Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Tuesday, October 15, 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): David Jarman

Applicant: Andrew Deane

Property Address/Description: 59 Bernard Ave

Committee of Adjustment Case File Number: 18 133259 STE 20 MV (A0312/18TEY)

TLAB Case File Number: 18 233517 S45 20 TLAB

Decision Order Date: Thursday, May 30, 2019

DECISION DELIVERED BY D. Lombardi

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request) of a decision of the Toronto Local Appeal Body (TLAB) by Member Talukder, issued May 30, 2019 (Decision) made by Sondra Fink (Requestor), a Party to the appeal in opposition to the approval of the minor variances sought. Ms. Fink is the owner of the property at 61 Bernard Avenue, a property adjacent to and immediately west of the subject property.

The Request is made for a review under Rule 31 of the Rules of Practice and Procedure (Rules) of the TLAB, as they then were prior to the May 6, 2019 revisions.

The Decision was in respect of 59 Bernard Avenue (subject property) wherein the Member dismissed the appeal and upheld the Committee of Adjustment's decision (attached as **Attachment 1** to this Decision), dated September 20, 2018, to approve a total of thirteen (13) variances from both City of Toronto (City) new, harmonized Zoning By-law 569-2013 and for similar relief under the former By-law 438-86.

The Request consists of an Affidavit (Form 10) sworn by Ms. Fink on June 20, 2019, and includes the following attachments:

- A three-page written document outlining her reasons for a review of the Member Talukder's Decision of May 30th attached to Form 10;
- A 'Front Elevation' drawing (identified as Exhibit 2 in the filed Hearing materials), illustrating an elevation comparison of 59 Bernard Avenue and the abutting dwellings at 57 and 61 Bernard;
- Four photographs showing views from the rear of the subject property to the rear yards of the abutting properties, three showing a panoramic streetscape of 55, 57, 59 and 61 Bernard Avenue, and a photo of 138 Bedford (Attachments A – E); and
- A petition (Attachment F), dated October 1, 2018, signed by 19 neighbours primarily residing on Bernard Avenue indicating opposition to the demolition and rebuilding of the subject property as proposed by the owners and approved by the COA.

The Request asks that the Decision be overturned, and the variance relief requested by the owners of the subject property be refused.

There were no submissions received on the Request by the TLAB either from the Applicant or the Appellant.

I am of the view that the Request was commenced in proper form accompanied by an affidavit sworn by the Affiant.

BACKGROUND

The owners of the subject property, Joan Gilmour and Paul Rosenberg, filed an application at the COA for approval of variances to build a new three-storey detached residential dwelling and a rear attached garage. The subject property is located in the 'East Annex' neighbourhood of Toronto, southwest of the intersection of Avenue Road and Davenport Road. The 'Annex' is characterized as an eclectic neighbourhood with older houses built over the period of the last 150 years.

As noted above, the owners propose to construct a new three-storey detached dwelling and a rear detached garage. A total of thirteen variances are requested: the eight (8) variances to By-law 569-2013 include front yard and side yard setbacks, front and rear main wall, FSI, roof eaves, rear yard landscaping, dwelling depth and encroachment for a fire shutter; five (5) variances to By-law 438-86 include corresponding front and side yard setbacks, side yard setback for the portion of the building exceeding 17 m in depth, landscaped open space, FSI, and front yard landscaping open space.

The Member heard from the Applicant's professional land use planner, Ryan Guetter of the planning firm Weston Consulting, as well as from David Jarman, the Appellant and owner of 57 Bernard Avenue, and Sondra Fink (Requestor), a Party in the appeal and the owner of 61 Bernard Avenue.

In testimony given at the Hearing, both Mr. Jarman and Ms. Fink expressed similar concerns with the variances being requested as well as with the dwelling to be

constructed. Their principal concerns can be summarized in the following manner: the proposed dwelling will adversely impact the enjoyment of their properties, in particular; the dwelling will be excessive in height and in lot coverage and therefore is a case of 'overdevelopment' of the subject property; Mr. Jarman suggested that there will be storm water management impact affecting abutting properties; and the proposed development will generally detract from the cohesive nature of the neighbourhood character.

With respect to neighbourhood character, both Mr. Jarman and Ms. Fink were adamant that the proposed building would disrupt the continuity of the four 'Tudor-style' homes (Tudor homes) along Bernard Avenue, which includes their dwellings proximate to the subject property, thereby negatively impacting the overall streetscape. Additionally, they submitted that the massing and length of the proposed dwelling would result in adverse impacts on their properties reducing privacy (overlook) and sunlight.

In the end, Member Talukder preferred the opinion evidence of Mr. Guetter. He characterized the neighbourhood as having various architectural styles with the predominant building typology is three-storey dwellings, usually adjacent to two-storey dwellings, which he successfully illustrated through photographic evidentiary materials of the area immediately surrounding the subject property. Hence, he concluded, and the Member agreed, that the proposed dwelling's built form incorporated architectural components that would be compatible with and would reinforce the existing characteristics in the neighbourhood.

As to the adverse impact issues raised by Mr. Jarman and Ms. Fink relative to overlook, privacy, sunlight and the overall enjoyment of their properties, the Member wrote in her Decision at paragraph 51, *"I accept Mr. Guetter's testimony that the proposed building will not provide an unacceptable shadowing effect as a result of the positioning and setback of the third storey, the lower rear height of the second storey and the positioning of the building. In addition, the portion of the roof that requires a variance for front and rear exterior main wall height is located at the center of the building and will not cause an unacceptable adverse effect with respect to overlook into neighbourhood properties."*

In the end, Member Talukder dismissed the appeal and upheld the COA decision, including the conditions imposed by the Committee's decisions.

JURISDICTION

Below are the TLAB Rules applicable to a request for review:

> "**31.4** A Party requesting a review shall do so in writing by way an Affidavit which provides:
>
> a) the reasons for the request;
>
> b) the grounds for the request;
>
> c) any new evidence supporting the request; and

d) any applicable Rules or law supporting the request.

31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:

a) seek written submissions from the Parties on the issue raised in the request;

b) grant or direct a Motion to argue the issue raised in the request;

c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or

d) confirm, vary, suspend or cancel the order or decision.

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

a) acted outside of its jurisdiction;

b) violated the rules of natural justice and procedural fairness;

c) made an error of law or fact which would likely have resulted in a different order or decision;

d) been deprived of new evidence which was not available at the time of the Hearing, but which would likely have resulted in a different order or decision; or

e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

31.8 Where the Local Appeal Body seeks written submissions from the Parties or grants or directs a Motion to argue a request for review the Local Appeal Body shall give the Parties procedural directions relating to the content, timing and form of any submissions, Motion materials or Hearing to be conducted."

CONSIDERATIONS AND COMMENTARY

The foregoing Rules restrict the scope of inquiry afforded a Review; the public interest sought to be addressed by the Rule is to permit the TLAB to have a sober second look at a Decision in light of the defined criteria on the types of errors that, if they occurred, might be afforded relief through the expedient remedies available to the reconsideration.

Rule 31.7 d), above, has several clearly defined components which, if met, permits consideration by the TLAB of the remedies afforded by Rule 31.6, also recited above.

In essence, a Review is not an open invitation to simply challenge a decision with which one disagrees. Rather, the Rules clearly envisage that there must be a demonstrable error in the categories identified that warrants relief of the variety provided for in the Rule.

I note that the Affidavit submitted by Ms. Fink in this matter, while somewhat discursive, was rather rambling and did not specifically identify the applicable Rules supporting the Request as required by Rule 31.4 d). Instead, she simply reiterated arguments she made in her testimony during the Hearing. I find this to be deficient given the direction for Affiants required by above referenced Rule.

However, despite the failure to define specific grounds in her Affidavit, I am prepared to consider her Request as afforded by the TLAB Rules.

After reviewing her submission, I would characterize her Request for Review as consisting of three fundamental assertions; false and misleading evidence submitted by the Applicant; error in fact or law; and violation of the rules of natural justice and procedural fairness.

These headings roughly track the proper grounds identified, above, in Rule 31.7 b), c) and e) and are discussed in the order communicated by the Affiant in her submission.

1. Heard False or Misleading Evidence

Rule 31.7 e) reads "heard false or misleading evidence from a Person, ***which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review***."

The Affiant (Ms. Fink) has continued to assert that the owner's architect, Richard Wengle, *"clearly made a false statement as fact which is patently irresponsible and outrageous because Richard Wengle is the Architect for this application* (p. 3 of the Affidavit)." The Affiant, above, is alleging that the project architect stated that the height of the proposed dwelling on the subject property *"would be 2 feet taller than 55, 57, and 59 Bernard Avenue rooftops" is false.*

Ms. Fink asserts, in fact, that the proposed dwelling will be 10 feet taller than 55, 57 and 59 rooftops," which she submits is not "*a minor variance" (her words)*. She provides a graph drawing (Exhibit 2) attached to the Affidavit to support her opinion. Furthermore, she suggests that the COA *"believed Richard Wengle that the rooftop of 59 Bernard Avenue would be 2 feet higher"* (p. 3 of the Affidavit), and further claims that the architect made this false statement *"to get a fast approval from both City Planner (sic) and the COA committee (sic)."*

Respectfully, I note that the Affiant raised this same issue in the TLAB Hearing on March 18, 2019. On page 6 (at paragraph 25) of Member Talukder's Decision, this

very point is highlighted by the Member, *"Ms. Fink's main concern is that the proposed building would be 10 feet or 14 feet above her property's roof line."*

As such, I do not find this be either a new assertion or new evidence before the TLAB.

In fact, I believe this was exposed as being generally inaccurate at the Hearing. At paragraph 35 in the Decision, under the heading *'Ryan Guetter's Testimony'* , the Member wrote,

> *"Mr. Guetter stated that if Mr. Jarman's calculations in his exhibit depicting the front elevations are correct (Exhibit 2 – the same exhibit attached to the Affidavit), then the difference between the eaves of the proposed building and the adjacent buildings (Mr. Jarman's and Ms. Fink's) is 1.29 m (4 Ft.) and the difference between the top of the roof of the proposed building and the top of the roof of the adjacent buildings is approximately 2.86 m and not 14 ft. as suggested by Ms. Fink."*

On this basis, I find no credible evidence of false or misleading evidence as per Rule 13.7 e). More importantly and considering the highlighted portion of the Rule above noted, the assertion of a false or misleading statement was first raised at the COA hearing. Irrespective of whether, as Ms. Fink asserts in her Affidavit, that the Affiant, and I presume Mr. Jarman, *"were not allowed to speak after Richard Wengle spoke"* at the COA hearing, the matter was raised again at the TLAB Hearing and was addressed by the presiding Member.

Further, I find no evidence that the alleged 'false and misleading evidence' purported by the Affiant "likely resulted in the order or decision which is the subject of the request for review." Making allegations such as those included in Ms. Fink's Affidavit, including her statement that *"Robert Brown, our assistant, used to be on the Committee of Adjustment panel and told David Jarman and myself that this application should never have been passed at the COA,"* is, in my view, non-evidentiary, pure speculation, not relevant here and I give no weight to it.

In this regard, I find no reason to conclude that false or misleading evidence was provided by the Applicant's architect or the planner, Mr. Guetter, for that matter. I also find that this was appropriately addressed at the TLAB Hearing by the presiding Member and cannot be claimed as having been discovered by the Requestor following the Hearing, as indicated by the evidence available. Therefore, there is absolutely no basis to conclude the likelihood of a different decision, on the appeal itself.

2. Error in Fact or Law

The Affiant refers to case law in her Affidavit (the top of page 2 of her written submission) citing the decision of *"Vincent v. DeGasperis"*; however, she provides neither a tribunal reference, a date nor has she attached a copy of the case for consideration. Later on the same page in the aforementioned Affidavit, she casually refers to the case with the notation "despite the court's clarification in "*Vincent v. DeGasperis",…"* which seems additionally vague as to where the case was heard,

although I believe the Affiant is referring to *'Vincent v. DeGasperis, [2005] O.J. No. 2890'* (hereinafter referred to as *DeGasperis*) which was an appeal to Divisional Court from an (former) Ontario Municipal Board decision dealing with a variance application under the *Planning Act*.

This is the very matter remitted to the Member and upon which the appeal Hearing was conducted, and the Decision rendered. The mere statement, assuming it is from the referenced case law, does not constitute evidence. Entirely absent is the factual basis of a ground of error allegedly made by the Member.

She suggests that in *"Degasperis*" the court stated that "a minor variance could be too large even if it will have no impact." She implies that this should be the rationale applied by the presiding Member to the subject development to evaluate whether the proposal meets the variance test of 'minor'. She reiterates her opinion that the proposed dwelling is an 'over development' of the subject property *and "does not fit in with the physical character visually and (sic) streetscape on our block and would stick out like a sore finger and make for a weird streetscape."* (p. 2 of the written statement attached to the Affidavit)

She further references *"Degasperis,"* suggesting that the subject application is not "minor at all" because there are only two people living at 59 Bernard Avenue and *"they do not need a 3 storey Monster/McMansion home on a very small lot."* I find this assertion to also be irrelevant and of no consequence to the review request.

Based on the above, I do not find a threshold to substantiate that the Member made an error of fact or law which would likely have resulted in a different order or decisions. In reviewing the Decision of May 30th, the Affiant did not cite case law for the Member's consideration nor did she question the Member's interpretation of that any case law or relevant planning instruments.

Therefore, I can give no weight to this ground for review.

3. The Local Appeal Body may have violated the rules of natural justice and procedural fairness

Finally, although Ms. Fink does not explicitly state that she was denied natural justice and procedural fairness, she makes a vague reference to a lack of procedural fairness in her Affidavit (p. 1 of the text). There, she *states "David Jarmin [sic] and I had only 4 days notice (of the application) from the COA and were ill prepared and were not given any instructions as to how to present and discuss variances and By-laws at the COA meeting."*

I note that it is clear in Member Talukder's Decision of May 30th that both Mr. Jarman and the Affiant were accorded the opportunity by the presiding Member to provide extensive testimony at the Hearing. Furthermore, in reviewing the recording of the hearing and the Decision, both the Affiant and Mr. Jarman were also both allowed time to cross-examine the Applicant's planning witness, as permitted of Parties by the TLAB Rules.

Accordingly, I find that the Affiant, and Mr. Jarman for that matter, had ample opportunity to participate in the hearing appeal process and present their cases at the March 18th Hearing. I note that on page 12 (at paragraph 50) of her Decision, Member Talukder acknowledged the genuine concerns expressed by both Parties but preferred the planner's opinion evidence in dismissing the appeal.

In the absence of an eligible ground being established in a compelling way, there is no basis to afford the relief requested. Deficiencies, if any, before the COA were rectified in the TLAB Hearing – which was a full and complete reconsideration of the requested variances.

I have no doubt that the concerns expressed regarding the size and scale of the proposal and the impact of this development on the aesthetics and preservation of area character are well founded and that the Decision is troubling to the Requestor in that regard.

However, it is not for the reviewer to speculate as to how evidence might have been weighed if presented to a different Member, especially in the absence of a compelling basis establishing a ground for review. As noted earlier, the Request opportunity is not one to simply re-argue a disposition that is not supported in the Decision. The Requestor's charge is to demonstrate an eligible ground that has been breached with sufficient facts to warrant the reviewer to intervene.

I find that there are not sufficient instances raised by the Requestor, in the Decision, to demonstrate on a compelling basis that the Member failed to perform her duty based on the evidence placed before her.

DECISION AND ORDER

The Request for Review is denied; the Decision is confirmed.

X _____

D. Lombardi
Panel Chair, Toronto Local Appeal Body

City Planning Division
Michael Mizzi, MCIP, RPP
Director, Zoning and Secretary-Treasurer,
Committee of Adjustment

Committee of Adjustment
Toronto and East York District

100 Queen Street West, 1st Floor
Toronto, Ontario M5H 2N2
Tel: 416-392-7565
Fax: 416-392-0580

NOTICE OF DECISION
MINOR VARIANCE/PERMISSION
(Section 45 of the Planning Act)

File Number: **A0312/18TEY**
Property Address: **59 BERNARD AVE**
Legal Description: PLAN M6 PT LOTS 115 & 116
Agent: ANDREW DEANE
Owner(s): JOAN GILMOUR
Zoning: R(d1.0)(x471) & R2 Z1.0 (ZZC)
Ward: Trinity-Spadina (20)
Community: Toronto
Heritage: Not Applicable

Notice was given and a Public Hearing was held on **Thursday, September 20, 2018**, as required by the Planning Act.

PURPOSE OF THE APPLICATION:

To construct a new three-storey detached dwelling and a rear detached garage.

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

1. Chapter 10.5.40.70.(3), By-law 569-2013
The minimum required front yard setback is 3.1 m.
The detached dwelling will be located 2.4 m from the front lot line.

2. Chapter 10.10.40.70.(3), By-law 569-2013
The minimum required side yard setback is 0.9 m.
The detached dwelling will be located 0.13 m from the east side lot line.

3. Chapter 10.10.40.10.(2)(A)(i)&(ii), By-law 569-2013
The maximum permitted height of all front and rear exterior main walls is 7 m.
The height of the front and rear exterior main walls will be 11.25 m.

4. Chapter 10.10.40.40.(1)(A), By-law 569-2013
The maximum permitted floor space index of a detached dwelling is 1.0 times the area of the lot (276.79 m^2).
The detached dwelling will have a floor space index equal to 1.07 times the area of the lot (296.56 m²).

5. Chapter 10.5.40.60.(7), By-law 569-2013
Roof eaves may project a maximum of 0.90 m provided that they are no closer than 0.30 m to a lot line.
The eaves for the pitched roof will project 0.88 and will be located 0.03 m from the east lot line, and the eaves for the flat roof will project 0.90 m and will be located 0.00 m from the east lot line.

6. Chapter 10.5.50.10.(3)(A), By-law 569-2013
A minimum of 50% (44.27 m²) of the rear yard must be maintained as soft landscaping.
In this case, 39% (34.22 m²) of the rear yard has been maintained as soft landscaping.

7. Chapter 10.10.40.30.(1), By-law 569-2013
The maximum permitted depth of a detached dwelling is 17 m.
The detached dwelling will have a depth of 18 m.

8. Chapter 10.5.40.60.(8)(A), By-law 569-2013
Wall mounted vents, pipes, or utility equipment may encroach into a required setback 0.60 m provided that it is no closer to a lot line than 0.30 m.
The fire shutter will be located 0.00 m from the east side lot line.

1. Section 6(3) Part II 2(II), By-law 438-86
The minimum required front yard setback is 3.10 m.
The detached dwelling will be located 2.40 m from the front lot line.

2. Section 6(3) Part II 3.B(II), By-law 438-86
The minimum required side lot line setback for the portion of the building exceeding a depth of 17.0 m is 7.5 m.
The 1.0 m portion of the detached dwelling exceeding the 17.0 m depth will be located 0.13 m from the east side lot line and 2.89 m from the west side lot line.

3. Section 6(3) Part III 1(A), By-law 438-86
A minimum of 30% of the lot area (83.04 m^2) shall be landscaped open space.
In this case, 26% of the lot area (73.30 m²) will be landscaped open space.

4. Section 6(3) Part I 1, By-law 438-86
The maximum permitted gross floor area of a detached dwelling is 1.0 times the area of the lot (276.79 m²).
The detached dwelling will have a gross floor area equal to 1.07 times the area of the lot (296.56 m²).

5. Section 6(3) Part III 3 (D), By-law 438-86
A minimum of 75% (14.32 m²) of the required front yard landscaped open space shall be in the form of soft landscaping.
In this case, 64% (12.20 m²) of the required front yard landscaped open space will be in the form of soft landscaping.

The Committee of Adjustment considered the written submissions relating to the application made to the Committee before its decision and oral submissions relating to the application made at the hearing. In so doing, **IT WAS THE DECISION OF THE COMMITTEE OF ADJUSTMENT THAT:**

The Minor Variance Application is Approved on Condition

It is the decision of the Committee of Adjustment to approve this variance application for the following reasons:

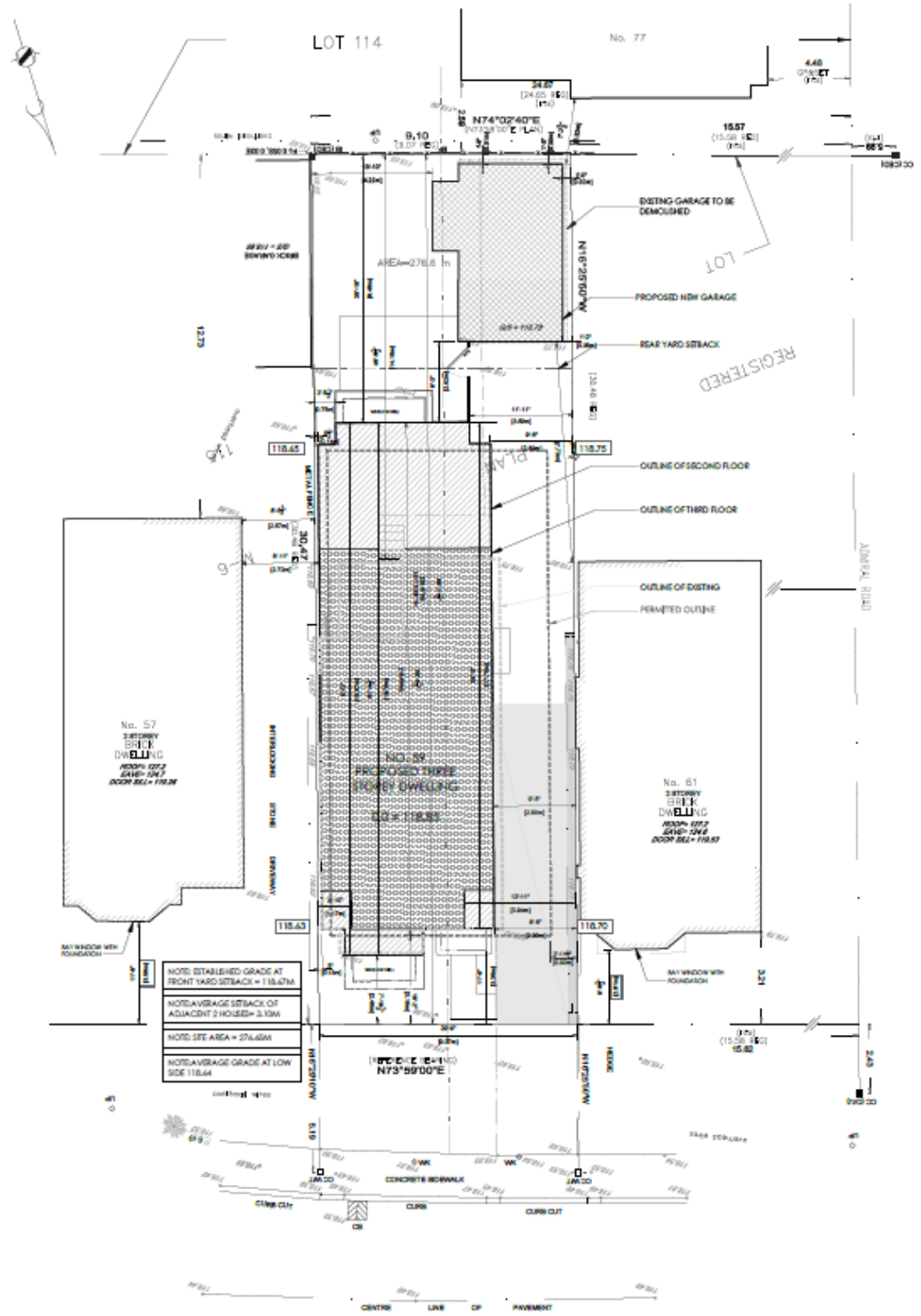
- The general intent and purpose of the Official Plan is maintained.
- The general intent and purpose of the Zoning By-law is maintained.
- The variance(s) is considered desirable for the appropriate development of the land.
- In the opinion of the Committee, the variance(s) is minor.

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

(1) Where there are no existing street trees, the owner shall submit a payment in lieu of planting one street tree on the City road allowance abutting each of the sites involved in the application or elsewhere in the community if there is no space, to the satisfaction of the Supervisor, Urban Forestry, Tree Protection and Plan Review, Toronto and East York District.

(2) Permeable pavers shall be installed along the entire length of the driveway leading to the proposed rear garage.

(3) The front yard setback of 2.4 m shall be limited to the bay window projection as shown on the Site Plan drawing received on March 22, 2018. Any other variances that may appear on these plans but are not listed in the written decision are NOT authorized.



BERNARD AVENUE
BY REGISTERED PLAN M-6

RICHARD WENGLE
ARCHITECT INC.

ROSENBERG-GILMOUR RESIDENCE
59 BERNARD AVENUE
TORONTO, ONTARIO
MARCH 22, 2018
1727

SITE PLAN
SCALE: 3/32" = 1'-0"

SIGNATURE PAGE

File Number: **A0312/18TEY**
Property Address: **59 BERNARD AVE**
Legal Description: PLAN M6 PT LOTS 115 & 116
Agent: ANDREW DEANE
Owner(s): JOAN GILMOUR
Zoning: R(d1.0)(x471) & R2 Z1.0 (ZZC)
Ward: Trinity-Spadina (20)
Community: Toronto
Heritage: Not Applicable

Edmund Carlson (signed)

Joanne Hayes (signed)

Ewa Modlinska (signed)

Nancy Oomen (signed)

DATE DECISION MAILED ON: **WEDNESDAY, SEPTEMBER 26, 2018**

LAST DATE OF APPEAL: **WEDNESDAY, OCTOBER 10, 2018**

CERTIFIED TRUE COPY

Sylvia Mullaste
Acting Deputy Secretary-Treasurer
Committee of Adjustment, Toronto and East York District

Appeal Information

All appeals must be filed with the Deputy Secretary Treasurer, Committee of Adjustment by the last date of appeal as shown on the signature page.

Your appeal to the **Toronto Local Appeal Body (TLAB)** should be submitted in accordance with the instructions below unless there is a related appeal* to the Local Planning Appeal Tribunal (LPAT) for the same matter.

TORONTO LOCAL APPEAL BODY (TLAB) APPEAL INSTRUCTIONS

To appeal this decision to the TLAB you need the following:

- a completed TLAB Notice of Appeal (Form 1) in **digital format** on a CD/DVD
- $300 for each appeal filed regardless if related and submitted by the same appellant
- Fees are payable to the **City of Toronto** by cash, certified cheque or money order (Canadian funds)

To obtain a copy of the Notice of Appeal Form (Form 1) and other information about the appeal process please visit the TLAB web site at www.toronto.ca/tlab.

LOCAL PLANNING APPEAL TRIBUNAL (LPAT) APPEAL INSTRUCTIONS

To appeal this decision to the LPAT you need the following:

- a completed LPAT Appellant Form (A1) in **paper format**
- $300.00 with an additional reduced fee of $25.00 for each connected appeal filed by the same appellant
- Fees are payable to the **Minister of Finance** by certified cheque or money order (Canadian funds).

To obtain a copy of Appellant Form (A1) and other information about the appeal process please visit the Environmental & Lands Tribunals Ontario (ELTO) website at http://elto.gov.on.ca/tribunals/lpat/forms/.

*A **related appeal** is another planning application appeal affecting the same property. To learn if there is a related appeal, search community planning applications status in the Application Information Centre and contact the assigned planner if necessary. If there is a related appeal, your appeal to the **Local Planning Appeal Tribunal (LPAT)** should be submitted in accordance with the instructions above.