

DECISION AND ORDER

Decision Issue Date Monday, December 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): MARY KRUK

Applicant: NELSON ESPINOLA

Property Address/Description: 43 HOCKEN AVE

Committee of Adjustment Case File: 17 275255 STE 21 MV (A1370/17TEY)

TLAB Case File Number: **18 173024 S45 21 TLAB**

Hearing date: Thursday, September 20, 2018

DECISION DELIVERED BY S. GOPIKRISHNA

REGISTERED PARTIES AND PARTICIPANTS

Applicant	Nelson Espinola
Appellant	Mary Kruk
Party	Roderick Macivor
Party	Barbara Gaye McDonald
Party's Legal Rep.	David Neligan
Party/ Owner	Treehouse Capital LTD
Party's Legal Rep.	Martin Mazierski

INTRODUCTION AND BACKGROUND

Mr. Nelson Espinola is the owner of 43 Hocken Avenue, located near the intersection of Bathurst Ave and St. Clair Ave W. He applied to the Committee of Adjustment (COA) to alter the existing two storey, detached dwelling by constructing a front ground floor addition, a rear second storey addition with a rear deck, a complete third storey addition with front and rear decks and a new rear detached garage. Counsel for the Applicants advised that "an olive branch was offered" to the opposition before the COA hearing, and that opposition was withdrawn based on changes to plans, and the recommendation of conditions to the COA. The COA heard the application on 17 May, 2018, and approved the application, with recommended conditions.

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On 6 June, 2018, Ms. Mary Kruk, the owner of 45 Hocken Avenue, appealed the Decision of the COA to the Toronto Local Appeal Body (TLAB). Ms. Gaye McDonald and Mr. Roderick McIvor, both of whom reside at 41 Hocken Ave, elected to be Parties, via their submissions dated 5 July, 2018.

The TLAB scheduled a hearing date for 20 September, 2018.

MATTERS IN ISSUE

City Wide Zoning By-Law:569-2013

1) A lot with a residential building, other than an apartment building, must have a minimum of 50 percent of the rear yard for soft landscaping: 50.71 square metres, if the lot frontage is greater than 6.0 metres. The proposed rear yard landscaping area is 34.6 percent; 35.11 square metres.

[10.5.50.10.(3) Rear Yard Soft Landscaping for Residential Buildings Other Than an Apartment Building

(2) A) The permitted maximum building depth for a detached house is 17.0 metres. The proposed building depth is 18.32 metres.

[10.10.40.30.(1) Maximum Building Depth]

(3) The permitted maximum floor space index is 0.6 times the area of the lot: 132.66 square metres. The proposed floor space index is 1.01 times the area of the lot: 221.31 square metres.

[10.10.40.40.(1) Floor Space Index]

4) The required minimum front yard setback is 2.89 metres. The proposed front yard setback is 1.30 metres. [10.5.40.70(1)(B) Front Yard Setback - Averaging]

(5) Roof eaves may project a maximum of 0.9 metres provided that they are no closer than 0.30 metres to a lot line. The proposed eaves project 0.18 metres ,and are 0.19 metres from the west lot line.

[10.5.40.60.(7) Roof Projections]

(6) On a lot with a detached house, semi-detached house, duplex, triplex, fourplex or townhouse where there is not a permitted driveway in the front yard, a minimum of 75 percent of the front yard must be soft landscaping; 9.88 square metres. The proposed front yard soft landscaping area is 57.2 percent: 7.53 square metres.

[10.5.50.10.(1) Front Yard Landscaping for Certain Types of Residential Building]

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

At the hearing completed on the 20th of September, 2018, Mr. Espinola, the applicant, was represented by Mr. Martin Mazierski, a lawyer and Mr. T.J. Cieciora, a land use planner. Ms. Kruk, the Appellant, represented herself while Parties MacIvor and McDonald were represented by Mr. David Neligan, a lawyer. I advised the Parties at the beginning of the hearing that I had completed a site visit in order to understand the context of the proposal, and the neighbourhood characteristics.

Mr. Cieciora was sworn in, and was recognized as an Expert Witness in the area of land use planning. He started with a preamble which referred to his retainer, and various issues that he intended to address. He stated that his evidence would demonstrate that the minor variances proposed for the subject land were in accordance with the Planning Act, consistent with the Provincial Policy Statement and conform to the Growth Plan for the Greater Golden Horseshoe, and that the minor variances, both individually and cumulatively, met the intent and purpose of City's Official Plan and Zoning By-law, were minor in nature, and were desirable for the appropriate use of the subject land.

Mr. Cieciora established the basis for his study area, by describing the study area surrounding the subject property was as follows:

Hocken Ave. is a small road that runs east-west from Wychwood Avenue to Vaughan Road, and has a total of 53 houses, of which many have two, or two and half, or three storeys. A rear laneway runs to the rear of Hocken Avenue and Helena Avenue, the street to the south, to provide access to detached garages to the rear of properties; the detached garage at 43 Hocken is accessed from this laneway. Since Ellsworth Avenue, the street to the north of Hocken Ave, does not have a rear laneway, the detached garages at the rear of these properties on Ellsworth Ave. are accessed from Hocken Ave. In other words, it is to be noted that the opposite side of Hocken Avenue, from the

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subject property, consists garages of dwellings fronting Ellsworth Avenue. 43 Hocken Ave is classified as "Neighbourhoods" under the Official Plan Designation, and is currently zoned "R2 Z0.6" under former municipality of Toronto Zoning By-law No. 438-86, as amended, and "R(d0.6), Residential" under Citywide Zoning By-law 569-2013.

Mr. Cieciora stated that the proposal was to construct additions to the existing dwelling including a one-storey front addition, as well as the rear of the dwelling, additions to the second storey and addition of a third storey. Discussing the history of the application, he said that the application before the COA included variances for front and rear yard soft landscaping, dwelling depth, floor space index, front and side yard setbacks, and roof projections. He then drew everybody's attention to the fact that the Committee of Adjustment had approved all the requested variances, subject to two conditions, as stated below:

1. The third-floor deck would be setback 1.52m from the rear of the dwelling and constructed with privacy screens to the east and west sides, and
2. There would be no second-floor deck above the rear one-storey portion of the dwelling

Mr. Cieciora then pointed out that for the purposes of the TLAB Appeal, the Applicant had reintroduced the balconies as originally proposed (i.e. before being amended at the COA hearing), and had revised the drawings accordingly to reflect the changes. He also noted that there were no variances related to the size or location of these balconies, and that the updated variances sought approval of various variances, include front and rear yard soft landscaping, floor space index, front and side yard setbacks, and roof projection.

He then provided a photo tour of developments within his study area to illustrate the kinds of developments that were in progress, or had been completed, in the community.

Mr. Cieciora then discussed the proposal's compatibility with the Provincial Policy Statement (2014) (otherwise referred to as PPS) and Growth Plan for the Greater Golden Horseshoe, 2017 (otherwise referred to as Growth Plan). He stated that the proposal looked to renovate, and add floor area to the existing dwelling, resulting in a residential property, which maintained the existing range, and mix of housing in the City and neighbourhood, thereby being consistent with the PPS. Pointing out that the zoning standard was out of date, Mr. Cieciora added that the use of the subject property for a density slightly higher than existing constituted more "efficient use of land", thereby complying with the PPS and the Growth Plan.

Mr. Cieciora then discussed how the proposal met the general purpose and intent of the Official Plan. He started with a discussion of Section 2.3 of the OP, "**Stable but not Static: Enhancing our Neighbourhoods and Green Spaces**", and discussed how the proposal added new floor space to the existing single detached dwelling, resulting in a higher density, but such that it reinforced the existing physical character of the neighbourhood.

He demonstrated how this proposal complied with Section 2.3.1.1's requirement about neighbourhoods being physically stable areas, and the requirement of development within neighbourhoods to be consistent with, respect and reinforce the existing physical character of buildings, streetscapes and open space patterns.

Mr. Cieciera then discussed Section 3.1.2, and interpreted the sentence "*For the most part, future development will be built on infill and redevelopment sites and will need to fit in, respecting and improving the character of the surrounding area.*", to demonstrate how the proposal fulfilled the direction in the aforementioned sentence through a specific addition to the existing single detached dwelling. He then discussed Section 3.1.2.3, and demonstrated how the proposal complied with this policy. He said that he had specifically examined the proposed massing, and discussed how the proposal fit the direction provided in the OP by virtue of the existing dwelling being "only slightly higher in proportion compared to the dwellings on either side of it, or along the street, and frames the street in a similar fashion as those already existing on the street, which are predominantly one or two storeys". Mr. Cieciera pointed out the fact that while the zoning allowed a 12 m height, the owner had decided to build only to 9.42 m in height, and set the third storey back 3 m from the two storey front façade to limit the impact of massing and shadowing on the street. He also emphasized that while the increase in FSI was the result of additional floor space on the second and third floors, the massing had been deployed in a "thoughtful manner". He said that the impact, and appearance had been minimized through positioning of the additional building mass, and form by being located 3 m from the front of the building, and 4.3 m from the rear façade.

With reference to creating appropriate transitions in scale, Mr. Cieciera said that the proposed addition of a third storey was in keeping with the scale of the street, and the neighbourhood. He said that the setbacks to the third storey would assist in the transition.

On the matter of providing for adequate light and respecting the neighbours' privacy, he stated that a single detached dwelling was permitted with a height of 12 m, with second and third floor terraces permissible as of right. Discussing the shadowing impacts on neighbouring properties, Mr. Cieciera asserted that the neighbours would not be impacted beyond what is as of right, because the building height, which contributes to shadow, was below what is as-of-right. In addition, Mr. Cieciera pointed out that the north-south orientation of the lots of Hocken Ave. limited shadowing on neighbouring properties, because the shadows would largely fall on the road in front of the property, where there were no dwellings on the opposite side of the property. Mr. Cieciera also said that for buildings with less than four floors, no shadow studies were required. Noting the higher threshold for shadowing on parks, Mr. Cieciera said that this was not applicable at 43 Hocken, since it did not border a park.

He then pointed to the case of 57 Hocken Ave, where the eaves had been placed such that they projected significantly closer to the lot line than what was allowed, and how this was similar to what was being requested at 43 Hocken Ave. He remarked that while such a placement of eaves was unusual, it was part of the community characteristic by virtue of the development at 57 Hocken Ave.

He then discussed Section 4.1.5 of the OP, and drew everybody's attention to the fact that changes to the character of neighbourhoods had to be sensitive, gradual and generally "fit" the existing character. Emphasized the repeated use of word "generally" in this section, he distinguished the expression "generally fit", as being different from duplication or replication. Applying Section 4.1.5 to the proposal, Mr. Cieciora said that subsections (a), (b), (c) and (h) did not apply to the proposal. With respect to section (d), Mr. Cieciora said that the proposal contemplated an addition to an existing single detached dwelling, which was what the community was zoned for. On subsections (e) and (f) discussing setbacks, Mr. Cieciora said that the existing dwelling had a legal non-conforming enclosed front porch, located within 1 metre of the front lot line and extending for a width of 5.12m. The proposed re-configuration of the first storey in this location would improve the "existing situation", he said, because the "building would then be set back further from the lot line". Commenting on the prevailing patterns of the rear and side yard setbacks, Mr. Cieciora said that the area had a variety of yard setbacks, and that the proposal would maintain that pattern. He emphasized that the footprint of the house would not be changed, though the footprint took into account the building permit issued in 2017, for additions to the rear of the dwelling. He then stated that the side yard setbacks would not change.

Mr. Cieciora then pointed out that the neighbourhood had seen the approval of various types of variances, which demonstrated the modest regeneration and transition in this area. Mr. Cieciora next referred to a table of approvals from the COA in his study area over the last 10 years, and said that the proposed variances were consistent with other approved variances. Stating that the proposal was generally consistent with the evolution in the neighbourhood, and other variances approved by the COA, Mr. Cieciora concluded that the proposal maintained the intention of the OP.

On the matter of zoning, Mr. Cieciora pointed out that the house was zoned R (d0.6) under the City Wide Zoning By-law, with a maximum density of 0.6, while the zoning under the former City of Toronto by-law is R2 Z0.6, again reflected a maximum density of 0.6. He said that the zoning regulated the use and physical characteristics of buildings on the site, and was intended to encourage a compatible built form within the zone, and surrounding properties. Stating that the purpose of the zoning by-law is to prevent any "different, or nuisance uses of the properties from the surrounding uses", Mr. Cieciora opined that the proposed variances were largely in line with the existing regulations in purpose and spirit, even if they didn't meet the strict minimum/maximum requirements of the by-law. He reiterated that the design of the proposed addition to the existing dwelling minimized the look of height through the use of horizontal elements, and that the setback of third floor living space further minimized any potential impacts.

Mr. Cieciora said that the maximum allowable FSI under By-law 438-86 was 0.6 times the Lot Area (or 132.66 sq m), while the altered dwelling would have an FSI of 1.01 times the of the lot (or 221.31 sq m.) He said the requested GFA generally matched the trend in development in the area for larger dwellings, and that there are many other dwellings like the proposed that have increased their FSI through approvals from the COA, as could be seen from the research table. After stating that the zoning restriction on floor space index was to prevent buildings that are too large for the lot to accommodate, he said that this lot could nevertheless accommodate the proposed

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dwelling because there are no variances required for height or number of storeys, nor do the front and side yard setbacks change from what currently exists. Lastly, Mr. Cieciora noted that the existing dwelling has a GFA of 152.39 sq. m. which represented an FSI of 0.68x on the existing lot of 221.10 sq. m. Therefore, with the proposed additions, the net increase only represented a 0.33x lot size increase in FSI over what existed, even though the variance was for 0.41x lot size over what the zoning permits.

Based on this he stated that the variances were compatible with the intention of the Zoning By-Laws.

On the matter of appropriate development, Mr. Cieciora noted that reinvestment and reinvigoration are what make the existing neighbourhood an attractive place to live, which was evident in the slow and stable evolution of the neighbourhood. While conceding that the proposed addition would increase the size of the dwelling on the subject property, he said that this would be a more “efficient” use of the subject land than the current dwelling. Based on this reasoning, he concluded that the application supported the appropriate development of the land.

Speaking to the issue of the application’s being minor, Mr. Cieciora asserted that the approval of these variances would not create a negative adverse impact in shadow, overlook, privacy, or other impacts to the adjacent dwellings over and above what would be experienced if a dwelling was built in accordance with the zoning by-law. Mr. Cieciora pointed out that there were no variances that specifically pertained to the rear yard terrace, the second floor rear deck, the third floor front and rear decks, and the height of the proposed building. Based on the lack of impact and that the proposal complied with many performance standards resulting in a lack of request for variances, Mr. Cieciora concluded that the proposal met the test of being minor.

Lastly, Mr. Cieciora recommended a privacy screen at the sides of the balcony being built on the second floor, of 1.5 m height , to address the privacy concerns raised by the neighbours, and concluded that the TLAB could approve the proposal as presented, because the variances individually, and collectively fulfilled the 4 tests.

Mr. Neligan began his cross-examination of Mr. Cieciora by questioning the rationale behind the selection of the Study Area. Mr. Cieciora replied that he would consider an area of approximately 500 m radius from where the subject property was located, and would exclude commercial, institutional uses, properties with frontages on larger roads in that neighbourhood before arriving at what would he would define as the study area. Mr. Neligan pointed out Mr. Cieciora had already noted the unusual nature of Hocken Street because it had houses only on one side of the street, and asked if any other street in the study area had such a feature, to which Mr. Cieciora replied in the negative. Mr. Neligan then asked Mr. Cieciora if Hocken looked like a laneway in spite of being a street and if this feature was unique enough to exclude it from his study area, to which the latter replied by stating that he didn’t think of this feature as being unique enough to distinguish Hocken from its neighbours, but merely an interesting feature.

Mr. Neligan asked if Wychwod Barns was part of the study area, to which Mr. Cieciora replied in the negative. Asked why examples from Wychwood Barns had been

included, Mr. Cieciora said that the decisions came up as part of the search for COA decisions within a 500 m radius of the property, but had not been used for the purposes of analysis. Mr. Neligan referred to the research table, and then asked Mr. Cieciora to confirm that there were only 4 such instances where the FSI >1, to which the latter agreed. Mr. Neligan then asked if Mr. Cieciora could agree that the average FSI based on the research table was around 0.8, to which the latter agreed. When Mr. Neligan asked if the houses with large FSIs or the “outliers” were the prevailing type in the neighbourhood, Mr. Cieciora said that while the outliers may not be the norm, or the prevailing type, they nevertheless contributed to the character. Since the community’s outliers fit in harmoniously, Mr. Cieciora concluded that that this proposal also would fit in harmoniously

Mr. Neligan asked for confirmation that the FSI of the house was 0.68 X the lot size , when the by-law permitted 0.6 X the lot size, and asked how the increase had come about, in the absence of any specific FSI related decisions from the COA respecting 43 Hocken Ave.. Mr. Cieciora confirmed the FSI figure, and said that while he did not have the exact rule in front of him, it was his understanding that for houses exceeding a “certain” age, “certain additions” were possible, without having to go the COA, resulting in the FSI of 0.68X lot size. Mr. Neligan next asked Mr. Cieciora to clarify the issue of rejuvenation, which he defined as the replacement of an old building by a new building, in the context of the proposal.. Mr. Cieciora responded that the process of rejuvenation applied to “both” cases i.e. an old structure being replaced by a new structure, as well as properties like 43 Hocken, where incremental growth had taken place. He emphasized that “a building permit had been granted for the proposal, which meant that it had demonstrated compliance with the Official Plan and Zoning”.

Questioning Mr. Cieciora on the size of the deck, and the reduced soft landscaping, Mr. Neligan asked Mr. Cieciora if the reduced yard soft landscaping reflected the owner’s choice to build a big house, to which the latter disagreed. Mr. Cieciora pointed to the fact that by-laws could conflict with each other, and that one had to be in general compliance with the by-laws, as opposed to absolute compliance, which allowed for the construction of a dwelling in line with what the developer desired. In the case of 43 Hocken Ave a more pleasing interior could be achieved if the soft landscaping would be reduced, and that this represented a reasonable, indeed a “thoughtful” choice .

Mr. Neligan then asked if adding more density to the house without adding people was consistent with being more “efficient”, to which Mr. Cieciora responded in the affirmative. Mr. Neligan then asked if the massing of the house was a thoughtful and sensitive choice when the third storey had been taken “back to where it was”, instead of concentrating the massing at the front, where there would be less impact, to which the reply was “Yes, this is a thoughtful choice”. Commenting on the increase in the FSI, Mr. Neligan said that the percentage increase in FSI was a significant 45%, to which Mr. Cieciora said that he tended to look at the actual increase in floor space, and not the FSI figure itself, and noted that the 88 sq. m. increase was spread out over three floors.

Mr. Neligan next asked Mr. Cieciora if there would be any impact as a result of the simultaneous extensions to the first floor and third floor, and the deck at the 2nd floor, and a possible deck at the third floor, to which Mr. Cieciora replied in the negative.

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He asked if the 3rd floor could be built as of right, to which the answer was negative. However, Mr. Cieciura answered in the positive to the question “Could the GFA been deployed to have less impact?”, to which Mr. Neligan retorted that “that” (i.e. deployment for less impact) was not the choice they had made.

Ms. Mary Kruk, the neighbour at 45 Hocken was the next witness to speak. She stated that she had lived at 45 Hocken for many decades, before throwing light on what she thought were some of the unique features of the street. She said that the residents “lived mostly in the backyards” because that is where they got sunlight, and was also the reason why the air conditioning was mounted at the front of her house, because the bedrooms were at the back of the house. She described Hocken Street as a “short street with 50 homes, on very small lots”.

Describing the proposal at 43 Hocken as being completely out of character with the aforementioned surroundings, Ms. Kruk asked that the second floor extension, and balconies not be approved, because of the impact it would have on her privacy, and the reduction in the sunshine entering her backyard.

Ms. Kruk said that the rear floor addition to 43 Hocken, built in the fall of 2017, had pushed out past the homes on both sides reducing the “sunshine hours to the neighbouring houses”. She was deeply concerned that approving the addition of the 2nd storey would further “dramatically reduce sunshine hours to both homes on a daily basis”. Pointing to pictures that she had taken, Ms. Kruk said that her home had been “dwarfed” by the construction of an addition as it currently exists, and that her garden had been “suffering significantly” as a consequence. She added that she had already transplanted a good portion of her garden because of the reduced sunlight, and had exhausted all available space for the transplantation.

Ms. Kruk then said that as a result of the construction at 43 Hocken, the sun did not reach her deck or garden until just before noon, and that was in “August, with the sun higher in the sky than most of the year.” She was therefore worried that a great deal more sunshine would be lost, “as the sun lowered in the sky in other seasons”. In addition to the garden, Ms. Kruk said that the sun also aided in heating her home throughout the fall and winter months, which she claimed would also be reduced, as a result of the approval of the requested variances at 43 Hocken St. “Above all”, she said, that she “would have to live besides a monstrous wall”.

Speaking next to the privacy concern, Ms. Kruk said that the decks at the second and third levels created direct sightlines into her home, with specific reference to her front and back bedrooms, not to mention a sightline into her bathroom. She concluded that the proposed third storey deck would end any privacy that she currently enjoyed, because that would provide a direct view into her yard “at all angles”. She disagreed with the idea that a privacy screen 1.5 m high i.e. 5 feet, was appropriate to address her privacy concerns. When asked if a 1.8 m screen i.e. 6 feet high privacy screen would give her comfort, she seemed undecided.

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In the cross examination by Mr. Mazierski, Ms. Kruk was stalwart- she did not agree with any of the formers observations, or stated that she couldn't answer his question because of her lack of knowledge of the topic and/or comprehension.

He asked if 45 Hocken (which by way of editorial comment, is owned by the other Party in opposition) "could be lifted and put into the space where 43 Hocken was, would the wall look any different from what she had with 43 Hocken?", to which Ms. Kruk responded by calling it "an unfair" question. If asked that she was aware that the shadows that she was currently complaining about were not related to any of the variances, Ms. Kruk again said that she didn't understand, and "all that she knew was, that if the building were to get higher, the shadows would be longer."

Mr. Mazierski then made the point that her house was the one of the smallest on the street- he asked her to show a house shorter than hers, she pointed to her neighbour on the other side (i.e. 47 Hocken). When asked if this neighbour had a closed deck, Ms. Kruk was thoughtful for a moment, and said that the deck was open, as were many other decks on the street- when asked if she was sure, Ms. Kruk said that she relied on her knowledge of the neighbourhood gained through many decades of living on the street.

Ms. Gayle McDonald, resident of 45 Hocken was the next witness.

She stated that Hocken Ave. distinguished itself from the community with" its smaller lots, houses only on one side and the garage entrances on the other side", and that this constituted a "micro neighbourhood". She reiterated the point made by Ms. Kruk about "living in the backyard". She said that the proposal before the TLAB should not be allowed to go forward, because it would block sightlines. Then, if a second storey was built, the deck would definitely provide "oversight". She scoffed at the idea of the proposed 5 foot privacy fence and called it "absurd" . She then contrasted the proposal at 43 Hocken Ave, with the development at 101 Ellesworth, where the process of building a house with a significant FSI had been "consultative", through discussions with the community. She said that there had been no consultation by the owner of 45 Hocken Ave, and that the proposed changes were significant and sudden, as opposed to the OP which stressed that change should be gradual, and sensitive to the community.

In his cross examination, Mr. Mazierski asked if Ms. McDonald had referred to Hocken as a "micro neighbourhood", which she confirmed. He followed up by asking if the photos she had brought had shown a total of 10 houses on Hocken Street, to which she said yes. When asked about how she defined the neighbourhood, she said that it consisted of the "quadrant", which included Ellesworth, Alcina and Helena Aves. He then asked Ms. McDonald if she walked up other streets in the neighbourhood on a regular basis, such as Alcina and Helena, to which Ms. McDonald replied in the affirmative. Mr. Mazierski then asked her about 57 Hocken, (by way of editorial comment, the house with the unusual eves) and asked her if the house contributed to the character of the neighbourhood by virtue of sheer existence, to which Ms. McDonald agreed.

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Regarding the consultation about 101 Ellesworth, Mr. Mazierski said that his client was not under obligation to consult, to which Ms. McDonald thanked him "for telling me that". Then referring to the shadows, Mr. Mazierski then pointed out that the backyards are to the south, and that the sun did not cast shadows in the direction of her house, to which Ms. McDonald said that it was "a great question", and added that the houses on Hocken were not aligned in a "perfect north south direction", nor was Hocken Ave. a "perfect east-west road". The houses were at an angle with respect to north-south directions which meant that shadowing had to be considered. .

Referring next to the relative lengths of the houses of 43, 41 and 39 Hocken, Mr. Mazierski asked if the house at 43 Hocken, as planned, was "sticking out, past" 41 Hocken, as much as the latter stuck out past 39 Hocken, to which Ms. McDonald replied in the affirmative. When asked if she felt "guilty" about her house "sticking past the neighbouring house", she said "no", and discussed how wonderful and neighbourly relationships with the neighbours helped her settle, and welcomed her into the community. When asked if a longer house at 43 Hocken would be more desirable, Ms. McDonald said that while she would not prefer the extension, but the extension was highly preferable to the height and massing of a three storeyed house next door. When asked if her concerns about the privacy were largely about the balconies, Ms. McDonald said "yes" and talked about how she was "cheek by jowl" with the neighbours, and that there sightlines would be into her house, from the balconies.

In response to a specific question, she also confirmed that she understood that there were no variances attached to the balconies. Mr. Mazierski then asked her if she knew that the reality of living in a "cheek by jowl" community was that there would always be sightlines, and shadows given the separation between the houses, to which Ms. McDonald replied in a non-committal fashion.

Mr. Mazierski then referred Ms. McDonald to her other neighbour (i.e. at 39 Hocken Ave) who also had a balcony, and asked her if she could she acknowledge that there were already sightlines into her house, on the basis of this neighbour's balcony? Ms. McDonald pointed to a tree separating the two houses at 41 and 39 Hocken Ave., and said that they maintained that "marvellous tree" together, since it helped protect privacy, including prevention of sightlines . When asked if this solution was "fail-proof"(by way of editorial comment, the expression may have been "fool-proof"), she said that it was not "fail proof ,but did a very good job of protecting privacy".

Before oral argument commenced, I asked Mr. Mazierski if his client was agreeable to a 1.8 m (6 feet) high privacy screen, instead of the proposed 1.5 feet high screen on the 2nd floor balcony, if the proposal was approved? Mr. Mazierski replied in the affirmative. I then asked Mr. Neligan to name his single biggest concern, and he said it was the FSI related variance.

In oral argument, Mr. Mazierski and Mr Neligan, summarized their perspectives on the evidence, as stated above, and provided me with books of authorities buttressing their perspectives on various aspects of the proposal. Mr. Mazierski discussed the condition for a 1.8 m screen on the 2nd floor, and asked for the inclusion of another condition, which would essentially allow his client to make a decision about building the third floor,

after a decision had been issued. I asked Mr. Mazierski to submit the suggested condition to me in writing. Mr. Mazierski sent me the language for the suggested condition in the next few days to the TLAB Hearing, with a copy to Mr. Neligan, as follows:

The proposal shall be constructed substantially in accordance with the revised site plan and elevation drawings submitted to the Toronto Local Appeal Body along with the Applicant's Disclosure on June 28, 2018, unless the property owner does not construct a third storey, in which case only the first and second storey shall be required to be constructed substantially in accordance with the specified site plan and elevation drawings. For the avoidance of doubt, the requirement that a third storey, if constructed, is to be constructed substantially in accordance with the aforementioned site plan and elevation drawings shall be binding on both present and future owners who construct a third storey, by relying on the variances authorized by the Toronto Local Appeal Body as part of TLAB File # 18 173024 S45 21, regardless of whether the third storey is constructed together with the rest of the proposal or at a later date.

Mr. Neligan responded on behalf of his clients, stating that it was their position that the condition was inappropriate because *"The Applicant is proposing that its development be permitted to be built in phases. There was no evidence led in respect of this proposal, and it has the effect of creating uncertainty for both the Applicant and the neighbouring properties indefinitely. It remains our belief that the Applicant should stand behind the plans it has brought before the TLAB, or revise and resubmit them based on the variances they require."*

ANALYSIS, FINDINGS, REASONS

I start by noting that Mr. Cieciora was the only qualified Expert Witness to provide evidence about the proposal at 43 Hocken Ave., and that his evidence was uncontroverted in certain aspects, and questioned critically in other areas.

It is also important to acknowledge the reason behind Ms. Kruk's appealing the COA Decision respecting 43 Hocken, as well as the involvement of Party McIvor/McDonald – their concerns focus on the impact of the proposed massing of the house, with specific reference to privacy, sunshine, and sightlines. The importance of massing in this appeal was best underscored, when I asked Mr. Neligan to name his single biggest concern regarding the proposal, to which his answer was an unequivocal "massing".

Mr. Cieciora began his proposal with providing the details of the proposal. He explained the PPS and Golden Growth Plan, and how they relate to his proposal. While Mr. Neligan had an interesting critique of how the proposal did not align with the emphasis on intensification as defined in the PPS, and the concept of rejuvenation, I accept Mr. Cieciora's conclusion that the proposal is consistent with the PPS and Growth Plan, because this proposal is such that it is difficult to distinguish between the manifestation of one definition of expression such as intensification, versus another, as in rejuvenation .

Before examining the variances, there are two issues that need to be addressed: the relevance of the proposed study area to my Decision, and how the topic of massing has been addressed.

Mr. Cieciora provided his study area, which consists of 3 parallel short streets south of St. Clair West, of which Hocken Ave. is the northernmost. Each of the streets is a short street being bounded by Bathurst and Christie Streets on either side, with Hocken having the largest number, and the smallest houses; it has a unique feature- all the houses are on the south side of the street, and look out at the garages behind the houses on the next street. Both Ms. Kruk and Ms. McDonald stated that while they certainly walked on the neighbouring streets, their street had a unique feel to it, because “they live in the backyards, stare at the garages”, and have small houses on small lots.

Counsel for the Applicants certainly demonstrated in the cross examination that the opposition members’ walking on the neighbouring streets was consistent with the guideline of the neighbourhood as defined in the well-known concept of a neighbourhood walk, and Ms. McDonald defined the same area as her neighbourhood while Hocken was her micro-neighbourhood. While not rejecting the interpretation, I believe it is important to refine the definition when analyzing a community where one street presents an unusual, indeed contrasting feature, when compared to its neighbours. On this matter, I have followed the reasoning of the *Levine* case (2009 Carswell Ont, 3817, 62 OMBR 470), which was referenced in oral argument. Vice Chair Campbell of the former Ontario Municipal Board (OMB), noted at Paragraph 18 of the *Levine* case

“Rather, a neighbourhood is what one experiences more generally in the vicinity of ones house. The Board has previously heard a “neighbourhood” is the particular area one experiences as one enjoys an evening walk”.

I note how key the expressions “experiencing” and “enjoys” are to the definition of a neighbourhood. The opposition made it clear that they enjoyed their backyards, and experienced their street differently from the other streets nearby, such as Ellesworth and Alcina. The visual difference between experiencing Hocken Ave. versus the neighbouring streets is stark, based on the narratives of the neighbours, as well as my own site visit. While I note that was no specific evidence presented about how the residents of Ellesworth and Alcina enjoyed their backyards, I conclude that Hocken distinguishes itself by how the residents enjoy their neighbourhood. The definition of the five minute walk assumes a general homogeneity of the neighbourhood, which is definitely not reflected in the look and feel of Hocken Ave, compared to its neighbouring streets.

Based on these differences, I conclude that that the residents experience Hocken Ave differently than the neighbouring streets, and that Hocken can’t be appropriately grouped into a study area, as defined by the Applicants.

Based on this conclusion, I have decided not to accord weight to the study area developed by the Applicants. The consequence of this conclusion is that the research

table provided on the basis of previous decisions of the COA is not relied upon for decision making, since it provides decisions from streets which have a different character and context, from what is experienced on Hocken Street.

As stated earlier, the other major question in this Appeal is massing, both for the reasons stated by the opposition, as well as the fact that at least 4 of the requested variances (depth, back yard soft landscaping, front yard setback, and FSI) are related to the discussion of massing. Among various cases discussed in oral argument, I have closely followed the reasoning used to decide the Appeal respecting 629 Rushton Rd, (*Re: 2018 CarswellOnt. 13791*) which was heard by my colleague and Chair of the TLAB, Mr. Ian James Lord. In the discussion of massing and FSI in this Appeal, Chair Lord observes at Paragraph 108:

“I am of the opinion that the use of FSI as one regulatory control is an important element that cannot be diminished, cavalierly discarded, or avoided, especially when so directly addressed as elements of impact concern.”

And at Paragraph 113, he observes:

“I find that the neighbour’s challenge on massing impact more compelling that the professional evidence in support, with which I am not comfortable”.

This observation helps express a starting point to resolve the issue of how to resolve the issue of massing, specifically weighing the evidence of the Expert Witness against the impact based evidence of the lay community witnesses. It suggests to me that notwithstanding the lack of formal expertise, the lay witness’ proximity evidence on the matter of impact, can be assigned the same, or greater significance than that of the Expert Witness, where appropriate. notwithstanding the latter’s comprehensive knowledge of planning issues.

Given the above comments on evidence and concerns, my approach to this Appeal has been to accept the Expert Witness’ uncontroverted evidence on issues where there was no significant objection from the opposition, and to weigh the evidence on impact related issues to see which perspective could be given more weight, notwithstanding the very different approaches and basis for conclusions. The specific challenges of using the FSI number by itself, is addressed later in this Decision.

I now examine the individual variances, and begin with the stand alone variance respecting the eaves.

I agree with Mr. Cieciora that the variance respecting the eaves, while unusual in that they project very close to the property line, already exists at a house on the same street, and may therefore be considered part of the community character. Noting that the opposition did not object to the approval of such a variance, I conclude that there is little, or no adverse impact if the variance were granted. The variance respecting the eaves is therefore approved.

The request for the front yard setback is the consequence of enclosing the front porch, which I understood to be a legal, non-conforming use. I interpret this to mean that while

there is a visual difference in the appearance between a closed and open porch from the street, there is little impact on the neighbouring properties. Combined with the fact that there was little questioning from the Opposition besides Mr. Neligan's reference to this as a "technical variance", I conclude that the evidence given by Mr. Cieciora in this matter is uncontroverted, and the variance may be therefore approved. The evidence passed all of the four tests under Section 45(1) of the Planning Act.

By way of comment, I don't have enough information to determine if approving the variance for the enclosed front porch and the "encroachment" into the yard, would influence the FSI calculation. This question is referenced at the end of this section, where a determination is made about FSI.

Likewise, the variance respecting the decrease in front yard landscaping was not questioned by the Opposition, resulting in Mr. Cieciora's evidence emerging and unquestioned. I conclude that the reduction in soft-scape landscaping in the front yard meets all the four tests, and may therefore be approved.

I now examine the variances for reduction in backyard soft landscaping, and the depth of the house together, because of the mutual and inverse relationship- the percentage of landscaping in the backyard decreases if the dwelling depth were to increase. Given the relationship between these variances, they would have to be approved or refused together. The most critical factor here, would be the impact of the increased depth of the building at the first floor level. The neighbours have complained about the impact it would have on their backyards, but have stated in no uncertain terms that the impact of the massing on the 2nd and 3rd floors is their biggest concern. I accept Mr. Mazierski's contention that some of the neighbouring houses are longer than the proposal at 43 Hocken at present, and have not had any negative impact on each other. I accept this impact based argument and approve the variance respecting the depth. By corollary, the soft landscaping in the back yard is also approved. It may be recognized that approving the depth variance all by itself does increase the FSI, from the existing 0.68 x Lot area to a greater fraction, less than the requested 1.01X Lot area.

The remaining variance is the variance respecting FSI. The FSI number is related to a number of variables, including height, length, and placement of the building. Given the number of variables, and the importance of the lot size in determining the FSI number, there is the risk of concluding that there is an apples-to-apples comparison between two proposals with the same FSI number, when in reality the proposals, and lot sizes are as dissimilar as melons and lemons. I concur with Mr. Cieciora that the actual massing of the 88 sq.m is easier to understand, and evaluate than a mere FSI number.

On the topic of impact, there are two important things to be noted- Mr. Cieciora confirmed that the existing FSI is 0.68 X Lot area, which is more than the zoning standard 0.6X Lot area. While I am not entirely convinced by the explanation about houses "of a certain age" having the flexibility to "add a few things", I nevertheless respect the fact that a building permit was obtained in 2017 for the configuration as it exists today, which implies that a competent authority has looked at the proposal, and thought it appropriate to approve the same.

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What is important to note that the impact of what is of right has been described by the neighbours as “monstrous”, “shutting out sunlight”, and “sightlines impacting privacy”. An examination of the pictures submitted lends credence to how the existing structure dominates its neighbors at 41 and 45 Hocken St- I specifically refer to the picture to the left , below, with Mr. Neligan’s pertinent observation- “the alignment of the houses is such that 2nd floor of 41 Hocken roughly aligns with the 1st floor of the proposal, as it exists, at 43 Hocken Ave”. Likewise, the picture to the right, below, captures how the proposal, as it exists today, as of right, dominates the neighbor at 45 Hocken Ave.



It is also important to note that the considerable impact of the house, as it stands today, with specific reference to shadowing and privacy, was not disputed by the Applicants, whose cross examination of the neighbours focused on the fact that the existing massing had not been caused by the requested variances. While that may be true, the impact of deploying an extra 88 sq. m. between extensions to the second, and the third floors, would just not result in a bigger house, but a mansion, such that the contrast between the neighbouring houses, contradicts the principle of “fit”.

Similarly, the Applicants’ cross examination of the opposition demonstrated that the conclusion of the lack of shadowing on neighbouring properties was influenced significantly by the assumption of the houses being oriented in a north-south direction, on an east-west street. However, the opposition’s evidence about Hocken Ave. not being a “perfectly aligned east-west street” was not challenged by the Applicants. The evidence of the Expert Witness discussed how the additions had been pushed back from the front of the house so as to not cast any shadows on the front; however, there was no corresponding discussion of what happened at the back or the sides of the house, to minimize impact on the neighbours. Lastly, the Applicants repeatedly said that the impact of the massing was comparable to what was as-of-right. Based on the photos discussed earlier, and the evidence of the opposition, I conclude that even building to what is as-of-right, can, with increased building depth, constitute undue adverse impact.

This concern is also consistent with the stated development criteria in the discussion of “Neighbourhoods” in the OP:

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

c) heights, massing, scale and dwelling type of nearby residential properties;

If the purpose of the zoning by-law is to prevent “any different or nuisance uses of the properties from the surrounding uses”, as stated by the Expert Witness, then this proposal fails the test of maintaining the spirit of the zoning by-law, because of the risk of creating a “nuisance” impact in the shape of shadowing, and privacy concerns. I conclude that the FSI related variance, with specific reference to the 88 sq. m. apportioned between the 2nd and 3rd floors, has failed the OP, the appropriate development of the land, and the performance standards in the zoning by-law, and the test of being minor. The full variance respecting FSI does not pass any of the four tests under Section 45(1).

The decision respecting the variance respecting FSI is therefore deferred. It may be reiterated that the FSI will be greater than the existing FSI of 0.68 as a result of approving the depth variance, but will be less than the proposed 1.01, due to refusing the additional massing on the second and third floors. I reiterate that the FSI may also be influenced as a result of the enclosed front porch, as noted earlier. There are no site plans attached to this approval of some variances, and Applicants will have to submit new Site Plans, with an updated FSI reflecting what has been approved and refused, before a final order can be passed.

It is now important to discuss the 2 conditions recommended by the Applicants..

The first is the placement of a 1.8 metre privacy screen on the sides of the 2nd floor balcony at the front of the house, to address concerns pertaining to the neighbours’ privacy. I am not sure of how refusing the FSI variance will impact the proposed balcony, but impose the condition with an abundance of caution, should the proposal move forward with the balcony intact

The proposed condition about not constructing the 3rd storey immediately, I believe, becomes moot, because of the refusal of the FSI component respecting the 2nd and 3rd floors.. Notwithstanding the condition’s becoming moot and not being imposed, I must comment on the challenges of suggesting conditions without adequate discussion.

The condition may have been meant as an “olive branch” to provide some comfort to the Appellant; but there is considerable discomfort to the adjudicator for approving such conditions, given that they were not discussed, and there was no opportunity to ask questions of the Appellant about this condition. I am unconvinced of the procedural soundness of introducing, or approving a condition, without affording adequate opportunities to the opposition for discussion. On a practical basis, it is only fair that a decision not be made so as to create an environment of continuous uncertainty for the residents, which could negate the approval of such a condition.

In summary, all the variances are considered approved, with the exception of the FSI related variance. While the FSI variance is not refused outright, a decision is deferred till the variance is revised and resubmitted, to reflect the approvals, and refusals, as discussed above.

I conclude by stating that the Appeal was allowed in part, for reasons stated above. I would like to provide the Applicants up to six months, to submit new Site Plans, and a variance with an updated FSI, reflecting the approval of the depth of the first floor at 18.32 m, and the refusal of the addition of 88 sq. m. between the 2nd and 3rd floors.. Should there be no response by the end of the six month period, the entire Appeal is considered allowed, and all variances refused. The TLAB may be spoken to, in the event of any confusion, or required direction.

DECISION AND ORDER

1. The Appeal is allowed in part, and the Decision of the COA, dated 17 May, 2018, is set aside.

2. The following variances indicated as “proposed” are approved, except where otherwise noted:

1) A lot with a residential building, other than an apartment building, must have a minimum of 50 percent of the rear yard for soft landscaping: 50.71 square metres, if the lot frontage is greater than 6.0 metres. The proposed rear yard landscaping area is 34.6 percent; 35.11 square metres.

2) The permitted maximum building depth for a detached house is 17.0 metres. The proposed building depth is 18.32 metres.

4) The required minimum front yard setback is 2.89 metres. The proposed front yard setback is 1.30 metres.

(5) Roof eaves may project a maximum of 0.9 metres provided that they are no closer than 0.30 metres to a lot line. The proposed eaves project 0.18 metres and are 0.19 metres from the west lot line.

(6) On a lot with a detached house, semi-detached house, duplex, triplex, fourplex or townhouse where there is not a permitted driveway in the front yard, a minimum of 75 percent of the front yard must be soft landscaping; 9.88 square metres. The proposed front yard soft landscaping area is 57.2 percent: 7.53 square metres

3. A decision on the variance below is deferred, which needs to be revised to reflect the approval of Variances (2) and (4) above, if pertinent. The new FSI number would also have to reflect the refusal of the placement of additional massing on the second and third floors.:

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(3) The permitted maximum floor space index is 0.6 times the area of the lot: 132.66 square metres. The proposed floor space index is 1.01 times the area of the lot: 221.31 square metres

4. No other variances are approved.

5. The following condition is imposed on the approval.

a) The applicants need to provide permanent, opaque privacy screens, at a height of 1.8 m, on both sides of the balcony at the northern side of the house, facing Hocken Avenue.

b) The variances approved by this decision are subject to the Applicant providing revised Site and Elevation Plans, and an associated plans examination review showing any required FSI variance for the project within six (6) months of the date of this Decision, failing which the appeal will be allowed in its entirety, and all the variances are refused. Such plans, upon receipt, shall form part of the Decision and Order as an Attachment.

In the event there is difficulty arising from the decision herein, including the timing, and the requirement to produce compliant elevation plans, and their evaluation, the TLAB may be spoken to.

X 

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body