

Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, November 20, 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): HAMIDREZA KAMALI

Applicant: ARCICA INC

Property Address/Description: 163 CORTLEIGH BLVD

Committee of Adjustment Case File Number: 18 122410 NNY 16 MV

TLAB Case File Number: 18 180922 S45 16 TLAB

Hearing date: Tuesday, October 16, 2018

DECISION DELIVERED BY G. BURTON

APPEARANCES

Name	Role	Representative
Arcica Inc.	Applicant	
Hamidreza Kamali	Appellant	Eileen Costello
Martin Rendl	Expert Witness	
Robert Tekker	Party	
Christine Tekker	Party	
David Juurlink	Party	
Moira Kapral	Party	
Birgitta Wallner-Savoie	Participant	

INTRODUCTION

This is an appeal from the Committee of Adjustment decision of May 31, 2018 that refused the owner's application for two variances for construction of a new two storey dwelling at 163 Cortleigh Boulevard in North Toronto. Three close neighbours have sought party status to participate fully in the appeal. Because of concerns about the effect on a mature tree to the rear of the property, adjustments had been made to the rear southwest corner of the proposed structure. However, the same two variances are still required, and are sought in this appeal.

BACKGROUND

The subject property is zoned R1 under former Toronto Zoning By-law No. 438-86 (the Old By-law) and RD (15.0; dO.35) (x961) in the new City of Toronto By-law No. 569-2013 (the New By-law). Variances were needed only from the New. It is designated Neighbourhoods under the City of Toronto Official Plan. The lot is 15.24 m wide, 40.84 m deep, and has an area of 622.4 m2.

MATTERS IN ISSUE

The TLAB must determine the usual issues on variance appeals, respecting whether the variances meet the statutory tests. In this matter, there was particular focus on what is an appropriate neighbourhood to be used for this assessment. Protection of a significant tree was also an issue.

JURISDICTION

For variance appeals, the TLAB must ensure that each of the variances sought meets the tests in subsection 45(1) of the Act. This involves a reconsideration of the variances before the COA in the physical and planning context. The subsection requires a conclusion that each of the variances, individually and cumulatively:

- maintains the general intent and purpose of the official plan;
- maintains the general intent and purpose of the zoning by-law;
- is desirable for the appropriate development or use of the land, building or structure; and
- is minor.

These are usually expressed as the "four tests", and all must be satisfied for each variance.

In addition, TLAB must have regard to matters of provincial interest as set out in section 2 of the Act. The variances must be consistent with provincial policy statements, and

conform with provincial plans (s. 3 of the Act). A decision of the TLAB must therefore be consistent with the 2014 Provincial Policy Statement (PPS) and conform to (or not conflict with) any provincial plan such as the 2017 Growth Plan for the Greater Golden Horseshoe (Growth Plan) for the subject area. Under s. 2.1(1) of the Act, TLAB is also to have regard for the earlier Committee decision and the materials that were before that body.

EVIDENCE

The owner's evidence was given by Mr. Martin Rendl, a professional planner with a great deal of both public and private experience. Several neighbours sought Party status so that they could have the right to participate fully in opposition to the application (by cross examination and summation). One of these persons did not attend, nor did the one Participant.

The subject site is located on the south side of Cortleigh Boulevard, northwest of the intersection of Eglinton Avenue West and Avenue Road. It is the third lot west of Avenue Road. The applicant requests two variances to enable the construction of a new two storey dwelling with an integral garage. These would allow for a floor space index (FSI) of 0.633 times the area of the lot, while the New Zoning By-law limits the maximum FSI to 0.35 times the area of the lot. There is also a "technical' height variance under the New By-law, caused only by the design feature of a dormer window at the roof level. (There are no variances required under the Old By-law, following OMB approval of most of the New on March 1, 2018.) There is no overall height variance needed, nor one for building length, depth, or any side yard, front or rear yard setbacks.

These are the requested variances from the New By-law (there are no others needed for the proposed design):

1. Chapter 10.20.40.40, By-Law 569-2013

The permitted maximum floor space index is 0.35. The proposed floor space index is 0.633.

2. Chapter 10.20.40.10, By-Law 569-2013

The permitted maximum wall height is 7.5m for 100% of the pair of side walls. The proposed wall height is 9.7m for 17% of the pair of side walls.

Mr. Rendl performed the usual analysis to identify an appropriate Study Area (SA) for the assessment of this application vis å vis the tests in the Act. This may be seen in Appendix D to Exhibit 3, his Expert Witness Statement. It is generally bounded by Avenue Road on the east, Strathallan Boulevard on the north, Proudfoot Avenue on the west; and the north side of Briar Hill Avenue, east of 552 Briar Hill. This was based on the following factors:

- All properties within the SA are zoned with a maximum floor space index of 0.35x, the same as the subject;

- Avenue Road is a major street, and forms a logical eastern boundary (the structures along its west side were excluded);

- The SA was chosen as it is reasonable walking distance from the subject, in accord with the usual informal "walking the dog" test of an appropriate distance when assessing the physical character of an area. He concluded that a three-block radius was sufficient here.

There is currently a two storey detached dwelling on the lot, seen in both the site photos and on an overlay of "red line elevations" filed on October 15. The area is a mature and stable neighbourhood of primarily two story detached dwellings, albeit with reinvestment occurring throughout. Thus it is stable but not static. Throughout the neighbourhood there are examples of new houses that have replaced original houses. These are generally larger than the older homes, in keeping with modern building trends in established neighbourhoods.

Under the Neighbourhoods designation in the OP, Mr. Rendl stated, residential uses in a wide range of low density buildings are permitted, including detached, semi-detached, duplexes, triplexes and townhouses.

The RD zoning under the New By-law permits a two storey detached dwelling. There is no zoning standard for maximum lot coverage for this area here, or in the rest of his SA. Properties to the west of it are in the former City of North York. They are also zoned RD in the New By-law, but the properties included in his SA are not subject to an FSI limit as is the subject one. Instead, massing in the former NY area is controlled by a maximum 35% lot coverage together with a two story height limit. In practice, he testified, these restrictions (35% coverage and a two storey limit) result in a built form that is equivalent to 0.70 FSI.

He included a chart of minor variances granted for FSI in his Witness Statement (Ex. 3, last page). The red dots there illustrate locations of approved FSI variances.

Mr. Rendl described the proposed structure and the two required variances. The front elevation illustrates a two storey dwelling, with a roof line that features dormer windows. These are a style element only; there is no third floor. The rear is a typical elevation, with a walkout and deck. There are minimal windows on the side elevations. Mr. Rendl referred to a redlined plan illustrating the proposed superimposed on the present structure, filed October 15. He pointed out that the height of the existing home up to the roof ridge is in fact higher than the proposed. The new home would generally fit within the width of the old. It would be situated further to the east than the present, as the driveway is removed as unnecessary for the integral garage. Looking at it from the front, the new would have very similar profile and massing to the present.

The variance required for the side wall height was imposed by the New By-law. This is how Mr. Rendl describes it:

"As shown in the front and side elevations (Drawings A 06, A 08, and A 09 respectively) the dormers facing the street are located within the sloping portion of the roof that faces the street. The side wall height for this portion of the dwelling includes the cladding within the triangular side wall above the second floor illustrated on Drawings A 08 and A09. The wall height within this triangular area is 9.7 metres, but this height applies to only 17% of the dwelling's two side walls. The other 83% of the side walls have a 7.5 metre height which complies with the maximum side wall height." (Ex. 3, para. 24).

As mentioned, the height increase applies only to the side triangular portion of the dormer design. This small portion measures 9.7 m high, though it is only a tiny segment of the side wall. The side wall height is measured from grade to the highest point of the side wall. Thus there is a technical variance for the small segment above the height limit of 7.5 m. All the other portions of the roof area, including the ridge, are under the total height limit of 10 m.

He also testified that the FSI is well articulated here. It is a ratio of the total interior floor area to the lot area. Here 0.633 times the lot area is configured as a three-dimensional box on two floors. Staff had recommended an FSI of 0.58, as "more consistent with the area". He did not concur, as an FSI number should not be just a goal in itself. The actual development should be evaluated within its context and surroundings, as well as other parameters in the area. Here there have been other approvals beyond 0.58 FSI. They are listed by street in Appendix D to Ex. 3: even within this block are 154 Cortleigh at 0.65, 185 at 0.75, and 246 at 0.67 times the lot area. These can be seen on the SA map on the last page of Ex. 3. The physical character of the neighbourhood is established by these larger structures as well. They are part of the fabric. He pointed to a subsequent email message (Ex. 3, p. 26) wherein the City Planner had stated that a variance of 0.6 FSI would be acceptable. In Mr. Rendl's opinion it would not be possible to ascertain the difference between 0.58 and 0.60 FSI if such structures were viewed side by side in a neighbourhood. One must rely on a deeper planning analysis to assess whether the proposal is appropriate.

The owner had provided an Arborist's Report (Ex. 6) and a Tree Protection Layout Plan (Ex. 7, revised Sept. 27, 2018) in response to the concerns of Drs. Juurlink and Kapral at 165 Cortleigh to the west. The issue is potential damage to a mature Black Walnut tree in the rear yard, more or less at the fence line between the two properties. A revision was made to the plans for the proposed dwelling following a recommendation by the Arborist. The rear southwest corner was retracted (see Plans, A-01 and Ex. 7) to better protect the tree roots during construction and after. Here is how the applicant set out the alterations in the Applicant's Disclosure (filed July 13, 2018):

" Drawing A02, Basement Plan, the exterior walls of the basement have been retracted in the Recreation Room to protect tree roots as per the recommendations of the arborist's report prepared by Judith S. Wright Associates and dated March 2, 2018. Please note that this same change to the structure of the basement is also reflected on pages A01, A07, A09.

2. Drawing A06, Main Elevation (North), the height of the garage door has been reduced to 10 ft. "

In Mr. Rendl's opinion the variances are consistent with the PPS' policies for managing and directing land use to achieve efficient and resilient development and land use patterns. Specifically, the proposed development:

• promotes efficient development and land use patterns (PPS Policy 1.1.1(a));

• promotes cost-effective development patterns and standards to minimize land consumption and servicing costs (PPS Policy 1.1.1(e));

• is an efficient use of land (PPS Policy 1.1.3.2(a)1);

• efficiently uses the infrastructure and public service facilities which are available (PPS Policy 1.1.3.2(a) 2). The variances also conform to and do not conflict with the Growth Plan.

The Official Plan

In assessing the tests under subsection 45(1) of the Act, Mr. Rendl first considered the intent of the Neighbourhoods designation in the OP. It is to maintain stable low density neighbourhoods, avoiding the opposite result. Policy 2.3 acknowledges that Neighbourhoods are "stable but not static" and that "neighbourhoods will not stay frozen in time." Physical change is expected to occur in neighbourhoods like this over time through enhancements, additions and infill housing. The objective is to reinforce the stability of the neighbourhood by ensuring that new development respects the existing physical character of the area. Regeneration is therefore an important aspect of stability, and the OP clearly anticipates physical change by replacement housing, particularly when it shares most of the desired design characteristics.

Thus the OP anticipates that physical change such as new replacement housing will occur in Neighbourhoods. Policy 2.3.1.1 requires that development within them "will respect and reinforce the existing physical character of buildings, streetscapes and open space patterns" in these areas. This would reinforce the stability of the neighbourhood.

However, Mr. Rendl stated, "respect" does not mean duplicate the same architectural style, massing, height and other characteristics of the existing housing stock. "Compatible" does not mean to be the same, or even similar. Rather it means that a design can exist in harmony with its surroundings.

Change in neighbourhoods is further addressed in Policy 4.1, the policies for the Neighbourhoods designation itself, and its explanatory text. Alterations in established neighbourhoods are expected to be "sensitive, gradual and generally 'fit' the existing physical character" by respecting and reinforcing the general physical patterns. Mr.

Rendl emphasized that the use of the terms "general" and "generally" here means that development does not have to replicate or copy existing development in the vicinity.

The OP assesses the compatibility and fit of new development not in actual numbers such as density, but rather by stating policy objectives for change and new development in stable residential neighbourhoods. These are used to evaluate how new development implements the policies for the Neighbourhoods designation.

Policy 4.1.5 requires that development in established Neighbourhoods respects and reinforces the existing physical character of the neighbourhood. The intent of this policy is further expressed in a series of development criteria which are to be considered in assessing the appropriateness of the development. He considers the following criteria relevant to the consideration of these proposed variances:

- Massing, scale, height and dwelling type of nearby residential properties;
- Prevailing building types.

Policy 4.1.6 points to numerical standards to be set out in the zoning by-law. These will ensure that new development is compatible (i.e., not identical to, but able to co-exist) with the physical character of established neighbourhoods. Standards for development govern height, density and building setbacks from lot lines, among others.

In Mr. Rendl's opinion the variances for the proposed dwelling maintain the general intent and purpose of the OP's development criteria and policies. It is a two storey detached dwelling, which is the prevailing building and dwelling type in the area.

This dwelling respects and reinforces the existing physical character of the neighbourhood, one that already exists there. That character consists of predominantly two storey detached dwellings. It fits this existing physical context with respect to its built form and setbacks from lot lines.

Mr. Rendl testified that the variances sought would not result in a change that is out of keeping with the established and emerging physical character of Cortleigh Boulevard and the area. The FSI variances are within the range of such variances approved for other new dwellings and additions in the near neighbourhood, as shown in Appendix D of Ex. 3. These variances do not constitute a change that threatens its stability. The OP policies conserving the natural environment will also be met, as Urban Forestry will have a veto over any disposition of the rear yard tree.

In his opinion then, the variances maintain the general intent and purpose of the OP.

The Zoning By-law

Mr. Rendl testified that the general intent and purpose of zoning by-laws is to protect the stable and mature low density character of a Neighbourhood through a combination of performance standards for buildings and properties. Here the variances maintain the general intent and purpose of Zoning By-law 569-2013.

For analysis he grouped the two variances into a discussion of the built form. The general intent and purpose of regulating maximum floor area and maximum wall height is to control the massing of a dwelling, and to avoid a house that is out of scale with its lot and surroundings. Built form is determined by several factors acting together, and massing is not solely controlled by the FSI limitation. These factors include FSI, but also building and wall heights, lot coverage, building length, building depth, and setbacks from lot lines.

Here it is important to realize that the proposed floor area of 0.633 times the lot area is entirely within the two storey building envelope that is prescribed by the zoning By-law - with respect to maximum building length (17.0 m), height (10.0 m) and setbacks from lot lines. Thus in his opinion, the built form of the dwelling maintains the general intent and purpose of the zoning By-law.

He stated that it is generally acknowledged that where older Toronto neighbourhoods have a 0.35 maximum FSI, it often does not reflect the density seen in the emerging character of these neighbourhoods. Because many previous planning reports to Council had not resulted in any increase in the 0.35 FSI number, it is presumed that it is kept at an artificially low standard. This ensures that a planning assessment will be conducted of most proposals through a minor variance application. Here, he provided information in Ex. 3, Appendix C on the existing FSI for properties in the vicinity on Cortleigh Boulevard, Hillhurst Boulevard and Briar Hill Avenue. The chart shows that the majority of the properties there have an FSI greater than the 0.35 maximum in the Zoning Bylaw.

The proposed 0.633 FSI is within the range of approvals granted for other new two storey dwellings, on Cortleigh Boulevard and in the area nearby. These are summarized in his Appendix D. As set out earlier, the 9.7 m side wall height is found in only 17% of the dwelling's side walls (these are only on the north and south side walls, triangular in shape, of the sloped roof facing the street.) 83% of the dwelling's side walls comply with the 7.5 m maximum side wall height. This variance results only from an appropriate treatment (dormers) for a small portion of the dwelling's side walls. For these reasons, this variance maintains the general intent and purpose of the zoning By-law.

His conclusion is that the variances sought for FSI and side wall height meet the general intent and purpose of the zoning By-law.

Desirable

He opined that the variances result in development that is appropriate for the site and compatible with the neighbourhood. The built form of the dwelling and the development standards applied to the proposal result in a new dwelling that is compatible with the neighbourhood and will contribute to its continued stability. This is not an overdevelopment of the property. He finds this to be consistent with others on identical lots and in similar contexts. Shadow, privacy and overlook impacts are not materially different than the current conditions. Photos of nearby homes show a very similar

design, width and roofline, even when there are newer and somewhat different designs. He stated that this embodies the vernacular of the neighbourhood. Zoning by-laws do not mandate that properties match what is adjacent (except for front lot lines.)

Part of the desirability test is the maintenance of a distinctive feature, landscape or physical character of the area – here, the rear yard tree will be better preserved as a result of a redesign of the structure.

Minor

Mr. Rendl outlined that the generally acknowledged test of whether a variance is minor is its extent and any negative impact. It is not just a numerical exercise based on percentages of difference from a by-law standard, but includes an assessment of whether it causes adverse effects of a planning nature. Here, the variances individually and cumulatively do not create any adverse impacts on nearby properties, as set out above. The new house respects and reinforces the existing physical character of the area. The variances individually and cumulatively are minor. In addition, the variances numerically and substantively are minor.

He concluded that the two minor variances requested meet the four tests of subsection 45(1) of the Act, and are appropriate for the development of 163 Cortleigh Boulevard. They respect and reinforce the existing physical character of Lawrence Park and properties in the immediate vicinity, and represent good planning.

Under cross examination by Dr. Juurlink, Mr. Rendl was asked about the size of his study area. Dr. Juurlink objected that it was too wide. Lot sizes to the south and west of the subject are smaller. Where they are larger, as in the subject block, homes are larger, a more apt comparison. He would restrict the study area to the single block here. Mr. Rendl emphasized that his SA was focused on the neighbourhood in planning terms, and that even those with a lesser frontage are still part of the relevant context. He reiterated his opinion that the proposed roof line would be very similar to others already built nearby. Respecting adverse impact in the test for a minor variance, he opined that the rear yard views following the new build would be little different from the present. This is true even though the structure would extend further back than the present one. There would be a change, but still a generous view of back yards and surroundings. The rear garage to the east would be removed. All told there would be no unacceptable adverse impact from the perspective of available views. The zoning bylaws are linked to the OP, and if the development standards are met (as the setbacks are in compliance here), it is assumed that the development is compatible with its surroundings.

Ms. Christine Tekker of 161 Cortleigh to the east challenged Mr. Rendl in cross examination about his testimony that a view from the street could be a factor in assessing compatibility. She raised nos. 154 and 185 Cortleigh as two new builds that, even though part of the neighbourhood, do not fit the streetscape. She stated that there are six lots of similar size within this block that provide ample "views and perspectives." He replied that there are six that in fact exceed the required FSI measurement. Both

Dr. Juurlink and Ms. Tekker asked Mr. Rendl if variances had been granted for new builds or if they had been for additions. He stated he would check this. He was asked to do so only for this block of Cortleigh. Ms. Tekker asked many questions about the space around or adjacent to a building. Mr. Rendl pointed out that there was no violation of the side, front or rear yard setbacks for this project, and that no variances were required. Therefore the proposed structure "fit" the By-law and OP requirements in this regard.

Ms. Christine Tekker and her husband Mr. Robert Tekker reside, as mentioned, at 161, to the east of the subject property. She sees very little alteration as claimed from the variances refused by the COA, and objects primarily to the FSI variance. If 0.633 x is granted, she sees a proliferation of requests for higher numbers. There is a material difference in her view between the planner's choice of 0.58 and the requested 0.63. She testified that of the six FSI increases in the block, three are for renovations in the rear, rather than for a complete rebuild. Thus all retained sufficient spacing around the structures, which she envisages as reduced here because of the increased FSI. She retains a concern over the height proposed, as the so-called "design feature" of the dormers adds two metres to it. She was asked if she would prefer that there be no dormers (she admitted that dormers were not unusual in the area). She responded that their removal "would reduce everything else down", as "everything flows from that." She believes that the new structure would extend 13 feet further to the rear when seen from her deck, so she would essentially see a blank wall, with reduced sunlight. She argued that the development could not be found to be in conformity with the policies of the Growth Plan favouring either intensification or affordability. Within the block here there is no other dwelling of comparable size, scope and massing. She said that she had difficulty believing that the Planning Staff had found acceptable an FSI of 0.6. She agreed that one cannot tell what the FSI of a structure is by merely walking down a street.

Dr. David Juurlink and Dr. Moira Kapral

In his message of May 28, 2018 to the COA prior to its hearing, Dr. Juurlink expressed succinctly the main concerns that both he and his wife, Dr. Kapral have with the proposal. They live in the home to the west at 165 Cortleigh, purchased in 2009. He stated: "In summary, the proposal deviates greatly from GFA and height restrictions, would require the removal of a mature tree that straddles our property line and offers shade, enjoyment and esthetic appeal to our family, and would negatively impact both the streetscape and our enjoyment of our own property. For these reasons, we respectfully request the proposal be refused."

In his evidence before the TLAB (given for both parties), Dr. Juurlink testified that the drawing of the proposed superimposed over the new created a busy image, and did not suffice to distinguish the two. There would be "no small difference" from the curb. He agrees that there might be other dwellings within the range of 0.633 FSI, but not within the most relevant area, the subject block itself. He believes the proposal to be well in excess of the majority there, with an adverse effect on the streetscape. Its impact, one aspect of the test of minor, will be significant, with the possible loss of an important

mature tree. He called it a majestic black walnut tree, whose removal had been denied in the past. The owner's arborist had stated that this would be "unlikely to survive" the construction. There had been no communication about this tree even though it is a boundary tree.

In his view the revised plans, which retract the southwest corner of the proposed structure, leave the tree's future still at risk. He had no faith that an arborist would be present during construction, as was recommended in the Arborist's report.

He also objected to the extension of a "large wall" to the rear, as it would cut off family enjoyment of their rear yard.

In cross examination he agreed that the arborist had classified the condition of the walnut tree as "fair", and that she had concluded that it would survive the injury, if some recommended conditions were met. He also understood that there would be a permitting process, outside of TLAB jurisdiction, but he feels that the issue falls within the question of the impact of the variances. He agreed that neither the proposed overall height and width of the proposed dwelling, as shown on the superimposed drawing, required a variance. He said that the majority of homes on the street were less than 0.633 FSI, but also accepted that the majority of them were greater than the 0.35 FSI that the By-law requires.

Mr. Rendl did respond to the nature of the new construction for the six homes in question on the block when it was asked whether they were additions or new structures. Even if three were additions, he stated, it did not alter his opinion on the impact of the resulting FSI.

ANALYSIS, FINDINGS, REASONS

Selection of the Study Area or Neighbourhood:

I accept the larger Study Area chosen by Mr. Rendl as a logical one, for the reasons he articulated. The neighbours would limit this selection to the single block on which the subject site is located. I reject this as an appropriate "neighbourhood" for assessment of OP policies and zoning intent, as I find that it is unrealistic. At least two or three blocks, what one might see on a walk or a short drive, is the usually accepted minimum (absent some physical rationale to cut it off such as a *cul de sac* or ravine).

It is clear from the past variances granted, as well as the chart of existing FSI in the two or three-block area surrounding the site, that there are many similar structures close by. I have verified this by checking the charts in detail. It appeared that there was a misunderstanding about the effect of an FSI limitation. It is a relative figure, not an absolute one. If a lot is smaller, the figure for permitted floor space index will increase, as it does, for example, for the instant 0.663 times the area of the lot. It may seem objectively a large number, but it depends upon the lot size. For this lot, the 0.633 figure is not excessive. It cannot be said the be a precedent. It will "fit" in this block and this

neighbourhood. For example, 216 Cortleigh was approved in 2014 for a FSI variance of 0.55 times the lot area, which is 624.7 sq. m. (the subject is 622.4 sq. m.), and close by. At No. 48 Hillhurst Avenue, one block south, the lot area is an even smaller 598.1 sq. m., with an FSI of 0.87 x. When lot size varies, FSI can as well, without a great increase in the size of the structures.

As Ms. Costello argued, any change in a dwelling will have some effect on the neighbours. Here a fairly substantial change in the building plans was made, in response to a concern about preservation of the tree. This addressed what might have been the main issue for the owners of 165. The other is their view toward the subject property. There is no right to an uninterrupted view in the rear yard, and there is no rear yard setback variance required here. The back walls of these dwellings do not line up at present as they do in the front. The garage would also be demolished, a modest improvement in the view. She emphasized again, and I agree, that there are only two variances requested here – none for length, depth, rear yard setback, or landscaping. City staff had no issues with the proposal, although they would have preferred a somewhat reduced FSI. Urban Forestry is in control of whether there is a permit issued for the trees on the site.

Dr. Juurlink had remaining concerns about the size of the structure and the visual impact, especially if the tree is not retained. I am certain that the owner will have as great a concern as he has about retention of the tree, and will follow the arborist's recommendations during construction. I note the comment in the Arborist Report (Ex. 6) confirming Dr. Juurlink's testimony about the consequences for a border tree. The provisions of the provincial Forestry Act state that:

"10. (2) Every tree whose trunk is growing on the boundary between adjoining lands are the common property of the owners of the adjoining lands.(3) Every person who injures or destroys a tree growing on the boundary between adjoining lands without the consent of the landowners is guilty of an offence under this Act."

However, the Report stated the following about this black walnut tree:

Bark has peeled off at trunk base, no obvious signs of a borer. Trunk also has sunken depression. Some branches on the neighbour's side have been pruned with stump ends. Branches on both sides of property line go over the houses. Majority of trunk in on owner's property." (ibid, p. 2.).

Thus I conclude that the owner here should not be held back from an FSI variance because of a merely speculative injury to this border tree, expressed to be in only "fair" condition. The revised Report did state that Black Walnuts are not tolerant of root loss and mechanical injury. However, it went on to conclude that while it is possible that some roots may exist in the area of new excavation and they could be severed, it is anticipated the tree will survive the injury.

I find that the streetscape will not be altered in any significant way by the design or size of the home, when there are many similar ones in the area. I believe that many of the

photos on the outer limits of Mr. Rendl's SA were too far away to be relevant. However, it is telling that there are many dwellings of similar appearance and features to the proposed within a few blocks. I note especially that it can be seen from the COA and other decisions on FSI that there are instances of fairly high FSI measurements within the two blocks surrounding the subject site. The chart at the end of Ex. 3 illustrates many examples of existing or planned structures that have FSI of 0.50 or more, and many are within the requested range at about 0.60 or more.

I do not find it important how additional FSI was created in nearby homes, whether by replacement or addition. I presume this was to point out differences in the streetscape if FSI is concentrated at the rear. However, for both OP and By-law tests, everything built there now must be considered when assessing a new variance (there is also the planned context, but that is not immediately relevant here.) For new builds such as 154 and 185 Cortleigh, variances were granted only for FSI and not setbacks, much like the present application.

Ms. Tekker had testified that if the triangle portion of the dormer structure were reduced or removed, it would be a more reasonable height. I agree with Mr. Rendl's opinion that this would have no effect on the overall height, as no variance is required for the main roof height. It would not affect either height or massing of the structure if the so-called triangles or dormers were removed. I find the height variance here to be extremely minor and technical in the context, just a design element and not at all what the New By-law wished to avoid.

I am satisfied by Mr. Rendl's evidence that the tests in subsection 45(1) are met in this application. The general intent and purpose of both the OP and the New Zoning By-law are addressed satisfactorily by a design requiring only two variances, one of which can be said to have almost no impact at all. The FSI variance will have minimal impact in this context: the impact is minor in planning terms, FSI increases are seen throughout this area, and this only appears to be high in numerical terms. It will not constitute a precedent as feared, as each application must be considered separately on its merits.

DECISION AND ORDER

The appeal is allowed, and the following variances are approved, subject to the conditions below:

1. Chapter 10.20.40.40, By-Law 569-2013

The permitted maximum floor space index is 0.35. The proposed floor space index is 0.633.

2. Chapter 10.20.40.10, By-Law 569-2013

The permitted maximum wall height is 7.5m for 100% of the pair of side walls. The proposed wall height is 9.7m for 17% of the pair of side walls.

1. The new detached dwelling shall be constructed substantially in accordance with the Plans attached as **Attachment 1** to this decision. **Any other variances that may appear on these plans that are not listed in this decision are not authorized.**

2. The Applicant shall comply with the City of Toronto Municipal Code Chapter 813, Article II (Private Trees) and Article III (City-Owned Trees).

ATTACHMENT 1 – Revised Plans

G. Burton Panel Chair, Toronto Local Appeal Body



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SURVEYOR'S REAL PROPERTY REPORT OF			
PART 1			
PLAN OF LOT 221			
REGISTERED PLAN M-346			
MUNICIPALITY OF METROPOLITAN TORONTO			
5 0 5 10 metres			
SCALE = 1 : 250			
A. AZIZ SURVEYORS INC., O.L.S.			
METRIC: DISTANCES SHOWN HEREON ARE IN METRES AND			
CAN BE CONVERTED TO FEET BY DIVIDING BY 0.3048.			
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THE REPRODUCTION, ALTERATION OR USE OF THIS REPORT IN WHOLE OR IN PART WITHOUT THE EXPRESS PERMISSION OF A. AZIZ SURVEYORS INC. O.L.S. IS STRICTLY PROHIBITED.			
PART 2 :			
REPORT			
THIS REPORT WAS PREPARED FOR A. KAMALI, AND THE UNDERSIGNED			
SOUNDARES			
ITLE SEARCH INDICATES			
NO EASEMENTS OR RIGHT OF WAYS REGISTERED ON TITLE.			
NO INVESTIGATION WITH RESPECT TO MUNICIPAL ZONING BY LAW HAS BEEN MADE			
ENCROACHMENTS			
PLEASE NOTE THE POSITION OF THE FENCES IN RELATION TO THE SOUTHERLY,			
SUBJECT BOUNDARIES TO THE EXTENT SHOWN ON THE PLAN.			
BEARING NOTE			
OF CORTLEIGH BOULEVARD HAVING A BEARING OF N 74'47'00" E			
GEODETIC:			
ELEVATIONS SHOWN HEREON ARE LOCAL.			
" SURVEY MONUMENT FOUND IN B DENOTES TRUN BAR "SURVEY MONUMENT SET GW " GUY WIRE			
CB "CATCH BASIN CS,W "NORTH, EAST, SOUTH, WEST MH "MANHOLE			
"BOARD FENCE WV "WATER VALE "CHAIN LINK FENCE HP "HYDRO POLE			
" REGISTERED PLAN M-346 OU " ORIGIN UNKNOWN " SURVEY BY SPEIGHT & VAN M M MEASURED			
NOSTRAND & GIBSON LTD ODT. " DECIDUOUS TREE			
DS " DOOR SILL			
SURVEYOR'S CERTIFICATE			
I CERTIFY THAT: 1. THIS SURVEY AND PLAN ARE CORRECT AND IN ACCORDANCE			
WITH THE SURVEYS ACT, THE SURVEYORS ACT AND THE			
ACT AND THE REGULATIONS MADE UNDER THEM. 2 THE SURVEY WAS COMPLETED ON THE 1st DAY OF MARCH 2017			
INCOMPLETED ON THE TOCOM OF MUTCON, 2017			
MARCH 01, 2017			
DATE: A. ABDELSHAHID			
	-		
120 NEWKIRK ROAD- #31, RICHMOND HILL, ONT. L4C-9S7			
Tel. (905) 237-8224 Fax: (416) 477-5465			
Website : M-Azizsurveyors.ca			
PROJECT NUMBER PROJECT			
17–056 163 CORTLEIGH BLVD (SR–PR)	1		
DRAWN BY KU CHECKED BY A A	1		





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