Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Thursday, May 31, 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): DANYLO JOSYF KLUFAS, CITY OF TORONTO

Applicant: THOMAS TURBAK

Property Address/Description: 12 SHAVER CRT

Committee of Adjustment Case File Number: 17 128090 WET 03 MV (A0237/17EYK)

TLAB Case File Number: **17 262905 S45 03 TLAB**

Hearing date: Friday, April 20, 2018

DECISION DELIVERED BY D. LOMBARDI

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Thomas Turbak	Applicant/ Owner	
Danylo Josyf Klufas	Appellant	
City of Toronto	Appellant	Sara Amini
Trista James	Expert Witness (City of Toronto)	

INTRODUCTION

This Hearing is in the matter of an appeal to the Toronto Local Appeal Body (the 'TLAB') by the Appellants (the City of Toronto and Mr. Danylo Klufas) of the decision of the Etobicoke York Panel of the Committee of Adjustment (the 'COA') of the City of Toronto ('City') to approve minor variances to construct a new detached two-storey dwelling with an attached garage at 12 Shaver Court (the 'subject property').

The subject property is located on the west side of Shaver Court, and is situated somewhat centrally within the Islington-City Centre West neighbourhood. It is bounded by the main intersections of Rathburn Road to the north, Martin Grove Road to the east, Burnhamthorpe Road to the south, and The East Mall to the west.

The subject property is surrounded by detached dwellings, with Glen Park located directly west of the property, Mimico Creek, Echo Valley Park and Hampshire Heights Park to the north-east, all of which are part of the City's Natural Heritage System.

The subject property is a 'pie-shaped' lot, with a frontage of approximately 9.24 m, a depth of approximately 54.86 m, and a lot area of 506.86 m. The property is currently occupied by a one-storey brick residential dwelling with a rear attached garage.

It is designated *Neighbourhoods* in the City's Official plan, and zoned Second Density Residential (R2) under the former Etobicoke Zoning By-law (the 'existing By-law') and Residential Detached (RD) (113.5;a510; d0.45) under the harmonized City Zoning By-law 568-2013 (the 'new By-law').

BACKGROUND

The Applicant, Mr. Thomas Turbak (who is also the owner), submitted an application (File No. A0237/17EYK) to the COA on March 13, 2017, to vary the existing and new zoning By-laws to permit the construction of a new two-storey residential dwelling with an attached, integral garage.

The COA scheduled a Hearing to address these variances for June 1, 2017. In advance of the COA Hearing, City Planning Staff ('Staff') submitted a report to the COA, dated May 2, 2017, providing comments with respect to the application.

The Staff Report, which was authored by Assistant Planner, Dereck Brunelle, recommended that the application for the requested variances be deferred in order for the Applicant to revise the proposal to be more in keeping with the Official Plan and Zoning By-laws.

In the report, Staff raised concerns regarding the proposed dwelling, noting that the requested variances for length and depth did not satisfy the intent and purpose of the By-laws. Further, Staff stated that, *"in their opinion the extent of these variances*

may adversely impact neighbourhood dwellings in terms of privacy and natural light and, further, that the proposed building location and massing are not in keeping with the existing character of the area."

Staff also recommended that, alternatively, if the COA chose not to defer the application, the requested variances should be refused.

At the COA Hearing, the Applicant requested that the application be deferred on the grounds that additional comments had been received from the City's Urban Forestry Staff one day prior to the hearing, and he requested additional time to review the comments.

The COA consented to the deferral request, and a revised COA Hearing Date was scheduled for October 26, 2017.

On October 26, 2017, the COA approved the following variances:

1. **Section 10.20.40.20.(1), By-law 569-2013**
   The maximum permitted dwelling length is 17 m.
   The proposed dwelling will have a length of 22.28 m.

2. **Section 10.20.40.30.(1), By-law 569-2013**
   The maximum permitted dwelling depth is 19 m.
   Section 320-42.1.D.(1)
   The maximum permitted dwelling depth is 16.5 m.
   Section 10.20.40.30.(1), By-law 569-2013 and Section 320-42.1.D.(1)
   The proposed dwelling will have a depth of 26.59 m.

The City, along with the Applicant's neighbor, Mr. Klufas (residing at 14 Shaver Court), appealed the COA's approval decision to the TLAB on November 14, 2017.

The City appealed on the following grounds:

I. *The proposed variances do not meet the intent and purpose of the Official plan or the applicable Zoning By-laws;*
II. *The variances adversely impact neighbourhood dwellings in terms of privacy and natural light;*
III. *The proposal does not represent good planning, does not respect and reinforce the existing physical character of the surrounding neighbourhood and is not desirable for the appropriate development of the Property; and*
IV. *Any further reasons that counsel may provide and that the TLAB may allow.*

Mr. Klufas appealed the COA Decision as well (Notice of Appeal – Form 1), providing the grounds for his appeal:

I. *Policy 4.1.5 of the Official Plan establishes that development will respect and reinforce the existing physical character of the neighbourhood, particularly the size and configuration of lots, massing, and scale of nearby residential properties. Further,`` …no changes will be made through rezoning, minor*

variance, consent or other public actions that are out of keeping with the physical character of the neighbourhood.``

II. *Policy 4.1.8 of the Official Plan states that Zoning By-laws will contain numerical site standards for matters such as density, lot sizes, lot depths, lot frontages, landscaped open space and any other performance standards to ensure that new development will be compatible with the physical character of established residential neighbourhoods.*

III. *The property is zoned Second Density Residential (R2) under the former Etobicoke Zoning Code and Residential Detached (RD) under the new City-wide Zoning By-law 569-2013.*

IV. *The applicant proposes to construct a new detached dwelling with an attached garage. City Planning Staff have reviewed the proposal and have commented that the variances for length and depth do not satisfy the intent and purpose of the Zoning By-laws, the extent of the variances may adversely impact neighbourhood dwellings in terms of privacy and natural light, and the proposed building location and massing are not in keeping with the existing character of the area.*

V. *City Planning Staff recommended that the COA defer the application until a revised proposal is submitted in order for the Applicant to revise the plans to be more in keeping with the Official Plan and By-laws. Staff further recommended that the application be refused should the COA choose not to defer.*

VI. *In terms of numerical site standards, the proposed dwelling length is more than 30% greater than the maximum permitted, the dwelling depth is 40% and more than 60% greater, respectively, than the maximums permitted in the By-laws. This in no way can be construed as a minor variance.*

The TLAB issued a Notice of Hearing (Form 2) and set a Hearing Date of April 20, 2018, pursuant to Rule 10.1 of the TLAB's Rules of Practice and procedure (the 'Rules').

On March 13, 2018, the neighbor, Mr. Klufas, filed a Notice of Motion (Form 7) request for an adjournment of the hearing to a date when he, as one of the appellants in the matter, would be in the country and available to physically attend the hearing.

In the alternative, Mr. Klufas requested that if an appropriate hearing adjournment date could not be determined, or otherwise not approved, that he be provided an allowance to attend the hearing by electronic means (e.g., by telephone or video conference).

Mr. Klufas advised that he currently resides outside of Canada, and that his residence at 14 Shaver Court, adjacent to the subject property, is currently being leased by tenants. He confirmed that he did not expect to be in Toronto on the date of the scheduled appeal hearing set for April 20, 2017, and noted that he expected to be back in the City in July, 2018. He added that expected to reside at his home at 14 Shaver Court, for an indefinite period, commencing as early as July, 2019.

The Appellant's grounds for requesting the adjournment were outlined in his Notice of Motion (Form 7). They included the facts based not only on the aforementioned circumstances, but also on the following additional grounds:

- *The requested adjournment is consistent with Rule 23 of the TLAB's Rules of Practice and Procedure and, specifically, although not limited to, Rule 23.3 (Considerations in Granting Adjournment), and Rule 23.4 (Powers of the Local Appeal Body upon Adjournment Motion); and*
- *If a ruling for an adjournment is not approved, a request that the motion be held by electronic means, consistent with Rule 24 (Hearings), and specifically, although not limited to, Rule 24.1 (Form of Hearing), and Rule 24.4 (Factors Considered for Holding Electronic Hearing).*

In a Notice of Response to Motion (Form 8) dated March 15, 2018, filed by the City solicitor, Ms. Sara Amini, the City consented to Mr. Klufas' request to adjourn the hearing, and also consented to Mr. Klufas attending the hearing via telephone or video conference.

In his Notice of Response to Motion, dated March 19, 2018, Mr. Turbak, expressed opposition to Appellant's request to adjourn or postpone the scheduled hearing, noting that there had already been significant delay in hearing the appeal in a timely fashion. However, the Applicant did consent to Mr. Klufas attending the hearing via telephone or video conference, so that he could participate in the process.

A Motion Hearing date was scheduled for April 3, 2018, and the Motion was heard by telephone conference, with the participation of the owner/applicant (Mr. Turbak), the City Solicitor (Ms. Debacker), and the neighbour (Mr. Klufas).

At that Motion Hearing, the City noted that the owner/applicant had not filed a witness statement and, therefore, could not call expert opinion evidence of a planner at the hearing. The owner stated that he was prepared to proceed with the appeal hearing without the benefit of a planning witness and would only present the plans on file with the TLAB as evidence. He adamantly opposed any adjournment.

In his ruling on the Motion, Panel Member Makuch noted that there were no matters in issue as all parties consented to Mr. Klufas participating in the April 20, 2018 appeal hearing by telephone conference. Member Makuch specifically noted that the owner was made aware of the risk of participating in the hearing without presenting any evidence – other than the plans – but had stated that he wished to proceed regardless.

The TLAB Decision and Order issued on April 9, 2018, provided that the hearing proceed on April 20, 2018, as scheduled, and that Mr. Klufas be allowed to participate by telephone conference pursuant to the TLAB Rules.

MATTERS IN ISSUE

At the commencement of the Appeal Hearing, the City Solicitor, Sara Amini, referred to the April 9, 2018 Decision and Order issued by Panel Member Makuch, regarding the motion brought forward by the Appellant (Mr. Klufas). Ms. Amini noted that the Applicant consented to proceed to a full hearing on the requested variances without the benefit of a planning expert witness, and she confirmed that the Applicant was prepared to move forward relying on the architectural plans already filed with TLAB as the only evidentiary material to be presented.

Ms. Amini also noted that when asked at the Motion Hearing whether the Applicant intended to seek legal counsel or retain a land use planning expert in anticipation of, and to be present at the April 20, 2018 hearing, Mr. Turbak answered 'no'.

At this point in the proceeding, Ms. Amini stated the City's position outlining that given that the Applicant has failed to disclose any documents or a witness statement, the Applicant should not be permitted to lead any evidence at the appeal hearing. Further, the City is of the opinion that to permit the Applicant to lead evidence would be unjust and would prejudice this proceeding.

She noted that there are rules and procedures that have been formulated by TLAB to ensure transparency at hearings and to prevent a so called 'trial by ambush' and advised that both the City and Mr. Klufas have complied with TLAB disclosure rules and submitted witness statements and evidence in advance of the hearing.

In referencing the Applicant's failure to do the same, Ms. Amini characterized the current situation as a case of 'asymmetrical disclosure', and requested TLAB's direction on determining how the proceeding would unfold.

She posited that this is a *'de novo'* hearing and the Applicant bears the burden of satisfying the TLAB that the proposed variances represent good planning and ultimately meet the four planning tests under Section 45(1) of the *Planning Act* (the '*Act*'). Ms. Amini noted, however, that it was unclear how the Applicant intended to do so given that he had failed to disclose any evidence to date.

Ms. Amini argued that the COA decision was appealed by the City and Mr. Klufas and, therefore, the Applicant was aware that opposition existed to his proposal. She suggested that the Applicant would have, or should have known that this would not be an 'uncontested' hearing.

Ms. Amini submitted two emails, one dated March 29, 2018 and the other dated April 16, 2018 (marked as Exhibit A), addressed to the Applicant and his representative, Channing Prater. The emails asked whether the Applicant intended to call expert witnesses or file evidence in this matter. Neither the Applicant nor his representative responded, and the City concluded that no further evidence was forthcoming.

In light of the lack of evidence from the Applicant, the City argued that to allow fresh evidence on the day of the hearing would, in the City's respectful submission, be prejudicial to the hearing. Ms. Amini noted that although it is unclear as to how the Applicant intended to advance his case, the City would be asking for the TLAB's direction as to whether it would be appropriate to bring forward a motion of 'non-suit' once that case has been presented.

Ms. Amini advised that the City was prepared to call a professional land use planner to give evidence in opposition to the proposal, and requested a ruling from the Panel Member as to how to proceed.

Given the matters before me, and pursuant to Rules 2.2, 2.3 and 2.5 of TLAB's Rules, I found that it would be appropriate to allow the Applicant to proceed to present his case using the plans submitted to TLAB as part of the filings for this matter. I cautioned the Applicant to limit his presentation to the plans before TLAB, and I ruled that I would not allow any additional evidence to be presented that had not already been submitted.

The City and the Applicant acknowledged this ruling and consented to proceeding with the hearing in this manner.

The applications and appeal were neither novel nor complicated. At issue was whether the Applicant's request for zoning relief in the form of minor variances to permit the construction of a new detached residential dwelling with an integral garage is appropriate for the lot.

The three requested variances from the By-laws seek permission to:

1. Increase the length of the proposed dwelling to 22.28 m, whereas the maximum permitted length in the new By-law is 17 m;
2. Increase the depth of the proposed dwelling beyond the allowable parameters of both the former and new By-laws:

    a. The proposal seeks a dwelling depth variance of 26.59 m, where a maximum of 19 m is permitted in the new By-law and a maximum dwelling depth of 16.5 m is permitted under the former By-law.

The key issues appeared to be the size of the proposed dwelling and the size of the ground floor component of the building mass as it relates to the dimensions of the lot, and the characterization of the variances as 'minor'.

In opening remarks, the contrasting positions were succinctly stated by counsel for the City. Namely, it is not good planning to permit a building with a drastic length and depth that does not *'fit'* the neighbourhood and is not compatible with adjacent conditions; versus, construction of a dwelling meant to be a 'multi-generational' home situated on a pie-shaped lot that requires varied setbacks intended to accommodate aging parents on a large, the main/ground floor.

The Parties disagreed on whether the variances sought were considered drastic or out of keeping with the conditions in the neighbourhood, specifically the abutting

properties, and whether the design of the proposed dwelling as a 'two-storey' structure would impact Mr. Klufas' property.

In addressing these matters in his opening remarks, the Applicant's Representative, Mr. Prater attempted to provide statements beyond his expertise and contrary to his responsibilities in his role at this hearing. Both the City and Mr. Klufas objected to Mr. Prater's statements pursuant to Rule 14.3 of the TLAB Rules, noting that a Representative cannot be an expert witness in the same Proceeding. I cautioned Mr. Prater on his approach to his opening statements and requested that confine his remarks to the plans in evidence.

Motion of 'Non-Suit'

Ms. Amini put forward a motion of 'non-suit', noting the Applicant's failure to provide the required evidence to allow this panel to make a determination on whether he has satisfied the four tests under section 45(1) of the *Planning Act*.

In support of this motion, she provided two cases for guidance. While I am appreciative of the assistance, ultimately the determination of a ruling must bear strong bonds to the arguments presented.

Ms. Amini reiterated that the onus is on the Applicant to prove to this panel that the subject application meets the statutory test under the *Planning Act*, and stated that it is the City's position that the Applicant has failed to do so.

The case law submitted by Ms. Amini deals with minor variance applications before the Ontario Municipal Board ('OMB'), and each is listed below by their popular name:

A. *Case 1 – 1744650 Ontario Inc. v. Toronto (City) 2015 (OMB Case No. PL141467) - 6921 Steeles Avenue West*

   This was an Ontario Municipal Board ('OMB') hearing of an appeal of a COA decision to refuse the requested variances. Ms. Amini highlighted Paragraph 13 on Page 3 of the Decision, where Board Member de Avellar Schiller wrote, *"It is the Applicant's responsibility to call a case that puts before the Board the evidence necessary to enable the Board to make the findings required by the Act that would result in a decision of the Board to authorize the variances. There is no requirement on the City to call any witnesses and put any evidence before the Board."*

   Since the Board was unable to make a finding that the variances meet any of the four tests of the Planning Act, the Board granted the City's motion for "non-suit" and dismissed the appeal.

A. *Case 2 – Wong, Re v. Toronto (City) 2008 CarswellOnt 8236 (20080 (O.M.B.D. No. 1220) re 1917 Queen Street East*

   This was an OMB hearing also dealing with an appeal of a COA decision for a minor variance. In this matter, the City made a motion for "non-suit" at the end of

the Appellant's case. In Paragraph 21 under the heading of Findings, Board Member Sniezek wrote, *"It is incumbent on the committee of adjustment, or the Board in the event of an appeal, to consider each of these requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before any application for a variance is granted, it satisfied all of the requirement."*
In this Decision, Ms. Amini noted that Member Sniezek was referring to the four tests of Section 45(1) of the Planning Act, and she highlighted that the Board granted the City's motion for "non-suit" and dismissed the appeal.

Ms. Amini noted that in the OMB cases above, the Board found that the witness evidence provided was insufficient for the Board to make a conclusion as to whether the variances sought met the statutory tests in the *Act.* She opined that in the two cases referenced, the Board dismissed the appeals because the onus is on the applicant to prove its case and they were unable to do so, based solely on relying on the cross-examination of an opposing witness.

As a result, the City asked TLAB to dismiss the subject application and allow the City`s appeal, since the Applicant had an opportunity and right to provide relevant evidence and failed to do so.

Counsel requested that should the Panel Member make a determination to proceed with the hearing, the City asked to be permitted to call their expert planning witness to give evidence in opposition to the application.

Mr. Klufas, the other appellant, concurred with the City`s position and confirmed his support of the motion. He advised the panel that he would be providing evidence only in the event that TLAB makes a ruling to go forward with the hearing.

Mr. Prater advised that the Applicant was prepared to proceed with the hearing so that he could have due process and present his case in a timely manner. I, again, reminded the Applicant that this is a `de novo` hearing and that the burden to satisfy the planning tests rests with him. I also reminded all Parties of the April 9, 2018 TLAB Decision, re-confirming that the owner has been made aware of the risk of participating in the hearing without presenting any evidence, other than the architectural plans already submitted.

RULING ON THE MOTION

In making a determination and ruling on the oral motion of `non-suit` from the City solicitor, I have considered the following TLAB Rules:

- 2.2 – These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits;
- 2.3 – The Local Appeal Body may exercise any of its powers under these Rules or applicable law, on its own initiative or at the request of any Person;
- 2.5 – Where procedures are not provided for in these Rules, the Local Appeal Body may do whatever is necessary and permitted by law to enable it to

effectively and completely adjudicate matters before it in a just, expeditious and cost effective manner; and

- 2.10 - The TLAB may grant all necessary exceptions to the Rules, or grant other relief as it considers appropriate, to enable it to effectively and completely adjudicate matters in a just, expeditious and cost-effective manner.

The Applicant was advised at the April 3rd Motion Hearing of the risks of participating in the hearing without presenting any evidence, and without the benefit of calling a planning expert witness. The Applicant also advised TLAB of his opposition to any adjournment of the hearing.

The TLAB staff advised the Parties that they should come prepared to proceed with the case, and the Applicant has reiterated his desire to proceed with the Appeal Hearing given the time lapse since the COA decision.

The TLAB is committed to a timely disposition of Appeals. Based on the COA decision, the evidence before the TLAB, and considering that this is a 'prima facie' case and I have not yet heard the merits of the case, I dismissed the City`s motion for `non-suit`, and ruled that the hearing would go forward.

The TLAB must consider the relief requested in the context of the appeal, and then the application itself, based on the four tests of the *Planning Act* and applicable Provincial Policy, as outlined below, and not merely on the desire of an Applicant to achieve a certain type of dwelling, regardless of the merits.

JURISDICTION

Provincial Policy – S. 3

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

Minor Variance – S. 45(1)

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

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

EVIDENCE

Mr. Turbak established the dimensions of the subject property and the proposed two-storey residential dwelling, referring to the architectural plans originally submitted to the COA and filed with TLAB (Exhibit 2 – Proposed Site Plan/Survey). He acknowledged that the subject property is an irregular, pie-shaped lot approximately 1,500 m^2 in area and that the proposed dwelling will be approximately 493 m^2 in size...

Mr. Turbak also noted that the proposed dwelling would result in lot coverage of 27%, or 402 m^2, which he argued was well within the standard permitted in the Zoning By-laws and did not require a variance.

He suggested that two factors contributed to the variances being sought for this proposal: the first being the shape of the lot; and, the second being the intended functionality of the proposed dwelling.

Due to the very narrow frontage of the lot, the design of the proposed dwelling required that the building footprint be setback further in order to achieve a more significant front façade/elevation. Mr. Turbak noted that the proposed setback is 14 m, which is consistent with the setbacks of both abutting neighbours, including that of the Appellant, Mr. Klufas. He also suggested that another house in the neighbourhood, which he could not identify by address, had a setback of 14.9 m.

Mr. Turbak confirmed that the majority of the living space in the proposed dwelling was to be focused on the ground floor/1st floor, and that the dwelling was designed as essentially a 'bungalow', with a single, second floor loft. The purpose of this configuration was to create a 'multi-generational' home to accommodate his aging parents.

In discussing the massing and scale of the proposed dwelling, Mr. Turbak noted that the height of the proposed structure was lower than the 9.1 m permitted in the By-laws. This fact, along with the minimal fenestration on the north east elevation, adjacent to Mr. Klufas' home, was highlighted by Mr. Turbak to illustrate that the Applicant had attempted to mitigate privacy and sunlight impact on the abutting properties.

Mr. Turbak referred to Appendix B of the City's Expert Witness Statement (a satellite view of the neighbourhood) to show the relationship of rear wall setbacks to properties in the neighbourhood, specifically to the dwelling at 11 Shaver Court. He opined that from a planning perspective, his proposal represented good planning.

In cross examination, the City solicitor first questioned the Applicant about his characterization of the proposed dwelling as a 'bungalow'. Ms. Amini confirmed that the architectural plans (Exhibit 2 – Pg. /Sheet 8) illustrated a dwelling with two-storeys and asked Mr. Turbak to confirm this fact, which he did.

Next, Ms. Amini attempted to establish the Applicant's knowledge of the four tests in the *Planning Act,* and how each related to the variances being requested. Her questioning confirmed that while the Applicant had heard of the tests, he was not

familiar with each individually, or how the requested variances satisfied the test cumulatively.

Ms. Amini confirmed that the Applicant was seeking approval for three variances in total, two for building depth and one for building length. She addressed each individually with the Applicant:

1) Building Length Variance

- The maximum permitted building length under the new By-law is 17 m, and the proposed length is 22.20 m. She noted that represented a building length that is 5.28 m greater than what is permitted. She suggested that the proposed building length variance, if granted, would result in the largest building length in the neighbourhood (Exhibit 3 – Page 27), and suggested that only two other building length variances have been approved in the neighbourhood (one for 17.01 m and the other for 17.37 m).

2) Building Depth Variances

- The new By-law permits a maximum building depth of 19 m, whereas the proposed building depth is 26.59 m or 7.59 m greater than what is permitted.
- The former By-law permits a maximum building depth of 16.59 m, whereas the proposed building depth is 26.59 m or 10.09 m greater than what is permitted.

Ms. Amini and Mr. Turbak debated whether the variances being requested could be termed as ‘drastic’ in the context of the planning tests, and contested the definition of what is determinant of whether a variance is ‘minor in nature’.

Mr. Turbak reiterating his position that the proposed dwelling design is a function of the lot shape and long-term functionality, but ultimately acquiesced to the City`s argument that the requested variances represent a `considerably drastic` increase from the By-law standards.

In fact, Ms. Amini was able to establish that the requested variances, if granted, would represent the largest deviations in variances in the entire neighbourhood. Ms. Amini, again, referred to the site plans for the proposed dwelling (Exhibit 2) and noted that the rear section of the proposed structure extends well beyond the building footprint of two abutting properties. She then referenced the Neighbourhood policies section of the City`s Official Plan, Chapter 4 (Exhibit 3 – Page 73), noting the wording of Policy 4.1.5:

> ``*Development in established neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including and in particular…height, massing, scale and dwelling type of nearby residential properties.*`

Ms. Amini reference the Official Plan in noting that the depth and length of a dwelling is considered massing and that in the case of the proposed dwelling, its massing is not compatible with the adjacent conditions and, therefore, does not respect and reinforce the existing physical character of the neighbourhood. The witness agreed with this assessment.

In summary, Ms. Amini concluded that the witness had provided no evidence to establish that the four planning tests had been satisfied and, further, she argued that in her opinion the requested variances are not minor in nature.

City`s Expert Land Use Planning Witness

The Hearing then heard from the City`s Expert Witness, Assistant Planner (York District), Trista James. Ms. James established that this file had been re-assigned to her, as the original author of the May 2, 2017 Community Planning Staff report to the COA, is no longer with the City.

Although not a Registered Professional Planner, Ms. James is currently a Pre-Candidate Member for Full Membership in the Ontario Professional Planners Institute and the Canadian Institute of Planners. I have reviewed her curriculum vitae, work experience and her familiarity with this file and I qualified her to give expert land use planning opinion evidence and advice. The TLAB can recognize professional planning qualifications apart from the foregoing membership: however, membership affords the public and the tribunal a consistent standard of continuing education, professional peer recognition and public and private disciplinary accountability that cannot otherwise be easily independently and objectively assessed or assumed..

Ms. James noted that as a precursor to forming a planning opinion regarding this application, she undertook to establish a Study Area for the neighbourhood, which she identified as bounded by Westglen Crescent to the north-west and East Glen Crescent to the south-east. She confirmed that this Study Area was selected in an effort to ensure a comparable analysis given the situation of the subject property within an enclosed cul-de-sac and being a pie-shaped lot.

She described the area as encompassing a particular character in terms of the lot fabric, with many lots having large frontages that either meet or exceed By-law requirements, all of which follow a consistent configuration that is established along a street network. She noted that the majority of properties within the Shaver Court cul-de-sac are pie-shaped lots with comparable setbacks that are compliant with the pattern of lots and the siting of dwellings along the curved streetscape.

Pursuant to the standing direction of Council to the TLAB, I advised her I had visited the subject property and surrounding streets.

Ms. James described the cul-de-sac as consisting of 12 detached houses, with the same land use designation within the Official Plan as the subject property, and subject to the same or similar zoning standards under the By-laws.

Ms. James gave evidence and opinion regarding the four tests set out under section 45(1) of the *Planning Act*, and stated that in her opinion the requested variances failed to satisfy the tests.

1. **General Intent and Purpose of the Official Plan**

The Official Plan designates the subject property `*Neighbourhoods*`. The Healthy Neighbourhoods policies in Section 2.3.1 considers Neighbourhoods to be

physically stable areas that will respect and reinforce the existing physical character of buildings, streetscapes and open space patterns in these areas.

a. Height, Massing, Scale and dwelling Type

Ms. James highlighted the development criteria in policy 4.1.5, noting criterion (c) as relevant to this appeal, as it addresses height, massing, scale and dwelling type of nearby residential properties. In her opinion, the massing of the proposed dwelling is not in keeping with the physical character of the neighbourhood. The Applicant is proposing a building length and depth that is greater than both the abutting properties on Shaver Court and properties within the Study Area.

She suggested that the extent of the variance being requested for building length has not yet been granted within the Study Area, and there have only been two building length variances granted in excess of the maximum permitted by the new By-law.

Similarly, she opined that the proposed building depth of 26.59 m was out of keeping with the character of the area, noting that the overwhelming majority of dwellings within the Study Area have an average depth of 19.01 m, with the largest building depth being 21.49 m.

In Ms. James opinion, the scale of the proposed dwelling is not consistent with the character of the other existing dwellings on Shaver Court, and the proposed building length, depth and overall scale fail to respect and reinforce the existing physical character of the neighbourhood.

b. Built Form

Ms. James opined that the built form of the proposed dwelling will impact the natural light currently enjoyed by the adjacent properties given that building length and depth will be significantly greater than the adjacent and nearby properties on Shaver Court.

She noted that section 3.1.2 of the Official Plan recognizes that Toronto is already built and that future development will occur through infill and on redevelopment sites. This development will need to fit in, respecting and improving the character of the surrounding area. Policy 3.1.2.1 encourages massing and exterior facades be designed to fit harmoniously into the existing and/or planned context, and that development mitigate impacts on neighbouring streets, parks, open spaces and properties by:

i. (c) Creating appropriate transitions in scale to neighbouring existing and/or planned buildings for the purpose of achieving the objectives of the Official Plan; and
ii. (d) Providing for adequate light and privacy.

2. General Intent and purpose of the Zoning By-law

Ms. James provided an overview of the general intent and purpose of the zoning by-laws noting that they regulate the use of land to ensure that development both fits a given site and its surrounding context. She suggested that by-laws are also intended to reduce impacts of development on adjacent properties.

She opined that building depth provisions essentially ensure that the scale of buildings does not exacerbate the maximum length requirements of the By-laws, and that buildings do not take advantage of a permitted front yard setback. Additionally, she suggested that depth provisions ensure that the permitted front yard setbacks are maintained and protected, and have regard to the existing streetscape.

Ms. James opined that in an effort to achieve a wider and more formidable dwelling frontage, the Applicant has set back the proposed dwelling beyond the existing dwelling and beyond the natural setback path of the adjacent dwellings on the cul-de-sac. In her opinion, this setback condition will exacerbate the dwelling depth condition.

In addition, she emphasized that the setback of the proposed dwelling does not maintain the consistency of the streetscape on the Shaver Court cul-de-sac, and it poses potential adverse impacts to adjacent neighbours with respect to overshadowing and privacy concerns.

Ms. James highlighted that the maximum building length permitted under the new By-law is 17 m, measured from the longest portions of the front and rear walls of the dwelling, and confirmed that the proposed building lengthy is 22.28 m. She opined that building length provisions, among other by-law provisions, assist in regulating the size of structures to ensure compatible building scales and streetscapes. In turn, she suggested that this reduces excessive building massing and mitigates impacts on privacy and natural light.

In Ms. James` opinion, the proposed building length is significantly greater than existing conditions and in excess of any variances approved in the Study Area. She suggested that the proposed dwelling poses potential adverse impacts of overshadowing and privacy to adjacent properties, and the scale of the proposed structure is not compatible with either dwelling on abutting properties or dwellings within the broader neighbourhood.

In her opinion, the requested variances do not meet the intent of the By-laws as, both individually and collectively, the variances significantly exceed what is permitted.

3. Desirable for the Appropriate Development of the Land

Ms. James noted that a significant number of dwellings in the Study Area have benefited from redevelopment and reinvestment in the form of renovated or new dwellings. In her analysis, she found that none have required the degree of relief through variances as requested by the Applicant.

She concluded that the requested variances for length and depth, combined, would result in a dwelling scale and size that is not appropriate for the lot. The massing

of the proposed dwelling will, in her opinion, negatively impact adjacent properties by creating overshadowing conditions that will affect natural light and privacy.

In Ms. James` opinion, the requested variances, collectively, are not desirable for the appropriate development of the land.

4. Minor in Nature

Ms. James reiterated that the requested variances, if granted, would result in a proposed dwelling that would differ substantially in scale and massing to other dwellings in the neighbourhood. She once again restated her belief that the proposed dwelling would represent the greatest building length and depth within the Study Area and would, in her estimation, be precedent setting if allowed.

As a result, it is Ms. James` opinion that the requested variances are not minor in nature.

She concluded her testimony stating that in her expert planning opinion, the appeals of the COA Decision should be allowed as the requested variances do not satisfy each of the four tests under section 45(1) of the *Planning Ac*t.

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ANALYSIS, FINDINGS, REASONS

Although the Applicant has requested relief from the By-laws for variances to building length and depth, a number of other issues are as germane to this application. They can be summarized as follows:

- How will the resulting scale and massing of the proposed dwelling impact the abutting neighbours;
- What weight should be given to the Applicant's desire to design a dwelling with a wider façade and larger ground floor footprint to accommodate his changing family situation; and
- Do the requested variances represent good planning and, in terms of numerical site standards, can they be construed as minor in nature.

With respect to the issue of the scale and massing of the proposed dwelling, I accept the City Planner's opinion that the proposal is not in keeping with the existing character of the area. Clearly, the City Official Plan holds out special attention to be paid to its 'Neighbourhoods'; new development must respect and reinforce the existing character of the neighbourhood, particularly the size, scale and massing as it relates to nearby residential properties. Policies in the Official Plan ensure that new development will be compatible with the physical character of established residential neighbourhoods.

The City's planning expert identified a Study Area by which she sought to assess a norm or description of character. The Official Plan encourages this effort, even refines it through emphasis that the policy obligations of planning decisions is to 'respect and reinforce the existing physical character of building, streetscapes and open space

patterns'. That definition is further honed by intended reference to attributes, measurers and features that are describable and replicable.

I find that the delineation of a Study Area is a necessary first step by planning practitioners to attempt encapsulation of measures that replicate the existing physical character of a neighbourhood. I agree with the City that character, 'existing physical character' to repeat the direction of the Official Plan, is 'what you see on the ground'.

I agree with Ms. James' approach to focus on tangible measures of character delineation which aims at a comprehensive assessment of physical character, inclusive of 'design' components such as built form.

On the evidence taken as a whole, including admissions in cross-examination, that amalgam of information necessary to make findings on the application is present.

I find that the Application proposes massing that is not in keeping with the physical character of the neighbourhood. The proposed building length and depth are greater than both abutting dwellings and are not representative of the building length and depth of single detached dwellings in the Study Area. I find that the scale of the proposed dwelling is not consistence with the character of the immediate neighbourhood, or the Study Area as a whole. I agree with the City that the length, depth and overall scale of the proposed dwelling fail to respect and reinforce the existing physical character of the neighbourhood.

I accept the City and Mr. Klufas' argument that the requested variances, if granted, would adversely impact neighbourhood dwellings in terms of privacy and natural light. I agree with Ms. James' opinion that building depth and length are provisions in the By-laws to ensure, among other things, that natural front yard setbacks are maintained and protected, and the established streetscape is enhanced. I accept that the variances being requested by the Applicant will exacerbate existing conditions and will not maintain the consistency of the Shaver Court streetscape resulting in adverse impacts on abutting properties including overshadowing and privacy concerns.

With regard to the second issue, the City solicitor was successful in establishing, through cross-examination, the rationale for the siting of the proposed dwelling on the property, and why the proposed design was not the only possible outcome given the shape of the site. In his testimony, Mr. Turbak acknowledged that the depth and length of the proposed dwelling was the result of his desire to create a more 'dramatic' front elevation/façade, and to concentrate the majority of living space on the ground or first floor of the dwelling.

On being challenged as to use of the term 'drastic' in describing the nature of the variances, Mr. Turbak agreed with the City that the resulting variances required to accommodate the building's design are 'considerably drastic' when compared to what is permitted in the By-laws, and when compared to the existing conditions in the neighbourhood. Mr. Turbak admitted that a different siting of the proposed building footprint on the property, and the incorporation of a smaller setback from the front property line would have resulted in significantly reduced length and depth requirements.

The Applicant also acknowledged that the proposed design of the residential dwelling was, in essence, an architectural 'preference', as his intention was to create a 'multi-generational' home with a larger ground floor living space to accommodate his elderly parents. Mr. Turbak was adamant that since the requested variances were originally approved by the COA, he should be able to proceed with his proposal.

In this regard, I can consider whether denying the variance relief sought would create undue hardship for the Applicant.

The Applicant argued that the proposed dwelling would allow him to accommodate the changing needs of his family and of his aging parents. However, this Panel must make a determination on all the proposed variances based on the tests of the *Planning Act*, including provincial policy.

The Courts have confirmed that a minor variance is not a 'special privilege' that requires the applicant to justify the relief sought on the basis of need or hardship. The Courts have concluded that jurisdiction to grant minor variances is permissive and confers a residual discretion as to whether or not to grant the requested relief even when the four tests are satisfied.

Finally, the third issue I need to consider is whether the proposal represents good planning and whether the requested variances can be considered minor. I accept the City's argument that the requested variances deviate significantly from the standards in the By-laws and, if granted, would result in the largest variances within the neighbourhood. I accept Mr. Klufas' testimony that, numerically, the proposed dwelling length is more than 30% greater than the maximum permitted, and that the proposed dwelling depth is 40% (former By-law) and more than 60% greater (new By-law), respectively, than the maximum permitted.

Therefore, I find that the proposed development does not represent good planning and is not minor in nature. The requested variances are numerically large in nature, and they will have a discernable impact on the neighbours. The adverse impact of the increase in length and depth of the proposed dwelling is not insignificant. The proposed structure will appear as a large two-storey building from the street, even though the Applicant argued that the design is essentially a 'bungalow'.

I agree with Ms. James' and the City solicitor's conclusions as to the provisions of the Official Plan and the Zoning By-laws. The proposal does not respect and reinforce the physical character of the neighbourhood, and it does not maintain the general intent and purpose of the Official Plan.

Respecting the general intent and purpose of the Zoning By-law, I find that the variances for building length and depth do not meet the general intent and purpose of the By-laws. This finding is made in light of the individual circumstances of the subject property and the proposed dwelling. Similarly, this panel finds that the development is not desirable for the appropriate redevelopment of the site and concludes that the requested variances are not minor in nature.

I find that the Applicant has failed to provide any evidence to the contrary. In fact, the Applicant has failed to provide any evidence to this panel member that assist TLAB in making a determination that requested variances satisfy any of the statutory tests.

In summary, I have had regard for the decision of the COA and independently satisfied myself that the particular variances at issue are not appropriate in the circumstances and within the scope of the relevant statutory considerations.

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DECISION AND ORDER

The appeal is allowed, and the requested variances are denied.

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D. Lombardi
Panel Chair, Toronto Local Appeal Body