

# DECISION AND ORDER

**Decision Issue Date** Thursday, November 14, 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): JUNG JA KIM

Applicant: FERNANDO LIMA

Property Address/Description: 938 QUEEN ST W

Committee of Adjustment Case File: 19 127890 STE 10 MV (A0279/19TEY)

**TLAB Case File Number: 19 188022 S45 10 TLAB**

**Hearing date:** Tuesday, November 12, 2019

**DECISION DELIVERED BY Ian James LORD**

## APPEARANCES

NAME	ROLE	REPRESENTATIVE
FERNANDO LIMA	Applicant	
JUNG JA KIM	Owner/Appellant	MICHAEL BARTON
JON HYMAN	Participant	

## INTRODUCTION

This is an appeal to the Toronto Local Appeal Body (TLAB) from the decision of the Toronto and East York Panel of the City of Toronto (City) Committee of Adjustment (COA) refusing a variance applicable to 938 Queen Street West (subject property).

The variance sought relief from a maximum 1.0x lot area floor space index, to permit the recognition and maintenance of new construction completed without building permit permission.

**Decision of Toronto Local Appeal Body Panel Member: I. LORD  
TLAB Case File Number: 19 188022 S45 10 TLAB**

The property is located at the northwest corner of the intersection of Queen Street West and Shaw Avenue in the City. The building, as constructed, has two storeys fronting on Queen and Shaw, decreasing to one storey along the Shaw frontage. Pedestrian accesses are proposed on both frontages. The subject property abuts commercial premises on its west side; all other sides are street frontages, including an at-grade unimproved lane along its north boundary. The subject property appears to be built to the lot line on all except its north limit where an at-grade open air space exists sufficient for the parking of a vehicle, enclosed by fencing.

I advised I had attended the site and reviewed the scant pre-filed materials.

In attendance was the owner Appellant, Mr. Daniel Ibrahim, and architectural technician and Appellant Representative, Mr. Michael Barton, a Registered Professional Planner retained by the Appellant, and Mr. John Hyman, owner of the abutting adjacent property at 940 Queen Street West.

Mr. Daniel Ibrahim substituted for Mr. Michael Barton as the Appellants' Representative.

No other persons spoke or participated in the proceeding.

## **BACKGROUND**

Mr. Barton was called to give professional land use planning evidence in support of the appeal of the COA refusal.

In response to a question as to why no materials had been filed, he explained that on September 23, 2019 he had filed the requisite Witness Statement, had a note that it had been received but was unaware of it not being posted. He acknowledged the duty of all Parties and Participants to constantly monitor the TLAB website to ensure a timely and orderly elicitation of evidence. The primary purpose of the disclosure of information and the timelines involved in the TLAB Rules is to avoid instances of 'trial by ambush' and to let the Parties and Participants to a proceeding know, by disclosure, of the case to be addressed.

Mr. Barton did not acknowledge receipt and exchange of advice from the TLAB that he could not both register as a Representative and also give expert opinion evidence. This circumstance did not arise given the presence of Mr. Ibrahim

It became apparent that the materials were filed in a timely manner and simply not posted through an administrative procedure.

Mr. Barton's credentials were reviewed, he was qualified without objection to give expert opinion evidence within the discipline of land use planning and his Expert Witness Statement was admitted as Exhibit 1. He was directed to review it in detail.

## **MATTERS IN ISSUE**

This is an instance of new construction built out beyond the floor space index (FSI) permission allowed in the by-law. As such, the TLAB is to examine the requested

FSI recognition as if it were not built, but the subject of an application on appeal from a COA refusal. The fact that the construction exists can be material as to the identification of impacts of the built form. In this circumstance, the building is new construction (albeit over an extended four year period) and remains unoccupied.

## **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. Barton explained three elements at the outset following his retainer post the COA decision:

1. the original plans, for which a building permit had been issued, included a similar or identical footprint but for the fact that the north limit was an unenclosed but covered space in the nature of a double carport; for security and other reasons this space had its Shaw Avenue frontage enclosed, thereby determining its eligibility for FSI inclusion and the advisability of a variance application;
2. the Plans submitted to the COA are the plans that are before the TLAB and show the area of the additional FSI increase (surrounded by 'bubbling' lines), and located towards the north limit in the single storey portion of the as-built structure/building.
3. The Plans above described are the current plans and those forwarded to and by the COA and contain a different statistic than used in the COA Notice of Decision; the earlier plans showed an FSI of 1.22x lot area; the plans before the TLAB as built show a total floor area exceedance of 59.0 sq. m, or an FSI of 1.25x FSI. It is this latter recognition for which approval is sought.

The planner prepared an extensive Expert Witness Statement for which undue repetition is not required as it is readily accessible via Exhibit 1.

**Decision of Toronto Local Appeal Body Panel Member: I. LORD  
TLAB Case File Number: 19 188022 S45 10 TLAB**

Mr. Barton's evidence was instructive on a series of salient points, below identified. He described the as-built building as a two-storey frontage transitioning to a single storey to the north, where semi-detached housing forms are found in a *Neighbourhoods* designation. He said the bulk and massing of the subject property was similar or less than, in terms of height, that of adjacent properties on Queen Street West and caused no impact on light, view or privacy on properties to the north or abutting to the west.

I find his evidence applicable to the subject property on the following points to be persuasive:

- i). Its Official Plan designation in 'Mixed Use' and the proposed use of all the space is for single or multiple tenants for commercial and office uses, not residential purposes
- ii). It is located within a recognized 'Avenues' delineation where Provincial Policy, the Growth Plan and, especially, the City Official Plan encourage reasonable intensification that is transit supportive and constitutes the regeneration of older premises;
- iii). The site is served by mass transit, requires no service extensions, has prominent frontage on two major streets and is zoned for commercial uses;
- iv). No variances are required apart from the FSI measure, which itself generates no need for relief from any other performance standard affecting built form, such as height or setbacks;
- v). The one-storey built form closest to the residential housing on Shaw Avenue is low rise, without windows and buffered by a significant setback from the north lot line and further separated by a lane access to properties to the west;
- vi). No adverse impacts arise from the enclosure of the previous carport space that can be identified or for which a complaint exists;
- vii). Identified sections of the Official Plan, notably 2.2.2.4 (supportive site development criteria); 2.3.1 (stable but not static); 4.5.1 (integration tests of 'fit') all are supportive of the space excess on an applied assessment basis;
- viii). Commercial zoning, the absence of any applied parking standard and the appearance and acceptability of the bulk, built form and massing without impacts or other variances are suggestive of meeting the intent and purpose on a neighbours and community basis.
- ix). The subject property would not be overbuilt and constitutes the desirable regeneration in a manner that, in the absence of impact or complaint, is minor.

Mr. Barton was questioned by the Member on three elements of the existing building.

First, given the support for the business presence on the Queen Street West frontage and its access to mass transit, why was the access entrance door elevated off

street level necessitating stepped access into the building, possibly an impediment to the public sidewalk? Mr. Barton was unaware of the issue but later advised that the client was prepared to ensure grade access is accommodated within the building as built to the lot line.

Second, given the presence of unimproved at-grade space in the rear yard, with access to Shaw Avenue, what was the intended purpose of this apparent derelict space enclosed by deteriorated fence and gate structures? Mr. Barton was unaware of the particulars of this space but later advised that it could be treated as amenity space, transition space, maintenance access space, or, possibly, a parking space subject to access considerations.

Third, given the presence of wood fencing along the west limit of the roof of the one-storey extension, what was the purpose of this crude and unsightly barrier? Mr. Barton was unaware of the issue of fencing on the roof but later advised it had been erected by the owner to prevent persons 'jumping' onto the roof of the one-storey structure and using it as a patio. The Plans clearly express no intention for a patio use of any of the roof.

Mr. Jon Hyman, who had been helpful on factual matters and sat through the morning evidence, was sworn as the owner of the immediately abutting? property. His own business is offsite; his adjacent property he said was tenanted with a furniture sales store and one two floor rental apartment.

He had filed an extensive Participants Statement lamenting the owner's previous use of the building, building deficiencies, lack of maintenance standards and 'tumultuous and unneighbourly' conduct over the several years of the construction project on the subject property.

These were not pursued as being germane to the variance afoot, other than the familiar refrain that construction in the absence of a building permit is not to be encouraged and should never have been undertaken.

Mr. Hyman stated he was not opposed to development and apart from the 'grief' experienced by the Appellant as a landlord, he had no issues with the existing untenanted building now that it had been enclosed and secured.

There were no questions of Mr. Hyman, no reply evidence called and no argument requested.

## **ANALYSIS, FINDINGS, REASONS**

The only professional planning assessment evidence heard on this appeal came from Mr. Barton, an accredited land use planner. I found that assessment to be reasonably thorough and credible and accept the generated opinion evidence on compliance with the applicable policy and statutory tests above canvassed in the introduction and nine point summary, above recited.

**Decision of Toronto Local Appeal Body Panel Member: I. LORD  
TLAB Case File Number: 19 188022 S45 10 TLAB**

I find that the enclosure of the prior space intended for vehicle storage has generated additional floor space. I also find that, despite the depiction of the space on the plans, which I include as **Attachment 1** hereto, the FSI number is undifferentiated as to location or import.

I agree that in this instance the increased in FSI is not coupled with any other variance affecting built form, massing, height or setbacks. I am content that the lot can accommodate the additional space and that its incorporation as useable tenancy space would enhance and intensify the use of the lot in a manner consistent with provincial and local policy support. I find that the location is appropriate for the size of the building contemplated and that the variance request is modest, reasonable, minor and desirable.

As well, I find that the additional space is fully consistent with the commercial and office uses proposed for the building which do not require onsite parking. Residential use is not contemplated and no comment is made as to the efficacy of a residential use of the subject property, applicable standards or appropriateness.

I find that the increment in FSI from 1.22x the area of the lot identified in the COA Notice of Decision to the 1.25x sought on the appeal to be minor and not require further Notice under section 45 (18.1) of the *Planning Act*.

The three observations made from the site visit conducted on Council's instructions to the TLAB were not adequately explained.

The planner supported the variance to FSI on the basis that the subject property was located on a designated Avenue with direct access to transit services. This is readily apparent from its glass frontage and access doors to Queen Street West. Less apparent is the usefulness of an access entrance on the lot line situated above street level requiring an access ramp or steps to enter the building. I am not prepared to approve an FSI increase that casts the burden of Queen Street access onto the City or creates a conflict or compromise to the sidewalk thoroughfare. Queen Street access is to be maintained and access to the first floor level is to be constructed wholly within the building.

The enclosure of the former 'carport' space has left the building on the subject property without parking. While this fact may satisfy zoning standards for a commercial and office use regime, it has left exterior space at the north limit of the building unspecified as to use and in a derelict and unseemly presentation for new construction. Without determining an intended use for this space, I am not prepared to approve an FSI increase that might continue the reputedly disruptive presence the property and its construction phase has cast on the community. The rear (north) outdoor space is to be suitably landscaped and improved for any lawful purpose the owner Appellant determines.

The existing construction of board on board fencing on the westerly roof of the building has an unsightly and potentially hazardous weather and construction appearance when viewed from the north and the west. Its functional rationale is to prevent roof access and use from adjacent properties. Without determining the ultimate configuration of any required barrier, I am not prepared to approve an FSI variance for the additional space without the assurance this barrier is removed or approved as to

height, construction safety and appropriateness. This barrier 'fencing' is to be inspected and a permit or other approval granted for its construction, replacement or recognition by the Chief Building Official or designate.

## **DECISION AND ORDER**

The appeal from the decision of the Committee of Adjustment in respect of 938 Queen Street West is allowed, on conditions, to legalize and maintain the existing two-storey mixed-use building that was constructed beyond the approved building permit.

Despite Chapter 40.10.40.40 (1) (B), of By-law 569-2013, a two-storey mixed-use building having a floor space index of 1.25 times the area of the lot (350.89 square meters) is permitted on the existing lot.

Construction is to be maintained substantially in compliance with the site plan and elevations in **Attachment 1**, hereto.

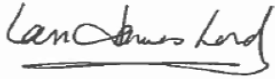
This variance approval is subject to the following additional conditions:

Prior to the first occupancy by the owner or of any tenant space, the following improvements shall be completed satisfactory to the Chief Building Official or designate:

1. Queen Street pedestrian access into the building is to be maintained and access to the first floor level therefrom is to be constructed in a good and workmanlike manner wholly within the building.
2. The rear (north) outdoor space on the subject property is to be suitably landscaped and improved and, if to be used for parking, a curb cut authorized and a parking space improved with permeable pavers, all only for a lawful purpose.
3. The existing perimeter wood fence barrier at or above the roof of the first floor level is to be removed or approved as to height, construction safety and appropriateness. This barrier 'fencing' is to be inspected and a permit or other approval granted for its construction, replacement or recognition. A roof deck, platform or patio is expressly not approved.

Any additional variances required as shown on the plans included as **Attachment 1** are expressly not authorized.

If difficulties arise in the implementation of this decision, the TLAB may be spoken to on Notice to the Parties and Participants.



X

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IAN LORD

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord

## ATTACHMENT 1



**LOT AREA = 282.70 M2**

LOT COVERAGE = 237.75(84.10%)

**FSI CALCULATION**

MAX FSI : 1 X LOT AREA (282.70 M2)

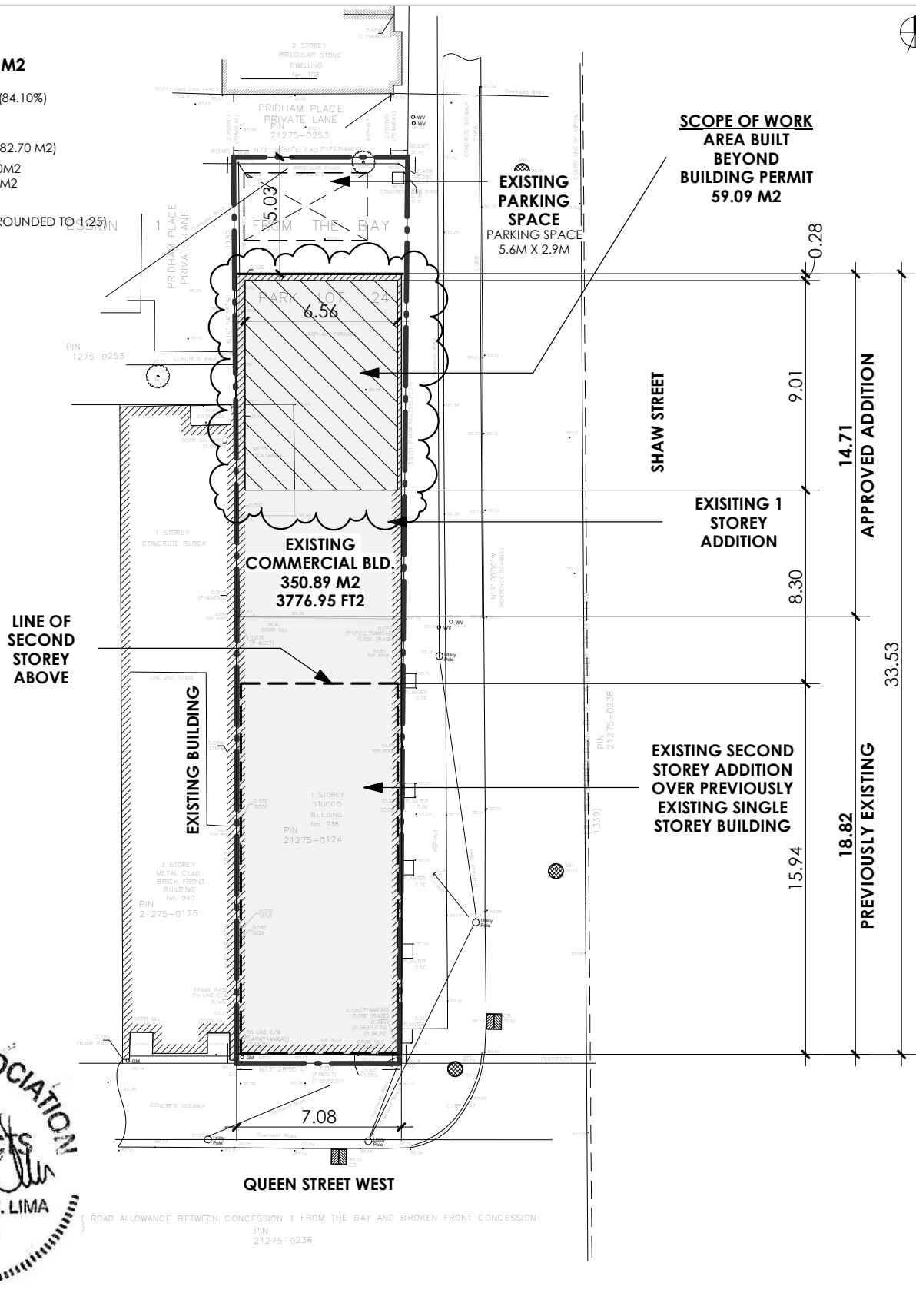
GROUND FLOOR = 238.00M2

SECOND FLOOR = 112.89M2

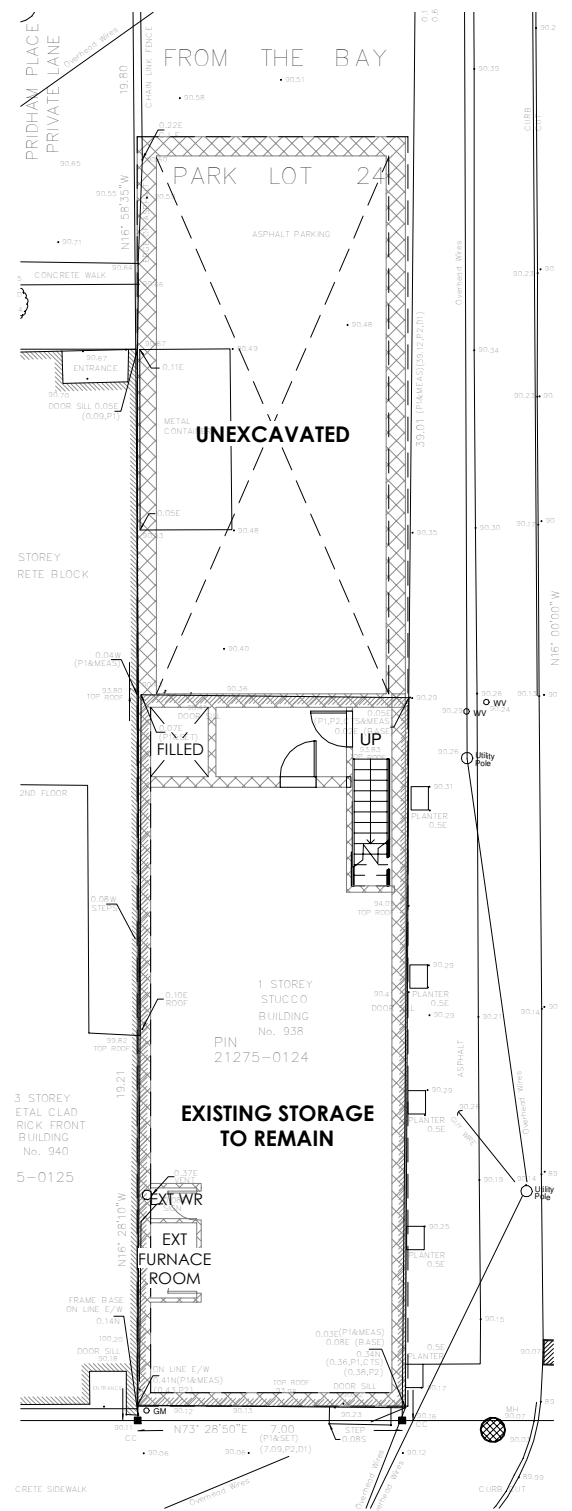
TOTAL GFA = 350.89

PROPOSED FSI = 1.2412 (ROUNDED TO 1.25)

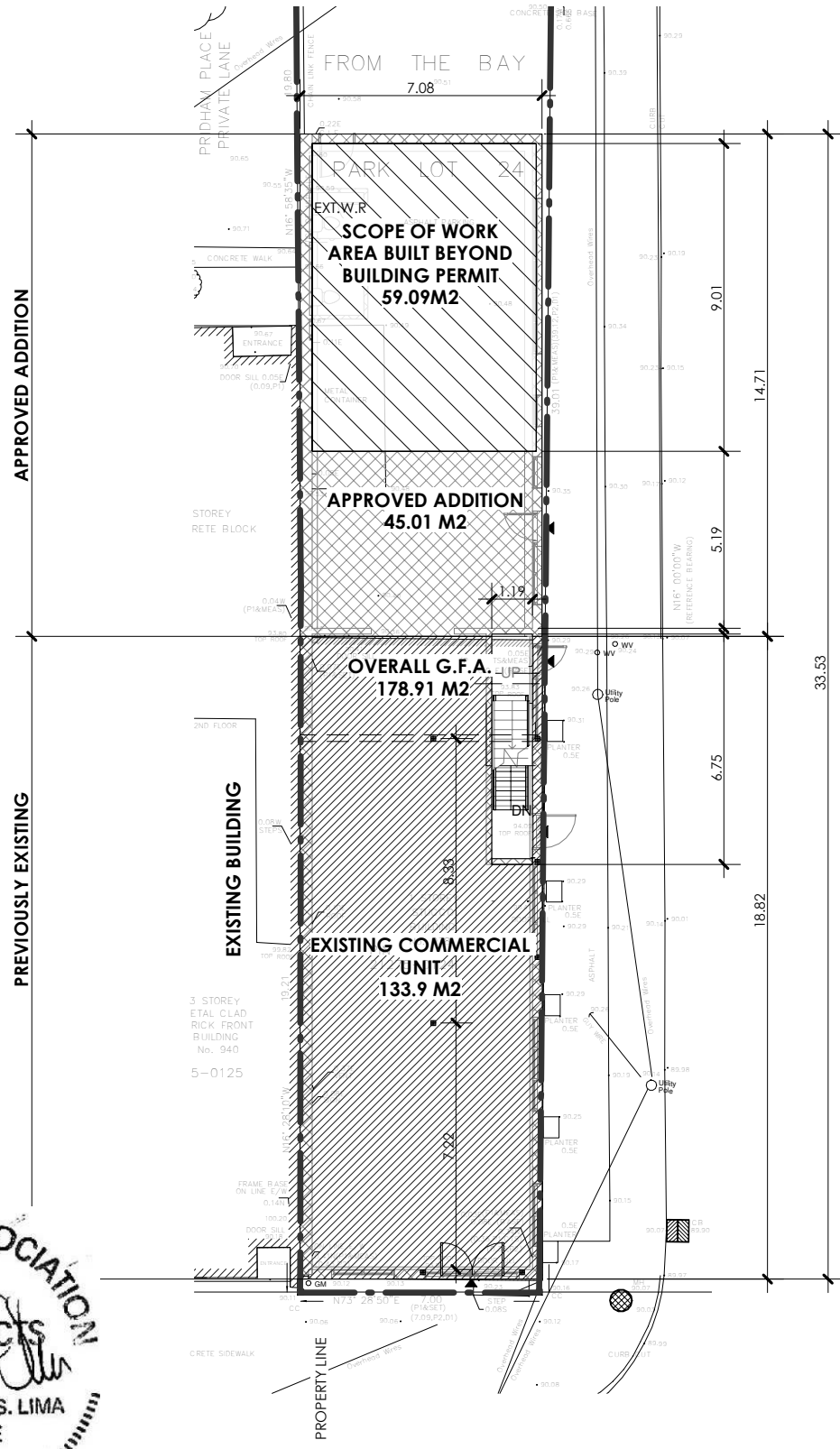
**SCOPE OF WORK  
AREA BUILT  
BEYOND  
BUILDING PERMIT  
59.09 M2**



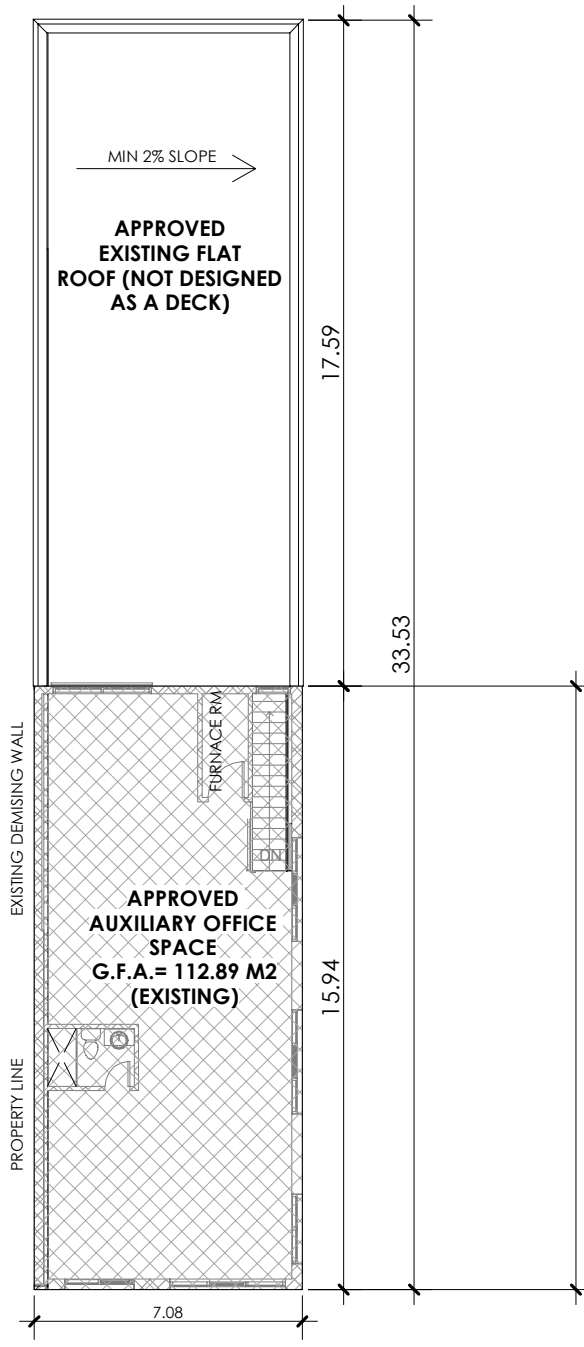
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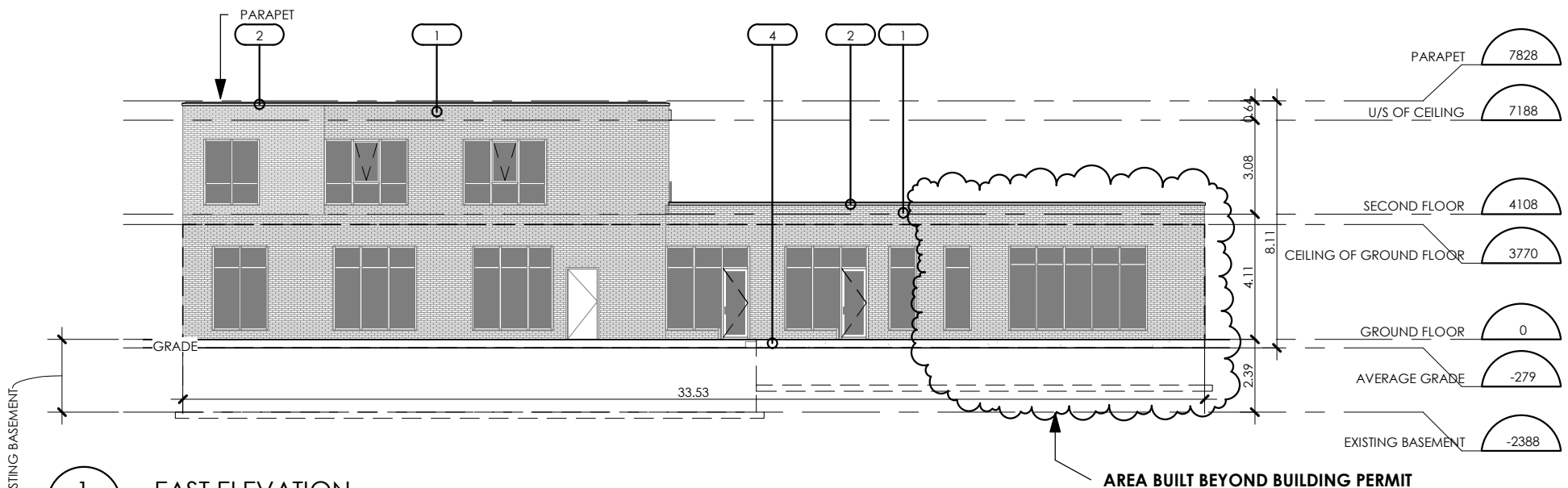
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DRAWING TITLE		EXISTING GROUND FLOOR	
PROJECT ADDRESS		938 Queen St W, Toronto, ON M6J 1G8	
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DRAWING TITLE		SECOND FLOOR
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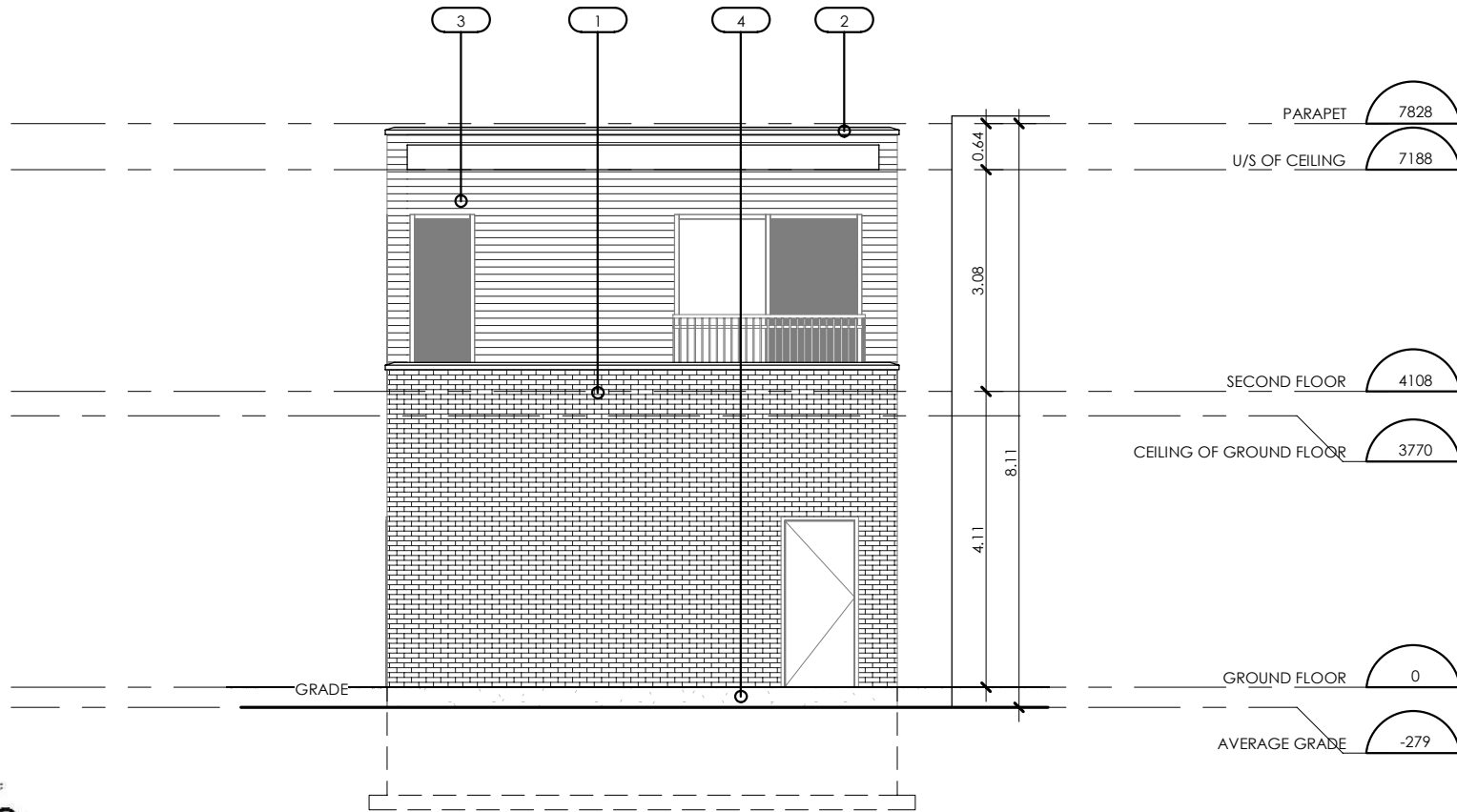


1 EAST ELEVATION  
A-5.1 1:200



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SCALE	DATE	PAGE NUMBER		
As indicated	MARCH 2019	A-5.1		

MATERIAL LEGEND:  
 1 - BRICK VENEER TYPE 1  
 2 - PARAPET CONCRETE CAP  
 3 - CEMENT SIDING  
 4 - POURED CONCRETE (FOUNDATION)



1  
A-5.2

NORTH ELEVATION

1 : 100



DRAWING TITLE

NORTH ELEVATION

PROJECT ADDRESS

938 Queen St W, Toronto, ON M6J 1G8

SCALE

As  
indicated

DATE

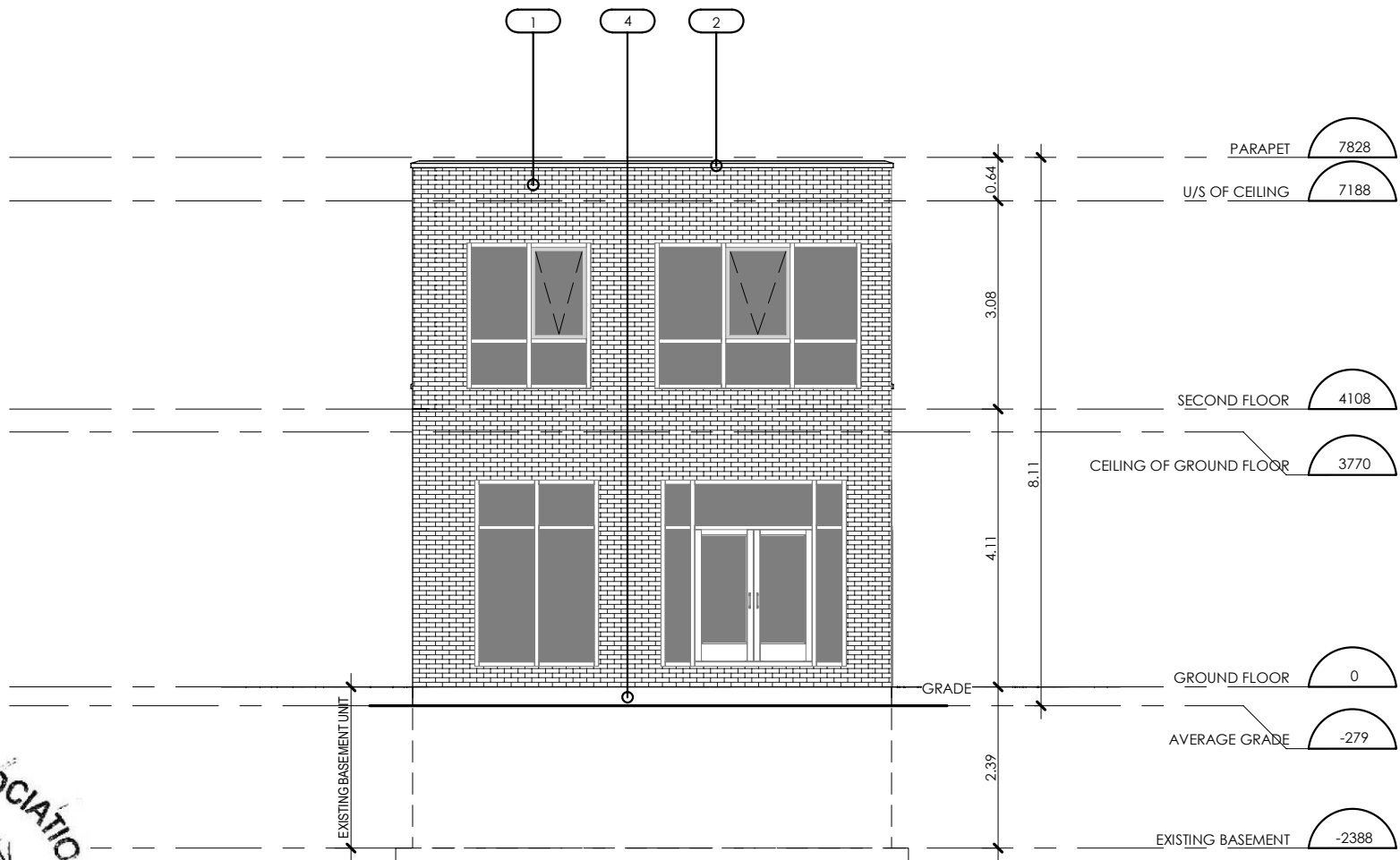
MARCH 2019

PAGE NUMBER

A-5.2

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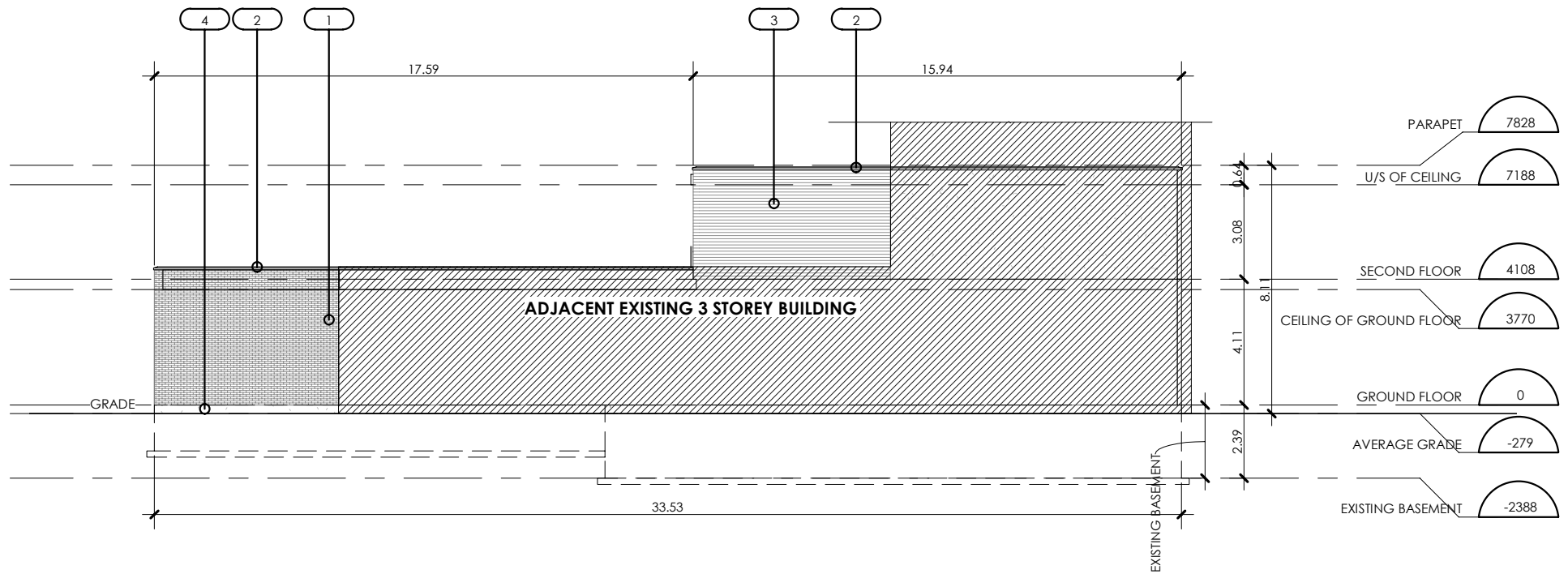
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- 4 - POURED CONCRETE (FOUNDATION)



1 SOUTH ELEVATION  
A-5.3 1:100

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SCALE	DATE	PAGE NUMBER		
As indicated	MARCH 2019	A-5.3		

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- 1 - BRICK VENEER TYPE 1
  - 2 - PARAPET CONCRETE CAP
  - 3 - CEMENT SIDING
  - 4 - POURED CONCRETE (FOUNDATION)



1 WEST ELEVATION  
A-5.4 1 : 200



DRAWING TITLE

WEST ELEVATION

PROJECT ADDRESS

938 Queen St W, Toronto, ON M6J 1G8

SCALE

As indicated

DATE

MARCH 2019

PAGE NUMBER

A-5.4

MATERIAL LEGEND:

- 1 - BRICK VENEER TYPE 1
- 2 - PARAPET CONCRETE CAP
- 3 - CEMENT SIDING
- 4 - POURED CONCRETE (FOUNDATION)