

# DECISION AND ORDER

**Decision Issue Date**      Friday, October 25, 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): SOUVIK MUKHERJEE

Applicant: STAVROS THEODORAKOPOULOS

Property Address/Description: 120 HENDON AVE

Committee of Adjustment Case File: 18 254749 NNY 23 MV

**TLAB Case File Number: 19 113459 S45 18 TLAB**

**Hearing date:**      Friday, June 07, 2019

**DECISION DELIVERED BY S. Talukder**

## APPEARANCES

NAME	ROLE	REPRESENTATIVE
SOUVIK MUKHERJEE	OWNER	
STAVROS THEODORAKOPOULOS	APPLICANT	
SOUVIK MUKHERJEE	APPELLANT	
CITY OF TORONTO	PARTY (TLAB)	JASON DAVIDSON

## INTRODUCTION

1. Souvik Mukherjee, the Applicant and owner of the property at 120 Hendon Avenue (Subject Property) appeals the decision of the Committee of Adjustment (COA). The COA denied removing the existing sloped roof from the detached garage of the Subject Property and replacing it with a flat roof at a height of 6.7m.
2. The Subject Property is located in the Newtonbrook West neighbourhood in North York.

3. The City of Toronto (City) opposes the application for the increased height of the garage.
4. At the hearing, I advised the parties and participants present that I visited the site of the Subject Property and surrounding area to familiarize myself with the neighbourhood.

## **MATTERS IN ISSUE**

5. At the COA, the Applicant sought a height for the garage of 6.7m. After the COA's refusal decision, the Applicant amended the site plans and now seeks approval of a height for the garage of 6.65m. Further amendments were made to the site plans (Attachment 1), which are discussed in the Evidence section below.
6. As a result of the amendment of the site plans, at issue is whether the following variance should be approved by the Toronto Local Appeal Body (TLAB):

### **Chapter 10.5.60.40.(2), By-law No. 569-2013**

The maximum height of an ancillary building or structure is 4.0m.

The proposed height of the ancillary structure is 6.65m.

### **Chapter 10.5.60.20.(2), By-law No. 569-2013**

If an ancillary building or structure is located on a lot with a lot depth greater than 45 metres, and its height is greater than 2.5 metres or its floor area, including areas for the purpose of parking, is greater than 10 square metres, the minimum rear yard setback for the ancillary building or structure is equal to half the height of the ancillary building or structure 3.35 metres.

The proposed rear yard setback for the ancillary building is 1.02 metres.

### **Chapter 0.5.60.20.(3), By-law No. 569-2013**

The minimum side yard setback for an ancillary building or structure in a rear yard and 1.8 metres or more from the residential building on the lot is 0.3 metres.

The proposed east side yard setback for the ancillary building is 0 metres.

1. At the hearing, the Applicant also sought to have the application approved under section 45(2)(i) for enlargement or extension of the garage that is legal non-conforming use. At the hearing, the Applicant was given the opportunity to establish the applicability of this section despite the City's objection for the Applicant to present evidence on this issue.

## JURISDICTION

### Provincial Policy – S. 3

2. A decision of the TLAB must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area ('Growth Plan').

### Minor Variance – S. 45(1)

3. In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:
  - maintain the general intent and purpose of the Official Plan;
  - maintain the general intent and purpose of the Zoning By-laws;
  - are desirable for the appropriate development or use of the land; and
  - are minor.

### S. 45(2)(a)(i)

4. On appeal, the TLAB, upon any such application where any land, building or structure, on the day the pertinent by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit:
  - i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed....

## EVIDENCE

### Carolyn Winsborough

5. The Applicant called Ms. Carolyn Winsborough, who was qualified to give professional land use planning opinion evidence on sun/shadow studies.
6. Ms. Winsborough conducted her shadow study based on two assumptions: (1) the trees/cedar hedges that currently exist around the Subject Property are cut down permanently and not replaced and (2) the current fences of all properties will stay in place. She relied on the first assumption because if the current hedges stay in place, there will be almost no increase in shadow from the proposed garage and the hedges will act as a privacy screen for the garage's shadows. Assuming that the surrounding hedges are removed, there will be a small increase in shadowing. The largest increase in shadowing will be at 10:18

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a.m. on March 21<sup>st</sup>, which will cover an additional 10m<sup>2</sup> of the rear yard of the property behind the Subject Property at 7 Gaslight Court. She noted that this is not a major increase, as this increase in shadow will cover about 4% of the rear yard. The shadow will not hit the main face of the house at 7 Gaslight Court. She noted that nearby municipalities have guidelines on when the effect of shadows are adverse. Based on the results of her study, Ms. Winsborough concluded that there are no adverse or undue shadow impacts on the neighbouring properties.

Roy DallaZuanna

7. The Applicant called Mr. Roy DallaZuanna, who works in the construction industry and worked on the Subject Property. He was involved in the partial demolition of the house on the Subject Property and repairs of the existing house and the current garage.
8. Mr. DallaZuanna reviewed aerial photos of the Subject Property dated 1950 and 1953, which were available at the City's public database. By that period, the house was built but the garage was not. He opined that as the garage was a solid structure with proper concrete footing, it would have been built contemporaneously or immediately after the construction of the house. This is because proper access to the rear yard would have been needed to transport the construction materials for the garage and a completely built house would have impeded clear access. An aerial photograph of the property taken in 1953 shows the presence of the garage structure.
9. Mr. DallaZuanna opined that it would have taken about a year to complete the garage structure from 1950. Therefore, he opined that the garage would probably have been built by the summer of 1951. On cross examination, he clarified that it was possible to build a garage a few years after the construction of the dwelling, however, it would be more difficult than building it simultaneously or immediately after the dwelling construction because of access issues to the backyard. He noted that in 1950, access to the back of the house was possible by an access road which was no longer available by 1953.

Kadambini Pandey

10. The Applicant called Ms. Kadambini Pandey, who I accepted as qualified to give professional land use planning opinion evidence.
11. Ms. Pandey described her study area to be bounded by Blake Avenue in the north, Eldora Avenue in the east, and by Altamont Road in the west. The south of the Neighbourhood Study Area is bounded by Finch Avenue West but excludes properties on this street itself as well as new townhouses on the south-west corner where Altamont Road meets Finch Avenue West. The study area is within a five minutes walking distance from the Subject Property. The Subject Property is in a site designated as a Neighbourhood in the OP and is classified as RD under the Zoning By-law 569-2013.

12. The Subject Property is in a stable neighbourhood with bungalows and larger replacement single detached dwellings with 1-1/2 and 2 storeys. The parking arrangement in this neighbourhood includes single and double front yard parking pads, integrated garages, below grade garages and detached rear yard and side yard garages. Integral garage is the dominant form of garage.
13. The current application has the following amendments on the site plans provided at the COA:
  - a. Height of garage is 6.65m
  - b. The west side of the garage has one small window instead of two windows, reducing privacy impacts on the west side
  - c. The bottom floor windows are removed and replaced with concrete
  - d. The upper floor windows will be removed
14. Ms. Pandey testified that the rear garage is in keeping with the neighbourhood characteristics. The existing garage has a sloped roof, which will be removed and replaced with a flat roof. The renovation will maintain the current existing storage loft above the garage. As the result of the amendments described above, there will be only one window in the west which addresses privacy concerns regarding overlook from the windows.
15. Ms. Pandey stated that the current garage is legal non-conforming and believes this garage was built near the time the original bungalow house was built in around 1950. During her site visit, she noted that the garage had significant raccoon feces and presence of raccoons. She noted that there may be a raccoon infestation in this garage. The City of Toronto raccoon management guidelines provide the suggestion that a flat roof for a garage assisted in inhibiting raccoon infestation. Therefore, in her view, having the flat roof structure is a preferable roof structure for the garage.
16. Ms. Pandey referred to OP policies 2.3.1.1, 3.1.2 and 4.1.5. She stated that the side and back yard variances satisfy these policies and respect and reinforce the existing physical character of the neighbourhood, as these variances refer to already existing conditions of the garage. The garage already exists in the neighbourhood with a roof that is higher than the proposed roof height. With respect to the height variance, she stated that the new flat roof will provide an interesting new roof structure to the neighbourhood and the garage will be visible from the street or sidewalk. She noted that the renovation of the garage would not have any adverse impacts on the character of the existing neighbourhood.
17. Ms. Pandey also referred to the concept of “prevailing character” as set out in policy 4.1.5 in OPA 320. She noted that there is no prevailing character for a garage in the neighbourhood, as the neighbourhood has different types of parking spaces. On cross-examination, she agreed that the predominant garage type in the neighbourhood is an integral garage.

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18. Ms. Pandey testified that the general intent and purpose of the zoning by-law for an ancillary building, such as the garage, is to maintain the consistency of height when there is more than one structure and to prevent excessive shadowing. She opined that based on the shadow study filed by the Applicant, there is no adverse impact of shadows on adjacent properties.
19. With respect to side yard setbacks, Ms. Pandey stated that the general intent and purpose of the by-law is to allow for utility access and to maintain consistency of structure location along travelled paths. She noted that the current structure existed peacefully on the side lot line for decades and is obscured from the street. The general intent and purpose of the by-law for rear yard setbacks for ancillary structure is to allow for open views, which is also satisfied as the structure does not block the view of the sky of the neighbours.
20. Ms. Pandey also opined that the requested variances are minor as there are no undue shadow, light, privacy, or overlook that have adverse impacts on the neighbours. She also opined that the proposal is desirable and appropriate for the development of the land as renovation of the garage will contribute to the stability of the neighbourhood. In addition, four neighbours support the proposal as they would prefer a renovated garage over a dilapidated one.
21. On cross-examination, Ms. Pandey agreed that Chapter 10.5.40.11 of By-law 569-2013 allows for height exemptions for lawfully existing buildings with respect to principal residences. However, a similar provision under ancillary structures is not available.

Ameena Khan

22. The City called Ameena Khan, an assistant planner with the City. She was qualified to provide expert opinion evidence on land use planning.
23. Ms. Khan proposed a larger neighbourhood study area than that proposed by Ms. Pandey. This study area is bounded by Blake Avenue to the north, Finch Avenue to the south, Yonge Street to the east and Bathurst Street to the south. She chose the east, west and south boundaries, as the perimeter streets are major roads and the north boundary of Blake Avenue is a utility corridor above this street. The neighbourhood consists of 548 houses. She noted that the prevailing building type is single detached dwellings of one or two storeys with an integral garage or a detached one-storey garage. New builds in the neighbourhood usually have integral garages and not detached garages.
24. Ms. Khan stated that the proposal does not respect and reinforce the characteristics of detached garages in the neighbourhood. She reviewed over 100 minor variance decisions within the neighbourhood and none of them granted an approval or rejected an application for increased ancillary structure height. During her site visit, she did not notice any ancillary structure with a height similar to the proposed height, which she was able to view from the street. She also conducted a review using Google Maps for any visuals available for the garages. She submitted that the current existing structure on the Subject

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Property is an historical anomaly that should not be reproduced. The height of 6.65 m exceeds the 4m zoning by-law requirement and does not respect and reinforce the physical character of other garages within the neighbourhood. She noted that the maximum height for a dwelling with a flat roof structure under Chapter 10.20.40.10 of By-law 569-2013 is 7.2m and the proposed height of the garage will be 6.65m, which is similar to the height allowed for a residence.

25. Ms. Khan referred to OPA 320 and emphasized that this proposal will contravene the concept of “prevailing” height in policy 4.1.5, as none of the detached garages in the neighbourhood have heights similar to what is sought in the proposal. She mentioned that even if the OPA 320 amendments are not considered, her opinion did not change. She agreed that OPA 320 is informative and not determinative.
26. Ms. Khan noted that the neighbourhood has experienced significant redevelopment and reinvestment in the form of renovated or new dwellings with integral or detached garages, without the requirement of variances for height of a detached garage. The Subject Property exceeds both the lot frontage and lot requirements of the zoning by-law. Therefore, the size and configuration of the Subject Property does not limit the construction of a garage that meets the zoning requirements or is compatible with the character of other neighbourhood ancillary structures.
27. Ms. Khan noted that approval of the proposal will introduce a new development standard in the neighbourhood as the constructed garage will have the greatest massing and height in the neighbourhood.
28. Based on the above testimony, Ms. Khan opined that the proposed height of the existing structure did not meet the four tests for variances. She did not have any objections with respect to the side yard and rear yard variances.

Andrew Lee

29. Mr. Andrew Lee, owner of the property at 7 Gaslight Court, attended the hearing and was granted standing as a participant. He testified that the existing double garage in the Subject Property is already the highest ancillary structure. All the other garages on Hendon Avenue are either integral garages or one storey detached structures. He stated that the size of this structure has impacted his property and the neighbourhood. His kitchen window faces the garage and he had planted cedar hedges to partially block the view of the garage which is very close to his property line. He noted that the garage existed when he purchased his property approximately 30 years ago.

**ANALYSIS, FINDINGS, REASONS**

30. I am satisfied that the amendment to the application and the site plans are minor and a further new notice is not required pursuant to s. 45(18.1.1) of the Act.

31. The PPS and the Growth Plan are not relevant for this application, as these deal with intensification and policy implementation.

S. 45(2)(i)

32. I refer to the decision by Member Yao for 3 Markdale Avenue<sup>1</sup> for a test or approach to address s.45(2) (i). Member Yao adopted the decision of *Foster v. Toronto*<sup>2</sup> and stated that any meaningful analysis under sections 45(1) and 45(2) require a review of whether the relief requested constitutes “good planning,” which requires reference to the general intent and purpose of the OP and Zoning by-law. Similarly, Chair Lord in his decision on a motion for 2915 St. Clair Avenue East<sup>3</sup> stated that:

In the case of the powers granted by the Planning Act subsumed under both subsections 45(1) and (2), the discretionary decision made on applications includes assessment as to whether the relief requested constitutes ‘good planning’ and is in the public interest. While the subsection considerations themselves are not identical and cannot be given the same interpretation (given their differing scope of application and the relevance or otherwise of in-force zoning), the essential disposition must satisfy the decision maker that the principles of good community planning are met. In short, under both subsections, I consider that decision making on applications under both sections involves the ultimate application and adherence to planning principles and the public interest.

33. The Applicant has not provided relevant evidence on whether section 45(2)(a)(i) is applicable. Section 45(2)(i) refers to prohibited use. Legal non-conforming use protection extends only to the issue of use, not the regulations attending the use permission. As a consequence, the jurisdiction of the TLAB is confined in this circumstance to the use, which appears not to be in issue. I do not have any evidence before me that the use of the current garage was prohibited by the current By-law 569-2013.

34. The Applicant has not met his onus of proving that his application falls within the purview of section 45(2)(a)(i) and satisfies the legal requirements imposed by this section.

35. I must still consider whether it constitutes good planning and whether it is in the public interest to have the proposed garage with a second level storey in the neighbourhood. I have no compelling evidence that it is so.

S. 45(1) – the four tests

36. The Applicant submitted that a flat roof structure is beneficial and desirable because it will prevent raccoons and other wildlife from inhabiting the garage

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<sup>1</sup> 18 139717 S45 21 TLAB

<sup>2</sup> 1996 CarswellOnt 5837, 33 O.M.N.R. 280, V950392

<sup>3</sup> 17 188179 S45 31 TLAB



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roof. While I appreciate that a flat roof may provide more restriction for wildlife, it is not clear why a flat roof of height 6.65m is desirable instead of a flat roof with a height of 4m.

37. The proposal has addressed privacy concerns adequately by eliminating the windows. In addition, I accept that there is no concern about shadowing. I am also satisfied that the Applicant has satisfied the four tests with respect to requested variances for the rear yard setback and the east side yard setback based on Ms. Pandey's evidence, which I will not repeat.
38. However, Ms. Pandey did not fully use her defined study area to provide sufficient qualitative and quantitative analysis on whether the proposed height of the garage is comparable to what is found in the neighbourhood.
39. It is difficult to analyze whether the proposal respects, reinforces and fits with the existing physical characteristics of the neighbourhood without such quantitative and qualitative analysis. One question that was not addressed was how can this proposed structure with its specified height and location abutting the property line on the east, and therefore partially visible from the street, be considered good planning? It is understandable that it is difficult to analyze rear yard garages with visual evidence; however, no specific attempt was made to analyze available data or compare this proposal with the height and massing of other garages in the neighbourhood.
40. Contrary to Ms. Pandey's assertion that the garage has obscured visibility from the street, her photograph shows that some portion of the garage is still visible from the street through the driveway. The garage height could be similar (or much less) to those of the surrounding buildings. An analysis of the surrounding residences and garages would have been helpful. At such, some level of analysis is required to determine whether the proposed height and streetscape effect meet the general intent and purpose of the zoning by-law.
41. The question of how the construction of a garage at a height of 6.65m is desirable and appropriate for the use of the land was not addressed. I have to consider whether a garage with the requested height is good planning – I do not have enough evidence to support that this is the case. A rear garage can be a desirable development of the land. Also, neighbours indicated that they would prefer a renovated garage over a dilapidated garage. This does not mean that a rear yard garage of any specification is desirable and appropriate for the development of the property.
42. As a result of my foregoing analysis, the variance request for a garage of the requested height of 6.65m is denied.

## **DECISION AND ORDER**

43. Accordingly, the appeal is allowed in part.

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44. The following variances are approved:

**Chapter 10.5.60.20.(2), By-law No. 569-2013**

If an ancillary building or structure is located on a lot with a lot depth greater than 45 metres, and its height is greater than 2.5 metres or its floor area, including areas for the purpose of parking, is greater than 10 square metres, the minimum rear yard setback for the ancillary building or structure is equal to half the height of the ancillary building or structure 3.35 metres.

The proposed rear yard setback for the ancillary building is 1.02 metres.

**Chapter 0.5.60.20.(3), By-law No. 569-2013**

The minimum side yard setback for an ancillary building or structure in a rear yard and 1.8 metres or more from the residential building on the lot is 0.3 metres.

The proposed east side yard setback for the ancillary building is 0 metres.

45. The appeal with respect to the following variance is denied:

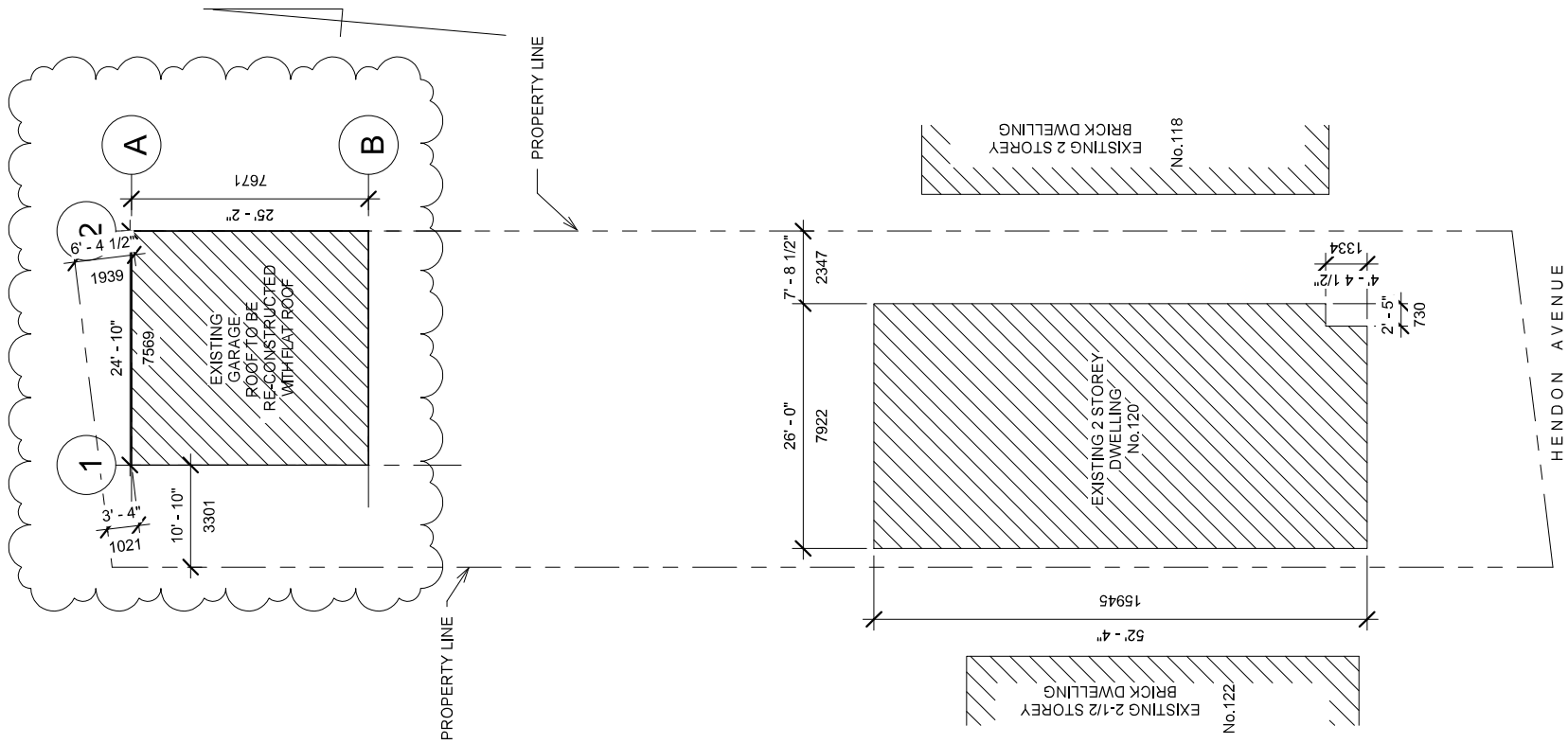
**Chapter 10.5.60.40.(2), By-law No. 569-2013**

The maximum height of an ancillary building or structure is 4.0m.  
The proposed height of the ancillary structure is 6.65m.

X 

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S. Talukder  
Panel Chair, Toronto Local Appeal Body  
Signed by: Shaheynoor Talukder



120 HENDON AVENUE, TORONTO, ON

NEW FLAT ROOF OVER EXISTING 2 STOREY GARAGE

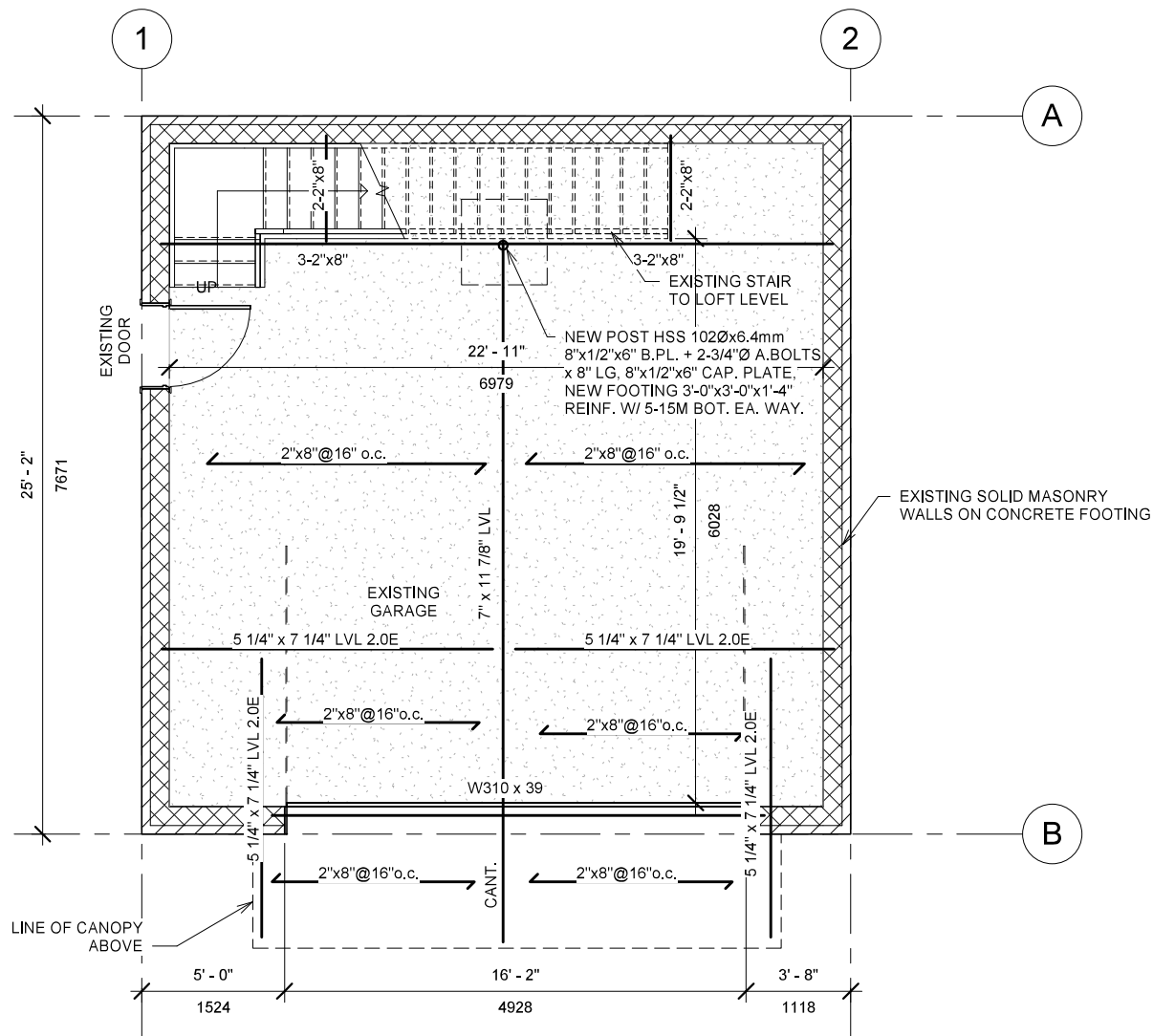
No.	Description	Date

### SITE PLAN

Project number	18-031
Date	Jun 9, 2019
Drawn by	ST
Checked by	ST

**TLAB-1**

Scale 1 : 150



120 HENDON AVENUE, TORONTO, ON

NEW FLAT ROOF OVER EXISTING 2 STOREY GARAGE

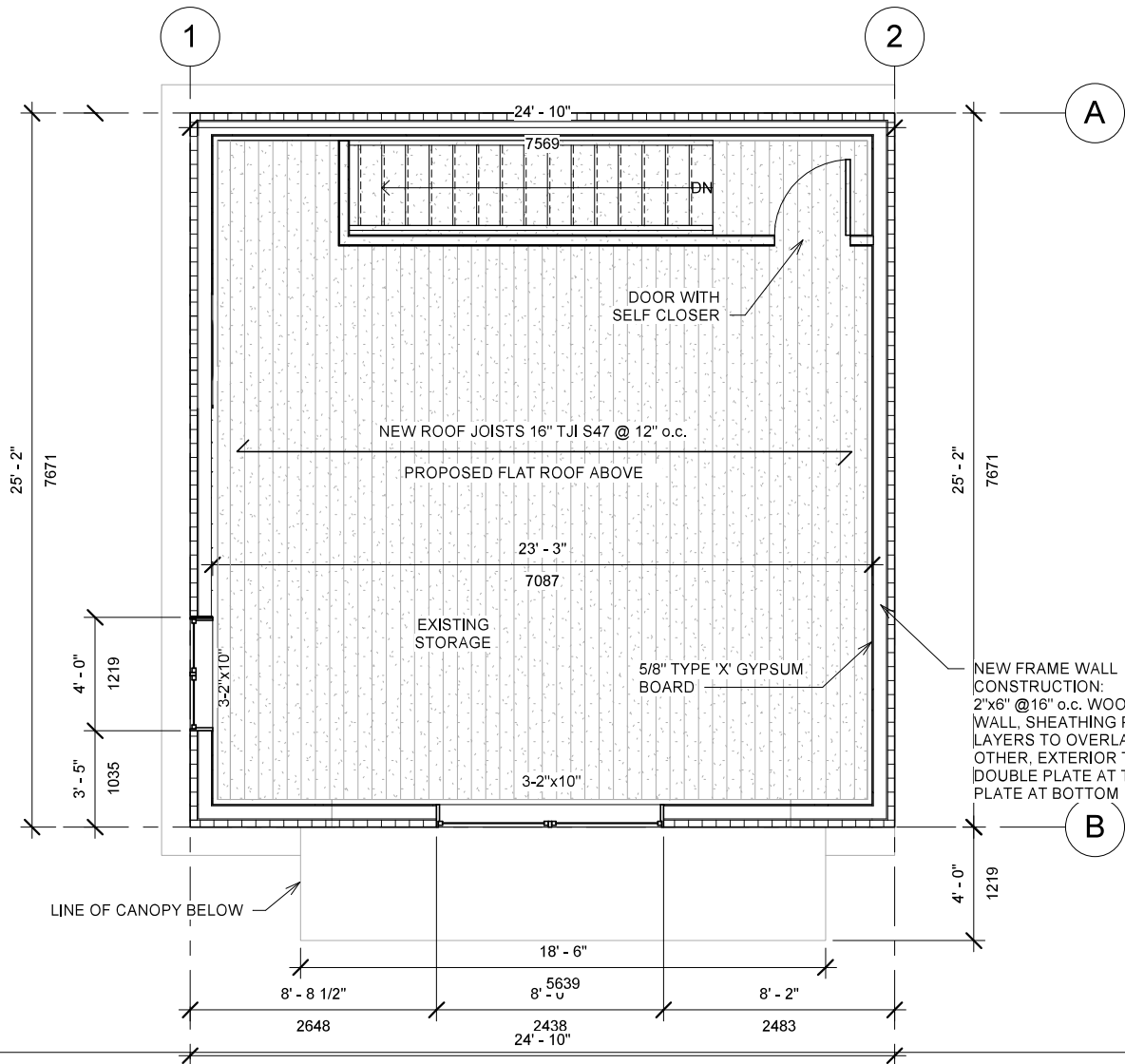
No.	Description	Date

### GARAGE PLAN

Project number	18-031
Date	Jun 9, 2019
Drawn by	ST
Checked by	ST

**TLAB-2**

Scale 1 : 50

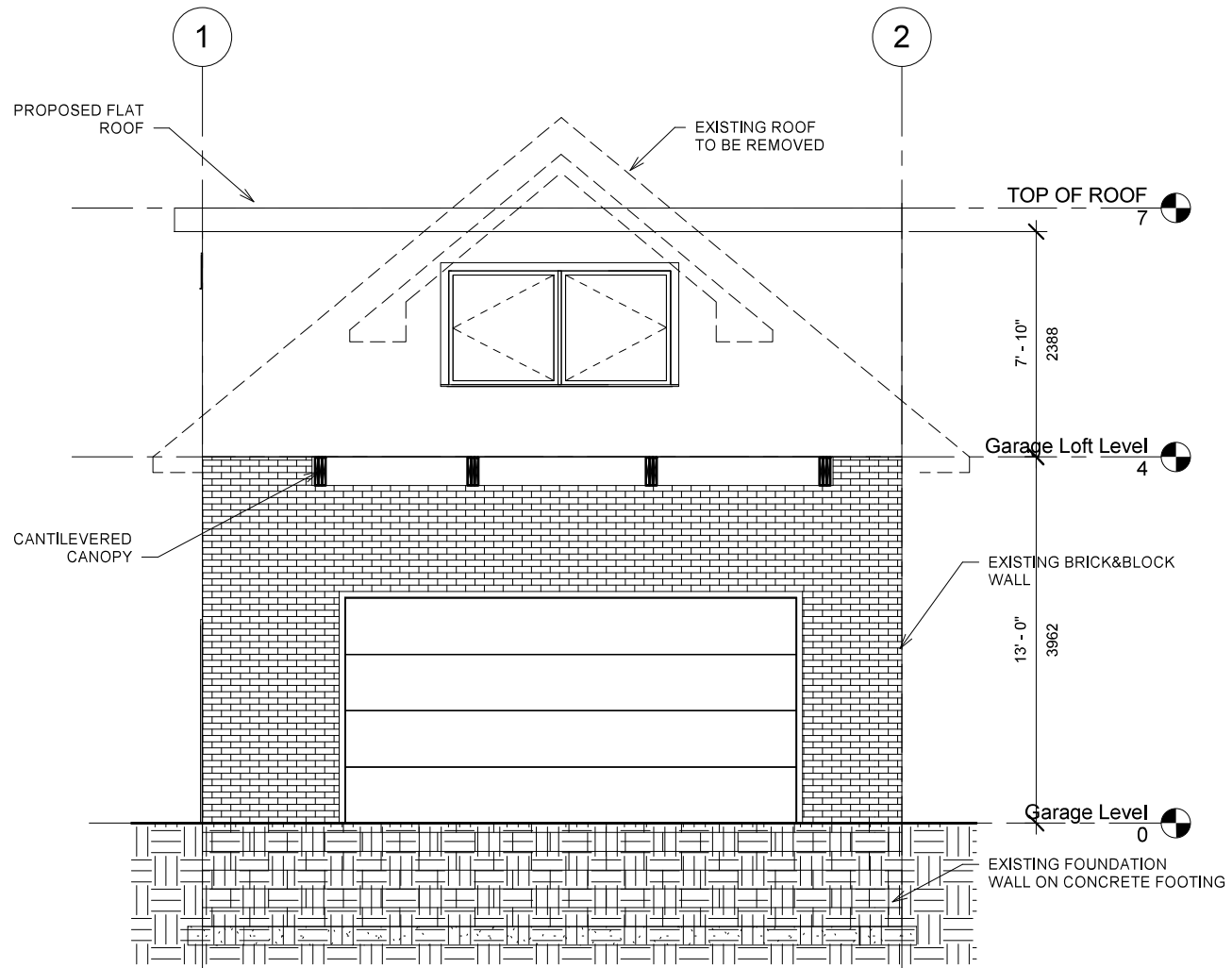


120 HENDON AVENUE, TORONTO, ON  
 NEW FLAT ROOF OVER EXISTING 2 STOREY GARAGE

No.	Description	Date

**GARAGE LOFT PLAN**

Project number	18-031	<b>TLAB-3</b>
Date	Jun 9, 2019	
Drawn by	ST	
Checked by	ST	
		Scale 1 : 50



120 HENDON AVENUE, TORONTO, ON

NEW FLAT ROOF OVER EXISTING 2 STOREY GARAGE

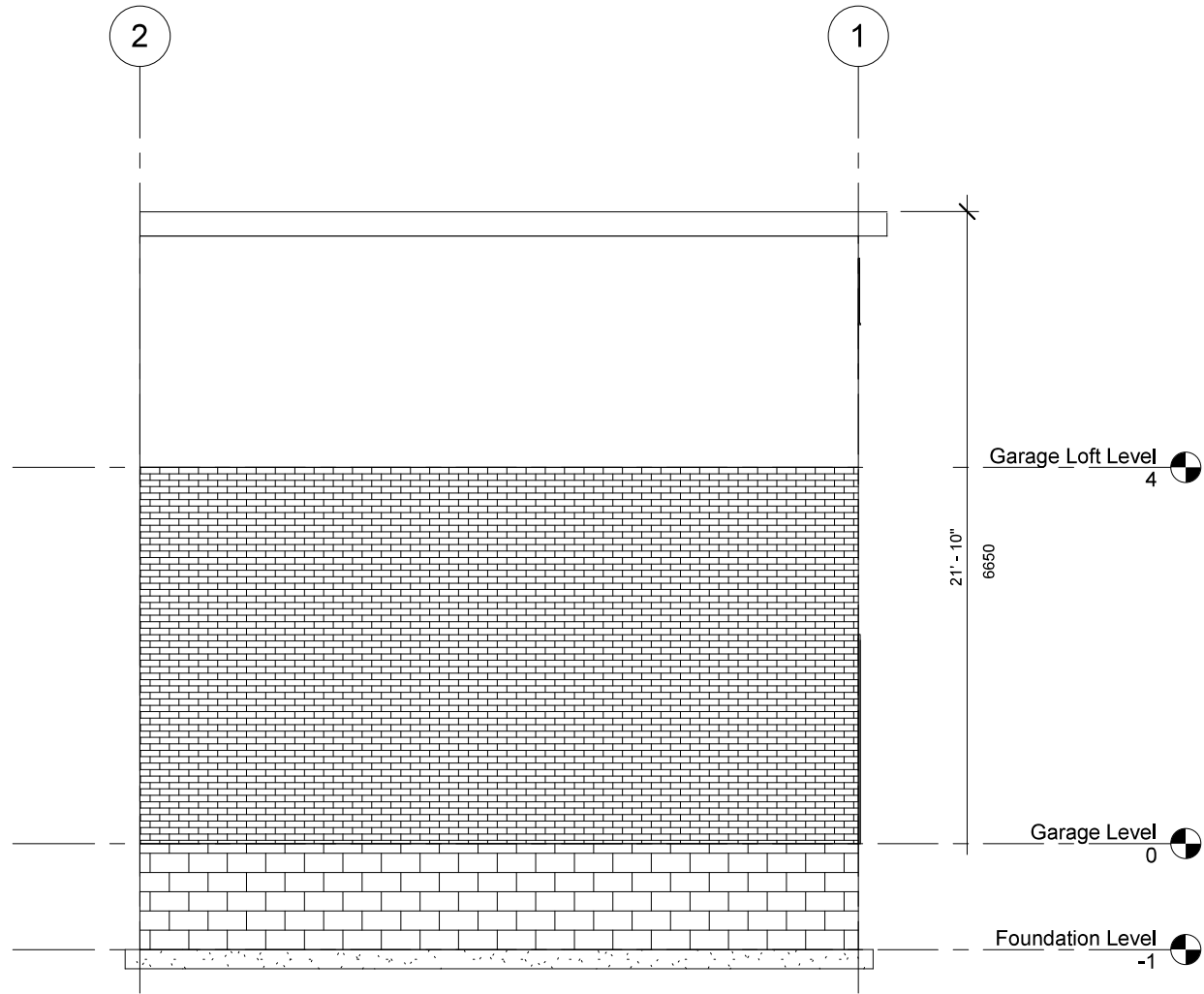
No.	Description	Date

### FRONT ELEVATION

Project number 18-031  
 Date Jun 9, 2019  
 Drawn by ST  
 Checked by ST

**TLAB-4**

Scale 1 : 50



120 HENDON AVENUE, TORONTO, ON

NEW FLAT ROOF OVER EXISTING 2 STOREY GARAGE

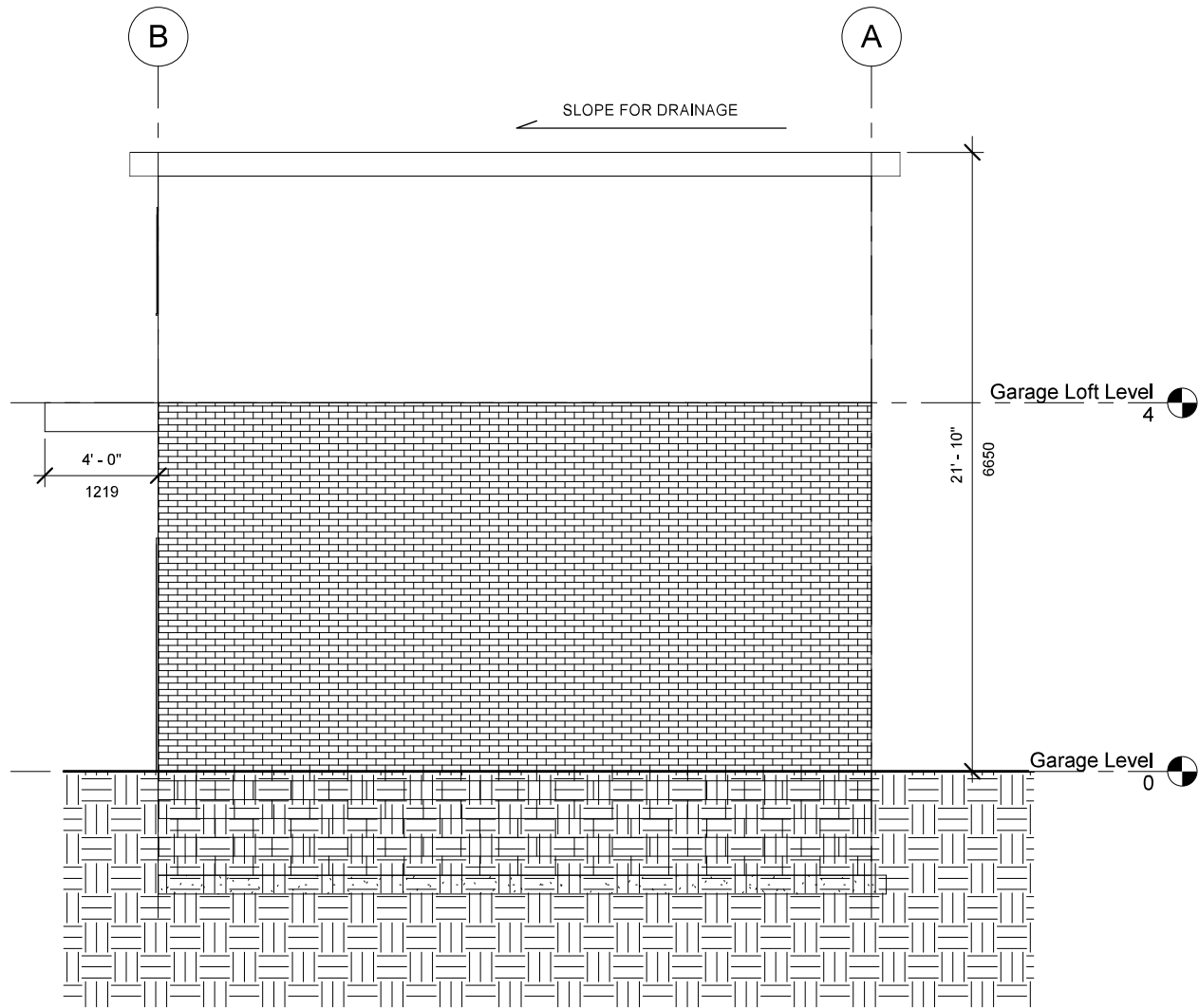
No.	Description	Date

**REAR ELEVATION**

Project number	18-031
Date	Jun 9, 2019
Drawn by	ST
Checked by	ST

**TLAB-5**

Scale 1 : 50



120 HENDON AVENUE, TORONTO, ON

NEW FLAT ROOF OVER EXISTING 2 STOREY GARAGE

No.	Description	Date

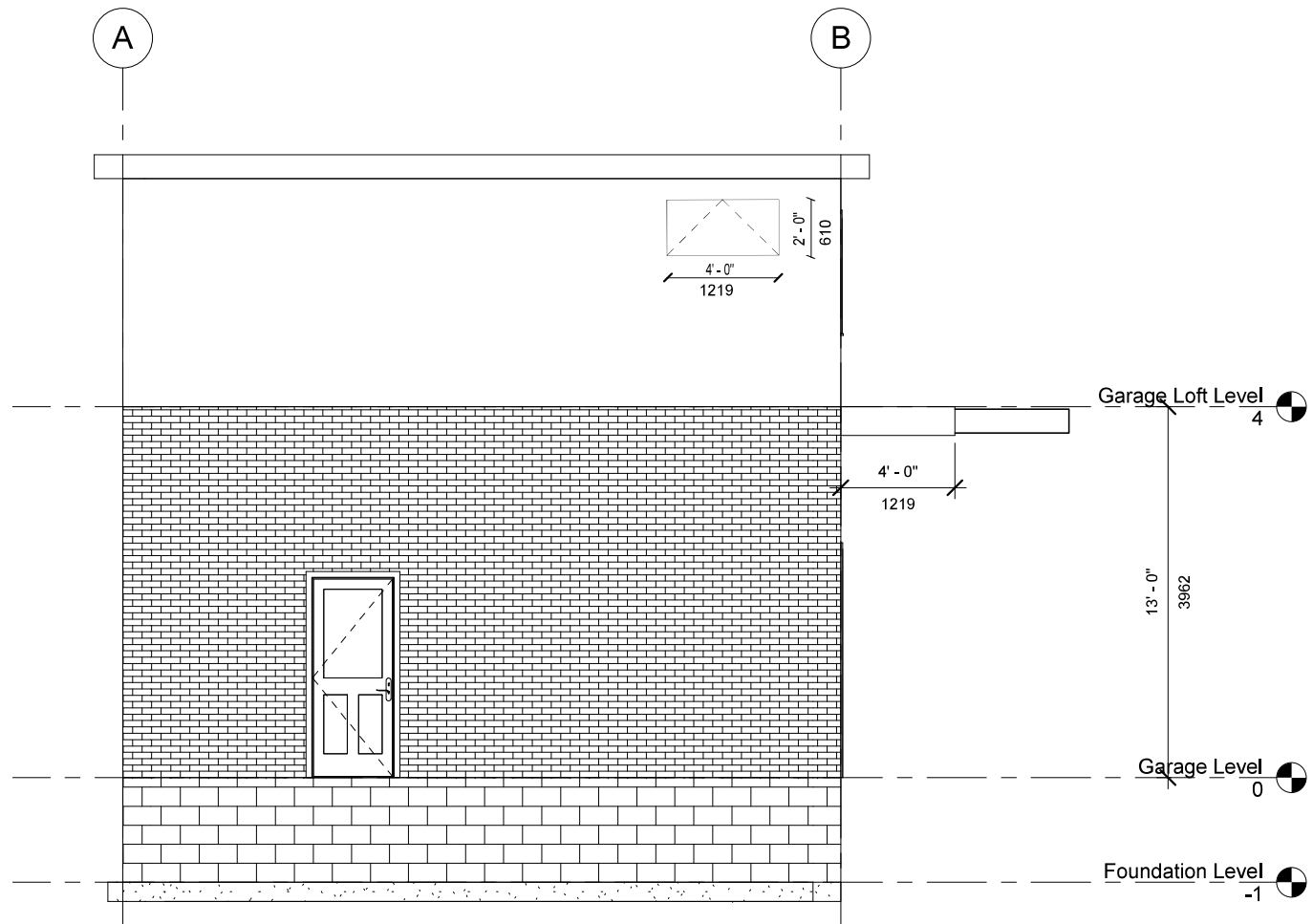
**SIDE ELEVATION (EAST)**

Project number	18-031
Date	Jun 9, 2019
Drawn by	ST
Checked by	ST

**TLAB-6**

Scale 1 : 50





120 HENDON AVENUE, TORONTO, ON

NEW FLAT ROOF OVER EXISTING 2 STOREY GARAGE

No.	Description	Date

**SIDE ELEVATION (WEST)**

Project number	18-031
Date	Jun 9, 2019
Drawn by	ST
Checked by	ST

**TLAB-7**

Scale 1 : 50