Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Monday, September 30, 2019

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): RICKY GABRIELE

Applicant: JEFF COGLIATI

Property Address/Description: 40-42 ELMER AVE

Committee of Adjustment Case File: 18 140708 STE 32 CO, 18 140721 STE 32 MV, 18 140618 STE 32 CO, 18 140634 STE 32 MV, 18 140656 STE 32 MV

TLAB Case File Number: 18 243484 S53 32 TLAB, 18 243487 S45 32 TLAB, 18 243488 S53 32 TLAB, 18 243489 S45 32 TLAB, 18 243491 S45 32 TLAB

Hearing date: Thursday, September 19, 2019

DECISION DELIVERED BY Ian James LORD

APPEARANCES

Name	Role	Representative
JEFF COGLIATI	Applicant	
RICKY GABRIELE	Appellant/ Owner	BRUCE KETCHESON/TINA KAPELOS
JO-ANN MARGARET BUSH	Owner	
FRANK GABRIELE	Owner	
COLIN BHATTACHARJEE	Party (TLAB)	
MICHAEL WILSON	Party (TLAB)	
SARAH HENDERSHOTT	Party (TLAB)	

FRANCO ROMANO	Expert Witness
ALEXANDRIA LEUNG	Expert Witness
KIM JEFFREY	Participant
RONALD CLARK	Participant
JACK PROKOPEC	Participant
CHARLOTTE PROKOPEC	Participant
MICHAEL HYNES	Participant
ROSS DIXON	Participant
SANDY FAIERS	Participant
PAUL KENTNER	Participant
RETA MAJOR	Participant
JEFFREY KENTNER	Participant
WILLIAM ERVING	Participant
MARK VANELSBERG	Participant
DEBORAH BROWN	Participant
HEATHER WISE	Participant
LISA ANN FINLAYSON-MARCON	Participant
KEVIN ARTHUR PAGET	Participant
ROBERT MICHAEL MCLELLAN	Participant
DONNA JOYCE MCLELLAN	Participant
MICHAEL PROKOPEC	Participant
KAREN PROKOPEC	Participant
SCOTT EWEN	Participant
MARSHA ELIZABETH O'CONNOR	Participant
JINGWEN FRANCIS	Participant

GRETHE LUND	Participant
PETER BRIMSON	Participant
PATRICIA BRIMSON	Participant
SCOTT MCCORMACK	Participant
MICHAEL JOHN PARISH	Participant
TRACEY IRENE PARISH	Participant
PHILIP GREET NICHOLAS	Participant
DONALD ALLAN ROBERTSON	Participant
IAN GROVE TAYLOR	Participant
PAUL FINLAYSON	Participant
GABRIELLE PEACOCK	Participant
TYNG-HUI CHONG	Participant
DEBBIE RESENDES DA SILVA	Participant
DANNY DA SILVA	Participant
DAVID WILLIAM WALLIS	Participant
DEEPTI PUSHKARNA	Participant
ROSS MACDUFF	Participant
GORD HOLTAM	Participant
KATHLEEN MCAULAY	Participant
MARG GILLESPIE	Participant
PAMELA SALLEY	Participant
MICHAEL BUNGA	Participant
GILLIAN DICKIE	Participant
JAMES WILLIAM DALBY	Participant
AMANDA MARIE EWING	Participant
THOMAS WILLIAM HORN	Participant

INTRODUCTION

These appeals arise by virtue of decisions of the Toronto and East York Panel of the City of Toronto (City) Committee of Adjustment (COA) refusing to grant severance and variance approval to create new three-storey detached dwellings on three proposed lots at 40-42 Elmer Avenue (subject property), in the prestigious 'Beach' Area of the City.

The subject property is currently improved with a 'Queen Anne' style semi-detached residential structure, constructed in approximately 1905, having an identifiable character of a low rise, turreted, two-storey sloped roof appearance surrounded by characteristic green space and mature boulevard trees. It is situated on the west side of Elmer Avenue considerably north of Queen Street. It is somewhat central to an extensive residential neighbourhood consisting primarily of single, semi-detached, duplex and a lesser distribution of apartment building forms. It is elevated somewhat above street grade and has a single rear yard detached garage with access taken from Elmer Avenue, a two-way, north/south street. The driveway is situated along its northerly boundary affording separation from the duplex dwelling at 44 Elmer Avenue, immediately to the north.

BACKGROUND

By decision mailed October 2, 2018, the COA refused three variance applications to construct a new three-storey detached dwelling on each of three residential lots proposed to be created and described in accompanying consent applications. The parallel consent applications, refused on the same mailing date, were to obtain severance approval to divide the subject property into three new residential lots, including division and merger of six Parts and to provide a right-of-way for maintenance access. Each lot is proposed to have private driveway access to Elmer Avenue. Each new lot would have front yard parking and the existing driveway access would be removed and consumed by the northerly house form, its side yard and a front yard parking pad, partially using the existing curb cut.

I had advised that pursuant to Council's instruction, I had attended and viewed the property on two separate occasions antecedent the Hearing of these appeals, held March 26 and September 19, 2019. Further, that despite having reviewed the extensive pre-filed materials including that of over 50 registered Participants, matters that were sought to be part of the evidentiary record needed to be brought forward in the oral Hearing.

Following the COA decision, the Applicant/Appellant had made revisions to the applications. These had the effect, when combined with the subsequent approval of Zoning By-law 569-2013 (superseding By-law 438-86), of much reducing the number of variances associated with each of the proposed new lots.

Due to the number of registered Parties (4) and Participants (50+), the Hearing was unable to be concluded in its first sitting. The Toronto Local Appeal Body (TLAB)

wishes to express its appreciation to all those attending for the enterprise, civility and efficiency in completing the matter in two full Hearing days.

The City did not attend nor participate in this matter.

MATTERS IN ISSUE

The consent and variances were stoutly opposed as being unsuited for the character development of the subject property. The principle premise of this opposition was to the effect that the proposal constituted too much building mass for the proposed lots. The proposed use of 'attic' space, incremental to the permitted Floor Space Index (FSI) calculation, figured prominently in the issues associated with height, scale, massing and 'fit'.

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).

Consent – S. 53

TLAB must be satisfied that a plan of subdivision is not necessary for the orderly development of the municipality pursuant to s. 53(1) of the Act and that the application for consent to sever meets the criteria set out in s. 51(24) of the Act. These criteria require that "regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

(a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2 of the Planning Act;

(b) whether the proposed subdivision is premature or in the public interest;

(c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;

(d) the suitability of the land for the purposes for which it is to be subdivided;

(d.1) if any affordable housing units are being proposed, the suitability of the proposed units for affordable housing;

(e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the

proposed subdivision with the established highway system in the vicinity and the adequacy of them;

(f) the dimensions and shapes of the proposed lots;

(g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;

(h) conservation of natural resources and flood control;

(i) the adequacy of utilities and municipal services;

(j) the adequacy of school sites;

(k) the area of land, if any, within the proposed subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes;

(l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and

(m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41 (2) of this Act or subsection 114 (2) of the City of Toronto Act, 2006. 1994, c. 23, s. 30; 2001, c. 32, s. 31 (2); 2006, c. 23, s. 22 (3, 4); 2016, c. 25, Sched. 4, s. 8 (2)."

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

The Applicant/Appellant, through its legal counsel, Mr. Ketcheson, called two professional expert witnesses: Mr. Franco Romano, a Registered Professional Planner and Ms. Alexandria Leung, an Arborist, as the replacement for Adam Vandermeij, also of the firm Central Tree Services, who had subsequently taken employment with the City.

Each was qualified without challenge to provide expert testimony in their respective fields.

On behalf of the Parties, Mr. Colin Bhattacharjee, Mr. Michael Wilson and Ms. Sarah Hendershott, Mr. Robert George Brown was called to give experiential knowledge evidence in respect of the appeals. Mr. Brown was not sought to be qualified as an expert in the discipline of land use planning. His initial tendering as a witness was objected to by Mr. Ketcheson as having filed materials late, having failed to disclose his area of evidence, his remoteness to the subject property and for having failed to properly perform under the *Rules of Practice and Procedure* of the TLAB.

In a separate Ruling, Mr. Brown was permitted, after pre-filing, to testify at the second day of the sitting, subject to full disclosure in the interim and a strict time limit. These terms were fully met. Mr. Ketcheson was afforded a full right of reply to the Brown evidence. Mr. Romano was called briefly in Reply.

Apart from the foregoing Parties and their witnesses, the TLAB heard from the following individuals generally in the order listed, while a significant number of other Participants attended at intervals. The Parties were offered and did participate to the extent of their interests in the examination and questioning of witnesses. Those Participants who attended and also gave evidence were: Paul Finlayson; Gord Holtam; William Erving; Marg Gillespie; Marsha O'Connor; Kathleen McAulay; Donald Brown; Deborah Brown; Sandy Faiers; Peter Brimson; Iris Savage; and Mike Hynes.

The evidence heard orally, supplemented by the filings, was extensive. I record below those elements germane to the disposition, but without discarding from consideration all that was heard and considered.

Franco Romano provided expert opinion evidence on his land use planning assessment in support of the appeals. His evidence relied upon his Witness Statement (Exhibit 1) and documents disclosure (Exhibit 3). He supplied a consolidated list of variances and conditions (Exhibit 4), subsequently revised (Exhibit 9). The plan of proposed severance was filed as Exhibit 5 and is included herewith for reference purposes as **Attachment 1.**

Mr. Romano's factual evidence and opinions are, for convenience, summarized in the following:

1. The subject property is a relatively large lot, 18.9 m wide, 37 m deep with an area of 708.7 sq m.
2. The zoning by-law permits lot frontages of 6 m width, an FSI of 0.6x lot area and uses that include detached, semi-detached, duplex and triplex dwellings.
3. Lots 1 (Parts 1,2), 2 Parts 3,4,5) and 3 (Part 6) in **Attachment 1**, require no variances and are by-law compliant. Between proposed Lots 1 and 2, being the southerly and middle lot, a right-of-way is depicted and proposed to prevent fence erection and permit unfettered access for a total of 0.9m, between side walls, for a specified length.
4. The house on lot 3, the north lot, is proposed with a side yard setback of 1.06m (front) and 1.07m (rear) whereas the zoning by-law requires 0.45m.
5. The variances sought, Exhibit 4 and 9, are the same for each lot except for the FSI proposed for the north lot, Lot 3 (Part 6). There are no building envelop variances sought for front, side or rear yards, or height (10 m). The

proposed building footprints are fully compliant with by-law locational requirements.

6. The zoning by-law requires one on-site parking space; proposed, via variance, is front yard parking otherwise prohibited in that location. In addition, a front yard parking pad permit is required for each proposed lot through a separate process. The City Transportation Services department has indicated the pad permit permission application must be made “for record keeping purposes”.
7. Plan revisions from those before the COA include the removal of rear covered patio’s and side openings to the buildings.
8. A permit application to injure trees is subject to a pre-filed application process based on an arborists’ assessment report: no trees are to be removed and conditions are proposed to address tree preservation.
9. The proposed buildings are height compliant on main wall height, height of first floor, overall height; the number of storeys is not regulated. A third floor is proposed within the roof line.
10. An artist’s rendering suggests a differentiation in frontage gables and shed roof design and materials reflective of the streetscape, with similar heights to adjacent buildings. For the planner, the design of a grade related porch and front treatment added a harmony but differentiation that, while compact, ‘fits’ with the streetscape.
11. The zoning permits an FSI of 0.6x lot area. Due to slight differences in lot area but identical floor areas proposed, Lots 1 and 2 seek an FSI of 1.05x; Lot 3, to the north, seeks recognition of 0.93x lot area FSI.
12. In an uncontested study area of 337 lots, he found examples of regeneration, a density range (from 0.31x up to 1.35x lot area), a compact low-rise building form with 37% of the lot frontages of similar width, 12% of the lots having an FSI of 0.9x or larger and buildings extending to the mid-point of the lot covering much of its width, and at 2 and 3 storeys.
13. He noted a variety of approaches to parking: street only; front yard (47%); driveways to rear; integral garages.
14. In referencing the Official Plan and OPA 320 (sections 2.3.1; 2.3.1.; 3.1.2; 3.1.2.1; 3.2.1.2; 3.2.1.3; 3.2.6.1;3.4;3.4.1 d); 4.1.1 and 4.1.5) he opined that over both the broader and immediate context, the proposed severances and variances in context, size, configuration, design, fit, mass, scale and built form were well represented, and that the proposal respected and reinforced the existing physical character of the neighbourhood, in both its existing and planned context.
15. In his view, FSI alone was not very instructive and that the proposal afforded ‘adequate light and air’, such that the intensification proposed met and advanced provincial policy, Official Plan, subdivision control and variance tests in a manner that was minor, desirable and ‘compatible’ (Exhibit 3, par.8, p.10).
16. In applying section 4.1.8 of the Official Plan, he asserted that the project is within the zoning permissions set as performance standards, and therefore, by definition, it was therefore compatible.
17. While the zoning prohibits front yard parking, he was of the view that a variance permitting the requisite on-site parking at that location could occur without compromising intensification of the subject property or increasing the

height and built form bulk of the dwellings, as would be the result from integral garages.

18. He found in his assessment no unacceptable adverse impacts of a planning nature.
19. He recommended consent and variance conditions respecting parking, pavers, tree preservation and building plans as a component of the approvals requested (consolidated in Exhibit 9).

In questioning, he felt the loss of street parking (one space) to be 'within the order of magnitude' of the context and not an unacceptable adverse impact, as defined in planning terms. He believed that space could be lost today to the subject property, having presently but one access. He noted the requirement is to provide parking and that yielded the need for a 'balanced' approach - as demonstrated by the proposal - where there is no variance required to any landscaped open space standard and all street trees were being maintained.

He felt that the 70% increase in FSI should not be examined in a mathematical relationship to the definition of 'minor', as a complete elimination of a standard has been considered to be 'minor' where there are no unacceptable adverse impacts.

As to FSI, he suggested that the same buildings as proposed on the lot would generate an FSI of 0.71x lot area, if the 'attic' space under the roof were not used as habitable space, as in neighbouring properties. In his view, the important measure is how the proposal manifests itself on the lot. Further, that the use of 'attic' space for floor area 'is a reasonable value'; he felt it bears no correlation to people or vehicle generation.

He said he had not considered how many lots at 6m width consisted of semi's or how the separation distances between existing houses would perform having met the standards set in By-law 569-2013. In re-examination, he stated the separation distance to the south residence (Mr. Wilson) was 0.61m and 0.45m on the subject property, wall to wall, or 1.06 m total. The by-law requirement for the subject property is 0.45m.

He disagreed that the proposal constituted the largest FSI on the street, citing an FSI of 1.13x on Norway and Kenilworth. In re-examination, his attention was called to 46 Elmer citing an FSI measure at 1.32x, from a COA decision recorded in Exhibit 3.

He noted that integral garages contribute to height, massing and scale and are not counted in FSI.

Paul Finlayson spoke in opposition to the applications in relation to the character of the neighbourhood. In describing the existing semi-detached residences as unique, he felt street character was negatively impacted by the proposal: to achieve front yard parking, the buildings extend further into the rear yards causing deterioration in both the visibility (view plane) and use of front and rear yard landscaped open space.

In questioning, he asserted the proposal 'takes public parking' and may increase the demand for street parking, through intensification.

He agreed that the provision of a front porch was not required under zoning and respected street frontage character on Elmer.

Gord Holtam, also opposed, noted the Applicant's lack of community consultation and lamented the possible loss of the private driveway with a six-vehicle parking capacity. He reiterated that on-street parking access is a major issue and the 'shoe horn' building lots was a precedent that would reduce the number of available on-street spaces.

In questioning, he acknowledged the concern for the possible loss of two parking spaces may in reality be only one. Nevertheless, he felt new families introduced to the lot could have the need for more than one space and increasing the density character of the area, on the subject property or in other houses, pressured scarce capacity.

William Erving, speaking in engineering terms, felt that the zoning limit on FSI at 0.6x must have some meaning and that its intent was not being met by the increases proposed. He felt the setbacks proposed would impact adversely on natural light. He supported area residents concerns as being real, including the loss of parking. He noted that parking pads had been rejected for existing homes (52 Elmer) due to the impact on lot trees.

In questioning, he acknowledged he had a driveway, likely since construction in 1911, and that he was unfamiliar with the zoning by-law.

On recommencement September 19, 2019, the TLAB heard first from **Robert Brown** on behalf of the three opposed Parties.

Mr. Brown stated the following:

1. All three of the proposed lots are by-law compliant.
2. The proposed density even at 0.98x lot area is almost three times the existing built form.
3. The Official Plan, section 4.1, calls for respecting and reinforcing existing neighbourhood character and the proposal in scale, massing and gross floor area at three storeys does not reflect either residential adjacencies, the street or the neighbourhood. It is too much building for the subject site.
4. With reference to Official Plan policy 4.1.5 c) and the Romano data sheet, the proposal in massing and scale is well outside a 'minor' increment in FSI or that prevailing in the area.
5. A graphic, Exhibit 7b, graphically shows gfa/density proposed as against existing, zoning, and area median and suggests it is 1.6 x the allowed zoning control: "this represents a material difference."

In questioning, Mr. Brown acknowledged previous FSI variances approved by the COA, but refused to except that lot size was of any concern beyond the measure of gross floor area. He agreed as to the variety of parking solutions existing in the neighbourhood.

On the issue of massing, he stated that to the lay citizen massing and gross floor area are interrelated. He agreed that architectural design elements can make the same

mass appear different in volume and shape but that FSI is a metric provided in zoning to direct development. In this case, he felt the architectural design of the proposed dwellings met a number of the zoning by-law standards, but not 'massing', through the proposed gross floor area. As such, a critical standard was not met and the proposal constitutes 'too much house for the lots': whereas family sized housing could be built; however, those proposed do not 'fit'.

He was not prepared to concede massing is simply a design exercise and noted that if the matter were advanced under zoning as a renovation, FSI could go to 0.69x; however, the proposal has to be distinguished as a tear down and new build. It is larger than allowed and that it is a 'disconnect' to relate the regulation to design. It is an application that has to be considered in the local context, including the immediate neighbourhood.

Alexandria Leung was called as an arborist to address trees on the subject property. She was accepted to be qualified as an Expert Witness (curriculum vitae, Exhibit 8a; Witness Statement, Exhibit 8c) and to speak to the tree assessment report prepared by her firm, Central Tree Care Ltd. (Exhibit 3, Tabs 14 and 15).

On questioning, she creditably responded that the trees assessment report and protection plan attached as an appendix to her Witness Statement had been reviewed by herself and with her colleagues: she had reviewed, adopted and supported its recommendations.

Of the four trees identified as affected by the proposal, she detailed the measures for protection and noted a permit to injure three trees was being pursued with Urban Forestry. All trees were expected to be preserved and survive the impact of affected works within their Tree Protection Zones (TPZ) - provided the recommendations, including on-site supervision of retaining wall, carport and paver removals by hand - are followed. There would be no tree removals.

On questioning, she acknowledged that like all living matter, there can be no guarantee of survival, but measures taken within the TPZ can follow best practices. The amount of injury proposed is within tolerance and of low impact. She would not agree that the potential for a reduction in the loss of tree canopy offended and was in conflict with the Official Plan policy to preserve the urban forest and increase the tree canopy within the City.

The first opposing Party to address the TLAB was **Colin Bhattacharjee**. In a possible and appropriate division of labour, as invited by Robert Brown, he identified his principle issues as the loss of two on-street parking spaces and the 'loss' of trees.

With respect to parking, Mr. Bhattacharjee provided perhaps the fullest account of parking restrictions, patterns, challenges and responses to the chronic demand for on-street parking on Elmer Avenue. He noted the conundrum created by the City parking By-law effectively discouraging existing residents, on application and appeal, from obtaining front yard parking pad approvals whereas the zoning by-law requires new development to provide parking on-site. In this case, the appeal requests that application be made for a front yard parking pad parking, but only for 'record keeping' purposes.

In his view, the proposal causes the loss of two on-street parking spaces resulting in an adverse impact on area residents that was neither minor nor desirable. He felt that it was not in the public interest to remove publicly available spaces, a scarce resource, by effectively privatizing the previous use of those spaces.

He felt that the 'general intent and purpose' of the Official Plan and zoning by-law is to protect on-street parking as a component of retaining and preserving the existing physical character of the area, including front yard green space. The proposal would not have this consequence of loss had it been located on the east side of Elmer, where on-street parking is not permitted.

In his view, the proposal to injure trees was also contrary to the preservation of tree canopy and protection of the natural environment policies of the Official Plan: that it not be compromised by growth, contrary to policy 3.4.1d. The heightened risk of tree loss and the number of trees affected, he said, was contrary to the Official Plan.

In questioning, he acknowledged that he personally was reliant on on-street parking and noted only one parking pad to his knowledge had been approved in 10 years. He was aware that the City Transportation Services staff had raised no concerns as to the loss of on-street parking, should the project proceed. He agreed that it was his expectation that two spaces could be lost, but that he was not certain as to that accuracy and that he expected the loss of at least one space. He felt development should look to not removing any on-street parking.

Sarah Hendershott was the second opposing Party to speak. She is a resident on the upper level of the duplex immediately north of the subject site. She asserted major negative impact arising from the imposing dimensions, size and density of the projects intended 'fit'. This impact was described as arriving by virtue of five south facing windows she and her neighbour below (Ms. McAuley) share, being their principle recipient of natural southern sunlight.

She said her outdoor deck space would be blocked and shaded by the additional two storeys of walls extending back further - in the plans extant. The building depth would also block sunlight to her son's third floor bedroom above the similarly shadowed dining room, below.

She said no other building has a mass, bulk and height that extends as far back or on a third floor.

She endorsed other comments on the loss of green space and, specifically the difference in the disruption of rear yards.

She felt the massing and bulk constituted too much house on each lot in a manner that did not respect the Official Plan. It is a 70% increase over the by-law: its regulatory effort and intent to prevent massing out in every direction was being frustrated to the disadvantage of the prevailing character of the street, and especially the adjacent properties to the north and south. She asserted that the developer proposes to leave no light, views or parking preservation in a manner that is neither minor, desirable nor a fit.

In questioning, she acknowledged that her property sits on its property line and while her west windows are not impeded, the balcony is within a tunnel that is also enclosed on its north side with most direct sunlight, coming from the south, being blocked.

While she agreed that absolute heights were not offended, she stated that the FSI control would affect the relationship between height and length: she felt that the permitted FSI would permit an addition but not a third storey, as proposed.

Michael Wilson was the final opposing Party to speak. He occupies the property immediately to the south. He asserted substantial impact on his property. That impact is assisted by an FSI increase that, in his opinion was 'grossly out of line'; it extends the building depth well beyond his and other rear yards. He challenged the absence of a rear yard massing rendering. He said his north facing window is subjected to a building extension that would be 1 m distant; he lamented at his rear deck there would be a loss of trees, grading and drainage insecurity, reduced side yards and loss of common viewable green space wherein a three storey building would tower over an outdoor deck.

He felt that the neighbourhood opposition was demonstrably engaged and ought to be acknowledged and respected.

In questioning, he acknowledged that drainage had not been previously raised and that grading, and runoff were a City review process administered through building permit issuance.

Marg Gillespie reasserted her experience with flooding issues; she challenged the efficacy of the applicant's front streetscape rendering as not fully presenting an appreciation of the larger streetscape.

Marsha O'Connor, **Kathleen McAuley, Deborah Brown, Sandy Faiers, Peter Brimson, Iris Savage, and Michael Hynes** supported the speakers and opposing Parties on the implications of the density relief sought, the 'total lack of light', the massing, loss of parking, the potential for injury to trees and the adverse and precedent implications for the streetscape and neighbourhood character consistency. This included the colouring of a sentimental memorialization and emotional support for retention of the existing historical building.

The Applicant's counsel recalled Mr. Romano. He presented Exhibit 9, including revised Conditions requested of the minor variance proposals. The revision adds the language of the Transportation Services recommendation that a permit application be made for parking pads for 'record keeping purposes'.

He also confirmed that the operative zoning by-law is By-law 569-2013 and the Examiners Notice of December 28, 2018 is in that regard govern.

The Parties delivered arguments in summary of their positions.

Mr. Ketcheson identified five primary concerns and addressed each: 1. FSI and massing; 2. Compatibility and adjacency; 3. Parking; 4. Trees; and 5. Precedent.

He emphasized that the proposed intensification scheme is fully by-law compliant and that the FSI increase is appropriate principally because the generated number does not tell much about the form or massing of the buildings. In his submission, he felt it appropriate to distinguish between renovations, additions and new builds. In his view, the emphasis or direction of consideration should turn on appropriateness and compatibility of the projects 'fit', including with adjacent properties, and that consideration or approach would not change. He emphasized compatibility is not sameness and that the test for whether a variance is minor and is acceptable turns on impact. Specifically, if the project meets all zoning by-law performance standards, then that is an appropriate response and is indicative of compatibility, with or without the inclusion of 'attic' space.

He said the FSI number in this instance is within an area range and is not the highest, with 12% of the study area population showing equivalency to the proposal.

He suggested the FSI in zoning is a trigger but that care needs to be exercised when exceeding the standard in how the additional space is deployed and in meeting the requisite statutory and policy tests.

He stated the FSI proposed by the project is 0.71x lot area without occupying the third floor 'attic' space. Since the design and massing is unaffected by employing the 'attic' space as habitable floor area, he urged that greater weight be placed on the massing and streetscape design similarities and 'fit', as well as compliance with all other zoning regulations.

He acknowledged there would be some loss of light and views and asked acceptance of the opinion of Mr. Romano that as a matter of extend it did not amount to unacceptable adverse impacts. He asserted that there is no 'right to a view' and that building footprints in the neighbourhood are staggered with some undulation and diversity.

On the loss of parking, he noted no City Staff concern and the prospect of adverse conditions growing, with or without the project, as demand increased. He suggested parking controls, their solution and options exploration are a circumstance for City consideration under the parking by-law provisions and not a rationale for variance refusal. He was adamant that nowhere in the City Official Plan or zoning by-law was the on-street parking permit system or available spaces made a relevant consideration to the required location of parking on a lot.

With respect to trees, he asked the acceptance of the evidence of the arborist Leung and re-asserted that no trees were requested to be removed. He noted the provisions of the Tree Preservation Plan that tree considerations would be subject to on-site supervision enforceable through the Urban Forestry division of the City.

Arguing against any indicia of precedent, either in respect of FSI or parking, he said each application is required to be evaluated on its own merit. Here, there is a unique opportunity for intensification that is largely by-law compliant wherein a design effort has been employed to ensure compatibility.

Colin Bhattacharjee submitted the core issue for the opponents centred on good planning and their position that the massing and scale of the proposal did not respect and reinforce the area, was not sensitive, gradual or a fit, while causing injury to neighbours, parking and tree resources.

He rejected Mr. Ketcheson's argument that the FSI control is simply a trigger. He re-asserted that moving from a by-law permission of 0.6x to 1.02x floor area is not minor and is a 70% increase, noting 88% of area lots are smaller than 0.9x FSI. He lamented that a City process of refusing parking pad permits to preserve on-street parking spaces was not fair to varying a zoning regulation to permit on-site parking that detracted from on-street parking: an 'inconsistent hammer adverse to existing residents'. He felt that the legislative intent of the pad prohibition is to protect on-street parking.

Michael Wilson also opposed labeling the FSI standard as just a number to trigger a review. He expressed abhorrence to a precedent that encouraged the maximization of development by ignoring the area standard "for a pretty roofline".

In his submission, the FSI control has the intent to keep the design scale down. The proposal, he felt, grossly exceeds the built form on the street.

In response, Mr. Ketcheson repudiated the suggestion that every zoning control was maximized. He denied that there was any legislative intent or relationship between the parking standard under zoning and controls on street parking. The zoning control is, in areas, City-wide, he said, and is not intended to protect local permit parking regulations.

ANALYSIS, FINDINGS, REASONS

It is a unique circumstance to have, on appeal, the division of a developed, inner City, semi-detached building area into three new compliant lots. The lot pattern in the Beach, including Elmer Avenue, presents itself as a diverse, closely knit built form community of period and renewed housing, both uniform and diverse in frontages, area and, less so, lot depth - given the relatively regular alignment of the grid road system.

The appendices to Mr. Romano' Witness Statement (Exhibit 1) adequately describe this character.

The evidence provided by Mr. Romano on lot formation is compelling. Namely, that there is no sustainable argument mounted that challenges the right to apply for a severance of lots that are otherwise fully compliant with the standards set for lot creation in the zoning by-law. There is no evidence that the 1905 'Queen Anne' style residences on the subject property have been designated or even listed for preservation. Indeed, none of the Parties or the Participants challenged that portion of the appeals related to lot creation, implicitly accepting the as-of-right standards. Robert Brown took no issue with the consent approvals sought.

I am satisfied on the evidence of Mr. Romano, having had regard to the provisions of Provincial Policy, the Growth Plan and the canvass of relevant considerations under section 51(24) of the *Planning Act* that lot division, but for the

terms that follow, can properly be entertained and supported as depicted in Exhibit 5 being **Attachment 1**.

I see no reason to labour on his evidence heard both orally and found in his Witness Statement. The subdivision control terms of the Act are addressed properly by the evidence and the applications. For reasons related to the variances, the lot pattern can address different considerations, below, at the election of the owner/applicant.

I find that the division of the subject property ultimately into three individual lots is appropriate on the evidence. While I respect the inherent desire of nearby residents to prefer the *status quo* and to retain the subject property in its existing form and historical ambiance, it is not appropriate to subvert the legitimate application of the planning process to consider alternative scenario's wherein the owner is offered by statute the opportunity for evaluation of the Applications. That planning review process on appeal should not be employed to achieve indirectly, namely building preservation, which it is not empowered to do directly. Heritage preservation is a component of the planning process. However, in the absence of rights and privileges being exercised under the *Ontario Heritage Act,* it is not within the providence of the consent and variance powers of the *Planning Act* to advance preservation by refusal or otherwise, in the absence of relevant and cogent evidence. Nor is it appropriate to use the *Planning Act* jurisdiction herein for the purpose of obfuscating the proper consideration of the approvals sought.

The Applicant proposes a building type (detached) and styles commensurate with the streetscape. Proposed at the street are attributes of the rooflines, height, porches, materials and window fenestration intended to mimic or reflect design elements commonly found on surrounding properties and consistent, even compatible with the neighbourhood norms.

To the extent remitted to the TLAB by the design related policies of the Official Plan, I find that its general intent and purpose is met by the frontage design componentry depicted in the site plan, elevations and rendering reproduced in Exhibits 1 and 3. The architect has used creativity to match streetscape componentry in building form and its construction and from a streetscape perspective that should prove compatible.

Those opposed argue the potential for injury to trees and the institution of front yard parking pads drive the building back and can and do erode the green space ambiance and infiltration capacity of the street frontages. Further, that coupled with the loss of one or two on-street parking spaces, the changes wrought to the streetscape are inconsistent with the retention policy of respecting and reinforcing the existing physical character of the streetscape and neighbourhood.

While there is the kernel of an element here that warrants consideration, I am not convinced on the evidence that certain of the specific objections are either appropriate or supportable.

With respect to the Official Plan policy support for preservation, protection and the enhancement of the tree canopy of the Urban Forest, I find the evidence of the arborist, Ms. Leung compelling and unchallenged. That evidence was to the effect that no trees are to be removed and the impacts expected by the parking pads and

construction proposed for the site are, by tree, tolerable - on the application of proper techniques, with monitoring. There were no adverse comments from the City Urban Forestry division and no conflicting evidence from a qualified professional. I accept that it is appropriate to give weight to this evidence and to conclude, with proper conditions relating to the Tree Preservation Plan in Exhibit 9b and the call for permeable pavers, that such will properly protect boulevard trees and their contribution to the streetscape.

Front yard parking is a contentious element of the applications on appeal and the recipient of cries of inequity directed at the City for the treatment of this subject under zoning and on front yard parking pad permit applications. Coupled with this is the claim to a loss of public on-street parking spaces affording accommodation to the residents and area transients, of which there are an undoubted number.

I agree with Mr. Ketcheson that the regulatory regimes are unrelated and appear to be in conflict as they apply on Elmer Avenue in the current form.

Under zoning, on the creation of a lot, construction of a residence was said to require the provision of on-site parking, specifically located behind the main front wall of the house. If implemented through the Applications, except in the case of an exemption (not applied for here), this would entail at least one additional driveway be added to the current condition, regardless of the parking location. This has the incidental but realistic effect of compromising the supply on on-street parking.

The application is to permit an exception to the locational direction of the parking space, to place it in the front yards. The Transportation Services Department of the City did not comment adversely to that location but, as the road authority, noted conditions to driveway construction and the need for an application for a front yard parking permit, ‘for record keeping purposes’.

The irritant to those opposed is magnified: loss of greenspace; loss of on-street parking and the inequity of instances of themselves being refused off-street parking pad permits ostensibly to preserve on-street parking supply.

I agree that the locational attributes of the zoning regulation have nothing to do with the on-street parking permit process or the formal consideration of applications for parking pad permission in existing front yards. While a clear disconnect (albeit with different considerations) in City regulations present a legitimate arena of frustration to area residents, there is no evidence to support the proposition that the City wide zoning regulation was intended to serve any purpose related to the preservation of the local on-street parking supply.

I agree that there are political options to be pursued with the City respecting the application of parking regulations on Elmer Avenue in its prohibitions, duration, location and permit priorities. These do not carry over to whether the zoning requirement for the presence and location of on-site parking should be varied.

I find that the narrow but compliant lot frontage permission of the zoning by-law dictates that on-site parking must either be provided in the front yard, through integral garages or eliminated altogether. The application is for the first option; there is no real alternative option given the lot widths, even for integral garages. Integral garages on

the evidence were said to increase massing and built form, a key objection in the neighbourhood. They not only contribute to size and scale but are not caught by the regulatory standard of FSI, on the evidence heard.

I find that the consideration of the front yard parking variance is appropriate in the circumstances, subject to the conditions advanced by Engineering Services. Its implications for on-street parking are real, but I accept those implications could possibly occur as-of-right today and that the supply remains under continuing and likely increasing pressure due to a variety of external influences. I find it appropriate that new construction provide on-site parking and that the consequential effect of that supply increase to be at or near net-neutral, in terms of impact, in these circumstances.

Mr. Ketcheson properly identified and framed the remaining major opposition to comprehensive project approval to be the issues of FSI, compatibility and precedent.

These elements are largely interrelated, and their impact considerations are deserving of evaluation and consideration together and separately, as appropriate.

The Applicant proposes an FSI increase to 0.98x lot area for the two southerly units and 1.02 x lot area for the northerly unit, where an enhanced north side yard setback provides an enhanced separation distance to its neighbour, a duplex constructed on the lot line.

That ‘density’ increase is supported as falling ‘within the range’ of densities found in the study area/neighbourhood of Mr. Romano. Further, that by design, it is comprised, significantly, as the employment within the roofline proposed, of ‘attic’ space. In that regard, roof design is said to be compliant with zoning and compatible such that it emulates neighbouring properties. Without the use of the ‘attic’ space, the FSI measure proposed was said to be 0.71x lot area, whereas 0.6x is permitted and 0.69x lot area can be achieved if a renovation, not a ‘new build’.

It is instructive to consider some evolving jurisprudence on the issue of the use and employment of ‘attic’ space as habitable floor area.

Mr. Ketcheson made submissions as to three scenario distinctions between: i) the conversion into habitable space of existing, historical ‘attic’ space through renovation, via enhancements or enlargements; ii) the incorporation of ‘attic’ space in recent construction, whether or not occupied: and, iii) the planned delivery of new dwelling units, through roof designs incorporating habitable space.

In his view, the consideration of applications to increase gross floor area, FSI, density or even coverage controls is the same in each case for the use of ‘attic’ space. Namely, each is to be evaluated separately on its own application of circumstances and subject to the policy and statutory tests applicable in the circumstances.

While he did not invite a finding on that submission, I find that the conclusions on the application of those considerations can well differ with the circumstances identified. Specifically, that new development that is in the applications stage of the plans approval process is of a different character. There, the planned intent to design and incorporate

'attic' space needs to be justified on merit applying the required policy and tests from the perspective of a blank slate.

I was not referred to any policy of the Province or the City that specifically addresses the subject of 'attic space'. There are general policies as to encouraging intensification, making use of existing investments, energy efficiency and the like, but none referenced addressing the use and consideration of 'attics' in the different fact scenario's or circumstances identified.

At issue is whether 'attic' space can be employed as a basis for the increase or variation in density controls, either as a general planning principle or specific rationale in individual circumstances. In the case of the subject property, Mr. Romano appeared to support the FSI variances sought premised, in part, on the filling out of 'attic' space, space within an otherwise compliant roof line (but not footprint), with habitable space.

The TLAB has addressed the employment of 'attic' space in some of the scenario's described.

In *103 Heath Street East,* a variance application included the request to include 'attic' space, through extensive renovations to the 'attic' in a 100+ year old home. That dwelling already enjoyed one of the highest density measures in the neighbourhood. Neighbouhood resistance was premised on issues of density excess, dormers, the potential for overlook, impact on privacy and streetscape considerations.

As the Member hearing the matter, on the principle of incorporating 'attic' space, I stated (TLAB 18226669 S45 27, at p.15-16)

> "I accept that the fsi of the subject property is oversized under current zoning. I also accept that no alteration is proposed to the footprint of the building; namely, that all renovations and proposed renovations are entirely within the vertical alignment of the long existing structure.
>
> I was directed to no policy or regulation in the City Official Plan or zoning by-law that addresses the incorporation of existing space within a building in a more functional manner. Certainly, if that incorporation further exacerbates a regulation, permission may be required and that is exactly how the Applicant has proceeded, first by building permit permission, and then by identified regulatory variances…
>
> In this circumstance, to the extent that living space within the dwelling has been expanded and converted, whether based on issued permits or not, the issue is whether the request to recognize and permit such space meets the applicable Planning Act tests, recited above.
>
> The witnesses in opposition focus on the incorporation of new 'attic space', not previously incorporated as living space or the fsi measure.
>
> Again, there was no policy impediment referenced in the Official Plan preventing the incorporation of attic space. If that is accomplished in this

circumstance by the zoning fsi standard, its relief must stand or fall on the application of the tests.

In my view, there is nothing in the evidence that mitigates against incorporation of existing attic space, even where made more relevant by roof restructuring done in accordance with an approved building permit. If the owner takes a risk in performing roof improvements without a contemporaneous variance, there is a risk - but equally there may well be reason to do roof improvements without a Machiavellian plan to enhance living space.

In this case, I see no undue off-site impact or failure to meet any of the four tests in the allowance of an increase in fsi premised upon making greater use of existing floor space within a structure. In this regard, both planners advanced support for the proposition that the use of existing volumes of space constituted regeneration of the use and was a good thing. Most residents, apart from a concern of the scale of the resultant fsi number, avoided directly contesting the employment of attic space, and its consequent increase in the fsi number."

In *22 Birchview Boulevard* a variance application included the request to include 'attic' space, through improvement to space under construction pursuant to an approved building permit. Changed circumstances in the life of the owners had suggested need to accommodate an aging family member. A density increase was sought for permission to incorporate habitable space via interior renovations to the 'attic', in the as-built but unoccupied new home. That dwelling already enjoyed a minor density variance; however, the application involved one of the highest density measures in the neighbourhood. Neighbouhood resistance was premised on issues of the density excess, dormers, the potential for overlook impact on privacy and whether a 'bait and switch' had occurred between successive applications.

As the Member hearing the matter, on the principle of incorporating 'attic' space, I stated (TLAB 19 1613755 S 45 03, issued September 24, 2019 at p.9-10)

"In any event, it is the substance of the application on appeal that is germane and not the individual circumstance, evolving or otherwise, of a particular party. The subject premises represents an investment likely to serve many generations; it is that long term duration that requires assessment on principles of good community planning.

Although a new- build circumstance, this appeal arises in the context of the dwelling being substantially complete. The 'attic' space, sought to be recognized by the density measure increase, exists. In this circumstance, although the dwelling has not been occupied, the request is more in the nature of a conversion of as-built space rather than an approval sought for the impending construction of new space.

There is no issue of the expansion or enlargement of an existing legal non-conforming or non-complying space. It is also not the circumstance of a renovation, with improvements, of existing historical 'attic' space, although an

analogy can be made, in part, to this Members decision in *103 Heath Street East* (TLAB 18 226669 S 45 27).

In circumstances where the TLAB is requested to 'recognize and maintain' a use of space by way of an FSI increase, the approach mandated is to assess the request as if the space did not exist and whether it would otherwise be warranted on principles of good community planning.

In such a circumstance, the actual existence of the space can assist with those aspects of assessment that go to impact and the other statutory tests. That can be a consequence of observation, experience or resultant circumstance. For the subject property, independent of the calculation of the FSI number, there was general agreement that the building, as constructed, sits comfortably on its lot. In Official Plan terminology, the structure 'fits' its surroundings, without raising issues of height, massing, or scale. Mr. Romano described the building, as built, to be similar to and compatible with the style, massing and type of nearby dwellings. He noted that the variance requested would, in this instance, result in no change to the accepted massing or height: that the design, height and physical character of low rise building form is maintained, in conformity with the Official Plan, OPA 320 and applicable zoning. Only the FSI, to him a 'proxy' for massing and scale, and a zoning regulation not an Official Plan measure is infringed. In his view, FSI "is not a measure of density" but an indicator of scale and fit, which in the instance of this built form is within the range of interspersed examples throughout his study area."

In the foregoing, I maintain that while the principle of allowing FSI increases to permit the habitation of existing space is supported, distinctions are to be drawn between renovations and new builds. In new construction, even where intended to be facilitated by variances that are subject to approval, the opportunity exists to comply with zoning permissions as well as increments that pass the requisite scrutiny.

I see no principle or support for the application of design and construction practices to incorporate 'attic' space in addition to variance approvals sought, where the FSI standard in the by-law is already exceeded. To suggest that an increase in GFA/FSI can be sought and justified for a new build and then further enhanced by the incorporation, within a roofline design or otherwise, of putative 'attic' space can be an example of 'gilding the lily'.

In my view, the intent of the zoning standard for density is to regulate, in crude measure, the amount of habitable space on a lot. The purpose of this standard is to encourage some consistency in massing as between neighbours across the zone. The standard neither dictates uniformity of design nor the actual size of dwellings or space occupied, where the lot pattern differs in lot sizes and architectural expression yields differing design approaches. The standard set does, however, especially where long established or recently reconfirmed, add an element of consistency and, by definition, compatibility. This check can appear where changes are sought with potential implications going to the policy requiring respect and reinforcement of the existing physical character of the area.

I am hesitant, therefore, in the absence of any 'attic' policy or generally accepted planning principle, to consider the density regulatory control in zoning merely as a trigger to consider requested increases in the light, simply, of an owner's aspirations for a lot. Rather, the zoning standard to be exceeded, must start with the zone standards in place and in circumstances of new construction, be justifiable on the policy and statutory tests applicable, without the presumption of justification as to additional entitlements arising by area examples, averages, 'attic' space inclusions or generalized 'trends'.

The Applications here are said to meet all zone standards except where specific relief is requested. Further, that the design is compatible in the sense of Official Plan Amendment 320 on a neighbour, street and geographic neighbourhood level - as it replicates existing built form and is within the range of FSI study area examples.

In contrast, the Parties, especially those adjacent, Ms. Hendershott, Mr. Wilson and Ms. McAulay, cite undue adverse impact by the volume of space occupied by the three structures. They properly connect volume to FSI and its influence on building height, setbacks, length and massing appearance. Those impacts are properly exemplified in the proposed buildings being driven further into the proposed lots by front yard parking, with building massing of three storeys blocking light and air circulation, adversely influencing privacy considerations and reducing the amount of rear yard greenspace.

The applicant argues that these very aspects of building length, depth, height and front and rear yard and design elements are fully compliant with the standards of the zoning by-law. While that is largely true, it is equally apparent on the evidence that the location of the massing does have the resultant proximity effects that are the subject of complaint.

The Official Plan and OPA 320 ask that respect be given and that the existing physical character of the neighbourhood be reinforced. Among the criteria for consideration in the advancement of that objective is the list in section 4.1.5, including:

> "5. Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular:
>
> a) patterns of streets, blocks and lanes, parks and public building sites;
>
> b) prevailing size and configuration of lots;
>
> **c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties**;
>
> d) prevailing building type(s);
>
> e) prevailing location, design and elevations relative to the grade of driveways and garages;
>
> f) prevailing setbacks of buildings from the street or streets;

> **g) prevailing patterns of rear and side yard setbacks and landscaped open space;**
>
> h) continuation of special landscape or built-form features that contribute to the unique physical character of the geographic neighbourhood; and
>
> i) conservation of heritage buildings, structures and landscapes.
>
> The geographic neighbourhood for the purposes of this policy will be delineated by **considering the context within the Neighbourhood in proximity to a proposed development, including: zoning; prevailing dwelling type and scale**; lot size and configuration; street pattern; pedestrian connectivity; and natural and human-made dividing features…"
>
> (Emphasis added)

While Mr. Romano addressed his opinion on each of these issues, his evidence on c) and g) was scant. His reply evidence did not address the matters raised, especially by the adjacent residents. His evidence consisted of the FSI justification being sought as fitting nearby properties and the suggestion that there were examples of 'undulating' buildings providing differentiation in rear yard setbacks and landscaped open space. In reply he spoke to unrelated conditions should approvals be granted.

In contrast, I was provided resident evidence of a greater rear yard incursion, by three storeys of volumetric space for the three dwellings – being both deeper and higher than the adjacent properties. I have recited in their evidence, above, the consequent perceptions of undue adverse impact of this massing and built form arising and as being real, present and negative to the enjoyment of their space and uncharacteristic of their existing physical environment. They raise the policy protections afforded that environment, above highlighted, and claim that the intent and purpose of those policies is being denied their living environment.

In *311 Chaplin Crescent* a variance application included the request to build out through renovation and enlargement a new detached dwelling including a density increase. That dwelling already enjoyed a minor density variance; however, the application involved one of the highest density measures in the neighbourhood. Neighbouhood resistance, particularly the adjacent neighbours, was premised on issues of the density excess, the potential for overlook impact on privacy and whether the proposal constituted too much building on the lot.

As the Member hearing the matter, on the principle of assessing undue adverse impact, I stated (TLAB 17 181621 S45 22, issued November 23, 2017 at p.14 and following):

> "Connected to the opposition concerning impact on neighbouring properties are the two principle issues of undue massing and loss of rear yard greenspace…
>
> On all the evidence tendered, this Member has significant reservations concerning a variety of aspects of the Applications.

1. Density or fsi: the Application request yields an fsi of 1.22 times the area of the lot. The fsi existing is @ .696; under both the new and the City By-law, the permission is .60.

It is patent is assessing good planning that matters not turn on a mere number. The Toronto Official Plan, offering direction as to how to assess whether approvals sought 'respect and reinforce' the physical character on an area, directs that consideration be given to, inter alia, measures of height, massing and scale. This direction is further amplified by the anchoring challenge of whether the proposal, in all its manifestations, physically 'fits' within its environs and context.

These tests are not unexpected, novel, ambiguous or unclear. They engage consideration of the many influencing factors, including the adequate use of spatial separation and consideration of the numerous private and public interests in delivering good community planning.

In that regard, decisions need to be cognizant that the fsi measure is but one gauge of the assessment of massing, scale and fit. What is most significant in this evaluation process is the presence that this proposal would assume in a physical relationship to existing and planned built form. Fit is, of course, a relative term. On the one hand an object may fit into a container, but it might be entirely inappropriate to do so in the absence of insulating the object from injury, thereby requiring a bigger container.

In the same manner, as indicated, consideration is required as to whether the concerns of the neighbours for the proposed massing are simply apprehensions or identify real incompatibility. We are all aware of the adaptability of the human form to accept circumstances not of one's initial choosing.

I agree with the interpretation of the planner Kakaria that 'compatibility' does not mean sameness. However, I did not take the concerns of the Appellant and Participants to be so narrowly focused.

The appreciation of the measure of fsi must come from its context and the objectives of land use planning, including the making of determinations in the best long term interests of those affected by them, present and into the future.

I also agree with the submission from counsel for the Applicant, that where the Official Plan strives for compatibility in physical character, this does not mean or require that the application of a uniform fsi standard is necessary to implement the goal. Namely, what is important is to stand back and examine the larger context and in suitable circumstances grant or support aberrations on touchstones of compatibility, fit, impact and neighbourhood context.

The use of fsi as one regulatory control is an important element of a variety of considerations. In a temporal sense, the subject property at an fsi of .696 has, for many decades enjoyed a perfect integration with its neighbours and in the context of multiple example dwellings in the 'immediate neighbourhood'.

The request for approval is more than twice the regulatory permission and approaching twice the existing reality. It therefore seems incumbent to have closely examined the evidence in support of its justification, with the larger context of considerations in mind.

I agree that current construction trends demonstrate an increase in building size (potentially density on a lot) and can be considered, even expected as an element of a demolition and new construction or a substantial rebuild. That increase, however, should be grounded on more than architectural drawings attesting to construction feasibility. It should have a rationale beyond "it is within the range experienced in the 'general neighbourhood'".

In my view, it requires more than a justification of replicating a dwelling type and scale within a size range that does not share the subject properties reduced lot dimensions or location.

However, for residential single detached dwellings within a Neighbourhood designation where 'stability' is recognized, 'fit' is mandated and change is to be 'gradual', the rationale seems a recipe for disruption. Where Council has sought to recognize and encourage higher densities and greater heights, massing and built form, it has done so with specific policies, ''Avenue designations', and zoning regulatory adjustments. None of these factors were said to be present or applicable to the subject property.

Here, the proposed increment in fsi was couched in a single rationale: 'that's what the plans show". The architect was not present to provide further insight and the planner was not able to demonstrate any contribution to the reasons proposed for the scale, massing or implications on landscaped open space.

Rather than comparing the proposed fsi of 1.22 times the lot area to the permission set in both by-laws, I find it incumbent on the proponent to explain, in land use planning terms, the reality of how that figure attaches to the context of the site and is a reasonable development standard for this lot. I find the explanation that it yields a dwelling size in the range of its new peers on different sized lots to be less than compelling. I find to create a notional fsi for the subject property, based on applying the projects size to an average lot size on an area basis, as described by the planner and counsel in argument, to be unhelpful. To accept such a rational would be tantamount to saying the contribution of the density control as a guide to the carrying capacity of a lot, is no longer a relevant land use planning tool or consideration. I am not prepare to go that far; the proposed increment needs to be viewed against the built form of its environment and in that context I find more in favour of the perceptions and measures of the neighbours, on massing impact, than the professional evidence, the support pillars for which I find were lacking."

I find that these considerations are applicable to the three proposed lots and that it is the density sought that contributes to the expressed massing and scale concerns expressed as yielding adverse impacts on the neighbourhood and the immediate, abutting properties.

No shadowing analysis was undertaken by the Applicant.

I accept that there will be undue adverse impact as proposed: it is apparent, open, notorious, appreciable and worthy of qualification, even in the compressed properties found in the Beach.

That said, I have no evidence as to an appropriate scale of acceptable FSI as no measures of differentiation were presented. Still, I am prepared to disallow the FSI variance appeal simply because the Applicant has chosen an FSI number and built form that generates unacceptable impact on light, views, air circulation, privacy and the prevailing pattern of rear yards and associated green space.

I was provided with no evidence or consideration as to why or how the footprint, common to all three dwellings, was conceived or the 'attic' space determined to be incorporated. Even at 0.71x lot area, the statistic space generation without 'attic' space bears no semblance of support as to a defined rationale. The buildings, albeit narrow, do present a layout that services a residential building with four bedrooms, but how that layout came about was not addressed. In my view nothing springs from the architect's layout, any other rationale or the suggestion that third floor occupancy of the roof structure yielding the FSI numbers proposed is sacrosanct or is based upon some objective rationale.

I accept, as did the COA, that the FSI measure requested simply yields too much massing and building form on the lots and is out of character with the physical attributes of the neighbourhood.

In my view, it is not the function of the TLAB to simply disagree with the Applications or an aspect and leave the matter in limbo. At the same time, there is no inherently correct FSI number and certainly none that might satisfy all of the engaged individuals that spoke.

The FSI variances applied for and appealed are not approved.

There are two elements in considering 'how much is too much'.

First, from the evidence, I am of the view that the proposed three level incursion into the rear space of the properties sought to be created is simply too great, having in mind the importance of that space and the amenities it affords to the use and enjoyment of all properties influenced by the built form.

I find the building mass proposed for the rear of the subject property is simply too imposing.

I am supportive of and require the following modifications to the plans for the subject property:

1. The complete elimination of any third floor space, habitable or attic, west of the westerly main wall building face of the residence actually

existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1**.

2. A redesign of the second floor exterior treatment to emulate and continue the roof design for second storey occupancy, west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1.**
3. A prohibition on any deck, balcony or platform above the first floor, west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1**.
4. A prohibition on any windows or openings on the south or north walls abutting No's 38 and 44 Elmer Avenue, west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1**.
5. A prohibition on any covered porch, patio, platform, apart from temporary awnings, or heating, ventilation air conditioning equipment westerly from the west building face of any proposed dwelling, or in any side yard.

Second, and in addition to the foregoing, I would also support and assist to complete as may be required within my jurisdiction:

6. the conversion of the southerly two proposed building lots and dwelling units on **Attachment 1**, Parts 1-5, (House #1 and #2) to a semi-detached dwelling unit type, thereby facilitating the elimination of much of the intervening space and proposed right-of-way between the two proposed buildings. In the event that the owner pursues this option, the south side yard setback of the proposed dwelling shall be increased to 1 m west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as depicted by dotted line limit on **Attachment 1**.

With these adjustments, the development of the subject property and its impact on adjacent properties may be mitigated to an extent.

A period of time will be afforded the owner to consider modifications to the plans to accord therewith, failing which the appeal will be refused and the decision of the COA confirmed.

INTERIM DECISION AND ORDER

The decision of the Committee of Adjustment is set aside and, subject to the terms and conditions herein:

1. The land division and right-of-way contemplated in **Attachment 1** is approved;

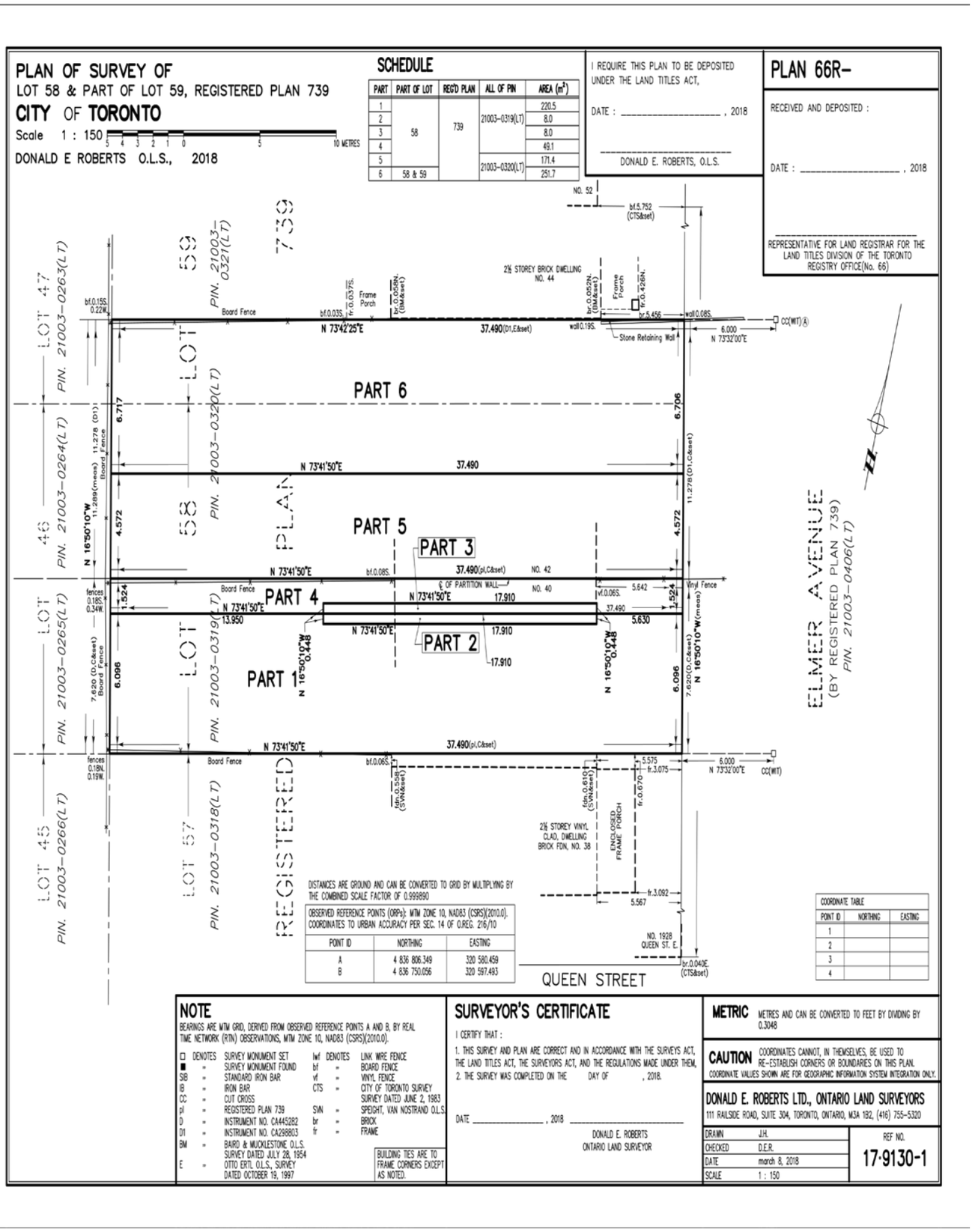
2. At the owners election, paragraph 1 may be modified by the conversion of the southerly two proposed building lots and dwelling units on **Attachment 1**, Parts 1-5, (House #1 and #2) to a semi-detached dwelling unit type, thereby facilitating the elimination of much of the intervening space and proposed right-of-way between the two proposed buildings. In the event that the owner pursues this option, the south side yard setback of the proposed dwelling shall be increased to 1 m west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as depicted by dotted line limit on **Attachment 1**.
3. The consent approval granted in paragraphs 1 and 2 shall be subject to the Consent Conditions Approval identified on **Attachment 2** hereto and the **Supplementary Approval Condition**, below in paragraph 6.
4. The variances set out on **Attachment 3** are approved save and except as may be modified by the option afforded the owner in paragraph 2.
5. The variance approvals granted in paragraph 4 shall be subject to the Variance Conditions Approval identified on **Attachment 4** hereto and the **Supplementary Approval Condition,** below in paragraph 6.
6. **Supplementary Approval Condition:** the approvals granted in this Interim Decision and Order and the time frame required to complete the Consent Conditions Approval are of no force and effect pending the following: the owner shall have a period of time to consider the option provided in paragraph 2 and to provide any revisions in the form of revised plans made in accordance with this Interim Decision and Order. A Final Decision and Order will issue upon advice as to the option in paragraph 2 and compliance with the conditions of variance approval as specified in paragraph 5. For greater certainty, if the requisite Plans Examination Report, lot division plan, plans, elevations, site plan and Floor Space Index information is not received by the TLAB on or before July 2, 2020, or such further extension as the TLAB may allow, the appeals herein are refused and the decision of the COA will be confirmed.
7. If difficulties arise in the implementation of this Interim Decision and Order, the TLAB may be spoken to by any Party on notice to the other Parties.

Attachment 1 Severance Plan (Exhibit 5)

Attachment 2 Consent Conditions Approval

CONSENT CONDITIONS APPROVAL

Exhibit 5/Attachment 1



The owner shall file the following with the Committee of Adjustment office within ONE YEAR of the date of this Decision:

1. Confirmation of payment of outstanding taxes to the satisfaction of Revenue Services Division, Finance Department.

2. Municipal numbers for the subject lots indicated on the applicable Registered Plan of Survey shall be assigned to the satisfaction of Survey and Mapping Services.

3. Prior to the issuance of a building permit, the applicant shall satisfy all conditions concerning City/Privately owned trees, to the satisfaction of Urban Forestry Services.

4. Where no street trees exist, the owner shall provide payment in an amount to cover the cost of planting a street tree abutting each new lot created, to the satisfaction of Urban Forestry Services.

5. One electronic copy of the registered reference plan of survey integrated to NAD 83 CSRS (3 degree Modified Transverse Mercator projection), delineating by separate Parts the lands and their respective areas, shall be filed with the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services. Two copies of the registered reference plan of survey integrated with the Ontario Coordinate System and listing the Parts and their respective areas, shall be filed with City Surveyor, Survey & Mapping, and Technical Services.

6. One electronic copy of the registered reference plan of survey satisfying the requirements of the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services, shall be filed with the Committee of Adjustment. Three copies of the registered reference plan of survey satisfying the requirements of the City Surveyor, shall be filed with the Committee of Adjustment.

7. Within ONE YEAR of the date of the giving of this notice of decision, the applicant shall comply with the above-noted consent conditions and prepare for electronic submission to the Deputy Secretary-Treasurer, the Certificate of Official, Form 2 or 4, O.Reg. 197/96, referencing either subsection 50(3) or (5) or subsection 53(42) of the Planning Act, as it pertains to the conveyed land(s) and/or consent transaction(s).

Attachment 3. Variance Approvals*

(Part references subject to the owner's option provided in paragraph 2 of the Interim Decision and Order)*

Note: a Plans Examiners Report is required to identify the space measures indicated by 'XXXX' for the following parcel variances)

40-42 Elmer Avenue – **Parts 1 and 2** – File A0381/18TEY

PURPOSE OF THE APPLICATION:

To construct a new three storey detached dwelling.

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

1. Chapter 200.5.10.1, By-law 569-2013

A minimum of one parking space is required to be provided behind the main front wall. In this case, zero parking spaces will be provided behind the main front wall.

2. Chapter 10.10.40.40.(1)(A), By-law 569-2013 The maximum permitted floor space index of a detached dwelling is 0.6 times the area of the lot (136.98m²). The new detached dwelling will have a floor space index equal to XXXX times the area of the lot (XXXXm²).

3. Chapter 10.5.80.10.(3), By-law 569-2013 A parking space may not be located in a front yard or a side yard abutting a street. The parking space will be located in the front yard.

4. Section 6(3), Part I 1, By-law 438-86 The maximum permitted gross floor area of a detached dwelling is 0.6 times the area of the lot (136.98m²). The new detached dwelling will have a gross floor area equal to XXXX times the area of the lot (XXXXm²).

5. Section 4(4), By-law 438-86 A minimum of one parking space is required to be provided behind the main front wall. In this case, zero parking spaces will be provided behind the main front wall.

6. Section 6(3), Part IV 1(E), By-law 438-86 A motor vehicle parking space is not permitted to be located between the front wall of the building and the front lot line. The parking space will be located between the front wall of the building and the front lot line.

40-42 Elmer Avenue – **Parts 3, 4 and 5** – File A0380/18TEY

PURPOSE OF THE APPLICATION:

To construct a new three storey detached dwelling.

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

1. Chapter 200.5.10.1, By-law 569-2013 A minimum of one parking space is required to be provided behind the main front wall. In this case, zero parking spaces will be provided behind the main front wall.

2. Chapter 10.10.40.40.(1)(A), By-law 569-2013 The maximum permitted floor space index of a detached dwelling is 0.6 times the area of the lot (136.98m²). The new detached dwelling will have a floor space index equal to XXXX times the area of the lot (XXXXm²).

3. Chapter 10.5.80.10.(3), By-law 569-2013 A parking space may not be located in a front yard or a side yard abutting a street. The parking space will be located in the front yard.

4. Section 6(3), Part I 1, By-law 438-86 The maximum permitted gross floor area of a detached dwelling is 0.6 times the area of the lot (136.98m²). The new detached dwelling will have a gross floor area equal to XXXX times the area of the lot (XXXXm²).

5. Section 4(4), By-law 438-86 A minimum of one parking space is required to be provided behind the main front wall. In this case, zero parking spaces will be provided behind the main front wall.

6. Section 6(3), Part IV 1(E), By-law 438-86 A motor vehicle parking space is not permitted to be located between the front wall of the building and the front lot line. The parking space will be located between the front wall of the building and the front lot line.

40-42 Elmer Avenue – **Part 6** – File A0379/18TEY

PURPOSE OF THE APPLICATION:

To construct a new three storey detached dwelling.

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

1. Chapter 200.5.10.1, By-law 569-2013 A minimum of one parking space is required to be provided behind the main front wall. In this case, zero parking spaces will be provided behind the main front wall.

2. Chapter 10.10.40.40.(1)(A), By-law 569-2013 The maximum permitted floor space index of a detached dwelling is 0.6 times the area of the lot (150.96m²). The new detached dwelling will have a floor space index equal to XXXX times the area of the lot (XXXXm²).

3. Chapter 10.5.80.10.(3), By-law 569-2013 A parking space may not be located in a front yard or a side yard abutting a street. The parking space will be located in the front yard.

4. Section 6(3), Part I 1, By-law 438-86 The maximum permitted gross floor area of a detached dwelling is 0.6 times the area of the lot (136.98m²). The new detached dwelling will have a gross floor area equal to XXXX times the area of the lot (XXXXm²).

5. Section 4(4), By-law 438-86 A minimum of one parking space is required to be provided behind the main front wall. In this case, zero parking spaces will be provided behind the main front wall.

6. Section 6(3), Part IV 1(E), By-law 438-86 A motor vehicle parking space is not permitted to be located between the front wall of the building and the front lot line. The parking space will be located between the front wall of the building and the front lot line.

Attachment 4. Variance Conditions Approval

1. Where there are no existing street trees, the owner shall provide payment in lieu of planting one street tree on the City road allowance abutting each of the sites involved in the application. The current cost of planting a tree is $583.00, subject to changes.

2. The owner shall submit an application for permit to injure or remove tree(s) to Urban Forestry, as per City of Toronto Municipal Code Chapter 813, Article III. All permit applications shall include the letter, Report and Tree Preservation Plan of Central Tree Care Ltd dated June 28, 2018 (Exhibit 3, Tabs 14 and 15, TLAB Hearing)

3. Each driveway and parking space, including the City boulevard portion of each driveway, shall be paved with permeable pavers excluding the use of limestone screening or polymeric sand.

4. The owner shall submit an application to Right-of-Way Management Section, Off Street Parking, for the parking space located on the private portion of each property, which will not be subject to any fees, but for record keeping purposes only.

5. Subject to satisfactory completion and filing with the TLAB of revisions to affect the following, the subject property shall be developed substantially in accordance with the site plan and elevation drawings prepared by Jeff Cogliati Architect, dated November 7, 2018:

a) The complete elimination of any third floor space, inhabitable or attic, west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1,** above.
b) A redesign of the second floor exterior treatment to emulate and continue the roof design for second storey occupancy, west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1.**
c) A prohibition on any deck, balcony or platform above the first floor, west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1**.
d) A prohibition on any windows or openings on the south or north walls abutting No's 38 and 44 Elmer Avenue, west of the westerly main wall building face of the residence actually existing at 38 Elmer Avenue on the issue date of this decision and as it is depicted by dotted line limit on **Attachment 1**.
e) A prohibition on any covered porch, patio or platform apart from temporary awnings, or heating, ventilation air conditioning equipment westerly from the west building face of any proposed dwelling, or in any side yard.
f) A Plans Examiners Report is required to identify the space measures indicated by 'XXXX' for the parcel variances for FSI in Attachment 3.