Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Wednesday, June 26, 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): YEN PING LEUNG

Applicant: KEVIN CHENG

Property Address/Description: 787 DUNDAS ST W

Committee of Adjustment Case File Number: 17 255982 STE 19 MV (A1198/17TEY)

TLAB Case File Number: 18 213028 S45 19 TLAB

Motion Hearing date: Thursday, May 30, 2019

DECISION DELIVERED BY S. GOPIKRISHNA

APPEARANCES

NAME	ROLE	REPRESENTATITVE
YIN PIN LEUNG	APPELLANT	KEVIN CHENG
TARIQUE CHAUDHARY	EXPERT WITNESS	
JOHN PROVART	PARTY	

INTRODUCTION AND BACKGROUND

Yin Pin Leung is the owner of the Subject property located at 787 Dundas St West, located close to the intersection of Bathurst Ave. and Dundas Ave W., in the downtown of the City of Toronto (City). She applied to the Committee of Adjustment (COA) for permission to convert the existing, two storey, non-residential building, into a hotel, containing six guest suites, and two office units, by constructing a new rear fire escape structure and stairs, as well as converting existing retail and office units. The COA, heard the application on August 1, 2018, and refused the application in its entirety.

Ms. Leung appealed the Decision to the TLAB on August 11, 2018; the TLAB initially set a Hearing date for December 17, 2018.

As a result of a Motion put forward by the Appellant asking for an adjournment, I issued a Decision dated December 6, 2018, refusing the Motion, heard the case on December 17, 2018, and provided directions through intermediary Decisions dated December 21, 2018 and February 19, 2019. The TLAB subsequently set a Hearing date of May 30, 2019, to complete the hearing of the Appeal respecting 787 Dundas St West.

MATTERS IN ISSUE

The following variances are requested:

#1 Rear Yard Setback

1) **By-law 569-2013: [40.10.40.70.(2)(B)(ii) Development Standard Set 2 – Building Setbacks]**

In the CR zone subject to the Development Standard Set 2, where the rear lot line abuts a lane, a building must be set back at least 7.5 m from the lot line of the lot abutting the lane on the opposite side of the lane.

The altered building will be located 4.66 metres from the lot in a residential district abutting the lane on the opposite side of the lane, as measured from the new rear fire escape structure and stairs

2) **By-law 438-86: [8(3) Part II 4(A) - 7.5 m Setback]**

The minimum required set back from a lot in a residential or park district is 7.5 m.

The altered building will be located 4.66 metres from a lot in the residential district.

#2 Public Lane Setback

3) **By-law 569-2013: [40.10.40.70.(1)(B) Development Standard Set 2 –Building Setbacks]**

A building or structure must be no closer than 3.5 m from the original centerline of a lane if the lot abutting the other side of the lane is in the Residential Zone category or Open Space Zone category

The altered building, as measured from the new rear fire escape stairs, will be located 1.61 m from the original centerline of a lane and the lot abutting the other side of the lane is in the Residential Zone category.

4) **By-law 438-86: [8(3) Part II 4(A) - 3.5 m Setback]**

The minimum required setback from the original centerline of a public lane is 3.5 m.

The altered building, as measured from the new rear fire escape stairs, will be located 1.61 m from the original centerline of the public lane

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 Pane l 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

The Hearing held on 30 May, 2019, respecting the Appeal at 787 Dundas St West, was attended by Ms. Yin Pin Leung, the Appellant, Mr. Kevin Cheng, Ms. Leung's son and Agent, and Mr. Tarique Chaudhary, their Expert Witness. Mr. John Provart, the resident of 6 Andrews Ave., located behind the Subject Site, and a Party in opposition to the Appeal, also attended the hearing.

After Mr. Tarique Chaudhary was affirmed, Mr. Cheng asked that Mr. Chaudhary be recognized as an Expert Witness in the area of Land Use Planning. By way of editorial comment, Mr. Chaudhary's CV stated that he had a Bachelor's degree in Architecture, and had subsequently acquired the following professional designations- Certified Building Code Official (CBCO), and Canadian Registered Building Official (CRBO). While Mr. Provart had no questions for Mr. Chaudhary regarding his qualifications, I asked Mr. Chaudhary if his professional duties as an CBCO, and/or an CRBO, would help satisfy the expectations that the TLAB had of an Expert Witness, whose ethical and professional obligations require them to assign greater weight to providing advice to the TLAB, than any obligations to their own clients. Mr. Chaudhary said his professional

designations placed “higher” responsibilities on him, “because Building Officials had more responsibilities than a Registered Professional Planner (RPP), and were therefore held up to more stringent professional standards”. On the basis of this assertion, statement about being qualified earlier to testify before the former Ontario Municipal Board, and lack of objections from the opposition, I recognized Mr. Chaudhary as an Expert Witness in the area of land use planning.

Mr. Chaudhary briefly described the proposal, and recited the variances. He also provided me an update on one of the variances, namely:

#2 Public Lane Setback

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*The altered building will be located **4.66** m from the lot in a residential district abutting the lane on the opposite side of the lane, as measured from the new rear fire escape structure and stairs. (The new separation is 4.66 m.)*

I waived the need for new notice under Section 45(18.1.1) because of the minor nature of the change- 4.66 m separation is close to what is of right than the previously listed 2.26 m. This variance is listed in the “Matters in Issue” Section in its updated version, as stated above.

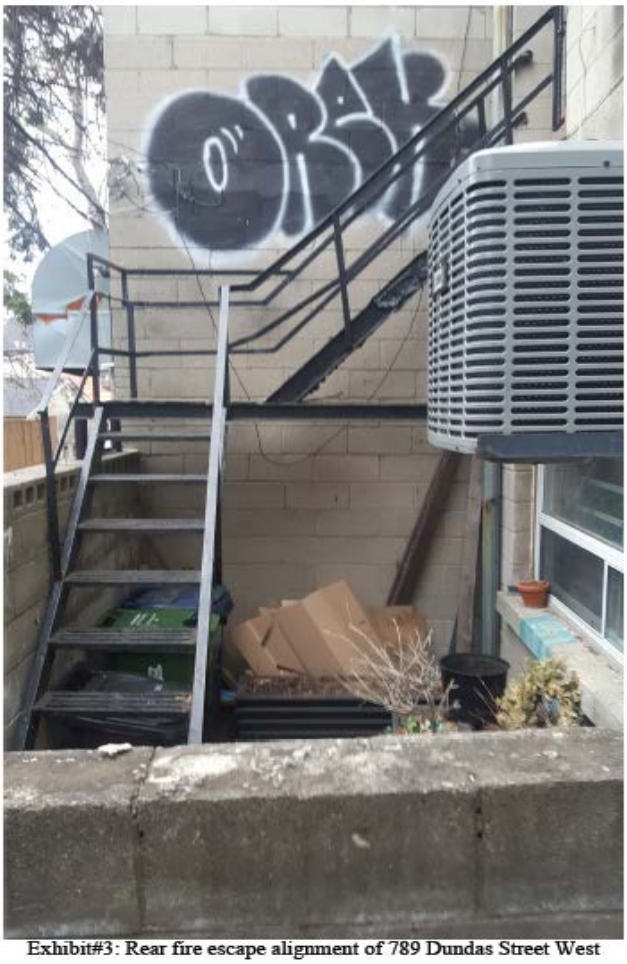
Mr. Chaudhary pointed out that the Subject Site along Dundas Street West is zoned Mixed Use District (CR) which permits select residential uses and a range of commercial, retail and institutional uses, including a hotel. He also stated that the Site was governed by By-Laws 438-86 (former City of Toronto By-Law) and 569-2013 (City Wide Harmonized By-Law).

Mr. Chaudhary then reviewed the Policy and Regulatory context, and stated that the revitalization of an existent building would make the proposal compatible with Policies 1.1.3.1, 1.1.3.2, 1.1.3.3 and 1.1.3.4 of the Provincial Policy Statement (2014), as well as the Growth Plan for the Greater Golden Horseshoe (2017).

Mr. Chaudhary then explained the compatibility between the proposal and the Official Plan. He said that the general intent and purpose of the Official Plan was to ensure that developments appropriately “fit” within their respective neighbourhoods, and expanded on Policy 2.3.1.2, to point out that development in “Mixed Use Areas” adjacent to, or close to “Neighbourhoods”, must address neighbourhood protection policies. He added that in his opinion, the proposal responded “appropriately to its neighbourhood”. Of special interest were the Built Form Policies in Section 3.1.2, and how they required new development to be massed, and exterior façade designed, to fit harmoniously into the existing, and/or planned context. He added that Section 4.5 (1) indicated that Mixed Use Areas consist of a broad range of commercial, residential and institutional uses, and reiterated that the proposed hotel use is permitted in this designation. Mr. Chaudhary added that a building permit had been issued “permitting its (hotel) use”.

Mr. Chaudhary referred to the Official Policy's encouraging intensification near public infrastructure, and discussed how the proposal achieved this goal because of its proximity to the Bathurst and Dundas St W bus routes. He then noted how Community Planning had "no objections" to the proposal, because it did not provide any comments when the COA examined the application.

Mr. Chaudhary then said that the proposed setback that would result from the fire escape, at the Subject Site, was "consistent with prevailing building type and setback" of the neighbouring properties, and proffered the picture below of the fire escape at 789 Dundas St W. When I asked him if the owner of 789 Dundas St W had applied for relief from the By-Laws to the COA, to maintain the setback, Mr. Chaudhary joked that the "building may have been built without a permit", and that he did not know if an application for relief had been submitted to the COA.



Exhibit#3: Rear fire escape alignment of 789 Dundas Street West

Lastly, Mr. Chaudhary highlighted pictures of other back yards in the laneway, and demonstrated how the "entire block had been built to abut the South Rear lot line." He named six addresses along the same block, and claimed that they had the same

arrangement, and concluded that the building to abut the rear lot line, was a "neighbourhood condition".

On the basis of this evidence, Mr. Chaudhary concluded that the proposal maintained the purpose, and intent of the OP. In response to my question enquiring about the existence of any applications to recognize the so-called "neighbourhood condition' to the COA, Mr. Chaudhary repeated that he did not know the answer.

Mr. Chaudhary then spoke about the compatibility between the project and the Zoning By-Laws governing the site, 438-86 and 569-2013. He asserted that the "encroachment into the required south setbacks will not create any adverse impacts to adjacent properties, except the neighbouring property at 789 Dundas St W", which, he added, is owned by the Appellant. Ms. Leung. He said that there will be no new windows on the north wall, and the south wall, resulting in no new privacy concerns. Mr. Chaudhary added that the fire escape "would include additional screening to improve privacy conditions".

Mr. Chaudhary stated that on the basis of this evidence, the proposal complied with the intent of the By-Laws. I asked Mr. Chaudhary a specific question about how the proposal was consistent with the performance standard for setbacks and received the following answer "the variance is really minor in nature because the setback to east side, also owned by the Appellants, would be "zero", whereas the setback on the west would remain unchanged". He went on to add that the planned changes to setbacks meant that "there would be minimal changes" to performance standards.

Mr. Chaudhary then discussed how the proposal satisfied the test of being minor. He commented that this test was not dependent on mere numbers, but had to examine the impact of the proposed variances, on the neighbourhood. He reiterated that there would be no light or shadow impacts on the neighbouring properties, before addressing the noise related nuisance concerns brought up by neighbours. He said that he had walked around the property, "equipped with a machine to measure sound", (which I interpreted to be a dosimeter), and that he could confirm that the maximal noise, recorded at the roof level, was 37 decibels, which was below the prescribed 60 decibels tolerance limit. He added that the source of the noise was the neighbourhing building at 789 Dundas St W, which was owned by the Appellant. I thanked Mr. Chaudhary for undertaking the dosimetry study, and stated that the sound nuisance did not have to be discussed further, since it did not arise out of activity at the Subject property.

Mr. Chaudhary asserted that because the building (at 787 Dundas St W) already existed, there would be no new impact on the neighbouring buildings, and that revitalization of the existing building, and the improvements made in the interior of the building would enhance the "streetscape", as well as support intensification in the area. He said that a five foot tall privacy screen could be built on top of the sides of the fire-escape, to address any privacy concerns.

On the basis of this information, he concluded that the building was compatible with the test of appropriate development. In response to a question from me about the test of appropriateness of taking public interest into account, Mr. Chaudhary replied in the affirmative, and added that allowing a building that would have offices, or rooms for overnight stay for visitors from out of town, was fulfilling public interest.

Mr. Chaudhary concluded by stating that the Appeal should be allowed because the proposal satisfied all the 4 statutory tests under Section 45(1). In terms of conditions, he said that a condition about the privacy screen could be added if necessary. When I him asked if the planned privacy screens (five feet as per the plans) could be increased to six feet, Mr. Chaudhary said that he would provide a response to the TLAB later.

Mr. Provart then cross examined Mr. Chaudhary. One of the points Mr. Provart brought up repeatedly, was the question of whether the hotel permit that the Appellant had been granted was premised, or linked in any fashion, to the planned fire-escape to be erected at the back of the building. Mr. Chaudhary countered that the elimination of the fire-escape would not allow the Appellant to build “the way they wanted”. Mr. Provart asked questions about the fire escape acting as an alternative entry point to the building, as well as specific questions about an entrance with a door at the top of the fire escape, and the type of locks that would be installed at the top of the fire escape for entering the second floor. Mr. Chaudhary replied by stating that he could not control the use of the fire-escape notwithstanding the very specific purpose for which it is in place, namely egress from the building in the case of a fire.

In response to a question from Mr. Provart about the impact of a 100 decibel bell being installed at the top of the fire-escape (as suggested in the Appellants’ submissions), and the need for such a bell, Mr. Chaudhary acknowledged that the bell would probably have a significant impact because it could be heard even across the laneway between the Subject property, including in the vicinity of Mr. Provart’s residence, across the lane. However, Mr. Chaudhary added that he had advised his client to talk to the City about the necessity of such a bell, and what could be done to mitigate the impact. Through the cross examination, it also emerged that the proposal to install a five foot privacy screen on the sides of the fire-escape was the “first time” Mr. Chaudhary had witnessed such an arrangement in his career. Mr. Provart also asked questions to demonstrate the lack of compatibility between the proposal and the OP’s focus on the quality of life of the residents, because the hotel did not correspond to the needs of local residents. Mr. Chaudhary’s repeated answer was that the hotel was in the public interest because residents from outside the City, using the Toronto Western Hospital, could stay overnight to provide support to the patient. He referred Mr. Provart to one of the latter’s own statements, where he said that there was just one other hotel in the neighbourhood.

After completing his cross examination, Mr. Provart said that he would not be offering any evidence due to the paucity of time, but wanted an opportunity to make written submissions later.

There was a brief re-examination from Mr. Cheng where he asked if the City had requested that privacy screens be installed on the fire-escape, to which Mr. Chaudhary replied in the negative. In response to a question about the biggest concern about lighting on the outside of the property, Mr. Chaudhary said that he had visited the property in the morning, and couldn't comment on the lighting issue. Mr. Cheng concluded his re-examination by stating that he had no further questions.

I stated that I was allowing the Appellants a few days' time to make submissions about the height of the privacy screen, and would also allow Mr. Provart time to make submissions, as well as provide the Appellants extra time to comment on Mr. Provart's submissions. I set time lines for each of the submissions referred to, thanked the Parties for their attendance, and adjourned the Hearing.

On June 3, 2019, Mr. Provart sent in an email stating that:

My position on this appeal continues to be that the requested variances do not meet the four-part test and should not be granted. In particular, they are not desirable for the appropriate development of the land. However, should the TLAB be inclined to grant the appeal, I would request that it do so with conditions that assist in mitigating neighbours' privacy and nuisance concerns. Any approval should thus be conditional upon:

> *1) Construction of a privacy screen on the landing and fire escape (in a manner consistent with the requirements of s. 3.4.7.2 of the Building Code, O. Reg 332/12 and any other applicable laws);*
> *2) The use of a one-way exit doors on all doors at the rear of the property, which do not permit entry or re-entry by guests;*
> *3) The owners advising guests and posting written notices advising there is no access to the rear of the property, landing or fire escape except for exit in cases of emergency; and*
> *4) The owners enforcing the policy in (3) and ensuring there is no guest access to the rear of the property or loitering or smoking on the landing, fire escape or otherwise at the rear of the property*.

On June 7, 2019, Mr. Chaudhary sent an email stating that:

It is my opinion that the fire escape and the privacy fence should be designed by a professional engineer, ensuring that the requirements of the fire escape as per section 3.4.7 of the 2012 OBC and Toronto municipal code chapter 447 are taken into consideration while applying these to the addition on the fire escape. A building permit should be obtained from the City of Toronto and the City as authority having jurisdiction should ensure that the OBC and the by-law is taken into consideration.

I leave the actual design to the engineer and the review to the City of Toronto through its plans review process to ensure compliance.

The email above was accompanied by a recital of Section 3.4.7 of the Ontario Building Code and Toronto Municipal Code Chapter 447.

On the same day, Mr. Cheng sent another submission objecting to Mr. Provart's submissions about requested conditions in the event of an approval:

In response to Mr. Provart's, email, we object to raising brand new submissions minutes before the closing of the hearing. As Mr. Provart is an experienced lawyer, he should appreciate the importance of timing, disclosure, discovery, deadlines, and procedure outlined in this Tribunal's Rules and Procedures.

None of these points were ever raised in the previous disclosure documents nor were any witness statements ever submitted. We did not have the opportunity to cross-examine or properly investigate these new points.

As noted in the hearing, the Expert Witness is in support of this application and his opinion was that it met the four tests of the Planning Act..

Responses

1) Building Code Requirements

The Expert Witness has already submitted the Ontario Building Code references and all applicable code will be reviewed by default once a new permit is applied for: This condition is redundant and not necessary, especially since a hotel use permit has already been issued.

2) One-way exit door conditions
This point was not raised throughout the entire proceeding nor was any evidence submitted to support this condition.

This is a technical condition relating the Ontario Building Code and would require an Expert Witness to support this. Note that all rear doors are already existing conditions.

3) Emergency Signage

Again, this point was not raised throughout the entire proceeding nor was any evidence submitted to support this condition. This is a technical condition relating the Ontario Building Code and/or Fire Code and would require an Expert Witness to support this.Note that upon permit review, Life safety would also be reviewed (i.e. any signage requirements). Furthermore, our plans already have the principle entrance along Dundas Street.

4) Hotel Management Enforcement
This is outside the jurisdiction of TLAB to enforce hotel management rules on the operation of a building.

We believe this matter should be dealt with between neighbours.

ANALYSIS, FINDINGS, REASONS

Before analyzing the evidence, I would like to briefly comment on my decision to recognize Mr. Chaudhary as an Expert Witness. While planners with a Registered Professional Planner (RPP), or Member of the Canadian Institute of Planners (MCIP) qualification are invariably qualified as Expert Witnesses at proceedings before the TLAB, the process to recognize architects, engineers, or practitioners of related professions as Expert Witnesses, is sensitive to a given situation, and has to be determined on a case by case basis. Notwithstanding the fact that I am unclear about how the CBCO or CRBO qualification empowers one to be held up to a "higher standard" than an RPP or an MCIP because the standards are not quantifiable , I was willing to bestow Expert Witness status on Mr. Chaudhary because he stated under oath that he had testified as an Expert Witness before the former Ontario Municipal Board (OMB). I would like to add that my reasoning behind recognizing the Expert Witness in this case may be interpreted as constituting precedent.

Under Section 45.(18.1.1), I waived need for further notice for the variance " *The altered building will be located **4.66** m from the lot in a residential district abutting the lane on the opposite side of the lane, as measured from the new rear fire escape structure and stairs."* This variance is closer to what is of right than the originally suggested 2.26 m separation, and does not need further notice.

I note that the onus of proving that the Appeal should be allowed rests solely with the Appellants/Applicants.

I accept the Appellants' argument on how the proposal is compatible with the higher level Provincial Policies. This is a consequence of the granularity of the proposal, which looks to develop a single property, and the scale at which higher level Provincial Policies apply directly- there is no direct nexus between the development of the property and the higher level Policies. However, on the basis of the revitalization argument, I conclude that the proposal does not contradict the higher level Provincial Policies.

On the matter of compatibility with the Official Policy, the broad strokes of the evidence respecting Policies 2.3.1, 3.1.2 and 4.1.5 provided some support about the proposal's compatibility with the OP, though the "fit" of the proposal with the neighbourhood could have been better explained. Notwithstanding this comment, I would have agreed with Appellants' conclusions about the proposal being compatible with the OP, except that they referred to half a dozen properties developed all the way to the rearline of the property, as constituting a "neighbourhood condition", implying that it was compatible with the OP. The issue here is that half a dozen properties do not constitute a "neighbourhood" under the OP; any question about such a consideration under the OPA

320 is moot because the Appellants did not argue that OPA 320 could apply to the property.

I specifically asked a question if any of these neighbouring properties listed by the Appellants (i.e. each of which had built to the rear property line) had sought seeking relief from the By-Laws, through an application to the COA. Based on Mr. Chaudhary's response, I understood that Mr. Chaudhary wasn't aware of such an application. I note that developing any property to the rear property line is overdevelopment on a *prima facie* basis, and deserves to be investigated in some detail to determine the impact on the neighbouring properties; the concern is heightened when I learn that there are six adjoining, overdeveloped properties, and that there is no information about the impact of the cumulative overdevelopment on the neighourhood.

My conclusion is that in the absence of information about applications and approvals from the COA, there has been no opportunity to evaluate the cumulative impact of the overdevelopment of six consecutive properties, on the remainder of the neigbourhood. Accepting the argument that the proposal conforms to the OP on the basis of the euphemistic "neighbourhood condition", not only condones the collective contravention of the By-laws by six adjacent properties, but elevates infringements to being something worthy of emulation by other properties on the grounds of conformity. Such a decision making process is the antithesis of upholding public interest.

Given my concerns and conclusions about the so-called "neighbourhood condition", and the lack of evidence examining its impact on the community, I find that the evidence does not support proposal's upholding the intent and purpose of the By-Law.

In terms of demonstrating compatibility with the Zoning By-Laws, the important test that needs to be met is that the variances satisfy the corresponding performance standards. When I asked a specific question of Mr. Chaudhary about how the setbacks satisfied the relevant performance standards, the response I obtained was that one of the setbacks would be zero, while the other setback would remain unchanged, which meant that the performance standards would effectively not change. This statement does not acknowledge the definition of a performance standard, let alone demonstrate compatibility. While the Expert Witness Statement states that "the intent of providing minimum yard setbacks is to ensure proper spacing between buildings, as well as to ensure adequate sunlight and privacy conditions", there is no explanation, by way of submission or evidence, about how any of these requirements are satisfied by the proposed setbacks.

I find that the evidence does not demonstrate that the proposal satisfies the intent and purpose of the By-Laws.

On the matter of satisfying the test of minor, the Appellants acknowledged that there is an adverse impact on the neighbouring property at 789 Dundas St West, when they stated that the "encroachment into the required south setbacks will not create any adverse impacts to adjacent properties, except the neighbour at 789 Dundas St W, which is owned by the Appellant". Their justification about this impact being mitigated is

based on the lack of objection, resulting from common ownership by the same individual. However, acknowledged adverse impacts and corresponding mitigation should be examined on the basis of property-to-property interaction, as opposed to who owns what- the planning impact should be modest enough to be unaffected by a change of ownership. On the basis of this observation, I conclude that there is a significant concern about on-going, adverse impact, which means that the test of "minor" is not met.

In terms of the appropriate development of the land, I disagree with the Appellants' argument that the variances contribute to an improved streetscape, because almost all the renovations are contemplated internally, as stated in oral evidence. I note that Mr. Chaudhary's submission in response to my asking if a six foot privacy screen can be installed on the fire escape, refers to the question to a Professional Engineer, without a direct answer. In addition to my being unsure about the impact of any privacy screen would serve on a fire escape, I am disappointed by the lack of a direct response to the question about raising the height of the screen to six feet. The Public Interest component is not met here because of the lack of assessment of the so-called "neighbourhood condition" on the community, as stated earlier. For these reasons, the test of appropriate development is not met.

On the basis of this discussion, I find that no test under Section 45(1) is satisfied by the proposal, and that the proposal should be refused . The Appeal is therefore refused in its entirety, and the COA decision is confirmed.

DECISION AND ORDER

1. The Appeal respecting 787 Dundas St. West is refused in its entirety, and the Decision of the Committee of Adjustment, dated August 1, 2018, is confirmed.

So orders the Toronto Local Appeal Body.

X 

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body