

DECISION

Decision Issue Date Tuesday, January 29, 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): EHSAN VALI

Applicant: GLENN RUBINOFF

Property Address/Description: 46 BANFF RD

Committee of Adjustment Case File: 17 278786 STE 22 MV

TLAB Case File Number: **18 180855 S45 22 TLAB**

Hearing dates: Friday, October 5, 2018, Thursday, December 13, 2018,
Monday, January 14, 2019

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Ehsan and Azita Vali	Owners	Jennifer Meader
City of Toronto	Party	Sara Amini
Susan Abbott	Participant	
Bruce Winning	Participant	
Al Kivi	Participant	
Deborah Glassberg	Participant	
Catherine Didrichsons	Participant	

INTRODUCTION

Ehsan and Azita Vali wish to demolish a bungalow at 46 Banff Road and construct a new two storey dwelling with an integral garage. They need variances from the zoning by-laws including a recent amendment that prohibits integral garages. On June 6, 2018, the Committee of Adjustment refused their application. The Valis appealed and thus the matter comes before the TLAB.

EVIDENCE

I heard from David Riley, the planner for the Valis, whom I qualified to give opinion evidence in land use planning. I also heard from Al Kivi, director of SERRA, South Eglinton Ratepayers and Residents Association, Catherine Didrichsons, Susan Abbott, and Bruce Winning, the last three with Banff Road addresses. The City of Toronto elected to become a party but confined its participation to cross examining Mr. Riley and making submissions.

BACKGROUND

Table 1. Variances sought for 46 Banff Rd			
		Required	Proposed
Variances from new City-wide harmonized By-law 569-2013			
1	Size of foyer	10 m ²	6.38 m ²
2	Integral garage (1426-2017)	No	Yes
3	Rear deck		
	area	Max 4 m ²	5.5 m ²
	height	1.2 m	Greater than 1.2 m
	setback from south lot line	1.8 m	.46 m
4	Building height	9 m	9.51 m
5	Front and rear exterior main wall height	7 m	9.21 m
6	Building depth	17 m	18.6 m
7	Maximum floor space index	.6 times area of lot	.65 times area of lot
8	Roof eave projection to south side lot line	Only allowed if at least .3 m from lot line	0.1 m from lot line
9	Front yard landscaping	50%	38.1%
10	Front yard soft landscaping	75% of required front yard landscaping	67.4 %

Table 1. Variances sought for 46 Banff Rd			
Variances from former Toronto by-law 438-86			
1A	Side yard setback for portion exceeding depth of 17 m	7.5 m	.46 from south side lot line, 1.12 m from north side lot line
2A	Maximum gross floor area	.6 times area of lot	.65 times area of lot
3A	Rear deck	Project no more than 2.5 m if higher than 1.2 m	Projects 3 m and is 2.77 m high
4A	Similar to variance 3 above		
5A	Similar to variance 2 above (1425-2017)		

Because the current City-wide by-law is still under appeal, the zoning examiner reviews all applications under both the current and previous (former City of Toronto) by-law and thus the Valis need variances under a 1986 by-law. This results in duplication and overlap for some variances. Because of this, Council adopted two versions of the Davisville zoning by-law amendments one for the current zoning by-law and one for the previous by-law.

MATTERS IN ISSUE

The applicants seek an integral garage, which is prohibited by the recent Davisville Amendment, a rezoning by-law covering 3800 homes between Eglinton East and Manor Road. The *Planning Act* process, which encompasses the TLAB, allows for the decision maker to authorize a variance to a zoning by-law, if the variance meets the **general** intent of the zoning bylaw. In this case, although a number of variances are sought, the key variance relates to an integral garage and the architectural consequences that flow from this.

The *Planning Act* requires that I be satisfied that variances meet Provincial policy and all the tests under s. 45(1), that is, whether they:

- 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.

ANALYSIS, FINDINGS, REASONS

The Davisville Amendment¹

On Dec 8, 2017, Toronto passed the “Davisville Village zoning amendment”, (By-law 1426-2017) prohibiting integral garages for the Davisville Village area, i.e. between Yonge and Bayview, south of Eglinton Avenue. The Valis are the third set of owners to seek an integral garage variance at the TLAB. I comment on the other two cases as follows.

In 401 Balliol St, TLAB Chair Lord granted a variance from the Davisville Amendment, allowing an integral garage. The owner applied for variances **before** Dec 8, 2017 and the Plan Examiner did not test the application for compliance with the soon-to-be adopted zoning by-law. There was less evidence than in this case since the design of the garage was not an issue at the Committee of Adjustment. It is not unusual for City officials to exempt an application that is far along in the process, out of a desire to be completely fair.

The second applicant was the owner of 585-7 Millwood Rd, who applied **after** the Davisville Amendment, in February 2018. Originally, the owner applied for two semis with integral garages; and instead of continuing to seek a variance she amended her plans at the TLAB to replace them with parking pads. The dimensions of the revised plans will be compared to the Valis’ proposal on page 14. Since the Davisville By-law does not give an automatic exemption for houses where an integral garage is deleted, a further variance for a parking pad is still required. The TLAB hearing was an unopposed “settlement”, in which the City did not appear. Mr. Kivi as representative of SERRA attended both these hearings as well as this one on Banff Road.

The Valis applied for their variances on December 21, 2017, 14 days **after** the adopting of the Davisville Amendment. This is critical; not only is the application fully subject to the plan examiner’s finding that they need an integral garage variance, but they applied within the 20-day time period after adoption of the Davisville Amendment and could have appealed it to the LPAT if they desired.

General Intent and ordinary “Intent”

The Davisville Amendment is a very short by-law. It prohibits integral garages and rear decks higher than 1.2 m. The architect who designs a main living area above a garage and whose client wishes everything to be on one level has no choice other than a main floor height from 8 to 9 feet above grade. To keep the front door low, these buildings then must have steps just inside the front door to get to the main floor.

¹ I am using the singular, although there were two amendments, one amending the current City-wide zoning by-law and one mending the previous Zoning By-Law 438-86 for the former City of Toronto.

To avoid steps down to the rear deck, a high main floor leads to a high rear deck. Since the Valis seek precisely what was prohibited, it would seem that their application does not meet the intent of the Davisville Amendment. But the *Planning Act* adds a word to “intent”. I am permitted to authorize “such minor variance” if in my opinion, the **general intent** . . .of the zoning by-law is maintained and the Valis ask me to determine whether they could fit within the wider discretion implied by “general intent” as opposed to just the word “intent”.

The Courts have made it clear a full examination of “general” intent is necessary (see *Degasperis*, citation in the footnote²). As Council has legislated to prohibit integral garages, the recent nature of this legislation is relevant because the phrase “general intent” still retains a core meaning of ordinary intent. This is exemplified in another directive from the Legislature, namely s. 64 of the *Legislation Act*:

Rule of liberal interpretation

64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

In other words, in evaluating the Valis’ request, I have to do so in a way that best ensures Council’s **remedial** objective when it prohibited integral garages.

This is stated in the “Purpose and Intent of the Proposed Zoning By-law Amendment”³ section of the planning justification report for the Davisville Amendment,

² Throughout the Board’s reasons, there are references to the evidence of witnesses whose evidence the Board accepted but those references do not state what the evidence was and why it was preferred over other evidence. Throughout the Board’s reasons the focus is on the likely impact of the variances sought with no or little regard for anything else. Of equal importance is the omission of any analysis by the Board of the **general intent and purpose of the by-law** and as part of the general intent exercise official plan and how the granting of the minor variances sought would maintain those intents and purposes. (my bold) *Vincent v Degasperis*, 2005 CanLII 24263 (ON SCDC)

³ The purpose and intent of the proposed Zoning By-law Amendment with respect to removing the as-of-right permission for integral garages within the Focused Study Area is in order to:

- Ensure a more predictable built form that is contextually appropriate and compatible with the existing physical character of the neighbourhood;
- Respect and reinforce the existing built form, scale and street proportion;
- Preserve the quality of the neighbourhood streetscape;
- Protect opportunities for front yard soft landscaping, including large growing shade trees;
- Promote front entrances and main living spaces at a height that reinforce the traditional character of the neighbourhood, are more visible from the street, and have better "eyes of the street";
- Ensure that front entrances and main living space windows are the most prominent feature of front walls at pedestrian level;
- Reinforce a consistent streetwall height;
- Maintain and improve the management of stormwater runoff;

whose author is Kevin Friedrich . Mr. Friedrich’s rationale is set out in full in footnote 3, which I summarize as comprising three main reasons:

- Achieving contextually appropriate built form in the area;
- Obtaining better parking solutions; and
- Protecting neighbours’ privacy from high rear decks.

Mr. Friedrich did not address directly the frequent complaint that integral garages create “too tall buildings” but indicated low main floor height is a key Council objective, especially for lots in the 7.6 m (25 foot) range. The report explains:

In order to avoid a significant loss of main floor habitable space, the replacement houses are designed with the garage at ground level and **the main floor located above, much higher than commonly associated with the houses of the area.** The higher front entrance and main floor result in a house with less physical relationship or visibility to the street level, a ground level where the most prominent feature is the front door of the garage, and greater eaves and overall building heights.

We see from #57 Banff (described below in detail) that a house with a non-integral garage can be as high and dense as the one Valis desire, but these variances can be overcome with good architecture, and a lower main floor that interacts with the streetscape to harmonize with the prevailing physical character.

The “respect and reinforce” test and OPA 320

The lands are designated “Neighbourhoods” and are to be a “stable but not static” residential area. For these lands, the “cornerstone” test is:

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

. . .

-
- Encourage more desirable forms of providing parking;
 - Enhance pedestrian safety and comfort; and
 - Protect the existing supply of on-street parking.

In instances where replacement houses with integral garages are deemed contextually appropriate, there is a remaining concern that a deck attached to the rear wall of the house and connected to the main living floor as a means of accessing the rear yard could result in adverse impacts to adjacent properties. Therefore, the purpose and intent of the proposed zoning amendment is also to direct the design of tall rear wall decks in order to:

- Mitigate overlook, loss of privacy, noise, and other adverse impacts associated with tall rear wall decks.

As part of the Davisville Village Zoning Study staff did not look at architectural style or materials. Buildings within the Focused Study Area are characterized by a variety of styles and architectural features. Staff is of the opinion that any well-designed new building or addition has the ability to fit harmoniously into the mature neighbourhood regardless of architectural style.

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- b) size and configuration of lots;
- c) **heights, massing, scale** and dwelling type of nearby residential properties;
- f) prevailing patterns of . . . rear and side yard setbacks and landscaped open space
(my bold)

Integral garages and rear deck heights are encompassed in “heights, massing and scale” of the Official Plan. OPA 320 adds a new development criterion to the respect and reinforce test by including the consideration of garage design and the buildings on the specific block face and opposite side of the street⁴.

The geographical neighbourhood

For the purposes of this case I think the most relevant neighbourhood is the block of Banff from Eglinton to Soudan. This is the assumption that all the witnesses made. The following is a tabulation of the number of integral garages by block for Petman, Banff and Cleveland.

Table 2. Bruce Winning’s tabulation of number of integral garages per block face					
Block face (between Eglinton and Soudan)	Homes		Garages		
Petman	4 bungalows	8%	At-grade	6	33%
	8 semis	17%	Below Grade	10	67%
	36 1.5 storeys and greater	75%			
	48 in total			16 in total	
Banff	7 bungalows	15%	At-grade	4	
	20 semis	42%	Below Grade	2	
	21 1.5 storeys and greater	43%	At-grade but attached	4	
			Carport	16 in total	
	48 in total		10 in total		
Cleveland	2 bungalows	4%	At-grade	2	33%
	18 semis	35%	Below Grade	14	67%

⁴ Most relevant to Davisville Village and the issue of integral garages, OPA 320 adds a new development criterion to Policy 4.1.5,[the respect and reinforce the existing character policy] to ensure that the prevailing location, design and elevation relative to grade of driveways and **garages** are considered in evaluating how a proposed development respects and reinforces the physical character of the neighbourhood. (my bold)

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	35 1.5 storeys and greater	61%		
	48 in total			16 in total

On all three blocks, homes with integral garages are a minority. I infer from the large number of below grade garages on Cleveland and Petman that there was a wave of development before that built form was prohibited.

Ms. Abbott supplied a map (below) showing this information spatially. The arrow points to 46 Banff, the subject property. The small squares indicate at-grade garages;

Picture 1. Abbott map of integral garages (squares), below grade garages (diamond) and car port at 57 Banff



the diamonds are below grade garages; and the “C” on its side is the carport at 57 Banff. The four open squares at the south end of Banff represent attached, but non-integral garages. She described the physical character of the neighbourhood as follows:

“The majority of these do not have integral garages, they have low front entrances, the **main living floor heights are low**, the same as historic properties on the street. They do have front yard parking, so there’s an awful lot of front yard parking.”

I recapitulate the sequence of even numbers (north to south, west side):

- nine houses with no integral garage,
- 50 Banff⁵, below grade garage;
- 46 Banff, subject property
- 44 Banff, a bungalow, no garage
- 38 and 40 Banff, two integral garages
- 36 Banff no garage
- 34 Banff, integral garage
- 7 properties, no garage
- 4 properties each with an attached garage.

On the odd numbered side, there are even fewer integral garages.

The elements of the respect test

In assessing the physical character of the neighbourhood, one issue is whether a below grade garage equivalent to an at-grade one. There are two below grade garages (diamonds) both in close proximity to #46 Banff. Mr. Riley testified that a passer-by would experience a below grade garage in the same fashion as an at-grade one and while I concur with his assumption, that we should start with the hypothetical passerby’s view, Council’s intent in lowering main floor height also has to be considered. Below grade garages represent an early and now prohibited attempt to deal with the same problem of high main floors. It attempted to make a better connection with the street than the modern integral garage. But the below grade garage solution had engineering, aesthetic and safety drawbacks. I find a below grade garage is not the full equivalent of integral garages for purposes of determining the character of the neighbourhood but a part way solution that is better in harmony with historic buildings.

Having regard for the context I have just described; my thinking process would be to look for at least one, and preferably more than one, of the following elements:

- 1. If it is just one isolated home, whether the proposed integral garage**

⁵ The next door to the north owners have entered into minutes of settlement with the Valis.

- was book-ended (on both sides) by two other integral garage homes;
2. Whether it was part of a strip of homes with integral garages; or
 3. Whether the majority of homes on that block face (that is, one side of the street), or a goodly part of that block face, was composed of homes with integral garages.

I find that the proposal does not meet any of these elements. This does not end the decision. I wish to review the rest of the evidence and draw out some measurements that I believe support the elements I have set out,



57 Banff – at grade carport solution

Ms. Abbott said:

“57 Banff was not discussed in the expert testimony but was cited as higher than permitted floor space index. I think it is a unique home. Although it is quite large, the presence of the flat roof, the setback portion makes it feel less dominating to the street. It has an at grade carport. The front window and main floor is really just above grade level. The front entrance is at grade. Although the paved portion of the driveway is unfortunate, there is still abundant soft landscaping. This lot I would note has a private driveway, unlike the lot at 46. I think it represents a very good design solution, to give the market a much larger property while respecting the character of the neighbourhood. We can see the design is quite different; it has a different aesthetic, it’s very modern, but I would still say that it is more

respectful of the prevailing character of the neighborhood than the proposed development.”

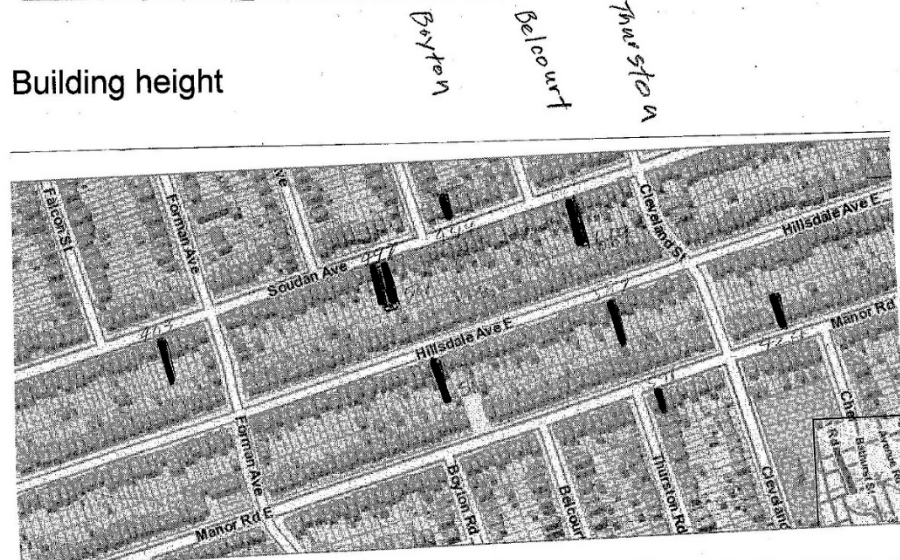
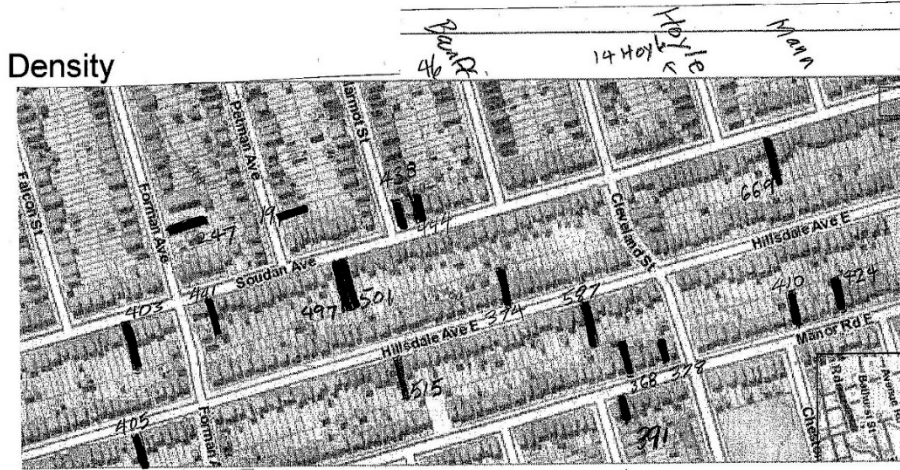
A comparison of the numbers shows that the heights and FSIs are almost exactly the same as those sought by the Valis.

Table 3. Comparison of variances sought for 46 Banff with those granted for 57 Banff Rd		
	46 Banff	57 Banff
C of A decision	2018	2010
Height	9.51 m	9.53 m
FSI	.65 (By-law 569-2013)	.64 (By-law 438-86)

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Front lot setback	Not needed	3.63 m to front of carport (Minimum 4.41 m)
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The appeal of 57 Banff, besides the intangible beauty of the various parts of the façade, is the two storey “look” as opposed to the three storey “look” of integral garage homes like 38, 40, 51 and 63 Banff.



Maps 3 and 4. Sources: Addresses from David Riley’s Witness Statement: Tables 1 and 2. Map from Toronto zoning by-law interactive map

Mr. Riley’s characterization of the neighbourhood

Mr. Riley concentrated his efforts on the portion of the report that deals with

minor variances, in which Mr. Friedrich wrote:

In instances where houses with front integral garages and taller building heights conform with Official Plan policies and **are part of the prevailing character**, and do not result in any adverse impacts, a minor variance may be appropriate to allow an integral garage.
(my bold)

The use of the word “prevailing” is an incorporation of OPA 320 principles to the test of Official Plan conformity. , Mr. Friedrich goes on to list six principles to “help to ensure that new buildings are well designed with ample space for front yard landscaping, including large growing shade trees” :

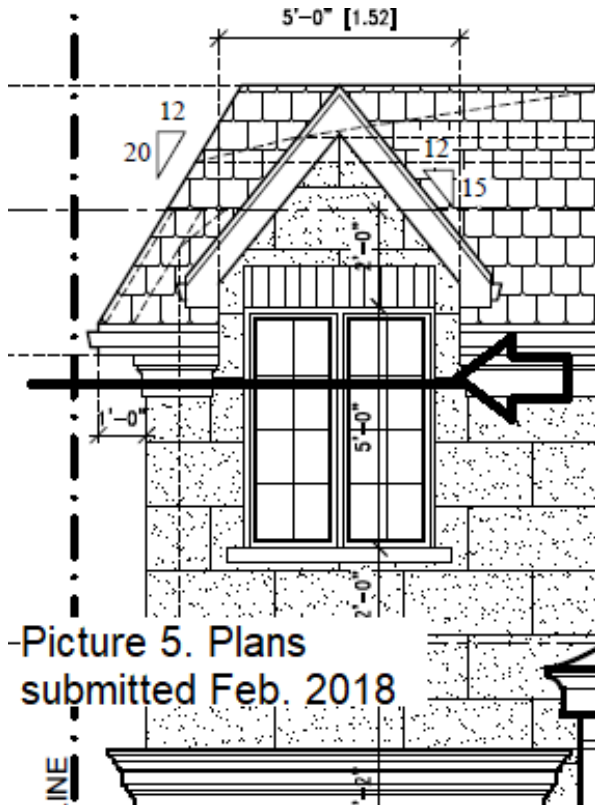
keep the eaves/cornice line generally in line with the prevailing streetwall height of the street;
keep the height of the main entrance and front door to a maximum of 1.2 metres above established grade;
add articulation (i.e. bay windows, front porch, peaks and dormers) to the main front wall to break up the massing and scale of a building to avoid the appearance of a 3-storey building;
utilize existing curb cuts particularly when mutual driveways are present;
minimize curb cut widths and locate them strategically to optimize on-street parking viability; and
maximize front yard landscaping by keeping driveway area to a minimum and consolidating driveways and walkways.

Mr. Riley stated that the Valis met all these principles, including that of the prevailing physical character of the neighbourhood:

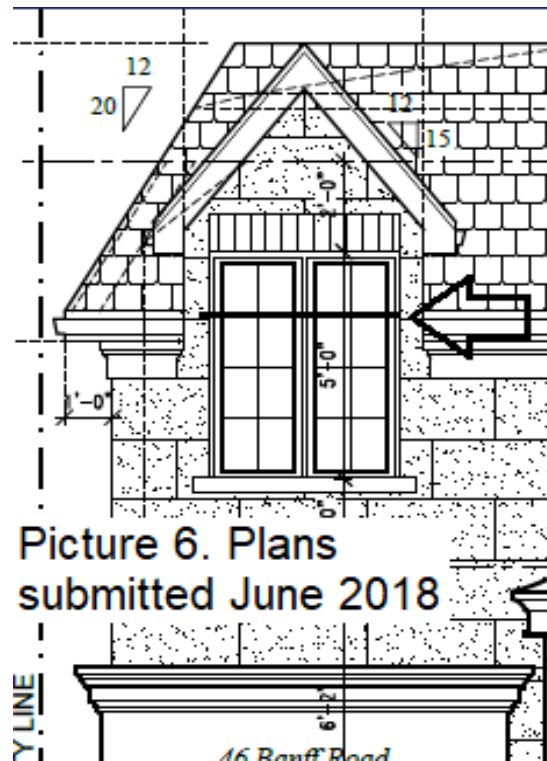
My witness statement shows examples of C of A approvals for increase in floor space index within the area south of Eglinton and the neighbourhood I identified, that shows the proposed .65 [FSI] in relation to some of the other ones. I will note that on this Table that I found, . . .of the decisions I reviewed, the only other one on Banff is .64 [#57 Banff], which is very similar to the .65 proposed. However, as I said, you have to look at the entire geographic neighbourhood, and you see that of these approvals for floor space index greater than .6, you see that this is on the lower end of things. Not that you have to judge it on its numerical value, but what this is showing is a changing character in the neighbourhood for larger dwellings in relation to site area. The other thing that I looked at is height. The proposal is for overall height of 9.51 compared to some of the other approvals in the area ranging to 10.84. Just again, showing the example of overall building heights, for newer dwellings that have been approved at higher than the maximum permitted, and again just showing a change in character.

In Maps 3 and 4 (previous page 11) I have mapped out the location of Mr. Riley’s comparables for floor space index over .6 (density) and height over 9 m. There are 18 density decisions; #57 Banff and 40 Hoyle Ave are off the map. There are nine height decisions and again #57 Banff is off the map. I assume that each of these decisions might have led to an integral garage.

The first thing that strikes me is that for a neighbourhood that is undergoing considerable demolition and rebuilding, there are comparatively few decisions. I find that Mr. Riley's conclusion of a "change in character" is an overstatement. Secondly, the decisions are scattered over a very wide area, wider than the one block or so that I have chosen as the most relevant study area. A passerby walking the long east-west blocks on Soudan, Hillsdale and Manor Road (about .4 km) would not piece together an isolated integral garage far away from the subject proposal in forming an opinion about the character of the neighbourhood. In fairness, this was not Mr. Riley's position.



Picture 5. Plans submitted Feb. 2018



Picture 6. Plans submitted June 2018

The City's comments on cornice line

The Valis seek a building height variance of .51 m (9.51 m v 9.0 permitted), which is less than the building height of 9.81 m originally sought. The City Planning Department (the planner was not Mr. Friedrich) commented in May 2018 that the height of the building and cornice line should both be **reduced by .3 m (1 ft)** and the depth of the building from decreased from 20.12 m to 18.6 m. The depth of building also reduced the floor space index from .70 to .65%. The Valis complied.

In Pictures 5 and 6 (above) I have reproduced the upper corner of the pre- and post-comment designs. I have placed a heavy line through the top muntin of the window to show a common reference point. I have not attempted to depict the lowering

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of the height by .3 m in a scaled fashion. While the overall height and cornice line were subtly lowered, all the other interior dimensions, notably the height of the main floor and the rear yard deck height (both about 8 feet 7 inches above established grade), were unchanged.

In my view, while the changes made in response to the comments were positive, the lowering falls short of being a justification for an integral garage variance. I still have to determine whether it maintains the general intent of the Davisville Amendment.

Due to the recent adoption of the Amendment I did not have the benefit of a witness to explain the full City position, although I did have Mr. Friedrich's report on the City's objectives.

The example of 585-7 Millwood

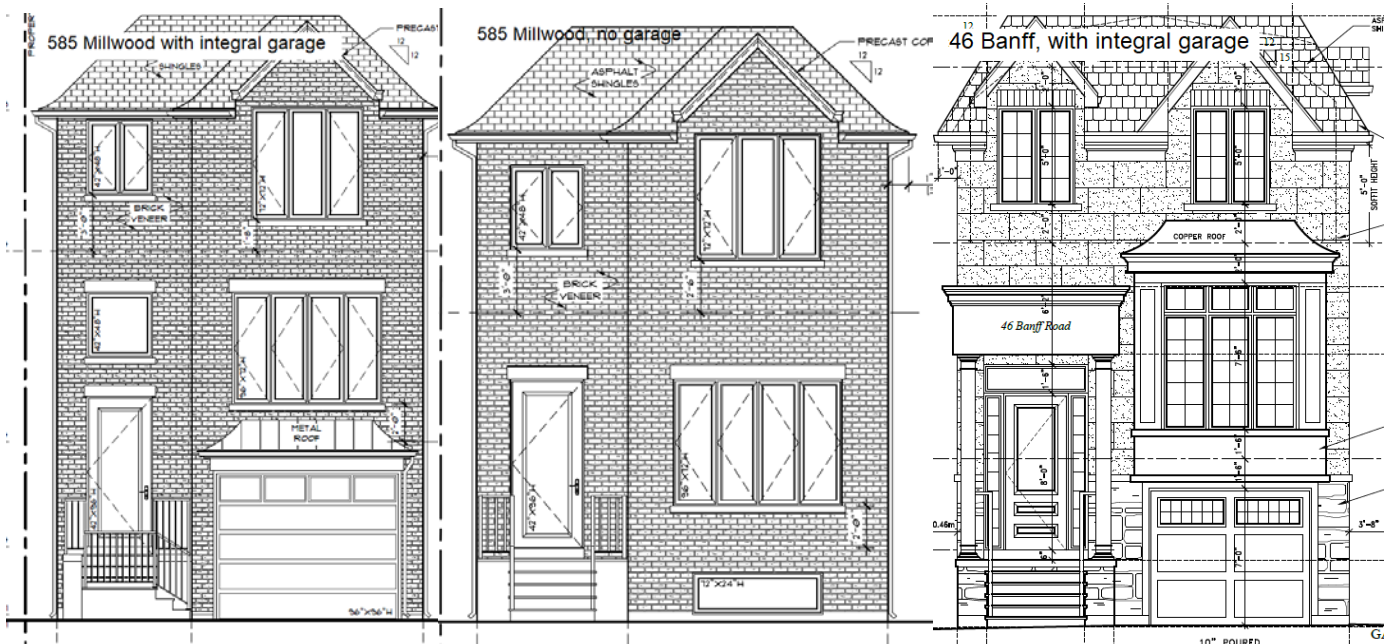


Table 4. Comparison of 585-7 Millwood and subject designs (all heights in meters)

	585 Millwood Integral garage	585 Millwood Parking pad	46 Banff, Integral garage
Roof	9.35	8.62	9.51
Underside Ceiling	8.3	7.53	8.72
2 nd Floor	5.85	4.49	5.97
Ground Floor	2.6	1.08	2.62
Entrance	1.3	1.08	1.2
Est. Grade	0	0	0

I have made a montage of 585-7 Millwood, first with integral garage and then with no garage, along with the 46 Banff front elevation. The two storey-above-integral

garage “look” (first and third elevations) and the corresponding measurements are similar. **I find that considering all aspects of the proposal, the integral garage design does not meet the test of general intent of the Davisville Amendment.** The non-integral garage solution in the centre diagram lowers the main floor by about 1.5 m (4.9 feet). The rear deck proposed by the Valis is about 8 feet high, higher than a human being; and eliminating these high rear decks is also a stated goal of the Davisville Amendment. These two were objects of Council’s intention.

Conclusion and next steps

In submissions, I asked Ms. Meader (the Valis’ lawyer) what I should do if I did not think the integral garage variance succeeded in meeting the tests for a variance. She asked that I should allow her clients to recalibrate their design. Since that is what I am deciding, I will not deal with Ms. Didrichsons’ objections, since the original plan is now shelved.

In order to retain jurisdiction and be more efficient, I am not making a formal order. I would suggest the Valis to come forward with a non-integral garage design and have it checked by the plan examiner. The new proposal will need a parking space variance and participants are at liberty to object to it and any other variance either fresh or previously sought, if that is their position. It will require some attention to the curb cuts and protection of a City-owned tree so those comments should also be obtained. Perhaps Ms. Amini (the City lawyer) can expedite those comments. Although I have not found in favour of the integral garage variance, I do find that the Valis have proceeded in good faith and already made some reasonable changes. I hope that this matter can be expeditiously resolved, so I will convene a conference call to settle the next steps and I would ask the parties to arrange a date with the TLAB supervisor, within, say six weeks. This will allow a new design to be circulated informally to the other parties along with the examiner’s notice. If there is difficulty, would the parties please email me via the TLAB.

X



Ted Yao
Panel Chair, Toronto Local Appeal Body
Signed by: Ted Yao