

DECISION AND ORDER

Decision Issue Date Thursday, June 14, 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): CARLA GLICK

Applicant: CASALDOM ARCHITECT

Property Address/Description: 165 BRIAR HILL AVE

Committee of Adjustment Case File Number: 17 194166 NNY 16 MV

TLAB Case File Number: **17 261468 S45 16 TLAB**

Hearing date: Friday, June 01, 2018

DECISION DELIVERED BY T. Yao

APPEARANCES

Carla Glick, Ari Glick	Owners	Tara Piurko (lawyer)
Gideon Zur	Neighbour	Michael Krylov (lawyer)

INTRODUCTION

Carla Glick seeks to demolish an existing two storey house and replace it with a new one . She needs thirteen variances. The Committee of Adjustment refused the variances on October 26, 2017, and Ms. Glick appealed. Thus, the matter comes before the TLAB.

BACKGROUND

The property is on the south side of Briar Hill Avenue, one and a half blocks west of Yonge Street. The pair of semis next door is owned by four persons, one of whom is Gideon Zur, who opposes Ms. Glick' application. Mr. Zur was represented by a lawyer, Michael Krylov, who introduced evidence on Mr. Zur's behalf through a qualified land

**Decision of Toronto Local Appeal Body Panel Member: T. Yao
TLAB Case File Number: 17 261468 S45 16 TLAB**

use planner, although he did not testify himself. The photo below shows his property (centre building, 159-163 Briar Hill Avenue) and Ms. Glick's (white and black building to right, 165 Briar Hill Avenue). The diagram that follows shows the front elevation of the proposed Glick residence.

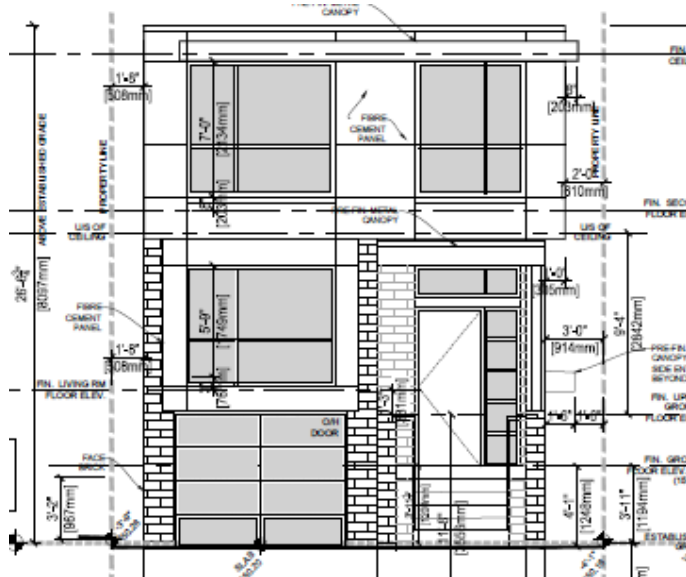


Diagram 1. Proposed front (north elevation) The height of the roof will be approximately in line with the middle of the dormers of the semis on the left.

MATTERS IN ISSUE

Variations must be sought under the former City of Toronto By-law 438-86 and the new City-wide By-law 569-2013, because the latter is under appeal. We are now five years since the latter by-law was adopted and appeals are beginning to be resolved. Until the last appeal is disposed of, however, all building applications must be considered under both by-laws.

Table 1¹. Variations sought by Carla Glick			
Zoning By-law 569-2013			
		Required/ permitted	proposed
1	Maximum building length	14 m	18.39 m
2	Maximum floor space index	.6 times lot area	.71 times lot area
3	East side yard setback	.9 m	.51 m
4	West side yard setback	.9 m	.61 m
5	Portion of first floor within 4 m of front wall	Minimum of 10 m ²	0 m ²
6	Maximum height of all side walls	7 m	8.097 m
Former City of Toronto By-Law 438-86			
7	Maximum gross floor area	.6 times lot area	.71 times lot area
8	East side yard setback for portion of building exceeding 17 m (i.e. rear)	7.5 m	.51 m
9	West side yard setback for portion of building exceeding 17 m (i.e. rear)	7.5 m	.61 m

¹Tables and diagrams etc. form part of this decision.

Decision of Toronto Local Appeal Body Panel Member: T. Yao
TLAB Case File Number: 17 261468 S45 16 TLAB

10	East side yard setback for portion of building not exceeding 17 m (i.e. front)	7.5 m	.51 m
	West side yard setback for portion of building not exceeding 17 m (i.e. front)	7.5 m	.45 m
12	Building depth	14 m	21. 49 m
13	Front yard soft landscaping	75%	55%

A decision of the Toronto Local Appeal Body must be consistent with the 2014 Provincial Policy Statement and conform to the Growth Plan of the Greater Golden Horseshoe for the subject area. I considered those documents and found no policies that were sufficiently detailed to be dispositive. The TLAB Panel must also be satisfied that the applications meet all the four tests under s. 45(1) of the *Planning 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.

PRELIMINARY “LIMITATIONS CONCERN”

This is the second application to the Committee for essentially the same building. Ms. Glick applied to the Committee in June 2017, with support from a planner (not her current planner Mr. Huynh) and her architect. The Committee refused the variances. She did not appeal further to the TLAB because she was advised it would be one year before the matter would be heard², so the advice she received was that it would be best to return to the Committee anew. She excised a second-floor balcony, reapplied, and the Committee refused her second application.

² The TLAB took over appeals from (then) OMB in May 3, 2017.

Mr. Zur's lawyer, Mr. Krylov, raised a "limitations concern", arguing that Ms. Glick, now being past the appeal period for the first decision, cannot proceed with this appeal. I reject this argument for two reasons. First, the oral evidence of Mr. Zur's planner, Michael Flynn, given at this hearing is that it is a *practice* of the of the Committee, not a matter of jurisdiction or legislative intent:

The Committee of Adjustment will generally not accept the same application twice. If an application is refused, a new application has to be substantially different than the original application. Of course, then the question is what substantially different means, is open to interpretation. But in my view, this application is substantially the same, plus or minus, as the first application. Therefore, it should not have been accepted as a valid application. Then the first refusal should have stood, and more substantial changes should have occurred before the second application was accepted.

The OMB³ has gone on record as finding no provision in the *Planning Act* that limits the number of times the same or similar relief may be sought from the Committee of Adjustment. However in *2915 St Clair* (Feb 12, 2018) the TLAB has applied the doctrine of *res judicata*/issue estoppel to a minor variance appeal in which a restaurant use was refused at a gas bar and the same permission had been previously refused by the OMB. As the trier of fact in this case, I find that Ms. Glick's first and second application were different in that she removed the second floor balcony in the second application. But more important is the fact that this is the first time these issues have appeared at the TLAB and the whole basis of the reasoning in *2915 St Clair* is that there should not be relitigation of the same issue *in the same tribunal*. The extension of this doctrine to litigation in a previous Committee decision proposed by Mr. Krylov is not consistent with *2915 St Clair* because in that case the OMB and TLAB were exercising a concurrent jurisdiction. This tribunal has no control over the substantial similarity or other administrative practices at the Committee of Adjustment. Finally although it is of lesser importance than the integrity of the process considerations pronounced by Mr. Lord in *2915 St Clair*, it was not proved to me that Mr. Zur appeared at the either of the Committee of Adjustment hearings, so he has not experienced the cost of relitigating the same issue.

EVIDENCE

David Huynh testified for Ms. Glick and Michael Flynn testified for Mr. Zur. I found both to be qualified as experts able to give opinion evidence in land use planning. In addition, Rob Allan, whom I qualified to give opinion evidence on construction management, testified that the second floor wall could be built whilst respecting the easements for the mutual driveway. Mr. Glick gave background information on the use of the residences owned by Mr. Zur.

ANALYSIS, FINDINGS, REASONS

Both planners underestimated the age of houses on Briar Hill Avenue, which were built from approximately 1910 to 1925. Building a “subdivision” over two decades is very different from today’s practice, and so it is not surprising that there is a wide variability in performance standards as measured by the zoning. This is the crux of Mr. Huynh’s evidence; he posited that such variability means that the Chapter 4 policies of the Official Plan are satisfied. This states that physical changes “must generally fit into the existing character of the neighbourhood”. Since the neighbourhood contains many different building lengths, heights and setbacks, a reasonable variance from these requirements means it will “fit in”. Mr. Huynh found 70 of 584 properties in the neighbourhood had a building depth greater or equal to the 18.39 m Ms. Glick seeks, and 64 had an FSI greater or equal to .71. (Zoning By-Law 438-86 permits a maximum depth of 14 m and FSI .6 times the lot area.)

Mr. Zur set out to rebut this. His planner, Mr. Flynn, has adjudicated over 5000 Committee of Adjustment applications and represented over 1000 private clients in seventeen years of private consulting. Although I reject his evidence, I wish to acknowledge that Mr. Flynn was forthright throughout and very ably and professionally advanced Mr. Zur’s position.

Minor — a question of numbers and impact

Mr. Flynn took the position that Ms. Glick’s proposed building is “too long, too wide and too high”. His starting point was the Divisional Court’s analysis of “minor” in *DeGasperis*:

The Divisional Court sent it back to the OMB to have the term - not word - “minor variance” defined. In effect the OMB defined that term to mean a combination of size and impact. And where there was no adverse impact the size didn’t matter. A combination of size and impact. And where there was no impact, the size didn’t matter. Alternatively, if there was a very small numerical variance that had a large adverse impact, it wasn’t minor. So, this is, and as [Mr. Huynh] said earlier, it is a combination of size, numerical size, and impact. But I would suggest to you the most important thing about it is the impact. So, in this case while you have such a large variance for length, I would suggest it is not minor.⁴

³ “The *Planning Act*, 1983, contains no provision which would serve to limit the number of times the same relief may be sought from the committee of adjustment (sic) as to the granting of a minor variance. Nor does the legislation provide any guidance as to the length of time that must elapse after an unfavourable decision by the committee before another application for the same relief is filed. On the contrary, s 44(4) of the Act provides that any application for a variance received by a committee of adjustment shall be accorded a hearing within 30 days.” Decision of OMB Vice Chair M.E. Johnson, *DaSilva v City of Cambridge Committee of Adjustment 23 O.M.B.R. 406* (This is a 1989 case, which is not available online.)

⁴ “. . . [After consulting a dictionary definition of “minor”] “It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an

Decision of Toronto Local Appeal Body Panel Member: T. Yao
TLAB Case File Number: 17 261468 S45 16 TLAB

He went on to say that the FSI was an artificial construct and, “in my mind, that’s a technical variance; it’s not a practical variance.” In reply to the specific question as to “the impact of a building of this size”, he replied:

Well, first of all it is out of character with the neighbourhood, totally. Not only because of its flat roof design, but the length of it out of character, but keep in mind that these homes were built, I believe it was from 1940 to 1960, so all of these houses, when they were built, were built without a zoning by-law⁵. ...So, many of those houses became what we would refer to as legal nonconforming. Now, in this particular case, this is an important issue, you’re talking about existing houses, with nonconforming specs, so, side yard, et cetera, et cetera. That is, in most jurisdictions, legal, as long as the house remains.

He then went on to explain that a house’s non-conforming status is lost when more than 50% of the side walls are demolished, which is the case with Ms. Glick’s proposal:

Mr. Flynn: When you’re building a new house, adjudicators would tend to say you have the opportunity to build a new house, you have the opportunity to meet the requirements of the by-law. And anything you do above and beyond that isn’t because you have an existing situation, it’s because you want it. . . . So, is there an impact to that FSI? No. I don’t think so. . . .So that’s why I say it is very technical and I don’t think it has any impact.

Mr. Krylov: So, let’s go back to “you’re too wide, too big, too long, too high (unintelligible)”.

Mr. Flynn: So, in this case, going back to that scenario, GFA or FSI, that variance is being created by the breach of the regulations, so in this case we’ve got the too wide, too tall, too long, scenario, all of those things create a structure that doesn’t fit the by-law and creates an impact on the surrounding properties. In this case the character doesn’t fall within the neighbourhood either but more important, going back to these regulations. . . [Mr. Flynn explains that cumulative variances are unacceptable, suggesting the cutoff point would be 6 or more variances].

Stopping at this point, Mr. Flynn is just reiterating that the zoning standards are not met, which is tautological. If they were met we would not need minor variances. The important question is whether those exceedances meet the intent of the Official Plan and zoning.

approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties. Accordingly, in my view the Board was required, at the outset, to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.” Judge Matlow, *Vincent v. Degasperis*, 2005 CanLII 24263 (ON SCDC)

⁵ Toronto’s first zoning by-law was 1953.

Decision of Toronto Local Appeal Body Panel Member: T. Yao
TLAB Case File Number: 17 261468 S45 16 TLAB

Table 2. Mr. Flynn's list of approved and refused applications for 47
to 211 Briar Hill Ave

	number of variances	Address		year
1	3	8 Hillhurst	Approved	2010
2	3	273 Briar Hill	Approved	2012
3	3	278 Briar Hill	Approved	2012
4	4	30 Lytton	Refused	2010
5	4	45 Briar Hill	Approved	2010
6	4	151 Briar Hill	Approved	2013
7	4	211 Briar Hill	Approved	2008
8	5	182 Briar Hill	Approved	2011
9	5	216 Briar	Approved	2013
10	5	178 Briar Hill	Approved	2018
11	6	92A Briar Hill	Approved	2013
12	6	92B Briar Hill	Approved	2016
13	6	269 Briar Hill	Approved	2016
14	13	165 BriarHill	Refused	2017

Mr. Flynn's proof of a cut-off point was contained in Table 2, above. In this Table, he considered all Committee of Adjustment decisions for 69 properties on Briar Hill and attempted to show that the more variances being sought, the greater the likelihood of refusal.

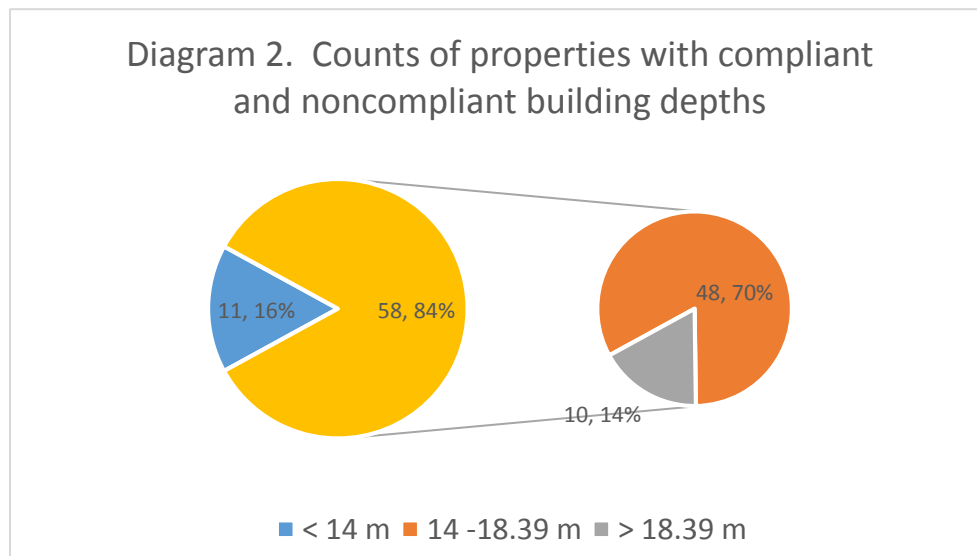
One might infer a tendency in Table 2's original list (not shown), the cutoff point being perhaps 4, 5, or 6 variances.. Both lists (original and revised after cross-examination) show Ms. Glick's property with the highest number, at 13 variances sought. Cross-examination shows that three of the "refused" properties have been appealed and overturned at the OMB, so those have to be flipped to the approved column. Ms. Piurko also added 178 Briar Hill, a recent May 2018 decision in which 5 variances were approved by the Committee. (It approved a building length of 15.55 m and density of .62). This makes 14 properties in total with two refusals:

- 30 Lytton (4 variances) and
- the subject site (13 variances).

In all the others, the variances were approved (range of 3 to 6 variances). The Table above is corrected for information uncovered in the cross examination. I find that this does not prove the proposition claimed by Mr. Flynn. I also note that 13 variances are sought because of two by-laws being in place. Ms. Glick seeks only 6 variances from the City-wide by-law. One of those is for portion of first floor within 4 m of front wall

which the City has found difficult to interpret.⁶ If we omit this variance, this leaves only 5 variances sought for 569-2013. Also, five applications were before the 2013 City wide by-law, which could have doubled the number of those variances.

There is another deficiency in Mr. Flynn's case. He analyzed 69 properties (Nos. 45 to 211 Briar Hill Avenue) but did not look to see what proportion were already non-conforming. I wanted to integrate Mr. Huynh's building depth/length data to Mr. Flynn's "neighbourhood". When this is done, out of those properties, 84% already exceed the zoning standard of 14 m; and, of that 84%, 10 properties or 14%, are in excess of the 18.39 m Ms. Glick seeks. This is illustrated below:



I mentioned earlier that Mr. Huynh found 70 of 584 properties (12%) had a building depth/length beyond the 18.39 m sought by Ms. Glick. This is roughly similar to my finding of 10 out of 69 properties, which is 14.5%.

This is also illustrated a diagram introduced by Mr. Huynh:

⁶ In *50 Marmion Avenue*, I wrote: "Currently the Mr. Conti of the Tribunal has commented on this issue at paragraph 104 of PL130592 (March 2018) as follows: 'The City also recommended that regulation 10.5.40.10 (5) which required a minimum of 10 sq m of the first floor to be within 4 m of the front main wall to be deleted. Mr. D'Abramo [the City's witness] indicated that there was difficulty in interpreting this regulation.' The final decision is being held pending further study on other issues, but the result will be that 569-2013 will no longer contain this provision and, in the future, the plan examiner will not ascertain if first floor areas meet this standard."

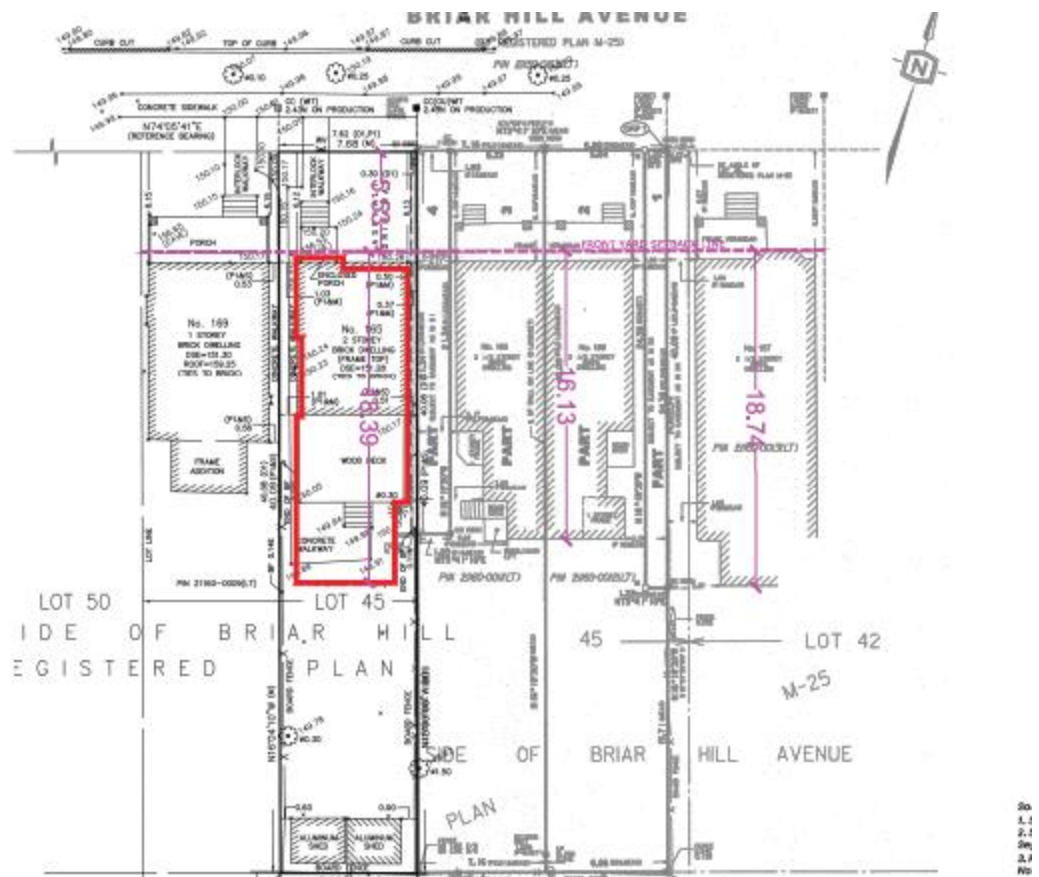


Diagram 3. Heavy line shows proposed Glick structure

Diagram 3 above shows the Glick house (18.39 m) will extend beyond Mr. Zur's semis (18.13 m). No. 157 currently extends beyond the Zur semis (18.74 m). I must then conclude that a building depth/length of 18.39 m meets the intent of the Official Plan, because it fits in and consistent with the prevailing building lengths created from 1915 to 1925.

Mr. Flynn has taken FSI off the table, conceding it is a technicality. The Glick proposal replicates the existing side yard setbacks, although variances must be sought for the under-by-law side yards for the portion of the building extending beyond 17 m. The proposed soft landscaping treatment will remove a parking pad and be an improvement over the current situation. Indeed, formal or informal parking pads proliferate in this area and I believe many area properties currently do not meet the soft landscaping requirements.

I believe the only remaining question is the impact of the increased building depth. Mr. Zur offered no evidence on impact; he did not take the stand; he did not offer a tenant as witness; nor did he attempt to put impact evidence through Mr. Flynn. The reason Mr. Flynn did not is probably because the current use of the Zur property is for Airbnb residences and the impact, across a mutual driveway and in a taller building, if

any, is problematic. The reason is because the existing or planned context is uncertain⁷. “Existing planning context” is a metric of how another land use should respond to physical change. At any rate, I had no evidence of impact, let alone “adverse impact”, and no evidence as to “unacceptable adverse impact”. If there is no impact, it follows on the reasoning of *DeGasperis*, that the variance is minor.

Additional finding on “respect and reinforce” existing character

The Official Plan requires that new development respect the existing physical character of the neighbourhood. The plans show that the first floor is composed of a 10' x 17' living room, an 18' x 19' kitchen and a 14' x 16' family room (all measurements approximate). The exterior wall that encompasses the first two rooms is shown as 42 feet 8 inches, which is within the maximum building length of 14 m or 45.9 feet. The additional building length of 3.39 m (11.1 feet) would appear to be a result of the Glicks' desire to have a family room adjacent to the kitchen. Such an arrangement on a narrowish lot, in this particular geographical context is an appropriate development and use of the land, in my view.

On the west side there are no windows at all; on the east side, the kitchen has no windows and the family room windows are set so high that to see out, one must stand on “tiptoes” to see out. On the second floor the Glicks have a chunk cut out of their floor space and this, plus frosted glass restricts any ability to see out to the rear of the Zur lands. I find that the proposal respects and reinforces the privacy and character of the neighbourhood and thus meets the “appropriate use of the land” test.

The zoning intent

The property is zoned R (Residential). It is subject to a maximum building depth of 14 m. Building depth is defined as:

Building Depth means the horizontal distance between the front yard setback required on a lot and the portion of the building's rear main wall furthest from the required front yard setback, measured along a line that is perpendicular to the front yard setback line.

The intent of the zoning is to tie this front wall to adjacent front walls to create a uniform street façade, which the proposal does do. Together with the previous finding that the vast majority of homes in the neighbourhood exceed the 14 m by-law standard, I find that the intent and purpose of the zoning by-law is demonstrated.

In conclusion I find the variances singly and cumulatively meet the statutory tests.

⁷ Developments must be conceived not only in terms of the individual building site and program, but also in terms of how that site, building and its façades fit within the existing and/or planned context of the neighbourhood and the City. Page 3-4, Official Plan

DECISION AND ORDER

I authorize the variances set out in Table 1 subject to the following conditions of approval:

1. The property be developed substantially in accordance with the plans and drawings submitted to the Committee of Adjustment and date stamped received by the City Planning Division on October 13, 2017, as revised by the Applicant's Form 3 Disclosure received by the TLAB at 2:12pm on February 16, 2018.
2. The proposed front driveway to be constructed of permeable pavers.

X

Ted Yao

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