Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, August 17, 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): DEAN JASON PODOLSKY

Applicant: MARIN ZABZUNI

Property Address/Description: 629 RUSHTON RD

Committee of Adjustment Case File Number: 17 244120 STE 21 MV

TLAB Case File Number: **18 137538 S45 21 TLAB**

Hearing date: Thursday, August 09, 2018

DECISION DELIVERED BY Ian James LORD

APPEARANCES

Name	Role	Representative
Marin Zabzuni	Applicant	
Dean Podolsky	Appellant/Owner	Paul Demelo
City of Toronto	Party	Alexander Suriano
Bernard Kalvin	Party	
Carmella D'Ambrosio	Party	
Read Bonnie Shettler	Party	
Ornella D'Ambrosio	Party	
Amanda Kosloski	Expert Witness	
Carmine Iuele	Participant	

Name	Role	Representative
Ruth Wade	Participant	
Cassidy McFarlane	Participant	
Marco Nalli	Participant	
Mike Lazarovits	Participant	
Gabriel Di Cristofaro	Participant	

INTRODUCTION

This is an appeal to the Toronto Local Appeal Body (TLAB) from a decision of the Toronto and East York District panel of the City of Toronto's (City) Committee of Adjustment (COA) in respect of 629 Rushton Road (subject property). The COA refused the Applicants request for: five (5) variances from By-law 569-2013 currently under appeal (new zoning By-law); three (3) variances from By-law 1-83 and two (2) variances from By-law 3623-97 (existing zoning).

During and subsequent to the COA decision, at least three discrete iterations of modifications occurred to the original application.

The first, occurring at the COA, was to withdraw the request for an increased deck or platform size at or above the second storey. The COA accepted this withdrawal and its decision did not deal with this component.

The second, upon filing the appeal, the applicant’s representative eliminated an entirely flat roof design structure in favour of a partial peaked roof over a third storey component of the built form. This revision eliminated variances originally applied for, respecting height and formal recognition of a third storey.

The third modifications arose late in the hearing schedule through agreement with the City as to a settlement involving further modifications to the plans, setbacks and variances. The settlement included the incorporation of suggested conditions agreed to and filed as Exhibit 2 to the proceeding and was also premised on revised plans under preparation. Revised plans were offered to be supplied to the TLAB in furtherance of the proposed settlement conditions, on allowing the appeal.

None of the changes altered the proposed absolute height, side yard setbacks, three storey element, building length or size.

Although there were a number of formal registered parties and participants, the only Parties to appear were the Applicant/Appellant, the City, and Mr. Bernard Kalvin.

The Appellant called one witness, Ms. Amanda Kosloski, qualified to give professional expert testimony as a Registered Professional Planner.

The City and Mr. Kalvin called no witnesses but participated actively in questioning, clarifications and submissions.

Ms. Ruth Wade gave evidence as a Participant and resident to the west, at 631 Ruston Road.

Ms. Cassidy McFarlane gave evidence as a Participant and resident to the east, at 627 Rushton Road.

The Toronto Local Appeal Body (TLAB) also heard from Mr. Josh Colle, a City Councilor and resident with his spouse at 627 Rushton Road, adjacent to the subject property. Mr. Colle is not the area Councilor and had not registered either as a Party or a Participant. His participation was objected to by the Appellants' counsel, Mr. Demelo, but was supported by Mr. Kalvin, as discussed further below.

I noted that I had attended the subject property and surrounding area and had read much of the material. However, those present were advised that if there was a matter or document germane to their position, it had to be called to attention for entry into the record, for and beyond the digital audio recording.

BACKGROUND

The COA decision was mailed March 27, 2018. It provided the standard language of a refusal; no reasons were provided.

There were no objections to the disclosure and filings made in response to the TLAB Rules, other than recited and described below.

At the outset of the Hearing, Councilor Colle sought direction as to: his addition as a Party with the right to call evidence through a professional land use planner; an adjournment of the proceeding to enable the planner to be properly prepared; and to supplement the evidence of Ms. McFarlane, his spouse, with direct testimony of a professional planner. He indicated his interest arose as the direct abutting neighbor, not as a representative of the City Council. He indicated his presence in arriving late to the TLAB process arose out of confusion as to his ability to participate while holding public office and the very recent decision to not register for re-election in the 2018 municipal elections. Council has recessed until that event.

Mr. Suriano, while noting the City conclusion to settle its concerns on the applicants appeal, described the Councilors request to be in his personal capacity, being an abutting neighbor, and that some leniency should be afforded the request to participate.

Mr. Kalvin supported all aspects of the request proposing that the procedural Rules needed to be flexible and the timing of the Councilor's decision not to run and the planners' unavailability on short notice were matters warranting exceptional status. He submitted there would be no surprise as to the neighbours opposition and substantial fairness in allowing Mr. Colle party status and an adjournment.

Mr. Demelo opposed the relief requested on multiple grounds: the inability of a non-party to bring a Motion; the lateness of the requests without any Rules support, including a failure to advise of the decision to seek status until the morning of the Hearing; the absence of any support filings compliant with the Rules of the TLAB; the vehicle of the wife's presence who had complied; the highly inappropriate conduct for a sitting Council member; the abuse to the processes of the TLAB in the interests of the Parties and Participants present; and the potential for prejudice to the Appellant.

I ruled that there could be no adjournment, there being no valid Motion on any aspect that was properly before the TLAB. However, at the close of evidence from the Parties and the Participants, in this specific instance, the TLAB would offer the opportunity of a statement from persons present who perceived themselves to be affected in their personal capacity and that was relevant and not repetitious.

To his credit, the Councilor stayed throughout and made such a statement.

MATTERS IN ISSUE

As they evolved, the Appellants requested variances as described and modified in the evidence consisted of the following (*italics, underlined, indicates settlement revisions)*

TABLE 1

PROPOSED MINOR VARIANCES to TORONTO LOCAL APPEAL BODY

629 RUSHTON ROAD, TLAB Case File No. 18 137537 S45 21 TLAB Based o n Zoning Notice issued May 4, 2018 May 8, 2018

BYLAW – 569-2013

1. Chapter 10.20.40.70.(3)(C), By-law 569-2013 The minimum required side yard setback is 1.2m. The new detached dwelling will be located at 0.9m from both side lot lines.

2. Chapter 10.5.60.50(2)(B), By-law 56-2013 The maximum permitted total floor area of all ancillary buildings or st ructures on the lot is 40.0sqm. The detached garage will have a floor area of *42 sqm with an added condition that despite the side yard setback, any*

accessory garage structure fronting on the lane adjacent the subject property will be set back 2.1 m from its west property line.

3. Chapter 10.5.60.50(2)(B), By-law 569-2013 The maximum permitted building length for a detached house is 17m. The new detached dwelling will have a building length of 18.51m.

4. Chapter 10.20.40.40(1), By-law 569-2013 The maximum permitted floor space index is 0.4 times the area of the lot (186.0sqm). The new detached dwelling will have a floor space index e qual to 0.66 times the area of the lot (307.0sqm).

5. Chapter 10.20.40.50 (1)(B), By-law 569-2013 The maximum permitted area of each platform located at or above the second storey of a dwelling is 4.0sqm. The area of the third-floor platform on the rear side (north) will be *10 sqm with an added condition that it will have opaque minimum 1.5 m high panels along its entire east and west limits and the said platform will be set back 6 m from the rear (north) main front wall of the first and second stories and all other second floor rooftop surfaces will be rendered inaccessible except for maintenance purposes*.

BY-LAW 3623-97

6. Section (3)(a), By-law 3623-97 The minimum required side yard setback is 1.2m. The new detached d welling will be located 0.9m from both the east and west side lot lines.

7. Section 3(b), By-law 3623-97 The maximum permitted gross floor area is 0.559 times the area of the lo t (186.0sqm). The new detached dwelling will have a gross floor area equal to 0.66 times the area of the lot (307.0sqm).

BY-LAW 1-83

8. Section (3)(i), By-law 1-83 The maximum permitted gross floor area is 0.4 times the area of the lot (186.0sqm). The new detached dwelling will have a gross floor area equal t o 0.66 times the area of the lot (307.0sqm).

The settlement between the Appellant and the City supported the variances as above described supplemented with two (2) additional conditions of approval consisting of the following, and accepted by the Appellant:

"Proposed Conditions of Minor Variance Approval

1. The Owner shall submit a complete application for permit to injure or remove privately owned trees under Municipal Chapter 813 Article III, Private trees.

2. The proposed development shall be constructed substantially in accordance with the revised site plan and elevations prepared for 629 Rushton Road by Contempo Studio dated _____, 2018 and submitted as Exhibit ___ in the Toronto Local Appeal Body's hearing for TLAB Case File No. 18 137538 S45 21 TLAB ."

Mr. Kalvin and the Participants who spoke, as well as Mr. Colle opposed several of the variances, notably to building length relief, the requested floor space index requested and the platform or deck size permitted above the second storey level.

Mr. Kalvin raised one additional issue: the inability of the Appellant to re-introduce into a *de novo* hearing, a request for the platform or deck size increase (above the second storey) as that variance had been withdrawn before the COA and was not part of the COA decision. As such, he had obtained the admission from the planner, Ms. Kosloski to that fact, and argued the TLAB was without jurisdiction to entertain a variance in that regard, it not appearing in the COA decision (see: Planning Act, s.45 (12)).

He added that despite the 're-introduction' being part of the filing record of TLAB, it was unfair to those persons who relied on the withdrawal before the COA and the COA decision itself, to now consider the size of the third floor deck or platform. He suggested it would be unfair to consider this variance - on the reasonable expectation that it was something that was no longer being pursued.

On these two aspects of jurisdictional challenges, I agree with the submissions of Mr. Demelo: namely, that the statutory jurisdiction of the TLAB is *de novo* and not limited to the 'decision' of the COA, as urged. Rather, the TLAB is given full originating authority to make any decision that the COA could have made "on the original application" (see: Planning Act, s. 45 (18)).

Indeed, the TLAB has an additional empowerment to consider revisions to that original application, subject to a determination as to the requirement on whether any additional notice is required (see: Planning Act, s. 45 (18.1.1)).

The roof deck, or 'platforms', were part of the original application. Moreover, the TLAB disclosure Rules on the Applicant/Appellant were complied with before the window of opportunity and obligation to disclose Party and Participant status, had passed. It is a responsibility of those concerned with a matter on appeal, to inform themselves of the appeal matters and their particulars. This is aided by the Notice of Hearing, the TLAB Public Guide, the TLAB Rules and the TLAB website - which direct public attention to the filing obligations of interested persons.

In my view, on this identified issue, there is neither a jurisdiction nor fairness impediment to consider the variance respecting the third-floor platform on the rear side (north) of the subject property.

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

As indicated, the only expert land use planning evidence called was that of Ms. Kosloski, called by the appellant. Her evidence supported, individually and collectively, the consistency of the modified variances, listed above in Table 1 as Variances 1 to 8, under 'Issues', with the Provincial Policy Statements and the Growth Plan, and the variance 'four tests', under s.45 (1) of the Planning Act.

While 'conformity' with the Growth Plan is the required test, there was no challenge to her evidence on these 'higher level' planning documents: they support and encourage the efficient use of land and cost effective use of public infrastructure, all of which is present or available to the subject property.

Her evidence on the contested variances requires a more detailed record and scrutiny.

Her evidence is set out in her Witness Statement and twelve attachments, identified as 'exhibits' thereto. I identified and entered these materials as Exhibit 1 to the Hearing.

She spoke to the proposed conditions of settlement and supported them. I identified and entered these agreed settlement conditions as Exhibit 2 to the Hearing.

I identified and reserved as Exhibit 3 proposed revised site plans and elevations, intended to be consistent with the Variances 1-8 and the conditions, as identified under the 'Issues', above. Mr. Demelo undertook to have prepared and submitted the plans reserved as Exhibit 3, satisfactory to Mr. Suriano, to the TLAB, should they be incorporated in its Decision and Order, as was being requested. The plans filed as reserved Exhibit 3 were asked to be inserted by reference in the proposed conditions, Exhibit 2 to the Hearing and repeated under the 'Issues", above.

These revised plans were subsequently submitted to the TLAB by correspondence.

On Variance 1 and 6, above, she supported the proposed side yard setbacks, east and west at .9 m. While a reduction from that required by the new and existing by-laws of 1.2 m, her analysis showed a consistency with area character, recent COA and Ontario Municipal Board (OMB) approvals (now Local Planning Appeal Tribunal (LPAT)) and existing site conditions.

None of Mr. Kalvin, Ms. Ruth, Ms. McFarlane or Mr. Colle took issue with these side lot line variances in the circumstances.

On Variance 2, above, she did not recommend the change but could support as part of her overall opinion, above, the proposed location and size reduction in the accessory garage structure, as proposed by the settlement. Namely, that the garage be limited and fixed by the site plan at a maximum permitted total floor are of 42 square meters fronting on and set back east from the abutting lane common property line, a distance of 2.1 metres. This lane/garage location setback was said to be accomplished by the size reduction to 42 square metres, with no change otherwise to the site plan garage location or its east rear wall location. The east side yard setback would be maintained by the garage location proposed.

The lane setback in respect of the accessory garage was said to be a response that is satisfactory to the Party Read Bonnie Shettler, who, as indicated, did not appear.

None of Mr. Kalvin, Ms. Ruth, Ms. McFarlane or Mr. Colle took issue with this variance or the additional set back condition it generates, in the circumstances.

On Variance 3, building length, she supported the building length variance to 18.51 m as a minor and desirable exceedance to the by-law standard of 17 m. In support, she stated the lot depth is substantial and the architects plan meets the internal design layout proposed by the owner. It applies to the first and second floor; the third floor structure (under the peaked roof) is set back approximately 6 m to the north main building wall elevation at the third floor level, is 2.6 m from the south building wall elevation and 1.45 m from the west building wall elevation, all at the third floor level. She stated that these third floor level setbacks served to reduce massing, coupled with essentially no windows on the side walls of the first and second floors.

On variance 4, 7 and 8, fsi/gfa, she supported the original application proposal of a move to .66 times the lot area over the by-law standard of .4 (new By-law) and .599 (existing by-laws). She acknowledged that the existing By-law contained a formula that permitted decreased fsi/gfa with increased lot area. Her Witness Statement provides the following explanation:

> "43. The York zoning by-law 3623-97, an amendment to York Zoning By-law 1-83, also identifies the subject property as Residential (R1). This zoning generally reflects zoning outlined in By-law 1-83; however, it allows for a maximum gross floor area (GFA) based on the size of a lot. For example, it allows a GFA of 0.6 for land area of up to 370 sq m in addition to 0.4 for the lot area for lands between 370-600sqm and 0.2 for land over 600 sq m in size. Maximum permitted GFA under by-law 3623-97 is 0.559* and the proposed is 0.66 times lot coverage." (Underlining added to reflect size range of subject site; (*) denotes that this statement appears on comparison to be in error as it applies to lots smaller than 370 sq m, whereas the subject property is 465.41 sq m in area)

When asked specifically on the latter, given its intent to permit density to vary with lot size, as to how exceeding that formula on the subject property met the intent and purpose of the by-law, no replicable answer was discernable.

Ms. Kosloski stated that her review of area character, lots within a 500 m radius bounded by obvious hard topographic or arterial features, included not just 'averages' (said to be 0.61x lot area for fsi) of standard measures, but also lot specific considerations, of 'fit' and impact. She said the OMB approved a parcel at 592 Rushton Road which exhibited a 3 storey configuration with a density measure of 0.74 x lot area. She acknowledged that in the zone category to the west of the subject property (633 Rushton has a 0.955x density), a different density permission existed (0.8x v 0.4x). She stated that 592 Rushton Road had a lot depth of approximately 5 m shorter than the subject property. No other statistics were stated to adjudge comparability.

She described that the fsi number did not necessarily translate to dimensional descriptions. She repeated her assessment that the proposal conformed with the Official Plan, s. 2.3. and s. 4.1.5, that it would be consistent with area character and that when observed from the public realm of the street, would 'fit' as a single detached dwelling with a stepped back roof appearance. She felt the established physical character of the street would be maintained and reinforced, in Official Plan policy conformity.

She opined that the fsi could be accommodated on the lot; that there would be impacts but not with height, size or massing based on the measure of density alone.

She noted that he garage was not included in the fsi number. She also noted that the garage placement allowed some 13.3 m of rear yard space, meeting rear yard amenity space considerations.

On Variance 5, deck/platform size, Ms. Kosloski had supported the initial scale presented to the COA of 16.9 sq m against the maximum permitted by the zoning by-law of 4 sq m. It was her advice that the space, augmenting a third floor bedroom, did not reflect an assembly area for outdoor use, and was appropriately set back and screened with privacy panels so as to limit overlook and privacy concerns of abutting properties.

While she did not recommend the further reduction revision proposed by the settlement discussions with the City, she said she could support a further size limitation to 10 sq m and a further consequent setback from the main rear wall of the proposed building, totaling 6 m.

She described the revised plans as having a sloped roof configuration, eliminating variances for both height and 'third storey' recognition, as the proposed habitable space of the third storey would be wholly contained within the roof structure.

None of the changes described respecting the third storey configuration or its amenity areas affected the building length variance or the fsi/gfa of the proposal.

She noted that the revised plans, in her Witness Statement, Ex.1, contemplated the removal, for structural reasons, of plantings at the third floor level, west side. Further, they envisage the placement of railings to prevent access, except for maintenance purposes, into those areas of the second floor roof (front, west side, extreme rear) not part of the proposed 10 sq m deck/platform.

She acknowledged that a condition could be added to secure the prohibition on access and the further setback of the deck/platform, from the main rear (north) wall of the first and second storeys. This would be to ensure its existence as non-accessible, non-habitable space.

In considering all these variances, Ms. Kosloski was of the opinion that the Official Plan's intent and purpose was being maintained: the building type remained single detached residential; the area character included examples of three storey buildings; the height proposed is permitted as-of-right; the existing setbacks were being recognized or increased; the massing from the streetscape benefitted from the setbacks; and pulling the third floor massing away from 'sensitive rear yard conditions'.

In her view, rather than consider massing as an issue of the fsi/gfa number, height and setbacks gave a better appreciation of scale and fit in relation to the lot and the neighbourhood.

She reviewed a portion of an architects sun/shade study and concluded that there would be no significant impact resulting from sun shadows between the proposal and an as-of-right project. She acknowledged, with counsel, that the 'as-of-right' component used by the architect was undefined or did not reflect the zoning by-law permission. In questioning by the City, she acknowledged that shadow and privacy considerations are relevant Official Plan considerations found in policy 3.1.2.

For similar reasons, the planner expressed the opinion that the intent and purpose of the zoning by-laws are maintained by the proposal. She felt the construction of a single detached residence, compliant in height, number of storey permission, enhanced side, rear and front setbacks, front yard tree retention, all supported a desirable addition to the neighbourhood consistent with its existing and planned physical character. She felt the variances, individually and collectively, with attendant conditions, were minor, particularly on her emphasis of no impact of significance: that the proposal constituted good planning. She suggested approval of Variances 1-8, with the conditions identified in the settlement (Exhibit 2) and the revised site and elevation plans noting the further revisions she supported (reserved as Exhibit 3).

As described, neither Mr. Suriano for the City nor Mr. Kalvin called direct evidence.

Ms. Ruth Wade, an 11 year resident of the parcel to the west of the intervening 3+ m wide lane, together with her filings, described the neighbourhood and its evolution. She expressed deep concern with the development, as proposed, hemming in her smaller 'coach house' bungalow property. Describing a neighbourhood undergoing renovation and enhancements respectful of existing built form, she described the Applicants west elevation plan as upsetting in size, uncommon, not respectful of the area, and 'dwarfing' her house. She tends a rear yard garden which she opined will be noticeably affected by a loss of sunlight. She objected to the prospect of oversight of her yard, an impact on privacy that when coupled with the scale of blank west wall constituted an impact on character that would 'freeze out' her appreciation of her property.

Ms. Cassidy McFarlane, a 12 year resident of the parcel abutting to the west, expressed similar concerns. While her property had been improved, including side yard variances and a garage removal, the proposal was described as extending beyond their deck causing: amenity space privacy concerns; potential tree injury, loss of sunlight; featureless east wall elevation and potential for overlook conditions. She suggested that there were no examples of the height, building depth and massing scale of the proposal in the Arlington, Rushton, Windley corridor, certainly on her side of the street.

She stated that the Application required her to respond to a parallel application filed to assess injury to a tree on her property arising from the proposed building length.

She felt that the accumulation of side yard variance relief, building length relief, massing and building scale relief sought through the fsi/gfa increase from 186 sq m to

307 sq m was not minor and was accompanied by an outrageous multiplicity of regulatory exceedances causing impact and injury adverse to her property interests and its amenities.

Mr. Colle concurred with his spouse's description. He independently concluded that the proposal was out of character with the neighbourhood in terms of size, height and massing. While acknowledging transitions in the neighbourhood by way of renovations, he stated they are not of the character proposed. These he found to be inconsistent with Official Plan character assessment criteria. He challenged the support rationale for the fsi increase (85%), the deck and rooftop platform, the privacy and overlook potential and the ability to police the retention of the second storey roof empty spaces as non-accessible.

He suggested that the cumulative consequence of shadowing, the privacy compromise perceived to their rear yard, the massing of three storeys and the double garage all constituted a domination of building space that was dramatic, so significant and unprotected by setbacks as to constitute unsupportable impact.

ANALYSIS, FINDINGS, REASONS

This appeal comes premised on a refusal by the COA to grant any of the variances requested and in a circumstance where, despite a settlement with the City as a Party, both immediate neighbours continue adamant opposition. While multiple others submitted materials opposing the appeal, it is the evidence of those that appeared and that gave direct testimony that warrants comment.

A settlement between two of the Parties is to be given great weight – all the more so when supported by the only professional land use planning evidence that was heard.

That said, there are elements of the evidence and circumstances here that remain of concern.

I accept the description of the neighbourhood that is the derivative both of the planner, Ms. Kosloski and the long term residents who spoke, notably Ms. Wise and Ms. McFarlane. The immediate neighbourhood consists primarily of one and two storey homes, having a substantial and rich presence in measures of built form, diverse architectural style, mature landscaping, varied parking solutions, predominantly single detached dwellings and obvious pride in the investment in their residences. While 'three storey' dwellings exist, their presence is dispersed; as well, some examples exist wherein dormers and the use of attic space for habitable purposes under the roof appear evident. While there were examples provided of flat roof homes in the vicinity, none exhibited the exact character of the proposal, a partial peaked roof with uncovered second floor rooftop space.

I see nothing in the Applicants revised façade design that suggests its character could not fit into the neighbourhood. Design is an important prerogative of an owner and is one that is not lightly to be interfered with in the planning approvals process. That is not to say that area character cannot have distinctive features which might warrant intervention in design expression in warranted circumstances. In planning policy terms, however, the expressed desire for 'similarity' does not imply that only identical design schemes are allowed.

Of interest to the subject property and its assessment of whether the proposal 'respects and reinforces the physical character of the area' are at least two aspects:

1. First, the subject property is on the edge of a zone change wherein parcels to the west of the abutting lane enjoy an as-of-right density recognition of .8 times the lot area. The subject property, and its neighbours to the south and east, in an enclave of a curvilinear street pattern, are fixed with a more restrictive floor space index measure of .4x, historically varying with lot size. On casual observation, those latter properties demonstrate both a more varied and larger lot pattern and house diversity response than those in the zone category to the west. Despite the density distinction, the easterly category also demonstrate houses of considerable size, perhaps responding to their lot frontage specification under zoning of 12 m.

Ms. Kosloski provided a statistic that average density for the area is .61x lot area, not far distant from that proposed at .66x. However, she did not define the area of reference for this statistic and if it included the zone category to the west, it would be clearly suspect to apply to the subject property. However, she said she preferred not to rely on averages and I agree.

The current zone permission is .4x lot area. This is paralleled by a lot frontage minimum of 12 m whereas the subject property has a lot frontage, according to Exhibit 1, of 9.02 m, significantly less than the regulatory standard. At the beginning of a curvilinear street pattern, the subject property frontage widens somewhat to the rear (north) edge before meeting a heavily treed ravine system with the Phil White Recreation Area almost directly below.

The subject property was described as having a generous depth (48.77 m). Certainly, the lot area generated (465.41 sq m) significantly exceeds the minimum lot size set as the applicable zoning standard.

Taken together, the lot size applied against the fsi permission of .4 generates the potential for a residence of 186 sq m. The fsi variance requested as a result of the architects design is for an fsi permission of .66x and a home of 307 sq m, constructed on the reduced lot frontage.

The effect of the lot frontage was not addressed by the planner but is subsumed in the impact concerns expressed by the residents. To a degree, the lesser lot frontage

appears to drive the shape of the building to be narrower and deeper on the lot. This has implications on the deployment of fsi on the subject property when coupled with the increased density requested, side yard reductions and the construction of an enlarged accessory garage structure.

It is apparent from the lot pattern of lots to the east in the same zone that there may be other lots on the curve that demonstrate similar lot shape characteristics: narrower, deeper, larger lots with expanded rear yards than the standards themselves would indicated. Nothing in particular turns on these similarities or differences.

I had asked for an explanation as to why no variance had been identified to recognize and maintain the reduced lot frontage of the subject property from the by-law standard, as is a common approach elsewhere in the City. Counsel agreed that legal non-conforming use provisions of s. 34(9) of the Planning Act did not assist with protecting against this regulation; an undertaking was given to search as to whether, under the new By-law, recognition relief was given for non-complying lots of record.

The TLAB has since received from Mr. Demelo, zoning excerpts that protect lots of record with non-compliant lot frontages. The concern expressed at the time was that no permit authorizing construction might be available if lawful recognition of the reduced standard remains outstanding.

I find that the subject property does not meet the zoning lot frontage standard of 12 m. As a lot of record at 9.02 m frontage, its recognition could occur as a matter of course and that is the sense of the provisions supplied pursuant to the undertaking. While not the subject of an application or the appeal, whether or not need warrants, I will in the order allow an amendment to the application (under the authority above discussed), and add a variance to recognize and maintain the subject property at its existing lot frontage. In my view, such a revision is technical, was patent from the outset of the application and no further notice is required pursuant to s. 45(18.1.) of the Planning Act.

2. Second, the subject property is at an inner city location that has previously been developed. The existing dwelling has a built form that does not comply with the side yard setbacks now proposed under zoning. Relief is requested to recognize the existence of these reduced side yards, and to marginally enhance the current deployment of space: to locate the new dwelling 0.9 m from both the east and west lot line whereas the minimum required side yard is 1.2 m.

Ms. Kosloski supported the recognition and enhancement of these side yards (with the one variation proposed by the settlement that the garage would be set back 2.1 m from the west lot line), as meeting the four tests of variance approval. No contrary evidence challenged this opinion. While passage between front and rear yards is difficult at the standard of .9 m between building and lot line, the applicant benefits

from an abutting public laneway that permits access. I find that the proposed side yard reductions, Variances 1 and 6, above, are appropriate and supportable.

The effect of these variances, however, while making full use of the reduced width of the lot, is to expand the building envelop and its' subsequent built form presentation on the lot. That effect was not directly addressed in testimony by the planner but is subsumed in the impact concerns expressed by the residents. To a degree, the reduced side yards appears as well to drive the shape of the building to be closer and deeper on the lot. This has implications as well on the deployment of fsi on the subject property when coupled with the increased density requested and the construction of an enlarged accessory garage structure.

The planner supported the original application before the COA after the architect had set the parameters of the application. The parameters of size and location (setbacks; height; fsi and building depth) did not change and there was no evidence from the planner of her involvement in setting these parameters. While she continued with that support, even to an acceptance of the modifications proposed by the settlement, their initial rationale remains elusive other than her notations sourced to the architect of a built form design scheme to reflect the client's wishes.

Taken together, I find that the reduced side yards and recognized reduced frontage are elements that do not detract from the appreciation of area character based on the evidence. These elements meet the four tests of official plan and zoning purpose, appear minor and are desirable to permit the construction of a new single detached dwelling on the subject property. They contribute favourably to a collective appreciation of a replacement building.

In like manner, I accept the evidence of Ms. Kosloski on the ultimate configuration, location and size of the new ancillary garage structure expressed in Variance 2, above. No direct impact concern was attributed to this building apart from its consideration in the objections taken to overall massing. Parking on the lot is an expectation of the City and the provision of two off-street parking spaces accessible from the existing lane, properly set back 2.1 m to permit access, is appropriate and supportable, at 42 sq m. These permissions/conditions meet the four tests of official plan and zoning purpose, appear minor and are desirable to contribute to the construction of a new single detached dwelling on the subject property. They contribute favourably to a collective presentation of a replacement building with ancillary parking.

Variance 3 relates to building length. Ms. Kosloski supported this variance of 1.51 m on two suggested grounds: it is what the plans show and the significant lot depth of the subject property.

Both abutting neighbours stated their perception that the enhanced building depth contributed to adverse impact on measures of visual appearance, shadowing, potential injury to a private tree, privacy, compatibility and area character appreciation. No response to these concerns came in the form of reply evidence.

Ms. Kosloski's evidence in chief included her application, generally, of the four tests applied individually and collectively to this variance, concluding its consistency with good planning.

I agree that the lot depth is capable of absorbing the permissible building depth permitted under zoning (17 m) and the additional 1.51 m requested by the architect's plans without compromise to other building envelop measures or giving rise to additional variances. Added to that, however, is the presence of the two car garage ancillary structure on the lot, occupying noticeable building space. On the evidence, the character of the area consists of dwellings that do not exhibit their full building length permission under zoning and enjoy considerable open 'green space' rear yards.

There was no evidence called as to whether the proposed rear yard deck contributed to the building depth variance request, if at all.

I am not satisfied as to the need or merit for an extension to the by-law permission for increased building length. I accept that there would be an impact, as above described by adjacent residents, from such an extension as being uncharacteristic and without significant physical character precedent. New construction, involving a detached dwelling building depth up to 17 m, with a supplemental at or near grade deck and a two car ancillary garage suggests an appropriate intensification for this lot, of less than the prescribed lot frontage. The lot depth is sufficient to accommodate these improvements and incorporate a landscaped rear yard consistent with the character of the area. I find that Variance 3 fails the test of Official Plan criteria, s. 4.1.5, including the prevailing pattern of rear yards, exceeds unnecessarily on the evidence the zoning standard and, on impact considerations is neither minor nor desirable. I do not accept the generalized planning opinion evidence on this variance.

Variance 4 and 7, above, relate to density as measured by fsi and gfa under the respective by laws. In the refusal of the COA, Variances 4, 2 and 1 respectively, this request is framed as "the maximum permitted gross floor area is 0.4 times the area of the lot (186 sq m)". The request is "equal to 0.66 times the area of the lot (307 sq m)".

As described in the materials before me, under By-law 3623-97, this request is framed as "the maximum permitted gross floor area is 0.599 times the area of the lot (186 sq m)". The request is "equal to 0.66 times the area of the lot (307 sq m)".

I find this latter phraseology to be somewhat inaccurate and misleading. Whether inadvertent or not, as indicated above, the planner provided little by way of satisfactory explanation as to how the density measures under the various applicable by-laws were calculated, their inclusions/exclusions or how their 'intent and purpose' were being maintained from an fsi/gfa perspective.

It is clear that the building proposed would generate a built form of 307 sq m, exclusive of decks (open and closed, all levels) and garage. To achieve this, it is

asserted that no variances are requested for front or rear yard setbacks, height, landscaped open space, or coverage.

The variances sought for reduced side yards (albeit an increase over existing), fsi/gfa and building length relate directly to Official Plan considerations and the variance tests relating to scale, massing and character.

Ms. Kosloski referred me to a recent OMB approval south on Rushton Road at No. 592, where a three storey dwelling (mansard roof) is being constructed at a density fsi of 0.74 x (on a lot 5 m shorter).

I had asked for a copy of this decision, but at the time of writing it had not been received. Mr. Demelo did provide another decision, below, referenced in the evidence, in a different zone category. The mistake may have be mine as to the clarity of the request; nothing turns on the presence or absence of the details of a single example.

She stated that the site at 592 Rushton Road had no above grade decks. The only other example pointed to by the planner, is at No. 633 Rushton Road, at 0.955 x lot area. This is a demonstrable smaller lot and in a different zone category.

While it is true that the proposal is of a dwelling 'type', single detached, prevalent in the area, that fact alone together with the efforts supported by the applicant to mitigate impacts on privacy, overlook and scale, do not obviate the need to examine the density measure sought, individually and collectively. The planner stated that the modified fsi is a result of the architectural style and owners content specifications within the home for the family proposed and the issue is: 'can it be accommodated; will there be impacts on the site and the neighbourhood'? She thought not and found conformity with the applicable tests. In her evidence, the setbacks of the third floor deck, the privacy screening and the condition undertakings mitigated against impact. She called reference to the architects shadow study, showing incremental shadow advances mid-day in March 21, June 21 and September 21 of: 1.3, 1.2 and 1.4 m, respectively, between as-of-right and the proposed condition. She provided the opinion that this constituted 'no significant impact'.

Juxtaposed against this evidence, uncontradicted by reply testimony, was that of the neighbouring residents, above recited.

I agree with the City that shadow and privacy are direct relevant considerations in Official Plan policy 3.1.2. I also agree with Mr. Demelo that the urban context expects a degree of privacy, overlook and shadow compromise resulting from building forms. The question is not so much of measurable degree, which is important, but whether the totality of the circumstances warrant the acknowledged impact.

Certainly, no objection was or could be taken to the use of available space in a third storey that is under a roof compliant with height provisions in zoning.

I accept that the concerns of the neighbours who spoke were not uni-dimensional or mere apprehensions. Their continued presence before the COA and the TLAB, their filings and evidence attest to their commitment to their neighbourhood, their own properties and to their perception of encouraging redevelopment that respects and reinforces the physical character of the area.

The concerns expressed returned to massing, area character and privacy. I am of the opinion that the use of fsi as one regulatory control is an important element that can not to be diminished, cavalierly discarded or avoided, especially when so directly addressed as elements of impact concern.

I find that the policies of the Official Plan, notably 2.3.1 and 4.1.5 set up a stronger direction than mere compatibility or the absence of measurable direct impact or the ability to accommodate the proposed construction on the subject property.

As I said in the *Chaplin Estates* file (*Re Lorne Rose Architects Inc.*2017 Carswell 18482; 17 181621 S45 22 TLAB):

> "I agree that current construction trends demonstrate an increase in building size (potential density on a lot) and can be considered, even expected as an element of a demolition and new construction or a substantial rebuild. That increase, however, should be grounded on more than architectural drawings attesting to construction feasibility. It should have a rationale beyond "it is within the range experienced in the 'general neighbourhood'"

In my view, the density control in the zoning by-law is a guide to the carrying capacity of a lot. Council recognized this in previous zoning, still in effect, that varied the density standard lower as lot size increased.

The request for .66 x the lot area needs to be examined against the built form of its environment, including the physical character of the neighbourhood, surrounding properties and the specific improvements intended for the subject property.

On this aspect, again, I find the neighbour's challenge on massing impact more compelling that the professional evidence in support, with which I am not comfortable. The increase from existing to 0.66x represents an uncommon departure in scale, mass, built form and, combined with the garage constitutes an overdevelopment of the lot. Its rationale, based on the architect's plans arrived at without the input of the planner and its support based on a density average, lot 'capacity' and the one OMB precedent is not compelling.

It is clear that the proposal is imaginative, creative, well designed and presented responsive elements designed to mitigate impact on privacy, but without a change to fsi.

The owner and planners' support for these revisions demonstrate responsible efforts to address impact concerns.

The appeal requests however, seek to retain some permissions recognizing existing encroachments (side yards) and seek additional expansion permissions elsewhere (building length, garage expansion, fsi). The result is a proposed massing for the lot that would permit a dwelling exceeding zoning permission by 121 sq m (1302 sq ft), excluding, *inter alia*, the garage.

I am aware that maintaining the by-law standard of 0.4x is potentially inappropriate, in that it would restrict a full two storey dwelling employing the side yard setbacks and as-of-right building length permissions in effect and supported herein.

I heard that the character of the area supports two and three storey dwellings of differing architectural design.

I find that the current proposal, particularly its massing and extensive flat roof areas and decking above the second floor, does not maintain the intent and purpose of the Official Plan or the 'bones' of any applicable zoning by-law, particularly in respect of the fsi/gfa variance sought. The scale, augmented by the garage, will overpower adjacent properties. Given the presence of the public lane along the western limit of the subject property, on site development will be a visible presence from the public realm out of character with the neighbourhood. This variance, for those reasons, I find to be neither minor nor desirable.

There is, of course much merit and support for the regeneration and redevelopment of older housing stock. I have accepted the planner's opinion that both provincial policy and the City Official Plan promote those objectives, subject to specific policies. I therefore find it appropriate and desirable, as a responsibility of the TLAB, to provide for the development of the subject property, but to a scale more commensurate to its setting and the physical character of the neighbourhood as described in the amalgam of evidence filed and heard.

I appreciate Ms. Kosloski's advice that fsi cannot be mechanically connected to a measure of impact. As well, I am cognizant that the site enjoys a physical feature, the ravine that presents an amenity opportunity both in respect of rear yard privacy and a view plane enjoyed by many neighbours. Indeed, the applicants desire for a platform or deck and the existence of such features in the neighbourhood attests to this element, addressed more thoroughly, below.

I am satisfied that there is sufficient evidence to address the fsi/gfa standard below the requested 0.66x, to permit a proportional increase over the current zoning allowance and to permit some flexibility for the architect to arrive at an appropriate built form in keeping with the physical character of the area.

I believe it publically responsible to advance redevelopment in this way.

Variance 5 relates to the area of a platform or deck above the second storey. The applicant seeks permission for a platform or deck exceeding the by-law recognized permission of 4 sq m. The planner, Ms. Kosloski supported a platform of 10 sq m, as a response to adjustments in roof design (from flat to peaked roof), setbacks from the main rear wall below of 6 m, opaque privacy screens of 1.5 m or more along the east and west limits of the platform/deck and a prohibition on access to all other parts of the second storey roof.

The owner, in a series of responses to neighbourhood concerns, has responded by a succession of design improvements. These avoid the concerns for a full recognized third storey or height increase to enable three stories of a flat roof design.

Decks and platforms can occur as of right, subject to restrictions under zoning as to size, number and, possibly, location.

I accept the evidence of the planner that, with the above measures supported, a deck or platform on the rear of the subject property may be a design component that the architect can incorporate, without undue adverse impact, to provide a project respectful of area character and the neighbours. The location of a deck, whether at or near grade as-of-right, and another at or above the second floor level is a matter for instruction and design that need not be precluded provided appropriate attention to privacy is incorporated.

I would dispose of the appeal as below, with a view to allowing redevelopment of the subject property and without the necessity of a further application. The owner and the architect are encouraged to demonstrate that they can deliver a sensitive deployment of the allowed space.

DECISION AND ORDER

The appeal is allowed in part. The variances below listed are approved subject to the conditions that follow.

BYLAW – 569-2013

Contingent on this by-law coming into force and effect in regard to these matters, it is ordered that:

1. Chapter 10.20.40.70.(3)(C), By-law 569-2013. The minimum required side yard setback is 1.2m. The new detached dwelling may be located at 0.9m from both side lot lines.

2. Chapter 10.5.60.50(2)(B), By-law 56-2013. The maximum permitted total floor area of all ancillary buildings or st

ructures on the lot is 40.0sqm. The detached garage will have a floor area permission of 42 sq m.

3. Chapter 10.20.40.40(1), By-law 569-2013. The maximum permitted floor space index is 0.4 times the area of the lot (186.0sqm). The new detached dwelling will have a floor space index permission of 0.55 times the area of the lot (256.0sqm).

5. Chapter 10.20.40.50 (1)(B), By-law 569-2013. The maximum permitted area of each platform located at or above the second storey of a dwelling is 4.0sqm. The area of one deck or platform at or above the second storey level at the rear (north) may be up to 10 sqm in area .

BY-LAW 3623-97

6. Section (3)(a), By-law 3623-97. The minimum required side yard setback is 1.2m. The new detached dwelling may be located 0.9m from both the east and west side lot lines.

7. Section 3(b), By-law 3623-97. The maximum permitted gross floor area is 0.4 times the area of the lot (186.0sqm). The new detached dwelling will have a gross floor area equal to 0.55 times the area of the lot (256.0sqm).

BY-LAW 1-83

8. Section (3)(i), By-law 1-83 The maximum permitted gross floor area is 0.4 times the area of the lot (186.0sqm). The new detached dwelling will have a gross floor area permission of 0.55 times the area of the lot (256.0sqm).

While counsel has subsequently satisfied me it is not necessary to do so, I include the following variance out of an abundance of caution:

ALL BY-LAWS

9. The minimum permitted lot frontage for a detached dwelling is 12 m. The new detached dwelling will have a lot frontage of 9.02 m; the existing lot frontage is recognized and maintained.

Conditions:

1. The Owner shall submit a complete application for permit to injure or remove privately owned trees under Municipal Chapter 813 Article III, Private trees.
2. The Owner shall retain an arborist to prepare a tree preservation plan for the protection of the red maple tree on the City road allowance in front of the subject property prior to redevelopment, including prior to demolition or building permit issuance, satisfactory to the Director, Urban Forestry Department of the City.
3. The Owner shall have a period of eight months from the date of this decision to provide a site plan and elevations drawings consistent herewith and satisfactory for building permit issuance but failing which, on that date, the appeal is dismissed and the variances are refused.
4. Despite the side yard setbacks provided for at 0.9 m, any accessory garage building or structure fronting on the lane adjacent the west limit of the subject property shall be set back 2.1 m from the west property line.
5. Any platform or deck at or above the first or second floor roof level will have opaque minimum 1.5 m high panels along its entire east and west limits and the said platform will be set back not less than 2 m from the rear (north) main wall of the first or second storeys. Any and all first or other second floor rooftop surfaces not occupied by the platform or deck will be rendered and maintained inaccessible, except for maintenance purposes.

   There are no approved plans attached to this decision and order.

If there are difficulties experienced in the interpretation or application of this decision, the TLAB may be spoken to.

X 

Ian Lord
Panel Chair, Toronto Local Appeal Body
Signed by: Ian Lord