

# DECISION AND ORDER

**Decision Issue Date**      Tuesday, October 29, 2019

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

Appellant(s): Rob Battista, Olga Fowell

Applicant: Michael Foderick

Property Address/Description: 32 Oxtan Ave

Committee of Adjustment Case File: 19 116184 STE 12 MV (A0160/19TEY)

**TLAB Case File Number: 19 181211 S45 12 TLAB**

**Hearing date:**      Tuesday, October 22, 2019

**DECISION DELIVERED BY Ian James LORD**

## REGISTERED PARTIES AND PARTICIPANTS

Appellant	Rob Battista
Appellant's Legal Rep.	Andy Margaritis
Appellant	Olga Fowell
Appellant's Legal Rep.	David Bronskill
Party	City of Toronto
Party's Legal Rep.	Ben Baena
Party	Ankur Bansal
Party's Legal Rep.	Michael Foderick
Expert Witness	Louis Tinker

## **INTRODUCTION**

This is an appeal from a decision of the Toronto and East York District panel of the City of Toronto (City) Committee of Adjustment (COA) approving on condition variances to alter a two-storey townhouse by the addition of a second dwelling unit establishing a duplex dwelling, through additions and enlargements (Application), at 32 Oxtown Avenue (subject property).

The Hearing Date was earlier requested by the Applicant's counsel, Mr. Michael Foderick, to be converted to a 'Settlement Hearing'. The Toronto Local Appeal Body (TLAB) had advised that Notice of the request be circulated to the Parties and Participants, posted, and that the matter of the request be addressed at the outset of the sitting.

On convening the Hearing, the Applicant was represented by Counsel, Mr. Foderick, a land use planner, Mr. Louis Tinker and an architect, Mr. Adam Brander.

Also present were Ms. Olga Fowell, a Party Appellant and Ms. Kirstin Piirtoniemi, representing Rob Battista, a Party Appellant, who was not present.

Neither of their counsel of record, Mr. David Bronskill nor Mr. Andy Margaritis, respectively, were present and no communication had been received by the TLAB from either counsel.

In like manner, counsel of record for the City, Mr. Ben Baena was not present, and no communication had been received by the TLAB from him or the City on his behalf. The City as a Party was not represented by any attendance.

At the outset I advised that I had attended on a site visit and walked the area as well as reviewed the filings, but noted the evidence consists largely of what is called to the attention of the Tribunal in the Hearing setting.

On inquiry as to whether there were any preliminary matters, Mr. Foderick provided a very brief chronology of the iteration of three sets of plans arriving at a settlement between the Parties, which he had forwarded to counsel of record on September 16, 2019.

The scheduled Hearing Date was, as indicated, October 22, 2019.

He provided confirmation emails to him from Mr. Bronskill (September 18, 2019) and Mr. Margaritis (September 19, 2019) as to the acceptability of the 'revised plans' to their respective clients. In like manner, Mr. Baena advised the same counsel (September 20, 2019) that "my planner does not take issue with the revised plans" and inquired as to whether a zoning review had been completed respecting the revised plans.

I do not fault counsel for the oversight of not informing the TLAB directly of their concurrence with a settlement or any of its terms. However, as both clients were in

attendance, as a courtesy to the public I sought confirmation from them as to their position.

The response was uncomfortable. Both expressed a degree of angst at having been 'forced to settle' arising from an inability to retain professional land use planning advice, representations as to the weight of City Staff's position as a 'preapproved', 'prejudged' position, advice received from counsel and being 'handcuffed' by the passage of events.

Mr. Foderick properly took exception to the descriptions and spoke in defense of counsel. Neither Party's representative had been sworn or affirmed but spoke extemporaneously and, of course, counsels were not present.

The exchange, however, required the Tribunal to be satisfied as to their intentions both in respect of the asserted settlement and the purpose of their presence.

No citizen should be deprived of the opportunity to express their position on a matter before the TLAB.

In the end I was satisfied that although the Parties had not signed Minutes of Settlement, both of their lawyers had agreed, on their behalf, and on the clients' instructions to accept the 'revised plans' (variances and condition) as terms of a settlement. The representatives present stated that they were not attending to oppose or give evidence, but rather to 'monitor' the process of what had clearly been a trying and expensive experience for both.

I am satisfied that there is no suggestion these Parties did not settle with the Applicant in favor of the Application as revised. I accepted Mr. Foderick's advice that no compliance with the exchange obligations had been demonstrated and, despite the record of COA filings, no Appellant Witness Statements had been filed as required by the TLAB Rules. Further, that the matter comes forward as a settlement and that the non-appearance of counsel, despite the email terms "to agree to support," should be accepted as consent and acknowledgement that the matter would be carried forward by the Applicant on the other terms apparently agreed.

## **BACKGROUND**

As described, the COA decision was to approve the request for six variances subject to one condition. That approval is set out in **Attachment 1**.

Despite apparent opposition made obvious by COA filings forwarded to the TLAB, substantial discussions appear to have taken place leading to the request and appearances above described.

The TLAB was asked by Mr. Foderick whether it required evidence to be heard in support of the settlement and how much. In view of the 'preliminary matters' as above described, the Hearing proceeded on the basis that the Applicant should demonstrate to the fullest extent possible the opinion evidence in support of the applicable policy and

statutory tests. As such, the Hearing proceeded in the normal course, occupied more than the full day of the sitting and two witnesses were heard from, the Applicant's planner and architect.

## **MATTERS IN ISSUE**

Before the COA, the Application was described as required approvals "to alter the two-story townhouse by establishing a second dwelling unit...".

At the time of the Hearing, counsel described the settlement as the establishment of a "Duplex." Namely, the conversion of an existing "Townhouse" to a "Duplex." Both use types were said to be permitted in the 'R' zone of B-law 569-2013.

For the TLAB, the public interest aspects that arise within the policy and regulatory framework of the City engage a consideration of the appropriateness of the proposed conversion or use, the implications for the site, its impacts, if any, and the application of the policy and statutory tests to the resultant built form proposed by the variances.

That framework is listed below.

## **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 for the Greater Golden Horseshoe for the subject area ('Growth Plan').

### **Minor Variance – S. 45(1)**

In considering the applications for variances from the Zoning By-laws, the TLAB 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**

Mr. Foderick called Louis Tinker, a Registered Professional Planner, who was qualified to give expert opinion evidence on land use planning matters. He had

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provided an extensive Expert Witness Statement (Exhibit 1), a Book of Photographs (Exhibit 2) and an Exhibits Document Book (Exhibit 3). These latter documents are in three Parts as posted on the TLAB website.

Mr. Tinker was retained after the COA decision; he was not aware of any previous planner on the file who had advised the Applicant.

He noted that the change of use, taken to mean the conversion from a Townhouse to a Duplex, was not a matter considered by the COA and was not a 'variance' as identified on **Attachment 1**.

Mr. Tinker did not vary dramatically in his evidence from that contained in Exhibit 1. As it was uncontested and heard, it is perhaps not necessary to detail all aspects here as it is summarized well in Exhibit 1, page 4ff, and below.

He identified several updates or changes to what was decided by the COA resulting from the settlement discussions:

- i) maximum building height was increased from 10.61 m to 11.37 m to accommodate the height of a roof mounted opaque glass 'privacy screen' protecting view planes to a skylight on the roof below, at 30 Oxtown Avenue. He felt this modest height addition, in respect of the screen only was not significant to warrant additional Notice under section 45 (18.1.1) of the *Planning Act*. A proposed stairwell access entrance to the third floor roof exceeds the height of the privacy screen but was found to be exempted by section 10.5.40.10(3) (b) of by-law 569-2013. (Variance 2 on **Attachment 1**).
- ii) Building depth exceedance had been reduced slightly from 15.56 m to 15.4 m. The by-law standard is 14 m for a Townhouse. (Variance 4 on **Attachment 1**).
- iii) Maximum permitted floor space index (fsi) had been reduced slightly on an agreement to a revised side yard setback (west side yard) from 1.27x lot area, to 1.25x fsi. The By-law standard is 1.0x lot area. (Variance 5 on **Attachment 1**).
- iv) Side yard setbacks had been agreed to by the neighbours; however, the Plans Examiner in a Zoning Notice of October 16, 2019 had eliminated that variance requirement entirely as a standard not applicable to the Duplex dwelling. The Plans would continue to show modest setbacks in respect for the settlement. (Variance 6 on **Attachment 1**).

Mr. Tinker adopted a set of plans by the architect, some of which had been last updated October 3, 2019, as incorporating the above features agreed to and being the final plans. These were admitted as Exhibit 5 and are attached on an undertaking to be supplied electronically as **Attachment 2** (Plans). In lieu of receipt, I have attached the most recent version of the TLAB file.

In his opinion summary, Mr. Tinker accepted the settled Plans as 'good planning in a policy and physical context. He said there were no unacceptable adverse impacts in the sense of light, view and privacy having had regard to the existing and planned context and the proposal "fit," in the Official Plan sense.

As stated, most of these opinions are well supported in the text and responses given to the leading examination conducted throughout. I allowed leading questions in the interest of time and in the absence of opposition. That allowance proved disquieting as, over the day, it gave the planner an appearance of a loss of independence, being prompted to supply confirmatory advice to propositions put by counsel. In another setting, the approach would be subject to challenge.

There are several aspects of Mr. Tinkers evidence and undertakings that warrant comment and recording:

1. At an existing fsi of 0.44x the subject property falls well below its recently rezoned potential permitted of 1.0x lot area; no reasons were expressed as to why the Application needed to exceed this new standard.
2. An undertaking was given to supply;
  - a) his updated matrix of variance changes and 'revised plans';
  - b) Any policy language of the City on the conversion of a Townhouse or Rowhouse to a Duplex;
  - c) Whether the City Official Plan permits consideration of built form design as an aspect of variance approval consideration.
  - d) Zoning standards applicable to a Duplex.These undertakings in the main were responded to through an email from Mr. Foderick dated October 25, 2019, with attachments. I am grateful for the timely response.
3. The Townhouse lot has a frontage of 5.74 m (5.47 m, Exhibit 1) and benefits from a rear yard right-of-way access 6.03 m wide. The right-of-way terminates at the east limit of the subject property; its terms were not investigated.
4. A Duplex is a dwelling type and differs from and is "more than a 'secondary suite or second unit'." In this case, the additional unit is a 'modest level of intensification for the location' – albeit at a 2600 square foot increment over existing.
5. There are no identified Duplex dwellings in the planner's Geographic Study Area; this is the first project for the planner and the architect of the conversion of a Townhouse to a Duplex, although both have participated in the addition of units to existing buildings.
6. The shadow impact study included in the Document parts was performed by others on a standard comparison basis not of 'existing to proposed' built form but of 'permitted to proposed' and showed shadow impacts to be minor. The 'permitted' envelop use exceeded as-of-right permission insofar as it disregarded the zoning performance standard of 1.0x fsi, and roof top appurtenances.
7. There is no discernable area built form character attributes on a geographic or immediate context basis and, as such, the proposal can be said to respect and reinforce this area character diversity and fall 'within the range' of perceived building densities. There were two instances noted of the COA

granting higher densities (6 Highbourne at 1.28x fsi; 883 Avenue Road at 1.42x fsi), the latter outside the Geographic Study Area; however, no comparability measures or descriptions were offered.

8. Despite the addition of a full third floor and full bank of windows above adjacent dwellings (**Attachment 2**, Plan A10), the purpose of Variance 3 on **Attachment 1** was acknowledged to be to preclude or discourage third floor flat roofed dwellings with different cornice lines and roof edges. The proposal and the Application with a sloped roof design and dormers were said to respect and reinforce the wider and immediate context of area physical character. The photographs of adjacent properties show third floor level windows within a sloped or mansard roof design, predominantly on detached dwellings.
9. Focusing on the existing Townhouse block or its heritage attributes would be inappropriate in the planned context of Oxton being identified as a 'major street' albeit within a local road right-of-way of 20 m.

Mr. Brander gave brief evidence as to his experience in adding additional units to buildings, primarily in the former Borough of East York. One project obliquely referenced was at 379 St Clarence Street, a townhouse to which a conversion added three units, with new building but not involving fsi.

He was clear the subject property was not proposing a 'secondary suite' or 'second unit' but a different dwelling type with its distinctions.

The Undertakings supplied distinguish the character of a 'second unit' as being subordinate to the primary unit. This is not as proposed by the Duplex conversion, on the evidence of both the planner and the architect.

He had not applied turning templates to the proposed two car parking spaces and could not comment on turning movements trespassing over soft landscaping or adjacent property to the east, where no right-of-way permission apparently exists.

He noted no department had raised functional or design issues.

He agreed that the massing details are not shown on the perspective drawings in relation to adjacent properties.

In closing submissions, Mr. Foderick can be commended for a comprehensive and focused summation of the evidence, argument and requested direction.

He urged these salient points, among others:

- a) Rule 19 encourages settlement and that was accomplished;
- b) There is no contrary evidence to that of the Applicant;
- c) Nothing is served by returning the subject property to its as-of-right condition, as the settlement terms with the neighbours would be lost;
- d) Higher heights and densities in the immediate context 'scream' the proposal is minor;

- e) Intensification by one unit is appropriate given the location. A second unit is permitted as of right;
- f) Design considerations, heritage values and materiality do not come into play as there are no associated variances;
- g) The 'dormer' variance is not essential to the proposal.

## **ANALYSIS, FINDINGS, REASONS**

This matter comes forward as a 'settlement' in which the three Appellants have instructed their counsel that they no longer wish to contest the requested variances.

The TLAB encourages settlement and on more than one occasion has made efforts to facilitate dispute resolution by expediting Hearings, offering mediation services and affording great weight to the Parties who have made sincere and diligent efforts to resolve their difficulties.

In no instance of a settlement is the TLAB permitted to abandon its responsibilities to assess the Application under the applicable policy and statutory tests imposed. Even the consent withdrawal of appeals is examined through the lens of whether the public interest is served by settlement terms and that principles of good community planning are upheld.

In this circumstance, the appeals were not withdrawn, and the 'settlement' was neither reduced to the form of 'Minutes', private or public. Its road to fruition as above described was not without elements of concern. Those elements were never 'proven' by evidence and the 'settlement' terms as expressed on behalf of the Applicant are accepted as having occurred of free will.

Despite this, the TLAB has not heard from any of the three Appellant's counsel and no evaluation report of City Planning Staff was tendered or presented. One modest condition was carried forward from Staff related, reportedly, to the soft landscaping variance requested.

The evidence as above referenced and reported generally served on face value to support the relief requested.

Even affording great weight to the settlement efforts of the Parties, the TLAB must examine the Application on the criteria to which it is directed, above, under jurisdiction.

In so doing, I am assisted by the Plans presented in Exhibit 5, **Attachment 2** hereto.

The project is to convert an existing Townhouse to a Duplex, the architects design for which engages the by-law variances listed in **Attachment 1**.



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I am advised that a Duplex is a permitted use in the zone category and no approval is required in respect of that type of dwelling unit. A Duplex does have distinguishable performance standards; it is apparent that only one of these requires relief, being building length beyond the regulatory standard of 14 m. Some of these standards are 'grouped', as the Undertaking response notes.

It was suggested that this is the only variance, building length, that directly engages changes to built form, a component of several elements of policy assessment in Chapters 3 and 4 of the City Official Plan. Were that the case, there could likely be no issue with the proposed settlement as some buildings in the Townhouse block of six units apparently extend to or near the proposed building length relief.

Mr. Tinker referred me to nearby adjacent single detached residences that have exercised their permitted building depth of 17 m, somewhat deeper than the 15.4 m proposed by the Application.

Had the subject property been a detached dwelling of new construction, I would accept the analogy, as has a previous TLAB Member (see: *79 Eaton Avenue* (18 167506 S45 29) dated October 9, 2018).

However, the Application is premised not on a detached unit but an existing Townhouse lot, with a relatively narrow frontage of 5.74 m ( 5.47 m, Expert Witness Statement of Louis Tinker, Exhibit 1, par.36). Moreover, it is not an end unit or a corner lot in the complex. It relies on the demising walls of its two adjacent Townhouse units, and as stated, a mutual right-of-way to afford rear yard parking and access.

The responses to the Undertaking supplied extracts of the Built Form policy of the City Official Plan, not previously reviewed in the evidence to any degree, if at all. I recite it here for the partial framework it directs:

"Policy 3.1.2(3) New development will be massed and its exterior façade will be designed to fit harmoniously into its existing and/or planned context, and will limit its impact on neighbouring streets, parks, open spaces and properties by:

b) incorporating exterior design elements, their form, scale, proportion, pattern and materials, and their sustainable design, to influence the character, scale and appearance of the development."

I find that the addition of a second unit to the building, defined as Duplex, is not determinative of any approval. A second unit is permitted, a Duplex is permitted, and an increase in unit count is consistent with general intensification policy support; one additional unit is worthy of general encouragement. However, a Duplex brings with it some consequences that are unique including the policy and regulatory obligations to ensure a comfortable independent living environment, parking provision and considerations of light, view and privacy. These become germane when consideration is given to the two other sought variances that this Member finds also affect Built Form and invoke the assessment criteria found in Chapter 4 of the Official Plan:

a) Relief from front and rear wall building height;

b) Increase in fsi.

I accept that Mr. Tinker provided the only qualified professional planning advice that fully supported the requested relief and that, essentially, was the relief granted by the COA. That advice layered with the 'settlement' and COA decision is compelling and is not lightly disregarded or dismissed. It is, however, not supported by this Member for the following reasons, in no particular order of priority:

1. I find that the rationale for a density of 1.25x the lot area was not established. By-law 569-2013 recently amended earlier zoning to increase the permitted density applicable to the subject property from 0.6x fsi to 1.0x fsi, thereby recognizing that the zone category on Oxtown Avenue warranted consideration of increased density. I was told the subject site existed at a density of 0.44x fsi; more than a doubling in size could occur as of right in a form respecting the 10m height limit which was also established/confirmed. No evidence was offered of the actual fsi of adjacent Townhouse units in the complex, but an obvious conclusion was drawn by the planner that there were examples of rear building depth extensions proximate to that proposed by the Application (see: **Attachment 2**, Plan A1). No variances for these were called to my attention.

I find that an additional increase in density over that recently rezoned cannot be justified based on falling within supposed 'area ranges of density' or, necessarily, the presence of a varied characteristic of building forms in the geographic study area, as defined by the planner. The 'general physical character' of this area includes high, mid and low-rise apartment buildings, and attached and detached dwellings. There are no examples of Duplex dwellings. The subject property is an integral part of a distinct Townhouse enclave, again, without any fsi analysis. The diversity of the housing stock is simply too great to make any density 'range' useful, even if the planner were able to supply any actual fsi measures, which he did not.

There was no suggestion that any dwelling unit in the Townhouse block approached 1.25x fsi, nor even that of any of the adjacent detached residential buildings. There were two examples of approvals within a recent period of an fsi exceeding the request, above cited, one within the study area. I find the support base of these analogies wholly unsatisfactory as a precedent as I was provided no information as to their lot width or area, unit type or addition particulars germane to a comparison. Neither were Townhouses, or mid-block within analogous circumstances. A 'floating' rationale for the fsi sought is unhelpful.

2. The requested relief of a Duplex unit requires the provision of its own parking space. That location is identified in Exhibit 5 and **Attachment 2**, Site Plan drawing A2. Neither Mr. Tinker nor the architect, Mr. Brander, had investigated the terms of the right-of-way or whether increasing the burden on it, by an additional unit with prescribed parking, was permitted. Neither had had the benefit of applying turning templates to determine if the proposed parking, required to be on the lot, actually worked without trespass onto 'soft

landscaping' or the adjacent property to the east. The right-of-way was acknowledged to terminate at the easterly limit of the subject property thereby affording no access privileges of the subject property or its proposed units onto its easterly neighbour's lands. There was also no confirmation that the easterly neighbour could access its property if parallel parked two cars occupied the specified locations, let alone the presence of more than two cars that could be generated from two independent dwelling units on the subject property. It is acknowledged that the parking standard required is proposed to be met; however, I was left unsatisfied as to its functionality, permission or off-site implications. That aside, the demonstrated space configuration immediately abuts the sole amenity space afforded the proposed lower unit, itself further compromised in terms of privacy by access stairs from the upper unit. Absent some form of further porch enclosure and isolation, possibly extending the building depth to an even greater degree than requested, the parking requirements appear conflicting to the public interest of providing suitable accommodation, privacy and rear yard access.

Parenthetically, the basement space of the lower unit, with rear porch and front access stairs, shows limited light and access conditions in a manner that the Plans in **Attachment 2** do not appear to reconcile.

3. Variance 3 requests alteration of the front and rear main wall height from the by-law regulation of a 7.5 m maximum, to 9.14 m. This latter height is within the maximum permissible height allowance for the subject property of 10 m. Curiously, this requested variance received a minimum of attention or support. Mr. Tinker initially described this variance as being triggered by the proposed dormer design element and five pane window array on the Oxton frontage as shown on **Attachment 2**, Plan A8. He said the standard was invoked because the dormer is wider and occupies a greater percentage of the frontage than is permitted and is considered a part of the main wall.

The TLAB, including this Member, has on many occasions, encountered this provision whereby variances are sought to recognize dormers that extend beyond the 7.5 m height limit, regardless of scale. Here, Mr. Tinker supported the variance and Plan drawing, earlier much reduced in window bank size, because "the Parties accepted the dormer reverting back to its original design as approved by the Committee."

On being called back by the TLAB to the zoning intent and purpose of this regulation, Mr. Tinker fairly then acknowledged that the rationale for the standard is new to By-law 569-2013 and is in response to 'to modern contemporary new builds with flat roofs, wishing to maximize out flat roof height within the overall 10 m height limit. The regulation ensures that new buildings respect the cornice lines and roof edge of the streetscape'.

In this case, he stated, the addition is to an existing building that will maintain a sloped roof with the dormer and windows that the architect has stated is desirable and functional to maximize light penetration.

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Respectfully, I do not accept the explanation or its relevance. There can be no doubt that windows afford light penetration. What was missing from both witnesses for the Applicant was any attempt to address the implications of the design on the streetscape and window-wall appearance of the third floor and roof projection above the adjacent Townhouse units.

I have reviewed the Expert Witness Statement of Mr. Tinker to determine if his written submissions provided any additional or amplified support for Variance 3. It does not. The provision is not examined specifically in Official Plan terms (Exhibit 1, paras. 57, 60-61) and it is not mentioned at all with specificity in discussion respecting height (Exhibit 1, paras. 67-68; 85-87) or with respect to By-law 569-2013, the applicable zoning (Exhibit 1, paras. 78-80).

I find that the proposal is not a 'sloped roof' in appearance but rather a flat roof seeking to maximize its height within the 10 m zoning standard, but as varied and prohibited by the express regulation. I find that the physical component of the third storey 'sloped' frontage (and rear replication) is illusory, minimal and not amounting to a replication of the prominence of adjacent buildings to the east and west of the Townhouse block. The proposed windows, either as demonstrated in the attachment or reduced as requested in argument, with a third floor flat roof, present exactly the 'modern, contemporary' built form that the by-law addresses and prevents.

The proposal is out of character with its adjacent connected units as a part of the whole.

I find the intent and purpose of the Official Plan extract, above, section 3.1.2(3) and the zoning regulation is offended, as described, and that no support rationale has been presented as acceptable for its variance. The design consequences described are open and apparent. The Application proposes to accomplish exactly what the regulation seeks to prevent. The subject was largely ignored, left unsupported and swept into general opinion language of acceptability.

In coming to these conclusions, I conclude the Application is overdevelopment for the subject property that manifestly does not fit in its context.

I have reviewed the application of both the 'Built Form' and '*Neighbourhoods*' criteria of the Official Plan. The '*Neighbourhoods*' extracts that follow, with emphasis added in bold, require, as policy directions, that the TLAB be satisfied that the existing physical character of the neighbourhood be respected and reinforced by development. Further, that the streetscape changes that occur be 'gradual' and 'fit' into the existing (and planned) context of the neighbourhood, geographic and immediate, with emphasis on the latter.

The Official Plan, as amended by OPA 320, in section 4.1.5 states the following:

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“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.

Lots fronting onto a major street shown on Map 3 and designated Neighbourhoods are to be distinguished from lots in the interior of the block adjacent to that street in accordance with Policy 6 in order to recognize **the potential** for a more intense form of development along major streets to the extent permitted by this Plan.

The physical character of the geographic neighbourhood includes both the physical characteristics of the entire geographic area in proximity to the proposed development (the broader context) **and the physical characteristics of the properties that face the same street as the proposed development in the same block and the block opposite the proposed development (the immediate context).**

Proposed development within a Neighbourhood **will be materially consistent with the prevailing physical character of properties in both the broader and immediate contexts.** In instances of significant difference between these two contexts, **the immediate context will be considered to be of greater relevance.** The determination of **material consistency for the purposes of this policy will be limited to consideration of the physical characteristics listed** in this policy. In determining whether a proposed development in a Neighbourhood is materially consistent with the physical character of nearby properties, only the physical character of properties within the geographic neighbourhood in which the proposed development is to be located will be considered. Any impacts (such as overview, shadowing, traffic generation, etc.) of adjacent, more intensive development in another land use designation, but not merely its presence or physical characteristics, may also be considered when assessing the appropriateness of the proposed development.

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**Lots fronting onto a major street**, and flanking lots to the depth of the fronting lots, are often situated in geographic neighbourhoods distinguishable from those located in the interior of the Neighbourhood due to characteristics such as:

- different lot configurations;
- better access to public transit;
- adjacency to developments with varying heights, massing and scale; or
- direct exposure to greater volumes of traffic on adjacent and nearby streets.

**In those neighbourhoods, such factors may be taken into account in the consideration of a more intense form of development on such lots to the extent permitted by this Plan.** The prevailing building type and physical character of a geographic neighbourhood will be determined by the most frequently occurring form of development in that neighbourhood.

Some Neighbourhoods will have more than one prevailing building type or physical character. The prevailing building type or physical character in one geographic neighbourhood will not be considered when determining the prevailing building type or physical character in another geographic neighbourhood.

While prevailing will mean most frequently occurring for purposes of this policy, this Plan recognizes that some geographic neighbourhoods contain a mix of physical characters. In such cases, the direction to respect and reinforce the prevailing physical character **will not preclude development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers** within the geographic neighbourhood, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood **and already have a significant presence on properties located in the immediate context** or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood...

**7. Proposals for intensification of land on major streets in Neighbourhoods are not encouraged by the policies of this Plan. Where a more intense form of residential development than that permitted by existing zoning on a major street in a Neighbourhood is proposed, the application will be reviewed in accordance with Policy 5, having regard to both the form of development along the street and its relationship to adjacent development in the Neighbourhood .**

**8. Zoning by-laws will contain numerical site standards for matters such as building type and height, density, lot sizes, lot depths, lot frontages, parking, building setbacks from lot lines, landscaped open space and any other performance standards to ensure that new development will be compatible with the physical character of established residential Neighbourhoods ... “**

I find that Variance 3 involves a performance standard contemplated in the zoning by-law for front and rear main wall height. I find that the variance requested is a gratuitous and unsupportable exception to that standard that changes the fit and appearance of this Townhouse unit within its block and street frontage in a manner that is abrupt, isolated, out of character and in a manner that is not harmonious to the

streetscape or respectful of the built form physical appearance of surrounding properties.

I find that policy 4.1.5 c) is offended by the proposal and recall nothing but the most general identification of this policy consideration by the planner. I find that a Duplex is not only not a prevailing building type, but also that it is a type not present in substantial numbers or at all in the planner's Geographic Study Area.

I find that the subject property has the potential for as-of-right significant intensification, over twice that existing. The response to Undertakings provided references to the *Planning Act*, the *Provincial Policies Statement* and the *Growth Plan 2019* all generally supporting of intensification and 'second units'. I find that there is no policy directive on conversions that either addresses a further intensification application generally to this site, to Townhouses as a general dwelling type or to the subject property specifically.

I find that in an applied sense, the intent and purpose of policy 4.1.7, above, is not met in respect of the requested fsi and main wall heights, for the reasons expressed.

Official Plan policy 4.1.8 supports the presence of the main wall height standard in By-law 569-2013. I find the proposal, Variance 3 in **Attachment 1**, to be not compatible with that standard with a resultant built form, streetscape presence and fit that does not meet the intent and purpose of the Official Plan or the zoning by-law.

While I agree with Mr. Tinker that intensification can be desirable, it must also be appropriate. In reaching this conclusion on this aspect, I have not focused on the immediate Townhouse block in considering area character, as might be the case if my concerns were focused solely or only on the adequacy of the shadow study, privacy, reduction in soft landscaping or parking conflicts. Nor have I had identified or given weight to any heritage attributes, real or imagined, of the subject property or its contiguous townhouses although I agree with their description as 'nice looking'.

In *40-42 Elmer Avenue* (18 243484 S52 32, et. al.) issued September 30, 2019, this Member had occasion to reflect on density increases arising from, *inter alia*, third floor and attic space in a manner that bears repeating here:

“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’.” (page 22 of 32)

Earlier, in *22 Birchview Boulevard* (19 161375 S45 03) issued September 24, 2019, in commenting favourably on the occupation of existing attic space (not directly in parallel here on that point); I observed:

“Past and even contemporary residential design can produce significant areas of void space that present potentially usable space alternatives to footprint expansion and its generally associated higher cost. There is a cogent argument that the employment of such spaces, in lieu of their dereliction and cost associated with heating, air-conditioning and maintenance, presents the opportunity for a higher and better use employment, in appropriate circumstances.

**What is to be avoided is the prospect of design approvals and construction sought at or near by-law standards then accompanied by a contemporaneous, intervening or after-the-fact seeking of permission - to augment proposed compliant space with designs that can materially alter zoning (FSI, gross floor area or density) permission, whether or not coupled with additional approvals. Such circumstances can be objectionable and may better be the subject of policy and consideration by Council.**

Support for the use and deployment of attic space is also not a hall pass for requests for density recognition in every circumstance. Nor are such permissions, if accepted, to be taken as a precedent for new or higher density numbers, establishing a new area benchmark, area average or an area character attribute. Individual circumstances can differ, and individual consideration is, I agree, the obligation of the review and appeal process.” (page 12 of 14, emphasis added)

For the reasons above stated, I conclude differently from Mr. Tinker but with the assistance of his evidence and that of Mr. Brander (albeit not so intended). I find that the grafting on to a narrow Townhouse structure a tripling of existing density in two discrete and independent dwelling units does not constitute good planning, even with the resultant benefit of a (still available) additional ‘second unit. A secondary suite (‘second unit’), on appearances, remains well manageable and as-of-right, as I am advised by counsel, and is within the modern zoning constraints recently afforded the subject property.

In the result, I have not found in favour of Variances 3 or 5 on **Attachment 1** on any of the four tests, or therefore the necessity of Variance 2, as modified in the evidence. These are arguably fundamental to the others, except Variance 6 which was released. It is perhaps not necessary to address them.

Out of completeness, however, and in the event they are useful to the Applicant to build out under existing zoning permission, I find agreement with the evidence of Mr. Tinker as to Variances 1 and 4 on **Attachment 1**, applicable to the Townhouse dwelling type.

In the event that those latter variances are employed, I agree with and would impose the accompanying condition recommended by Planning Staff and the COA.

I had requested, above, the production of any policy language of the City on the conversion of a Townhouse or Rowhouse to a Duplex for any assistance this might



offer. I was supplied, in addition to the provincial sources referenced above, extracts of the City Official Plan supportive of and encouraging 'second units', defined as subordinate and described in a variety of terms, not including a 'Duplex'.

That is not the deliverable proposed and supported as an objective of the Application, although it is clear some similar considerations apply.

I have dealt with the distinction, above.

Perhaps that policy aspect of conversions of different unit types "may better be the subject of policy and consideration by Council."

## **DECISION AND ORDER**

The appeals are allowed in part. The decision of the COA is set aside.

The following variances are approved subject to the accompanying condition:

### **Chapter 10.5.50.10.(3)(B), By-law 569-2013**

A minimum of 25% (18.73 m<sup>2</sup>) of the required rear yard landscaping is required to be maintained as soft landscaping.

In this case, 13% (9.77 m<sup>2</sup>) of the required rear yard landscaping will be maintained as soft landscaping.

### **Chapter 10.10.40.30.(1)(B), By-law 569-2013**

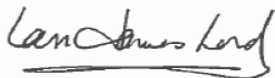
The maximum permitted building depth for a duplex is 14.0 m.

An altered townhouse will have a depth of 15.56 m.

### **Condition**

Any redevelopment of the subject property using either of the foregoing variances shall provide rear yard parking space and rear yard soft landscaping including tree planting. Any other variances that may appear on the redevelopment plans but are not listed in this written decision are NOT authorized.

X



I. Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord

## Attachment 1

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

**1. Chapter 10.5.50.10.(3)(B), By-law 569-2013**

A minimum of 25% (18.73 m<sup>2</sup>) of the required rear yard landscaping is required to be maintained as soft landscaping.

In this case, 13% (9.77 m<sup>2</sup>) of the required rear yard landscaping will be maintained as soft landscaping.

**2. Chapter 10.10.40.10.(1)(A), By-law 569-2013**

The maximum permitted height of a building or structure is 10.0 m.

The altered townhouse will have a height of 9.54 measured to the roof parapet and 10.61 m to the roof deck guard rail.

**3. Chapter 10.10.40.10.(2), By-law 569-2013**

The maximum permitted height of all front and rear exterior main walls is 7.5 m.

The altered townhouse will have front and rear exterior main wall heights of 9.14 m.

**4. Chapter 10.10.40.30.(1)(B), By-law 569-2013**

The maximum permitted building depth for a duplex is 14.0

m. The altered townhouse will have a depth of 15.56 m.

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

The maximum permitted floor space index is 1.0 times the area of the lot (193.5 m<sup>2</sup>).

The altered townhouse will have a floor space index of 1.27 times the area of the lot (245.82 m<sup>2</sup>).

**6. Chapter 10.10.40.70.(3)(B)(i), By-law 569-2013**

The minimum required side yard setback for a duplex is 0.75 m, where the side wall contains no windows or doors in that side of the building.

The altered townhouse will have a rear addition that will be located 0.305 m from the west side lot line.

This decision is subject to the following condition(s):

The rear yard parking spaces and rear yard soft landscaping including tree planting shall be required to be built by the applicant in accordance with the Site Plan Drawing A2, prepared by Brander Architects, revised as March 22, 2019, and as date stamped received by the Committee of Adjustment on April 11, 2019. Any other variances that may appear on these plans but are not listed in the written decision are NOT authorized.

**Attachment 2**

***(Note: these plans are for reference purposes and may not be identical to Exhibit 5 marked at the Hearing which included updated notations to October 3, 2019, e.g., Plan A1)***

(TLAB to insert plans A1 to A12 prepared by Brander Architects filed post October 22, 2019 by the Applicant or, if none, on the TLAB file shown as filed and marked received on September 27, 2019)

EXISTING TO REMAIN

TO BE DEMOLISHED

NEW WALL/PARTITION

###

CEILING HEIGHT

LINE BELOW

LINE ABOVE/EXTENT

PROPOSAL GFA INFOMATION

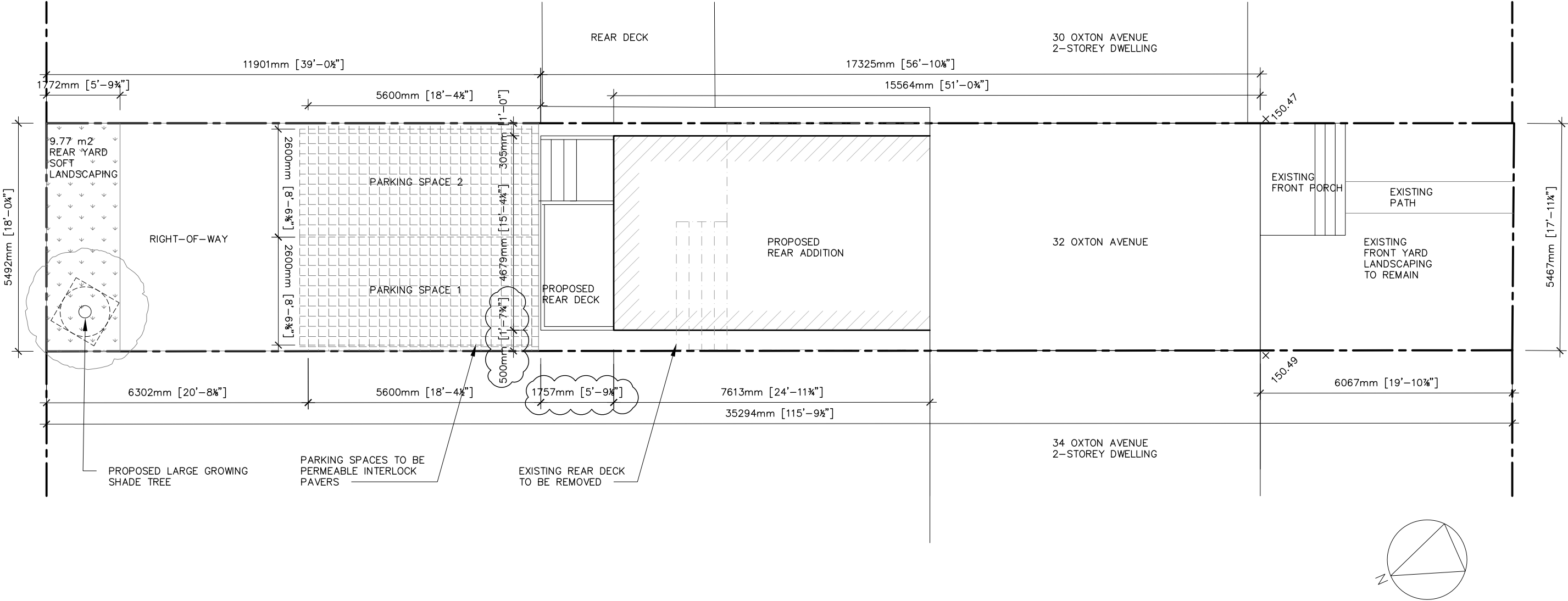
	EXISTING	PROPOSED	TOTAL
BASEMENT:	44.6m2 (480SF)	45.3m2 (488 SF)	89.9m2 (968 SF)
GROUND FLOOR:	43.5m2 (468SF)	37.2m2 (400 SF)	80.7m2 (868 SF)
SECOND FLOOR:	43.5m2 (468SF)	37.2m2 (400 SF)	80.7m2 (868 SF)
THIRD FLOOR:		78.7m2 (847 SF)	78.7m2 (847 SF)
ROOF ACCESS:		5.9m2 (63 SF)	5.9m2 (63 SF)
TOTAL ABOVE GRADE:			246.0m2 (2646 SF)

PROPERTY AND ZONING INFORMATION

ADDRESS:	32 OXTON AVENUE. TORONTO, ON
	PART OF LOT 207-210, REGISTERED PLAN 569E
ZONING:	R (d1.0) / R2 (Z1.0)
BUILDING HEIGHT:	10.0M MAXIMUM
LOT AREA:	193.5m2 (2083 SF)
LOT COVERAGE:	NO LIMIT

RECEIVED

By Toronto Local Appeal Body at 2:54 pm, Sep 27, 2019



BRANDER ARCHITECTS

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416 473 6956 | info@branderarchitects.com

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ISSUANCE	DATE	
1 ZONING REVIEW	2018-05-26	
2 RE-ISSUE FOR Z.R.	2018-08-27	
3 CofA APPLICATION	2019-02-05	
4 REV. PER COMMENTS	2019-02-24	
5 REV. PER COMMENTS	2019-03-22	
6 REV. PER COMMENTS	2019-07-23	
7 REV. PER COMMENTS	2019-09-06	

PROJECT  
32 OXTON AVENUE

PROJECT #  
17032

DRAWING  
SITE PLAN

SCALE  
1:100

SHEET  
A2

EXISTING TO REMAIN

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TO BE DEMOLISHED

=====

NEW WALL/PARTITION

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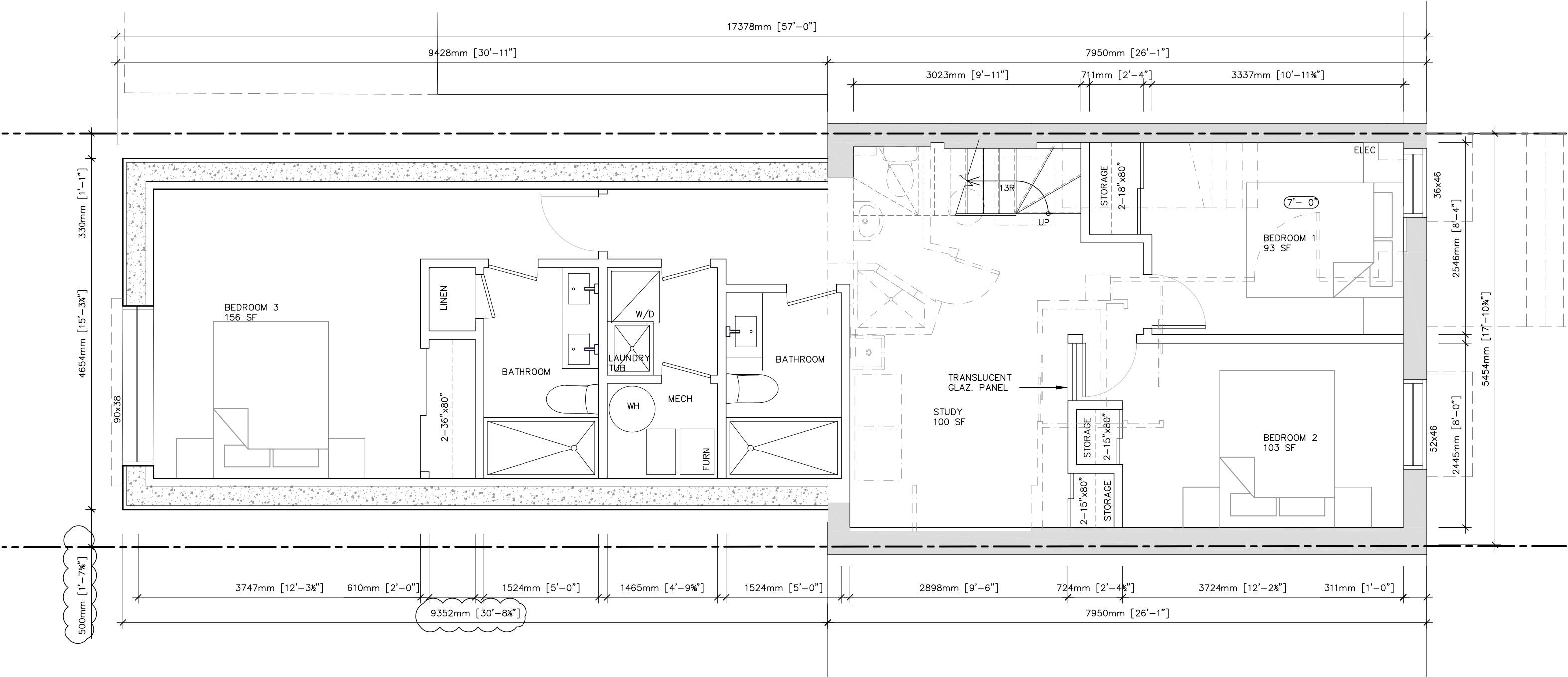
CEILING HEIGHT

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LINE BELOW

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LINE ABOVE/EXTENT



ISSUANCE	DATE	
1 ZONING REVIEW	2018-05-26	
2 RE-ISSUE FOR Z.R.	2018-08-27	
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6 REV. PER COMMENTS	2019-07-23	
7 REV. PER COMMENTS	2019-09-06	

EXISTING TO REMAIN

TO BE DEMOLISHED

NEW WALL/PARTITION

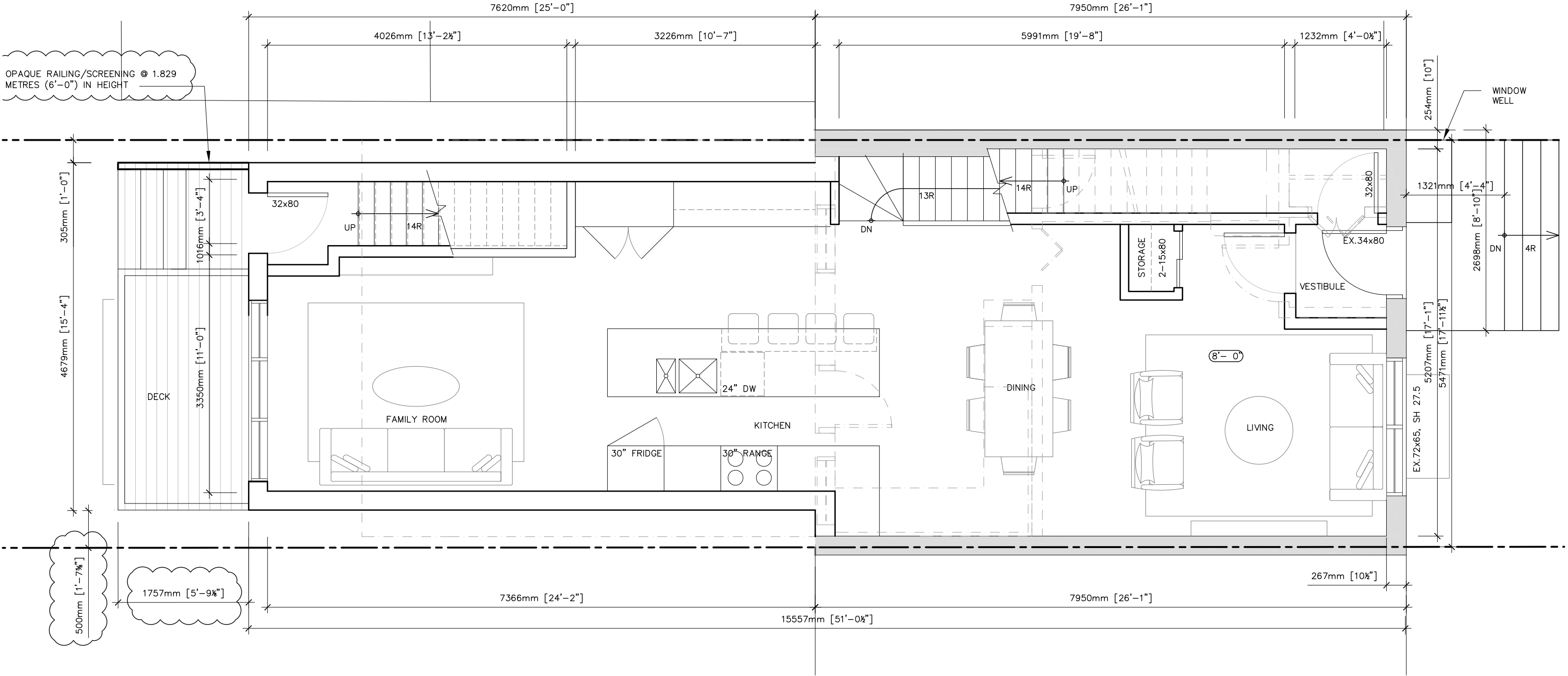
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CEILING HEIGHT

LINE BELOW

LINE ABOVE/EXTENT

LEGEND



ISSUANCE	DATE	8 REV. PER COMMENTS	2019-09-16
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2 RE-ISSUE FOR Z.R.	2018-08-27		
3 CoFA APPLICATION	2019-02-05		
4 REV. PER COMMENTS	2019-02-24		
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6 REV. PER COMMENTS	2019-07-23		
7 REV. PER COMMENTS	2019-09-06		

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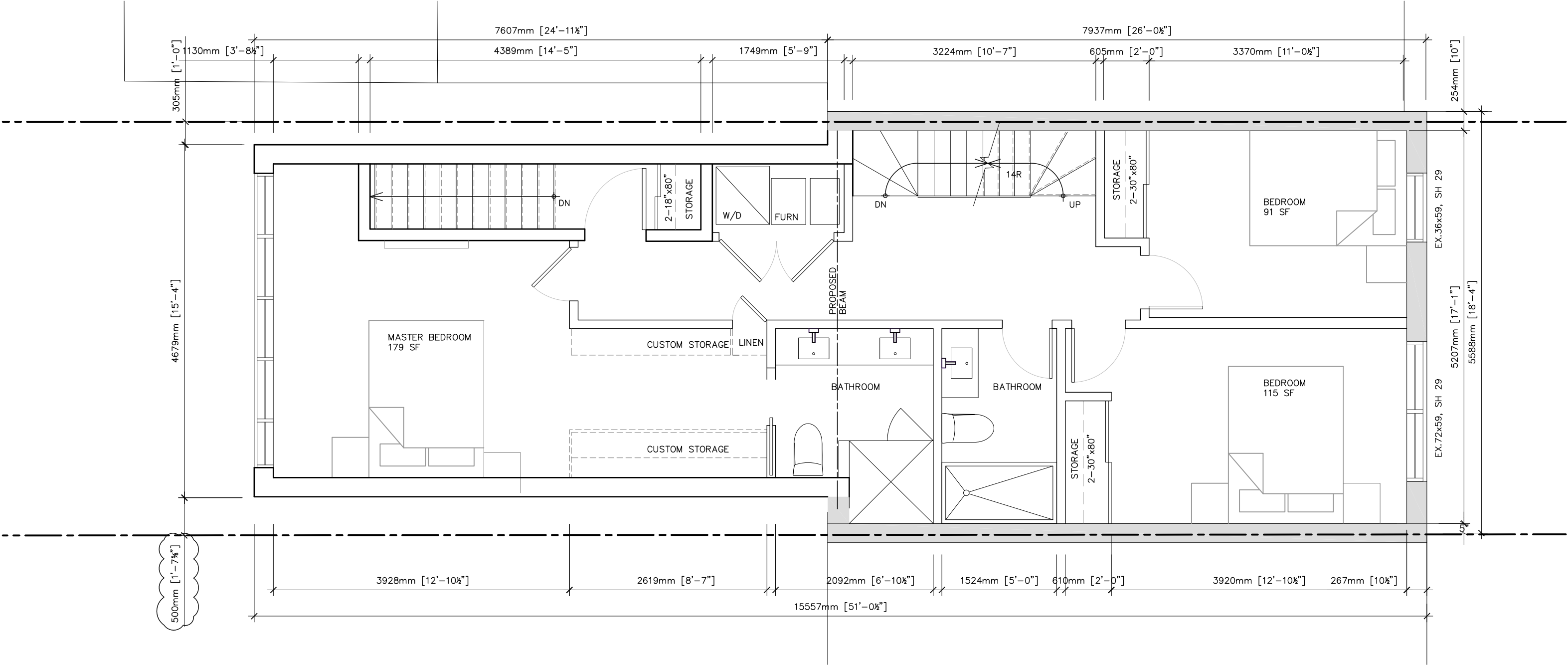
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LEGEND  
  
EXISTING TO REMAIN  
  
TO BE DEMOLISHED  
  
NEW WALL/PARTITION  
  
CEILING HEIGHT  
  
LINE BELOW  
  
LINE ABOVE/EXTENT



3

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ISSUANCE	DATE	
1 ZONING REVIEW	2018-05-26	
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6 REV. PER COMMENTS	2019-07-23	
7 REV. PER COMMENTS	2019-09-06	

PROJECT  
32 OXTON AVENUE

PROJECT #  
17032

DRAWING  
SECOND FLOOR PLAN –  
PROPOSED

SCALE  
1:50

SHEET  
A5

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TO BE DEMOLISHED

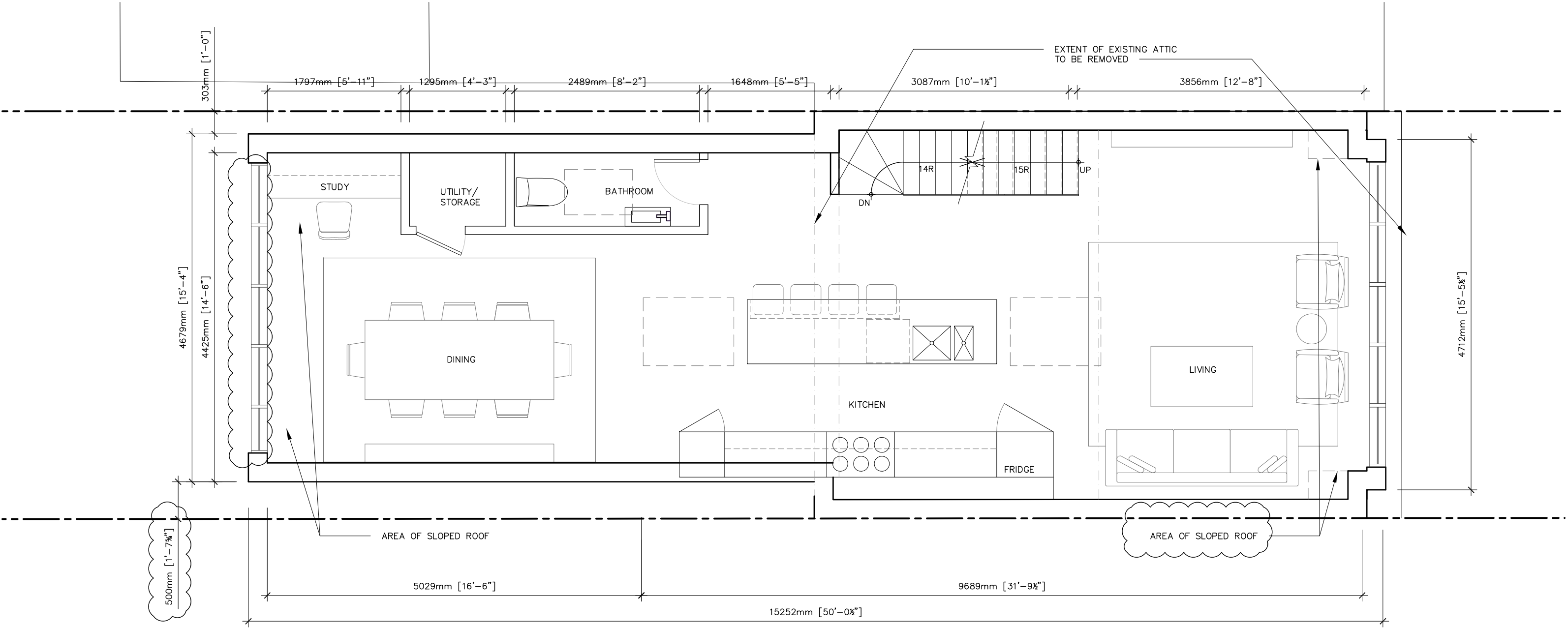
NEW WALL/PARTITION

#"

CEILING HEIGHT

LINE BELOW

LINE ABOVE/EXTENT





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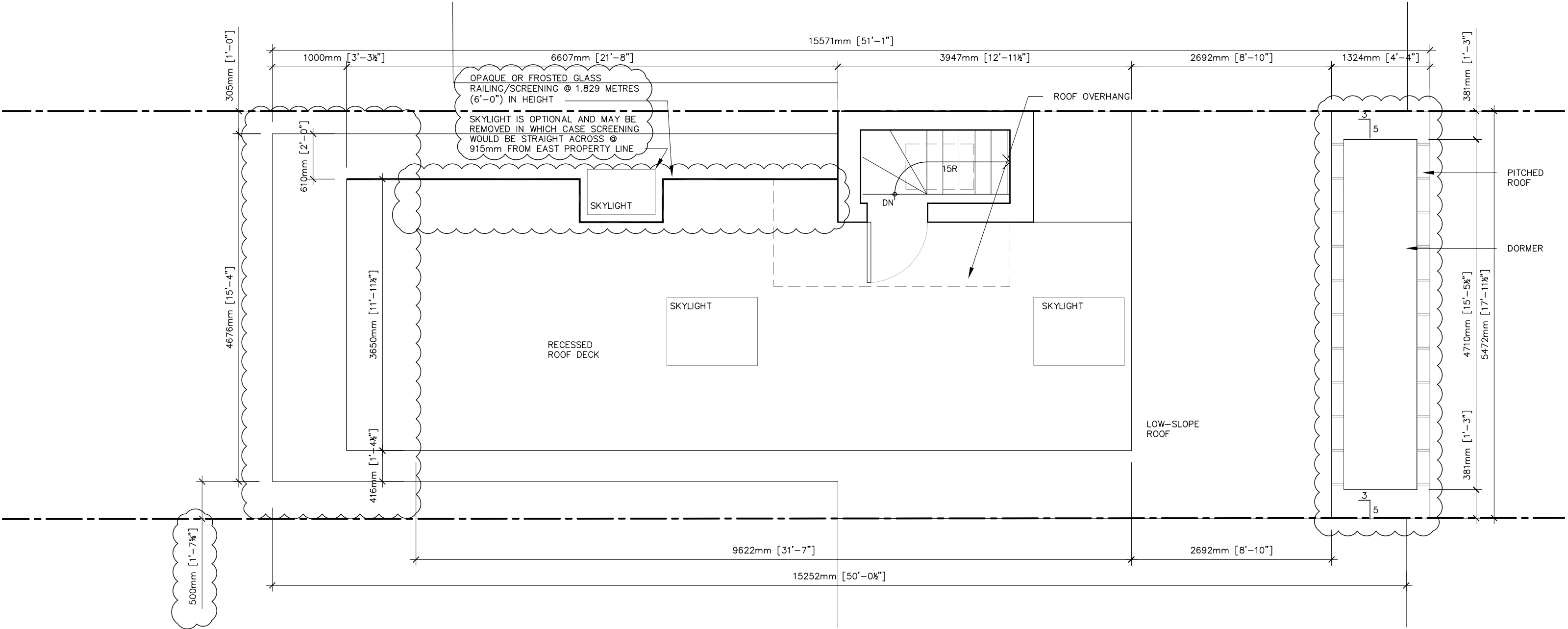
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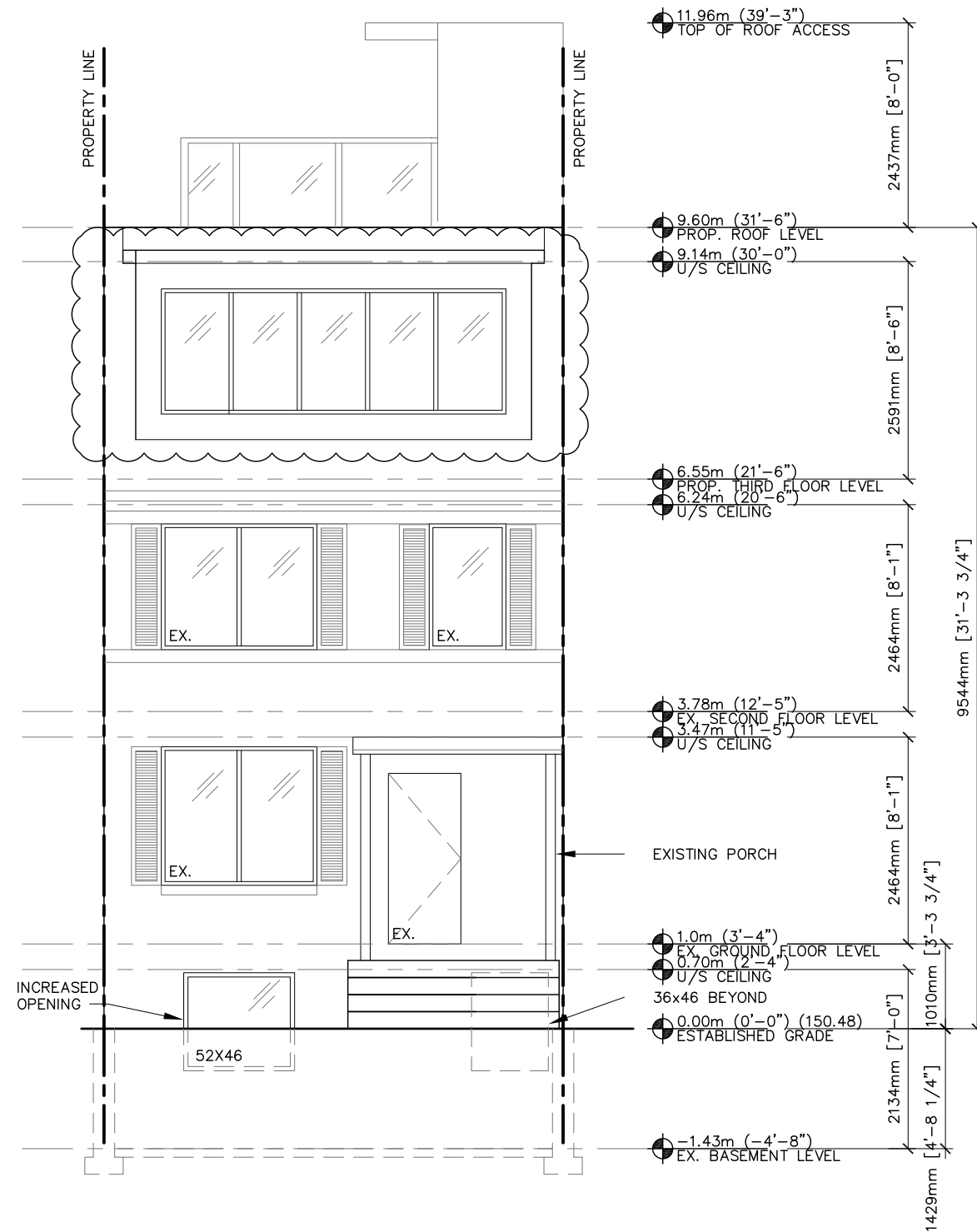
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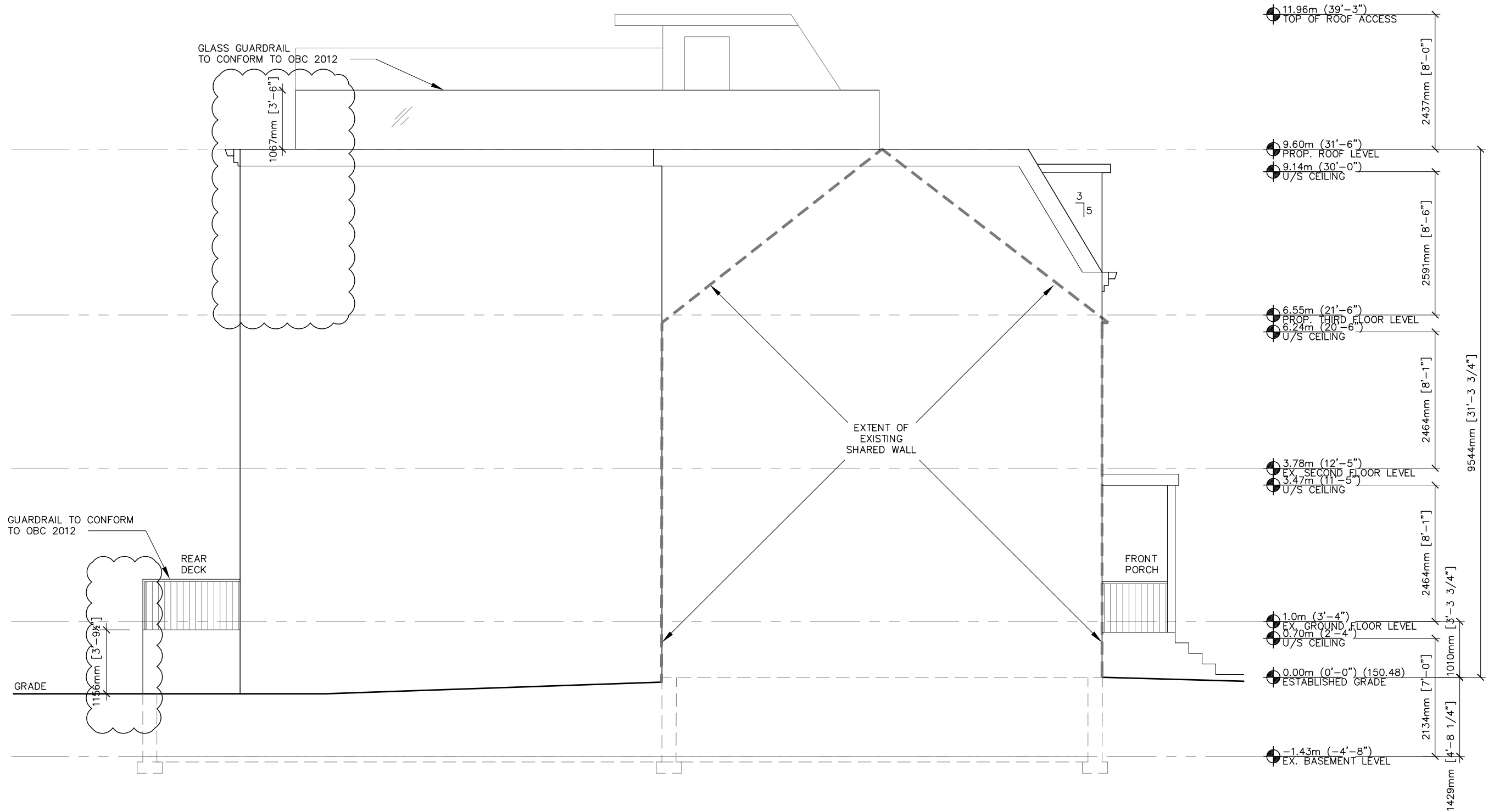
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LEGEND  
  
EXISTING TO REMAIN  
  
TO BE DEMOLISHED  
  
NEW WALL/PARTITION  
  
CEILING HEIGHT  
  
LINE BELOW  
  
LINE ABOVE/EXTENT



ISSUANCE	DATE	
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7 REV. PER COMMENTS	2019-09-16	





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7 REV. PER COMMENTS	2019-09-06

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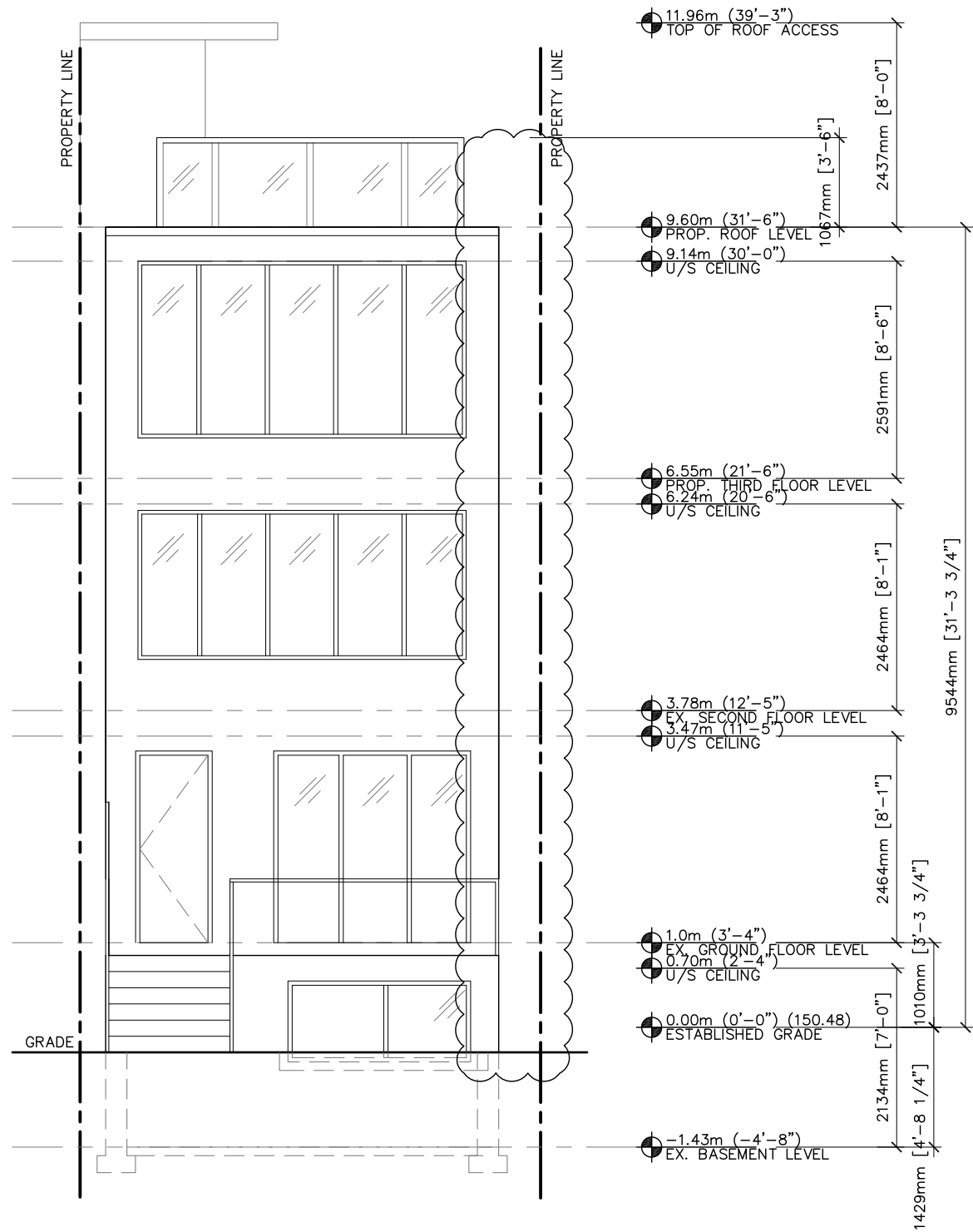
PROJECT  
32 OXTON AVENUE

PROJECT #  
17032

DRAWING  
SIDE ELEVATION WEST –  
PROPOSED

SCALE  
1: 75

SHEET  
A9



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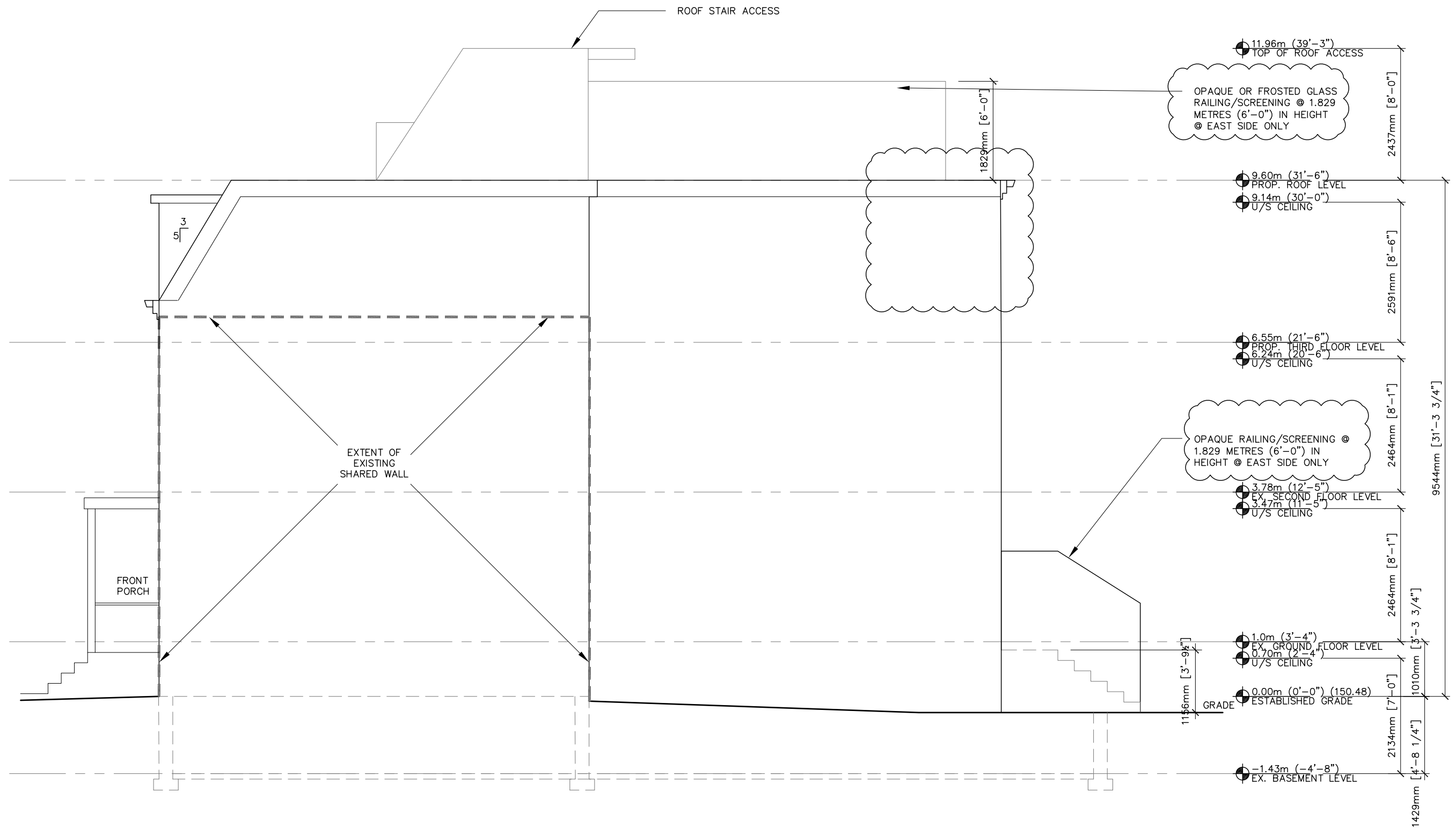
PROJECT  
32 OXTON AVENUE

PROJECT #  
17032

DRAWING  
REAR ELEVATION – PROPOSED

SCALE  
1:75

SHEET  
A10



ISSUANCE	DATE
1 ZONING REVIEW	2018-05-26
2 RE-ISSUE FOR Z.R.	2018-08-27
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4 REV. PER COMMENTS	2019-02-24
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6 REV. PER COMMENTS	2019-07-23
7 REV. PER COMMENTS	2019-09-06


PROJECT  
32 OXTON AVENUE

PROJECT #  
17032

DRAWING  
SIDE ELEVATION EAST –  
PROPOSED

SCALE  
1:75

SHEET  
A11

