

DECISION AND ORDER

Decision Issue Date Friday, January 10, 2020

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): DIMITRY SHLYONSKY

Applicant: DIMITRY SHLYONSKY

Property Address/Description: 336 ST GERMAIN AVE

Committee of Adjustment Case File: 19 153602 NNY 08 MV (A0341/19NY)

TLAB Case File Number: 19 184448 S45 08 TLAB

Hearing date: Friday, November 29, 2019

DECISION DELIVERED BY S. KARMALI

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Dimitry Shlyonsky	Applicant/Appellant	Alex Lusty
William Dolan	Expert Witness	

INTRODUCTION

[1] The subject property is 336 St. Germain Avenue. It is zoned Residential under Zoning -Law No. 569-2013 with a zone label of (f 7.5; d 0.6) (x604), which are respectively the values of minimum lot frontage, floor space index (FSI), and a site-specific exception. The subject property is also zoned R2 Z0.6 under the former City of Toronto Zoning By-Law 438-86. The number 0.6 indicates the permitted density. The subject property is nestled in the Lawrence Park North community.

[2] The matter before me concerns a Variance Application (Application), which was refused by the Committee of Adjustment (COA) North York District Panel on July 4, 2019. The purpose of the Application was to legalize and maintain the existing dwelling currently under construction on the subject property.

[3] There is some adjudicative history concerning this matter, referred to in the public documents. I have summarized this in the Background section below.

[4] A TLAB hearing is a *de novo* hearing. I am directed to have regard for the COA decision and materials that the COA had before it.

[5] I indicated I had visited the subject property and surroundings and had familiarized myself with the pre-filed materials, including the late election participant filing by Mr. Ronald Kunitzky, who lives at 334 St. Germain Avenue, just east of the subject property. Mr. Kunitzky did not appear at the hearing. There were no other registered parties or participants present at the hearing.

[6] Mr. Lusty introduced a late disclosure item on which he intended to rely. The item was a book of authorities about COA decisions concerning properties along St. Germain Avenue as well as Elm Road. The item also included an Ontario Superior Court of Justice (Divisional Court) decision and two decisions of the TLAB in respect of zoning variances.

[7] The TLAB does not condone the late presentation of the disclosure. Full and timely disclosure is required. Mr. Lusty stated that the item might be of general assistance for the TLAB to better understand the matters at issue. There were no objections raised about the item at the hearing. I accepted the disclosure item, which Mr. Lusty tendered as an exhibit, and I accepted it into the evidentiary record.

BACKGROUND

[8] On July 29, 2017, the COA had conditionally approved an application of nine variances in respect of the subject property (2017 COA Decision). The purpose of that application was to construct a two-storey rear addition and a third-floor addition above to the existing two-storey dwelling. The COA approved the proposal subject to the east and west elevation plans date-stamped July 6, 2017 by the City of Toronto Planning Division. The decision expressly stated that other variances not listed in the written decision are not authorized.

[9] A Building Permit was issued by Toronto Building on June 29, 2018. Construction for this renovation project started on October 22, 2018. The public documents filed revealed that the Applicant expressed a need to mitigate “the snow load for the roof deck” because of a harsh winter he had experienced. The Applicant stated that his engineer redesigned the third floor of his home to make it safe, resulting in an increase in FSI and Gross Floor Area (GFA) from 0.88 times the lot area to 0.97 times the lot area. The 2017 COA Decision, however, did not authorize this value increase. To be sure, it is troublesome and worrisome for a homeowner to give an order to build a structure and the builder to do so without obtaining necessary permission, which includes in-time permission. Mr. Lusty stated that the homeowner had an issue with the snow load, and received design advice. The situation would appear to have been unexpected.

Decision of Toronto Local Appeal Body Panel Member: S. KARMALI
TLAB Case File Number: 19 184448 S45 08 TLAB

[10] The Applicant completed a City of Toronto zoning review waiver form on May 10, 2019. The Applicant identified nine variances in an attachment to the waiver. The variance values identified for FSI and GFA were different from the 2017 COA Decision.

[11] On May 13, 2019, the Applicant prepared and filed the Application, which listed all of the previously granted variances from the 2017 COA Decision except for the FSI and GFA values, which were new.

[12] City Planning indicated that the variance to permit an increased side exterior main wall height (Variance 2) of 9.81 metres is due to the proposed third storey, which forms part of the building length. City Planning would like to ensure that the increased side exterior main wall height is limited for the third storey portion only. On June 25, 2019, City Planning Department filed a Staff Report which provided that should the Application be approved a condition is recommended: that the proposal be developed substantially in accordance with the east side and west side elevation plans submitted to the COA. These plans are identified as **Attachment A** in this decision.

[13] On July 4, 2019, the COA refused the Application. I have created a chart below, which compares the 2017 COA Decision with the 2019 COA Decision.

Variance Requests for the Subject Property at the Committee of Adjustment		2017		2019	
		Performance Standard	Requested & Allowed	Performance Standard	Requested & Refused
1	Floor Space Index (with respect to lot area)	0.6x	0.88x	0.6x	0.97x
2	Exterior Main Walls Height Facing a Lot Line	7.5 m	9.81 m	7.5 m	9.81 m
3	Projection of Eaves from a Lot Line	0.9 m	0.0 m	0.9 m	0.0 m
4	Rear Yard Soft Landscaping	50%	46%	50%	46%
5	Gross Floor Area (with respect to lot area)	0.6	0.88	0.6	0.97
6	Building Location from Adjacent Building	1.2 m	1.0 m	1.2 m	1.0 m

7	Building Height	10.0 m	10.8 m	10.0 m	10.8 m
8	Side Lot Line Setback	0.9 m	0.48 m	0.9 m	0.48 m
9	Flanking Street Setback	2.16 m	0.11 m	2.16 m	0.11 m

MATTERS IN ISSUE

[14] The Appellant seeks an unconditional grant of all of the variances indicated in the Application, as identified in **Attachment B** of this decision.

JURISDICTION

[15] 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').

[16] 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

[17] Mr. Lusty requested the entry of three exhibits into the evidentiary record:

- Exhibit 1: Expert Witness Statement of Mr. William Dolan
- Exhibit 2: Expert Witness Document Disclosure (from Part 1 to Part 7)
- Exhibit 3: Book of Authorities

[18] Mr. Lusty called Mr. William Dolan as an expert witness. Mr. Dolan was sworn. He stated he obtained a Bachelor of Arts degree in geography and urban planning from Brock University in 1969. His curriculum vitae indicates he has full membership eligibility as a Registered Professional Planner (RPP) and full membership eligibility in the Ontario Professional Planners' Institute (OPPI), and the Canadian Institute of Planners (MCIP). He has appeared as an expert in land use planning before the Ontario Municipal Board (OMB), the Local Planning Appeal Tribunal (LPAT), and the TLAB. Mr. Lusty asked Mr. Dolan to acknowledge his duties to the TLAB, as contained in Exhibit 1 and as stated in Part 4 on Form 6. Mr. Dolan acknowledged these duties, which included a statement that these duties prevail over any obligation that he owes to any party for whom he has been engaged.

[19] Mr. Dolan stated the Appellant contacted him on November 4, 2019 with the plans and drawings for the 2017 and 2019 COA decisions. On November 5, 2019, Mr. Dolan was verbally retained. He stated he is familiar with the geographic area as well as the activity in the area. He testified he was comfortable to take on the case. I qualified Mr. Dolan as an expert to provide land use planning opinion evidence at the proceeding.

[20] Mr. Dolan testified the subject property is located within an area bounded by Highway 401 to the north, Lawrence Avenue West to the south, Yonge Street to the east, and Avenue Road to the west. He described the subject property improvements as mature, about 80 years of age. He stated there are a number of renovations and new builds in the broader area of influence. He testified the lots in the area have frontages anywhere between 20 feet to 30 feet.

[21] He stated the subject property has a frontage of 20.5 feet or 6.25 metres with a flankage depth of 88 feet or 26.8 metres. He confirmed that the construction on the dwelling has been substantially completed, renovated and enlarged. He calculated the GFA of the dwelling as 163.26 m² with a lot area size of 167.50 m². The result is an FSI value of 0.97 times the lot area. I have discussed the question of illegal construction in the Analysis section below.

[22] Mr. Dolan communicated to me that he has no intention of speaking to the seven of the nine variances. He clarified that his focus is on the FSI and GFA variances. He testified that all of the variances approved in the 2017 COA Decision are final and binding. I reminded Mr. Dolan that what is before me is the complete Application with all nine variances.

[23] Mr. Dolan referred to Exhibit 3 and discussed variance applications, with similar FSI and GFA requests, most of which were approved by the COA. He clarified the approved applications with the assistance of Mr. Lusty. I have indicated some of these approvals, which seem to span over the last nine years more or less:

- *358 Elm Road* decided on January 12, 2011, in which the purpose was to construct a two-storey dwelling with a proposed GFA of 0.80 times the lot area (performance standard: 146.3 m²; proposed and approved: 195.1 m²)

**Decision of Toronto Local Appeal Body Panel Member: S. KARMALI
TLAB Case File Number: 19 184448 S45 08 TLAB**

- *297 Elm Road* decided on April 7, 2011, in which the purpose was to construct a two-storey dwelling with a proposed FSI of 1.1 times the lot area including the basement level (performance standard: 139.72 m²; proposed and approved: 186.73 m²)
- *298 Elm Road* decided on February 1, 2012, in which the purpose was to construct a one storey sunroom addition attached to the rear of the existing dwelling, and to construct a deck at the rear of the proposed addition, with a proposed GFA of 0.95 times the lot area (performance standard: 160.32 m²; proposed and approved: 220.82 m²)
- *373 Elm Road* decided on March 14, 2012, in which the purpose was to construct a two-storey dwelling with a proposed GFA of 0.85 times the lot area (performance standard: 146.32 m²; proposed and approved: 207.48 m²)
- *335 St. Germain Avenue* decided on October 9, 2013, in which the purpose was to construct a two-storey detached dwelling with an integral garage, and with a proposed FSI of 1.12 times the lot area, and a GFA of 0.8 times the lot area. Size measurement was not indicated on the decision notice.
- *376 Elm Road* decided on June 25, 2015, in which the purpose was to construct a two-storey dwelling with an integral garage, and with a proposed FSI and GFA of 0.87 times the lot area. Size measurement was not indicated on the decision notice.

[24] Mr. Dolan testified that what is being sought fits within the range of the new builds and renovations within proximity to the subject property. He stated that the 0.6 requirement is a carryover from the former City of Toronto going 'way back'. He further stated that new building activity, by and large, tends to exceed the zoning by-law density limitation of 0.6. He pointed to *371 Elm Road* which was approved for a GFA of 0.72 and *335 St. Germain Avenue* which was approved for an FSI of 1.1.

[25] Mr. Dolan opined about how the Application relates to the PPS and the Growth Plan. He referred to the policy directives of Sections 1.4.1(a) and (b) to make the point that residential intensification is encouraged and promoted. He stated in his professional opinion that the Application allows for modest intensification of a dwelling on a corner lot where density is best suited. He further opined that accommodating a study or home office will allow the Appellant to work from home. Mr. Lusty shared that the Appellant does consultant work. Mr. Dolan stated that co-locating living and working spaces reduces demand on public infrastructure such as roads. Intensification includes expansion or conversion of an existing building, he further stated.

[26] Mr. Dolan referred to Policy 2.2.2.2(3) of the Growth Plan, and testified that the expansion of an existing building is a form of intensification. He concluded that the Application is consistent with the PPS and conforms to the Growth Plan.

[27] Mr. Dolan discussed the general intent and purpose of the Official Plan (OP). He stated that the subject property is designated with a land-use of *Neighbourhoods*. Mr. Dolan stated that the area of influence around St. Germain Avenue and Elm Road are designated *Neighbourhoods*, with a mixture of single-detached homes and semi-detached homes.

[28] He testified *Neighbourhoods* are stable but not static and allow for a range of residential uses, including detached homes. He testified that 'stable but not static' encourages investment, rebuilds, and renovations in a gradual manner. He further testified that development must respect, reinforce and fit the existing character of the subject neighbourhood, referring to the OP Policies of 2.3.1 and 4.1.5.

[29] Mr. Dolan opined that the OP recognizes that as the economy shifts, people are increasingly working from home. He said there will be an increase in home offices, and that additional space in homes will be needed to accommodate the new demand.

[30] Next, Mr. Dolan discussed the four tests under the *Planning Act* for a variance application. He began with the minor in nature test. He stated that minor could not be used as simple arithmetic. He stated that the test in this respect is whether there would be any intolerable adverse impacts if the variances were approved. On this point, I asked Mr. Dolan to try to address the privacy concerns that Mr. Kunitzky had raised in his Witness Statement. To be clear, Mr. Kunitzsky was concerned that a larger room backs out and directly "faces over" his skylights.

[31] Mr. Dolan stated that the skylight of the neighbour is about two square feet by two square feet, and situated on an angle. He opined the skylight itself is bubbled, likely plastic, and probably allows for ambient light penetration; it is difficult to get direct sunlight. Mr. Dolan's main point, however, was that the Application seeks a larger upper floor element such that the north wall is further north, which he stated makes 'rubbernecking' much less likely. Mr. Dolan further opined, as a point of lesser importance, that the skylight of Mr. Kunitzky is not a skylight over a bathroom or bedroom.

[32] Mr. Dolan stated that there are no significant negative impacts generated by the proposed dwelling. He stated that the articulation of the roof minimizes the appearance of mass of the upper floor and larger upper floor element. He further stated that there have been many newer style dwellings built in the immediate area with which the proposed dwelling is in harmonious character. He opined the Application's variances individually and cumulatively are minor in nature. He specifically opined that the FSI variance request falls within a range of prior acceptance.

[33] Mr. Dolan discussed the test on the desirability for the appropriate development or use of the land. He stated that in assessing desirability, the final built form is paramount. He testified that the increase in density is in harmony with the established and emerging character of the immediate neighbourhood. He further testified that the development of a home office is something the OP recognizes is becoming more common as the nature of work in society changes. He stated that variances individually and cumulatively are desirable and appropriate.

[34] Mr. Dolan discussed the general intent and purpose of the zoning by-law. He opined that the zoning by-law has numerical minimums and maximum neighbourhood performance standards. He added that the by-law provides for practical use and enjoyment of private property, and is a document for public knowledge, confidence, reliance and expectations. He stated that the proposed dwelling would be of similar scale to others found in the neighbourhood. He testified the proposed dwelling results in a compatible relationship with abutting properties and harmoniously blends with the local residential environment. He stated that the variances individually and cumulatively meet the general intent and purpose of the Zoning By-law.

[35] Mr. Dolan finally discussed the general intent and purpose of the OP. He stated that the cornerstone policy directive of the OP is to ensure development respects, reinforces, and fits the existing character of the neighbourhood. He opined that the proposed dwelling is on a corner lot where slight increases in density help punctuate the street. He further opined that FSI is not a term explained in the OP. He stated that the variances individually and cumulatively meet the general intent and purpose of the OP, also by accommodating the growing trend toward working from home. I asked Mr. Dolan to comment on Official Plan Amendment (OPA) 320 in respect of the Application. He stated that the Application does not conflict with OPA 320.

[36] Mr. Dolan stated in Exhibit 1 that the 2019 City Planning Staff Report east and west elevation plans not to be imposed by the TLAB. I asked Mr. Dolan to elaborate on this statement. He stated that there is no practical need for it the condition now that the proposed dwelling exists. He also stated that the condition could encumber the paperwork.

ANALYSIS, FINDINGS, REASONS

[37] Mr. Dolan provided uncontroverted expert opinion in land use planning. He spoke persuasively about most of the evidence. His written evidence was well-organized.

[38] I have carefully considered the Application, its corresponding plans, and the oral and written evidence. I accept Mr. Dolan's evidence except for the request to not impose the City Planning condition to construct substantially following the east and west elevation plans. I agree that it is important to ensure that the increased side exterior main wall height (Variance 2) is limited for the third storey portion. The Plans were provided to the COA in June 2019 presumably by the Applicant, either before or after construction related to 2017 COA Decision. I was provided with no cogent reasons why these plans were inappropriate. I find these Plans should be or should have been followed.

[39] Development in Neighbourhoods is to respect and reinforce prevailing heights, massing, scale, density, and dwelling type of residential properties. The subject property is located in a desirable neighbourhood with single-detached and semi-detached homes. The building type should not change with the proposal. Indeed the requested height variance is a built form variance and is to be given due consideration. However, the increase from 10 metres to 10.18 metres is an example, in context, of what the variance regime was created for: to apply for a 'minor variance' and its deliberative consideration. I do not find the height variance to create any unacceptable impacts.

[40] The primary issue concerns the other built-form variances of FSI and GFA. Here the FSI and GFA are deployed on the property and within a built form that utilizes the building foot-print and is not inconsistent with some of the homes within the neighbourhood. There have been other approvals nearby of FSI/GFA of up to 1.2x. Some existing structures already exceed the Zoning By-law requirements as noted by Mr. Dolan. I do not find that the proposal represents a dramatic increase reflective of overdevelopment.

[41] Unfortunately, Mr. Kunitzky could not be present at the hearing. Mr. Dolan addressed his concerns about privacy and overlook. I find that the Appellant has taken measures to ensure that privacy and overlook have been mitigated to an acceptable extent.

[42] I am satisfied that the requested variances in **Attachment B** with the condition proposed by the City in **Attachment A**, meet the criteria set out in Section 45(1) of the Planning Act. The general purpose and intent of the Official Plan and Zoning By-laws is maintained. The proposal results in an appropriate and desirable development for subject property and the variances are considered minor in the nature. The TLAB is satisfied that the variances are consistent with the Provincial Policy Statement and conform to the Growth Plan.

DECISION AND ORDER

The TLAB orders that the appeal is allowed, and that:

1. The variances as listed in **Attachment B** are authorized.
2. The dwelling shall be constructed substantially in accordance with the Plans listed in **Attachment A**.
3. Any other variances not listed in **Attachment B** in this decision are not authorized.

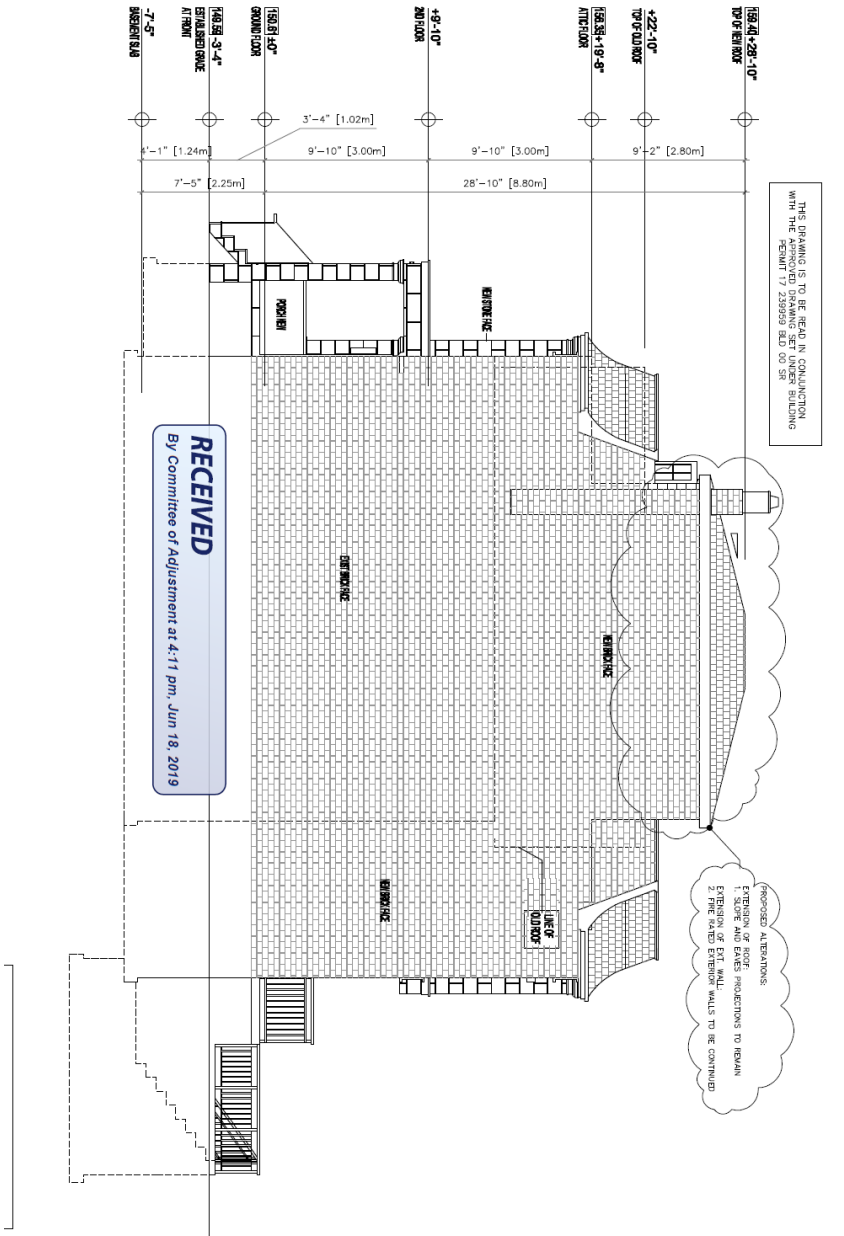
If any difficulties arise from the implementation of this decision, the TLAB may be spoken to.

X

Sean Karmali
Panel Chair, Toronto Local Appeal Body

ATTACHMENT A: EAST AND WEST ELEVATION PLANS

Attachment 1: East Side Elevation

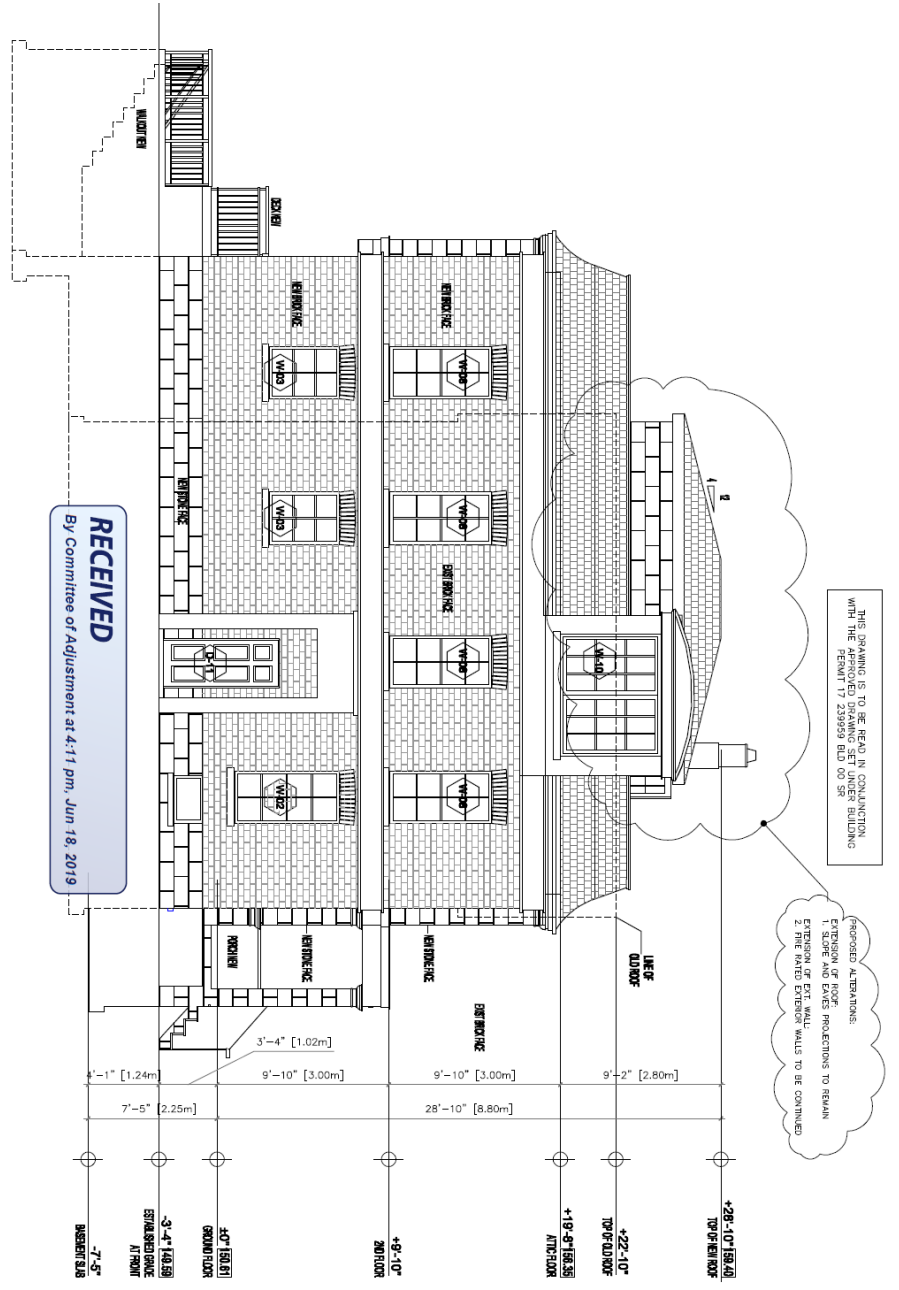


<p>LASONNE</p> <p>398 SAINT GERMAINE AVENUE RENOVATION Toronto, Ontario</p>	
<p>TITLE</p> <p>ELEVATION EAST PROPOSED</p>	<p>NO.</p> <p>Revision/Issue</p> <p>DATE</p>
<p>2</p>	<p>1</p>
<p>1</p>	<p>10/10/19</p>

APPLIED ALTERATIONS ONLY

LICENSED PROFESSIONAL ENGINEER
 D. FALZON
 100159595
 PROVINCE OF ONTARIO

Attachment 2: West Side Elevation



LASSONNE		<p>336 SAINT GERMAINE AVENUE RENOVATION TORONTO, ONTARIO</p>									
<p>TITLE ELEVATION WEST PROPOSED</p>	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 5%;">No.</th> <th style="width: 70%;">Revision/Issue</th> <th style="width: 25%;">Date</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">1</td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;">2</td> <td></td> <td></td> </tr> </tbody> </table>	No.	Revision/Issue	Date	1			2			
No.	Revision/Issue	Date									
1											
2											

ATTACHMENT B: APPLICATION VARIANCES

PURPOSE OF THE APPLICATION:

To legalize and maintain the existing dwelling currently under construction.

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

- 1. Chapter 10.10.40.40.(1), By-law No. 569-2013**
The maximum permitted Floor Space Index is 0.60 times the area of the lot.
The proposed Floor Space Index is 0.97 times the area of the lot.
- 2. Chapter 10.10.40.10.(2), By-law No. 569-2013**
The permitted maximum height of all side exterior main walls facing a side lot line is 7.5 m.
The proposed height of the side exterior main walls facing a side lot line is 9.81 m.
- 3. Chapter 10.5.40.60.(7), By-law No. 569-2013**
Roof eaves may project a maximum of 0.9 m provided that they are no closer than 0.30 m to a lot line.
The proposed West side eaves are 0 m from the lot line.
- 4. Chapter 10.5.50.10.(3), By-law No. 569-2013**
The minimum required rear yard soft landscaping is 50%
The proposed rear yard soft landscaping area is 46%
- 5. Section 6(3) Part I 1, By-law No. 438-86**
The maximum permitted Gross Floor Area is 0.60 times the area of the lot.
The proposed Gross Floor Area is 0.97 times the area of the lot.
- 6. Section 6(3) Part II 3(II), By-law No. 438-86**
The by-law requires that the proposed building be located no closer than 1.2 m to the portion of the side wall of an adjacent building that contains openings.
The proposed building is located 1 m from the adjacent building on the east side.
- 7. Section 4(2), By-law No. 438-86**
The maximum permitted building height is 10 m.
The proposed building height is 10.18 m.

8. Section 6(3) Part II 3.B(II), By-law No. 438-86

A minimum side lot line setback of 0.9 m for that portion of the building not exceeding 17.0 m in depth, where the side wall contains openings.
The proposed East side lot line setback is 0.48 m.

9. Section 6(3) Part II 3.A(I), By-law No. 438-86

The by-law requires a building to have a minimum flanking street setback of 2.16 m.
The proposed flanking street setback is 0.11 m