Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Thursday, January 10, 2019

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): PRAKASH DAVID

Applicant: DEAN RUFFOLO

Property Address/Description: 97 KENILWORTH AVE

Committee of Adjustment Case File Number: 18 120459 STE 32 MV

TLAB Case File Number: **18 217972 S45 32 TLAB**

Hearing date: Friday, January 04, 2019

DECISION DELIVERED BY Ian James LORD

APPEARANCES

Name	Role	Representative
Dean Ruffolo	Applicant	
Prakash David	Appellant	Daniel Artenosi
Christopher Marshall	Party	
Michael Bissett	Expert Witness	

INTRODUCTION

This is an appeal by the Applicant from a decision of the Toronto and East York District Panel of the Committee of Adjustment (COA) refusing variances to permit the construction of a new, single detached residence at 97 Kenilworth Avenue (subject property). The variances as sought before the COA were revised on appeal and, as revised, are set out in **Attachment 1**, forming part of this decision.

The subject property is improved with a one and one-half storey bungalow and front yard parking pad; it is located on the east side of Kenilworth Avenue, a one-way street, northbound, and approximately five 'doors' south of Queen Street East in the prestigious 'Beach' area of the City.

BACKGROUND

The Applicant sought approval to facilitate the demolition and construction of a replacement dwelling of a new three-storey detached dwelling with integral garage. Initially, a flat roof modern design was contemplated requiring relief from the maximum permitted height of all side exterior main walls facing a side lot line, among other variances. At the COA, two neighbours in the vicinity of the subject property opposed: residents of 78 and 99 Kenilworth, the latter being the adjacent neighbour to the north.

At the hearing before the Toronto Local Appeal Body (TLAB), Mr. Christopher Marshall, the owner of 99 Kenilworth Avenue had elected party status and appeared in opposition. The Applicant was represented by Mr. Artenosi, counsel, and Mr. Michael Bissett, a Registered Professional Planner. Both Mr. Bissett and Mr. Marshall provided direct testimony. No other persons provided evidence. The owners were present virtually throughout. Mr. Marshall had not filed any disclosure documentation nor had he provided a Witness Statement in compliance with the TLAB Rules. Mr. Artenosi was content that he be allowed to testify, subject to the introduction of any new material that was not a component of his submission to the COA. I agreed.

While a petition in support and letters opposed were before the COA, they were but referenced in the TLAB proceeding.

I indicated that I had visited the subject property and had reviewed much of the pre-filings.

Mr. Artenosi provided succinct opening remarks indicating that the variances (totaling three) now sought, as set out in **Attachment 1,** resulted from a design modification post the COA refusal. The modification involved a conversion of the roof design to include a front (with dormer) and rear 'mansard' style roof treatment, thereby allowing the elimination of the aforesaid height variance required for all side exterior main walls, under By-law 569-2013. This interpretation was explained by the planner Bissett; its application was accepted as the responsibility of the owner, pursuant to a recent plans examination by the City.

Modest reductions in the other requested variance measurements were also disclosed in the Applicants Disclosure exchange under the TLAB Rules: the floor space index (FSI) requested moved from 0.88 to 0.86 times the lot area (permitted is 0.60x); and, the required parking space minimum width requested moved from 2.99m to 3.02m (required is 3.20 m). This last revision and continued variance request applies to both By-law 569-2013 and the older City By-law 438-86, as the parking space width provision (but not the FSI) was said to remain under appeal.

I was asked, and ultimately made the ruling that the revisions to the Applications now as identified in **Attachment 1** are minor and no further notice is required, all as provided in section 45 (18.1.1) of the *Planning Act.*

MATTERS IN ISSUE

All persons who spoke identified that opposition was taken to the floor space index relief requested and consequent massing and scale of the proposed dwelling. It is that one aspect of the proposal, accentuated by the integral garage (itself not a component of density), which yielded the impact concerns of the adjacent neighbour to the north, Mr. Marshall.

No concern was expressed as to the width of the internal parking space.

Exception was taken to the massing and built form in respect of the blockage of light, views and increased shadowing arising from the size and proximity of the proposed Applicant's north wall. The concern included the presence of the integral garage which was expressed to 'drive' the design and scale to the disadvantage of the neighbours.

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

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

EVIDENCE

As stated, Mr. Bissett was qualified to give expert opinion evidence in the discipline of land use planning. His evidence was comprehensive, applied a traditional

methodology of a study area delineation, the assembly and photographic compilation of physical characteristics of the area attributes, COA decisions, City data on densities, and a documentary review from which he formed his opinions on the applicable tests.

Because the primary issue was scale, I recite below elements of his evidence germane to that topic both as contained within his Document Book (Exhibit 1, with sections) and Witness Statement (Exhibit 2, with attachments):

1. The Study Area selected, while 'small', was appropriate in scale and properly bounded to provide a comparative picture of neighbourhood character, the physical attributes of which included a diversity of tightly knit, detached and semi-detached dwellings, one to three-storeys in height, with a variety of roof styles (including mansard frontages), parking solutions (including integral garages), ages, architectural built form, building typologies and building materials; further, that redevelopments and improvements comprised a stable but regenerating environment;
2. The intended purpose of the revised Applications was consistent with, conformed to and implemented provincial policy direction for the regeneration of aging housing stock;
3. The proposed plans would provide a new dwelling similar to the prevailing neighbourhood character both modern and traditional in design with the mansard roof; it is to be set back further than the existing residence from the street to address current regulations and would be compliant with all zoning standards set for: front, side and rear yard setbacks, height, parking, building length and depth and landscaping, including a modestly enhanced north side yard setback (0.64 m v. 0.46 m minimum required);
4. COA density approvals in the past 10 years have seen approvals on Kenilworth (and Waverley) supportive and exceeding that requested for the proposal (.86x) at: .77, .97 (No. 105 Kenilworth) and 1.04x lot area, and higher. The ongoing construction at 105 Kenilworth, to the north, is occurring on a larger lot with both a height and density variance and without integral parking.

From this canvass and observation, Mr. Bissett opined that the proposal constituted the same variety of street housing, modern, traditional and of a design and scale that 'fit' with the physical character of the neighbourhood. He asserted the proposal to be in compliance with the Official Plan, policy 4.1.5, and met substantially all zoning standards, thereby meeting the intent and purpose of both instruments.

He was of the view that the enhanced FSI allowance (approximated 700 square feet) was appropriately deployed and 'fit' within the as-of-right three-storey building envelope and that the proposal in its totality respected and reinforced neighbourhood character. He stated that both variances resulted in modest to no impact and were minor and desirable, qualitatively, quantitatively and without amounting to anything that could be described as undue or adverse.

He reiterated, at paragraph 53 of his Witness Statement, Exhibit 2, that the objective of compatibility is achieved by the deployment of the massing within the contemplated building envelop set by zoning, without variance. He felt that by definition the FSI standard of 0.6x does not dictate building scale or form, and that by staying within the zoning envelope the proposal respects and reinforces the deployment of massing as contemplated by the Official Plan, section 4.1.8, and the zoning by-law standards.

He was of the opinion that there would be no adverse impact on light, view and privacy to the Marshall property to the north compared to the building envelope permission already present. He did acknowledge there will be some reduction in light and view but that it would not be appreciable from that of any other as-of-right built form that might be proposed for the lot.

In cross-examination by Mr. Marshall, he acknowledged that the Official Plan, section 3.1.2, paragraph 3, provided the policy support that built form 'provide for adequate light and privacy'. He was of the view that the policy had to be read and considered in light of what is permitted as-of-right.

Mr. Bissett also agreed that the presence of the integral garage 'pushed' some of the internal levels of the dwelling up, but not at the expense of a requested height increase from that permitted as-of-right. He noted that the provision for one parking space is required by the by-law for the redevelopment.

The evidence of Mr. Marshall was refreshingly succinct. His issue was the adjacency of a 'volley ball court' upended beside his home, in close proximity, undifferentiated and blocking light and views from six windows, two on each of his floors.

In his view, a '43%' increase in FSI created a size and proximity that was too great, not minor, not desirable and constituted substantial impact. He stated the revisions made to the original application did nothing to resolve or reduce the wall perception, and the effect of the proposal did not respect his building. He felt the blocking of his views was not answered by the comparison to as-of-right permissions. He acknowledged in cross-examination that he would object to construction in accordance with the by-law, if that same blockage occurred.

He claimed it was not the FSI number itself that caused the concern, but the blockage of the third storey; only a substantial lowering of the proposed building would provide the relief he sought, together with a sloping of the roof.

ANALYSIS, FINDINGS, REASONS

There are essentially two variances sought: to gross floor area and to the width of the proposed parking space. I agree with Mr. Bissett that there is no impact from the latter and that it need no further consideration. I agree with him that this variance meets all relevant considerations.

The gross floor area exceedance stems from building out the allowable envelope. It requires consideration. Mr. Bissett agreed with me that neither the Official Plan nor any other instrument depicts the FSI permission of .6x the lot area as a 'trigger', to address anything in particular as an area characteristic. It is a standard to enforce conformity but only practically works in laboratory settings. I agree with the planner that the standard does not itself dictate built form. By the same token, I was not provided with any specific rationale to support the request that the proposed standard of .86x was anchored in a statistical way or was based on design, massing or any other particular area characteristic or objective.

The issue is whether this requested variance to the new By-law, on all relevant considerations, is warranted.

Mr. Bissett supports the FSI variance on traditional land use planning measures above noted. His main point is to the effect that in the context of this particular lot, there is no derivative of the variance that would be out of character to norms in the neighbourhood or that creates an undue adverse impact. The point is underscored by his emphasis that all other zoning performance standards affecting the scale and massing of the house are complied with and that any replacement house on the lot, even one conforming to the FSI regulation, could take on a height and length having equal or greater impact than the proposal. The proposal does not build out to all the zoning permissions, notably the north side yard setback. While acknowledging some impact on light, shadowing and view, Mr. Bissett opined that these increases appear small even in comparison to the existing building, let alone as-of-right construction.

It was his professional planning opinion, not modified under questioning, and formed from what I find to have been a competent assessment and evaluation, that this variance for FSI was neither unique, uncharacteristic, excessive nor resulted in an overbuilding on the site, absolutely and in comparison to as-of-right standards.

I found Mr. Bissett's evidence to be thorough, balanced, comprehensive, and well founded in comparison and conclusion. He presented an uncontested and apparently accurate and representative canvass of the physical built form of the neighbourhood and neighbouring properties. His evidence included the application of the relevant policy, regulatory and opinion tests established by statute respecting policy and impact considerations.

Mr. Marshall was clear as to his perception of impact on his property. He assumed no mantel representing an alleged public interest. To him, the incorporation of an integral garage and the FSI increase of 43% over permitted were driving a built form

that caused him injury – blocking views, light, and air circulation from that currently experienced from six windows on the south side of his dwelling.

Zoning is nothing if it does not attempt to address the potential for nuisance as between properties or the casting of undue adverse intrusions burdening property offsite.

Mr. Marshall rationally expressed his frustration with the prospect that the admittedly needed new construction would have the adverse consequences he perceived.

I find however that as genuine as the perception of impact is, Mr. Marshall failed to describe it as 'undue' or provide any tangible measure of its potential degree. There is no doubt from his testimony that the design of the proposed house was the source of his assertions of adverse impact as to loss of views, light and increased shadows. But from that there was no analysis to suggest precedent, no pictures from windows to reflect existing views, let alone prospective views, no tangible measures of impact, shadow study or other element that might lead to assessment or amelioration.

Mr. Marshall suggested a lower or shorter or sloped roof house might be suggestions as to improvements, but these too were suggestions that remained unexplored, unquantified and speculative. He said, not surprisingly for honest and sincere evidence, that any house built to the height of the by-law permission would be objected to because of the impact on the existing windows southward facing from his residence.

He decried the use of the building envelope 'as-of-right' permission analogy employed by Mr. Bissett as a strong component of his analysis of impact, by and for comparison purposes. I find that such comparisons are common to the planning profession and exhibit a degree of demonstrative and compelling but not determinative logic or evidence.

I agree with Mr. Bissett that 'context' forms the significant element in the consideration of the FSI variance sought in this particular circumstance. In this circumstance, the streetscape presentation is improved by setback compliance, the mansard roofing replicates nearby examples, the side yard setbacks comply or exceed zoning requirements, and there is no massing or height manifestation or relief engaging the public realm. The proposed building is not higher, longer, deeper or broader than permitted as-of-right in a neighbourhood characterized by tight building relationships and similar parking solutions. The Marshall property as well enjoys an integral garage, although slightly below grade, when such design was supported.

There is no issue raised of precedent or neighbourhood impact.

I do not see the TLAB's role as to be the arbitrator of building design issues except perhaps where obvious improvements to streetscape appearance might aid in replicating neighbourhood attributes. While Mr. Marshall identified the potential for

design to deploy density in different ways, the description was rhetorical and unaccompanied by any detail or substantive effort. Urban design is not excluded from consideration by the City Official Plan as a relevant consideration; building design, however, is nowhere identified as being within the exclusive jurisdiction of the COA or the TLAB, on appeal.

On the evidence called, the TLAB is in no position to pursue the design suggestions proffered by Mr. Marshall. Not only do they not offer an assurance of satisfaction to him but also they would appear to require a constructive rezoning of the subject property for implementation. The TLAB has serious reservations in engaging in such a wholesale design implementation enterprise without any substantiated evidentiary foundation of direction or merit.

I find the proper approach to this appeal to be that advanced by Mr. Bissett, from the general to the specific, the latter relating to the site and its surroundings. From that is the application of policy, law, planning principles and opinion on the applicable tests.

I prefer his evidence.

I agree that there will be some unquantified impact on the south facing windows of the Marshall property. I agree that the revisions to the plans following the COA refusal did little to alter that impact. It is debatable whether the substitution of a mansard roof improved the project design or simply facilitated the removal of a main side wall height variance. I agree with Mr. Marshall that those changes did nothing to alleviate the scale and height of the side wall or provide any differentiation as to its appearance vis-à-vis the northern neighbour.

That said, it is the consequence of urban living that zoning regulations can provide comfort to some and angst to others. Their goal is compatibility and where there are no changes proposed to the building envelope I am loath to find, on the area evidence provided, that the density increase proposed resulting from the application of these as-of-right parameters is unacceptable.

Moreover, having no measure of the degree of impact, I am not prepared to require an alteration of design. Residential views are not protected by City policy and there is no evidence of measure to suggest the degree of change in light or shadowing is sufficient to offend the policy direction that light, view and privacy be ‘adequately’ protected.

I have had regard for the decision of the COA and the materials filed with and before it and the TLAB.

In all respects not mentioned, I accept the opinion evidence of the planner Bissett that the variances sought in **Attachment 1** are consistent with the Provincial Policy Statement, conform to the Growth Plan and, individually and collectively, meet the test above recited under ‘Jurisdiction’.

I find that the plans filed are what is proposed and that the Applicant should be held to the same.

DECISION AND ORDER

The appeal is allowed and the decision of the Committee of Adjustment is set aside. The variances contained in **Attachment 1** are approved subject to the following condition:

1. Construction shall proceed generally in accordance with the site plan and elevations filed with the TLAB and prepared by DERO Building Design dated March 22, revised August 22, 2018, including drawings A1-A13.

If difficulties arise in the implementation of this Decision, the TLAB may be spoken to.

X

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

Attachment 1

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

1. Chapter 10.10.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index of a detached dwelling is 0.60 times the area of the lot (160.26 m2).

The altered detached dwelling will have a floor space index equal to 0.86 times the area of the lot (236.29 m2).

2. Chapter 200.5.1.10.(2)(A)(ii), By-law 569-2013

The required parking space must have a minimum width of 3.20 m. The parking space will measure 3.04m in width.

3. Section 4(17)(a), By-law 438-86

The required parking space must have a minimum width of 3.20 m. The parking space will measure 3.04m in width