.

This was based on the rationale concerning the public policy component in TLAB hearings. It also upheld the rules for advance notice by the prefiling of motions.

I would not rule to exclude Mr. Mills from the hearing during Mr. Abbott's testimony. It assists the member presiding if all witnesses can hear the others, so that all of the planning evidence is heard and clarifying questions can be formulated. As well, there was no danger of a witness "tailoring" their evidence from that of another witness, because all testimony has already been prefiled and read by all.

2. When Mr. Mills was qualified to provide expert evidence, Ms. Lee gave notice that she may be objecting to the admissibility of his Witness Statement (Exhibit 7). It fails to demonstrate the necessary degree of objectivity, she claimed. I ruled that, having read it, I could not agree that any such bias could be discerned. It appeared to be a typical expert planning report, with proper background and foundation for his professional planning opinion. Ms. Lee was free to challenge on this ground later, but I was not going to refuse initially to hear his evidence or to consider his Witness Statement. The panel does have a gatekeeping function on the issue of admissibility, but his evidence was not inadmissible here, as I and the other party had already read it from the prefiled reports. The hearing officer must hear an outline of the evidence to be able to rule on its relevance. However, there was no equivalent to a *voir dire* in hearings involving public policy, especially where all evidence is prefiled and read before the hearing itself.

The claim appeared to be based on bias, as in her opinion the wrong area was chosen for Mr. Mills' study area. It had not included several examples of three storey homes just beyond its borders. In the end, Mr. Mills had a logical rationale for his choice of areas, based as it was upon the applicable zoning provisions. Some examples of three storey structures did exist nearby, but they were in zoning categories where three storeys are permitted. I saw no bias in his Witness Statement or in his testimony, as the owners claimed.

Mr. Roberts again said that this challenge should have been in the form of a prefiled motion. I made another exception as is permitted under section 2.10 of the TLAB rules, and considered it.

3. Ms. Lee began to discuss the state of the neighbourhood in her opening statement, and Mr. Roberts objected as this constituted evidence rather than a brief opening statement. I agreed.

4. Ms. Lee asked Mr. Mills repeatedly where the words in OP Policy 4.1.5 were addressed in his Witness Statement. I ruled that this question had been answered thoroughly.

ANALYSIS, FINDINGS, REASONS

Mr. Abbott devoted a good deal of his evidence to responding to objections that Mr. Mills had apparently made in the COA proceedings, in reply to Mr. Abbott's earlier written submissions. A principal one was Mr. Abbott's reference to a one and one half storey house, with a portion of the second storey to be within the roof. Some of the

existing walls on the second floor are sloped steeply for headroom, and Mr. Abbott testified that this added a quaintness to the interior that the design within the roof duplicates. He was asked if the application to the COA would have differed if it had been a two storey home, and he said that only the drawings would differ.

Mr. Abbott concluded that if the house was "in character" when it was built, then it would still be in character when reconstructed, as there would be no addition visible from the street. It "fits" under the OP test, as it would be the same architectural style, roof pitch and brick as those nearby.

The objection made by SAHRA in this appeal is a more technical one. In its report of Nov. 7, 2017 to the COA, Planning Staff had said:

"The application proposes variances to permit a third storey whereas under both Zoning By-laws, the maximum permitted storeys is two. The maximum permitted storey provision under both Zoning By-laws is devised, in part, to ensure a consistent pattern of development. Within the immediate area there have been no approvals by the Committee of Adjustment to grant a third storey. It is the opinion of planning staff that granting an additional storey contemplates a significant change in character from the established neighbourhood. As a result, staff recommend that the application be refused as the third storey variance is not in keeping with the established character of the neighbourhood and is contrary to the intent of the Official Plan." (p. 3).

Thus it appears that **no matter how** Mr. Abbott or the owners here would characterize this attic addition, the by-law requirement for two storeys is contravened. I concur that it is important that the City did not appeal the COA decision. I can understand the strong feelings on both sides of this argument – the owners' desire for more space for a growing family, and the Association's desire to uphold a long-preserved and hard-fought-for limitation in neighborhood design. While having every sympathy with the owners here, I find that it would be indeed a third storey addition, in size and function. Even their architect frequently termed it a third storey in his evidence.

It can be seen from the quotations by Mr. Abbott in his letter to the COA (Ex. 4) that the proposed addition was depicted as practically invisible from both the front and the rear of the property. It was said to be merely "filling in" the existing attic space. It must be considered in light of the actual addition proposed: a two-storey rear addition, with the extension of the roof toward the rear of the property, including a portion of the roof that would have a flat design. This constitutes an addition of significant size (it is difficult to determine the exact figure from the site plan in Exhibit 4, but its physical extent can be seen there.) In his evidence he stated that it would be 383 sq. ft., including the access stairs (which is his habit to include in the area measurement).

There is a very good illustration of both the existing home size and that of the proposed addition visible in the west side elevation he provided (4A and B). The best perspective of all is found in Mr. Mills' Exhibit 7, Visuals, at p.20A.

But is it a proscribed "third storey"? I considered the definition of "storey" in the New By-law, found at Chapter 800, Definitions, #820:

"(820) Storey means a level of a building, other than a basement, located between any floor and the floor, ceiling or roof immediately above it."

It is difficult to conclude that this "attic space" would not constitute a storey under this definition. There would be stair up to it, a literal floor of a significant square footage and a roof immediately above it. Mr. Abbott used the term storey repeatedly in referring to the proposed addition. The question becomes, then, whether a variance should be granted for this third storey in this area.

The other variances are indeed minor, including the side and rear yard setbacks. No east side setback is required because of the parking space there. The variance for no parking rather than the two required is minor because of the provision of this space, acceptable to the Transportation Department.

I find that there was no bias evident in the procedure followed by Mr. Mills in accepting his assignment to represent SAHRA here. It is normal, at least from the professional planners that I have seen in hearings, to acquaint oneself with the file in question before accepting the assignment. It was unnecessary to ask the detailed questions about the process, again seemingly directed at impugning Mr. Mills' objectivity. He signed the TLAB's Form 6, Acknowledgment of Expert's Duty, containing the following:

"I acknowledge it is my duty to provide evidence in relation to this proceeding as follows:

a. to provide opinion evidence that is fair, objective and non-partisan;
b. to provide opinion evidence that is related only to matters that are within my area of expertise; and
c. to provide such additional assistance as the TLAB may reasonably require to determine a matter in issue.

I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged."

The latter statement alone suffices as a response to this allegation, no matter what a party may suspect. He testified that his only instructions in this matter were to appeal the decision, based on the Association's long-held opposition to any proposed third storey development in this area. He has provided planning evidence on many appeals, including the OMB and TLAB, as he did recently in the appeal for 79 Felbrigg Ave. The TLAB refused to approve a third storey in that matter. His recommendation for a by-law change was not advocacy. He was merely interpreting and upholding the wording of the existing by-laws for this minor variance application.

I came to believe that Ms. Lee's repeated questioning of Mr. Mills could have arisen in part from a lack of familiarity with the type of appeal and the planning process in general. However, as she and her husband are both legal professionals, I found it difficult to understand why they did not appear to have better acquainted themselves with the duty of expert witnesses at the TLAB. As well, it was difficult to understand why they would not be aware of the procedure and purpose of an administrative hearing with a public interest component, versus a more formal court procedure. I gave Ms. Lee the benefit of the doubt when Mr. Roberts objected that she was providing evidence during her questioning, finding that she was merely asking Mr. Mills

questions on his report. I also permitted her a reply to Mr. Roberts' submissions at the end of the hearing.

However, I find that the applicants' seeming refusal to accept that Mr. Mills' choice of a study area was both logical and fitting was unwarranted. He had provided this very cogent explanation: " [32] The Main Character Area Neighbourhood was determined within the Broad Area by applying the Official Plan Policy 5.6.5 guidelines to determine its boundaries after reviewing existing zoning by-laws, prevailing lot depths, lot patterns, and use patterns. The selected Main Character Area Neighbourhood matches the local RD (f9.0) district's boundaries." The owners went beyond this zoning limitation for examples of third storeys as he claimed, and unjustifiably.

On the tests I must apply to assess the variances here, I would support another statement found in the aforementioned case of *Re Yang* 2015 CarswellOnt 7144. "When considering policy 4.1.8 of the Official Plan, the Board recognizes that the zoning sets out the appropriate zoning standards to ensure that new development such as this is compatible with the physical character of established residential Neighbourhoods." (ibid, p 5).

However, I would distinguish the decision for 77 Mason Boulevard (PL130868). There the application to fill in the attic was approved, because there were several existing three storey houses in the area as well as some with architectural features of three storeys. The entire neighbourhood was a mix of two- and three storeys. The Board stated on p. 5, para. 19:

"…..The application is to convert existing interior attic space into a habitable third storey. The purpose of the zoning by-law in restricting dwellings to two storeys is to control the height, scale and massing of new dwellings in the neighbourhood. The application for conversion of the attic space does not entail any changes to the exterior of the dwelling as there are no requests to increase the height of the dwelling, it will continue to occupy the same footprint as was approved by the City."

This is not the case here, even if there is no height or footprint increase. It is a good example of how each application turns on the specific facts involved. The argument made by objectors in that case was that the control mechanism of maximum coverage and two storeys did not permit any increase in GFA. The Board rejected this on the facts, saying that an attic fill in would not increase the massing. However, in the current proposal, it would be more than a mere fill in. It is a large addition to the rear, including a visible roof extension, a window and significant square footage – it is a third storey even if the height is not increased.

I adopt the expression used by Mr. Mills, that to approve this third storey where the zoning specifically limits dwellings to two, would be to let the genie out of the bottle. Both the existing and the planned character of the neighbourhood here is in fact a two storey one, imposed by both applicable by-laws. The knock-on impact of an approval of a de facto third storey could cause the neighbourhood to be somewhat destabilized, and this would not conform with the Official Plan.

This variance having failed on the test of meeting the general intent and purpose of both the Official Plan and the zoning by-laws, it must be denied. I find the other variances to be minor and to meet the other tests. SAHRA' s appeal must succeed on the principal variance for three storeys.

DECISION AND ORDER

The appeal is approved and the minor variance for three storeys is denied. The other variances are approved.

X

G. Burton
Panel Chair, Toronto Local Appeal Body