Toronto Local Appeal Body

40 Orchard View Blvd, Suite 211
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

INTERIM DECISION AND ORDER

Decision Issue Date Friday, February 28, 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): Salvatore Benedetto

Applicant: Joseph Mazzitelli

Property Address/Description: 2 Bridgman Ave

Committee of Adjustment Case File: 18 255504 STE 21 MV (A1056/18TEY)

TLAB Case File Number: 19 221657 S45 12 TLAB

Hearing date: Wednesday, February 12, 2020

DECISION DELIVERED BY Ian James Lord

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Salvatore Benedetto
Applicant	Joseph Mazzitelli

INTRODUCTION

This matter arises by way of an appeal from the Toronto and East York District Panel of the City of Toronto (City) Committee of Adjustment (COA) decision dismissing an application for multiple variances related to 2 Bridgman Avenue (subject property).

The COA had before it an application described as follows:

> "To legalize and to maintain as well as construct new alterations to the three-storey detached dwelling. The additional secondary suite (for a total

of two), front second and full third storey additions, the front portion of the rooftop mechanical and perimeter screen fence which were constructed without a building permit will be legalized and maintained. The rear portion of the rooftop mechanical and perimeter screen fence, a rear exterior stair/platform structure serving the ground floor to roof level and two rear surface parking spaces will be constructed."

Twelve (12) variances are sought to By-law 569-2013 and two (2) to By-law 438-86 (Application). The requested variances are listed in **Attachment 1**.

The Hearing of this matter occupied the morning. In attendance were the Appellant and Mr. Tae Ryuck, a Registered Professional Planner, retained by the Appellant.

Mr. Ryuck provided the only oral evidence; neither the City nor any other interested party or participant was in attendance.

I advised that I had reviewed generally the pre-filed material and had conducted a site visit of the subject property and surrounding area. Because the Appellant had filed no Witness Statement or Expert Witness Statement and Mr. Ryuck did not appear on the record of the Toronto Local Appeal Body (TLAB), I clarified that I would hear from Mr. Ryuck in oral testimony but not submissions. Mr. Benedetto elected not to give evidence.

A TLAB new appointee, Ms. A. Bassios attended throughout and audited the Hearing but did not participate therein.

BACKGROUND

The file of the COA contained the materials before the COA, including City Staff consultations and recommendations from three (3) Departments: Planning, Transportation Services and Urban Forestry. Ultimately, none of their positions were carried forward into the disposition as the COA refused all variances.

On inquiry as to the absence of filing supportive evidence, disclosure documents, Witness Statements or other submissions, Mr. Ryuck responded that he had filed the requisite Expert Witness Statement with Appendices, curriculum vitae and the TLAB Expert Witness Attestation Form "before the New Year."

None of this material had appeared on the TLAB website thereby inhibiting the normal ability to prepare for the Hearing.

On the Witness' advice that the material had been filed, it was assigned Exhibit 1, as a composite of all of the filings of the Appellant's witness.

The TLAB Staff later clarified that on December 30, 2019, Mr. Ryuck had indeed attempted to file materials within the period specified in the TLAB Notice of Hearing. That attempt was entirely unsuccessful as the file was incomplete or corrupted.

Mr. Ryuck was advised by TLAB Staff on December 31, 2019 of the unsuccessful effort. No further communications ensued.

Mr. Ryuck then stated he had filed the Exhibit 1 materials the morning of the Hearing, February 12, 2020. He did not elaborate on these procedural exchanges. As filed, even at the time of writing of this decision none of the attachments or appendices to the Ryuck Expert Witness Statement, although referenced therein, are included. I find they are not essential to reaching conclusions on the evidence.

The *Rules of Practice and Procedure* (Rules) of the TLAB not only provide discrete obligations on Parties and Participants who wish to play a role in an appeal matter, including all witnesses and experts, but also direct their attention to the TLAB website and the obligation to keep informed of filings made in respect of all matters affecting their interest. This is an obligation on all persons with an interest in an appeal matter. The fact that a professional witness fails to consult the website and note the absence of his/her own materials reflects poorly on the diligence of the professional witness.

It is fortunate that in this circumstance only the TLAB panel was inconvenienced with the likely result that the oral evidence was somewhat extended, including some requested clarifications to amplify the evidence heard and three (3) requested undertakings for subsequent consideration.

Had the circumstances been different, with other parties, the inconvenience of an adjournment is a real prospect for consideration.

MATTERS IN ISSUE

Given the many variances sought by the Application, their consideration individually and cumulatively, in light of the relevant statutory considerations, below, constituted the matters in issue. An added element to that assessment is the fact that substantially all of the variances relate to a request to recognize and maintain construction that had occurred in the absence of Building Code permit permission. Construction that is illegal carries with it an intrinsic obligation on the part of the TLAB to examine the requested revisions to zoning, under both By-laws, as if the construction had not taken place. Namely, the perspective of the TLAB must be to consider the requests upon the application of statutory criteria as to whether they should be approved applicable to the subject property in its pre-existing state, prior to any construction giving rise to the request to legalize.

This perspective is well known to be an obligation on both the COA and the TLAB. It carries with it an expectation that the evidence, especially the professional opinion evidence and its assessment, will address the requests under the jurisdiction

invoked as a comparative analysis. That analysis is not between the existing and the requested recognition (which in this case are largely the same), but between, at a minimum, as to what is permitted as-of-right and what is proposed. Namely, would the relief requested, individually and collectively, meet the tests established in the absence of the exceedances unlawfully constructed?

The existing excesses in construction or built form on the subject property are relevant, if at all, perhaps only as an appreciation or measurement base of impact - on the relevant assessment criterion.

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).

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. Ryuck was sworn and qualified to give expert opinion evidence on land use planning matters. He relayed that the essential foundation of the Applications, filed in November of 2018, was to legalize and maintain second and third storey additions to the subject property (third-storey in full) and, as well, wood fencing on the roof above the third floor. With this recognition are accompanying height, setback, parking space and occupancy/use requests, all as detailed in **Attachment 1**.

Outside of this requested ‘recognition’ aspect is the proposed addition of a rear exterior stair, from grade to the roof level, and certain extended roof fencing to be set back from the roof limit, for the balance of approximately one-half of the roof.

He described the subject property as a north west corner parcel located within the '*Neighbourhoods'* Official Plan (OP) designation, fronting on Bridgeman and siding on Dartnell Avenues. It is surrounded by roads to the south and east and a lane to the rear. Surrounding uses to the south are a parking lot, residential to the west and north, and a large complex of George Brown College located on the block east of Dartnell.

He summarized the City Staff considerations as follows:

a) Planning Staff had no variance related issues beyond a limitation recognition on building height at 10.21 m and a condition that further roof fencing be set back from the roof edge;
b) Urban Forestry had no objections but requested two conditions;
c) Transportation Services recommended refusal of the parking space variances but would have no objection to the complete elimination of any parking space requirement; the Permits Division requested conditions: where parking is permitted that it must be on private property; that the boulevard abutting on Dartnell Avenue be returned to soft landscaping; and, that a 1.5 m walkway be provided to any rear entrance.

The planner indicated his client had no objection to any of these requested conditions.

By way of explanation for the illegal construction, Mr. Ryuck relayed the advice he had received that previously existing balconies on the Bridgman frontage had been enclosed by the client's father. At the same time, the entire third level roof area was 'renovated, altered, converted' and 'opened up' as habitable space. It was his understanding that prior to this unauthorized construction, the roof was level or mansard style and that the resultant work did not change the overall height or massing beyond the balcony enclosure extension.

This work was said to have occurred in the 2014-15 era.

Later, Mr. Ryuck volunteered that the subject property had been the subject of an Ontario Municipal Board (OMB) decision (PL020246) - with which he offered no familiarity on content, beyond the suggestion that the subject property had been granted an fsi of 1.05x lot area.

I requested production of the OMB disposition PL020246 (**Undertaking 1**).

As a result of the prior construction, the planner relayed that the subject property, a single detached dwelling, was in fact being used as three (3) dwelling units:

Apartment 1, consists of the ground floor and basement.

Apartment 2, consists of the second floor, as a 'secondary suite'.

Apartment 3, consists of the third floor, as a second 'secondary suite'.

No definitions were provided.

At this point it should be noted that a site visit noted six (6) blue box (recyclable) bins on the Dartnell boulevard frontage and several grey box (waste) bins, four (4) separate gas service connections into the building and four (4) separate entrances at grade, two (2) in the front and two (2) in the rear.

Mr. Ryuck described the intended new exposed rear staircase, 1.8 m in width and reaching four (4) levels from grade to the roof, to be a Building Code and Fire Code requirement identified by the 'architect who prepared the plans'. That person not being present for confirmation, I requested production of the specific Building Code and Fire Code provisions requiring the 'as proposed' rear stairs structure (**Undertaking 2**).

He volunteered that the proposed staircase would be separated by some 9 m to residences on the north side of the lane and that there were no comparable examples nearby, although stair exits existed. As the only 'new element' being requested, while he agreed it added massing, it was neither a part of fsi or setback variances requested, nor was it proposed to be enclosed. The planner felt it would not be intrusive.

A diagrammatic representation of this somewhat imposing structure referenced in the evidence is included in the revised Site and Elevation drawings on file with the COA and the TLAB, prepared by J. Mazzitelli, filed July 15, 2019.

In describing a Study Area, delimited by Kendall Avenue, Davenport to the north, Bathurst Street to the west and Bridgman itself to the south, he found it to be 'highly eclectic' with a mix of uses, some commercial, a theatre (Tarragon) and the institutional George Brown college. He noted that residential dwelling units, too, were varied by type, frontage, height and built form.

In describing the subject property, Mr. Ryuck, called it a three (3) storey (existing) single detached dwelling on a lot of 148.64 sq m, with a frontage width of 4.88 m and a depth of 30.84 m. The gross floor area sought to be recognized is 264.8 sq m with a height of 10.21 m and an fsi of 1.78x lot area. Zoning regulations were not juxtaposed but are in **Attachment 1.**

In stating 'his approach to evaluation' of the requested variances, Mr. Ryuck was very clear to compare the request to a recognition of the existing condition. He gave the following opinions:

1. The requested fsi of 1.78x is to be considered against a prior approval of 1.05x lot area and is not a true indicator of built form as the building itself is largely built within the building envelop established by zoning for: length, depth, height. He acknowledged that the fsi was not within the order of magnitude of area examples where the highest fsi recorded is 1.23x lot area, at 342 Albany Street.

   He volunteered that despite the request being a 'large' number, area character was one of tightly compact buildings with comparable

heights, reduced setbacks; he felt that the deployment of space on the subject property was appropriate. In his view, the number generated by the existing condition was not a true indicator as to whether the building was 'oversized' or inappropriate.

2. On the requested height variances respecting front, side and rear walls, he observed that the requested absolute building height variance is only 21 cm over as-of-right permission, at 10 m. He said that while this is exceeded for the side exterior main walls (maximum 7.5 m), that condition is frequently exceeded across the City for different roof and dormer designs. In any event, he felt the overall height remained relatively compliant consistent with the height of the previous building and not inconsistent with town house and other dwellings west along Bridgman Avenue.

   He was not aware of the height before construction leading to the recognition request.

   I requested production of any materials available depicting the original building, its height, roofline, style (**Undertaking 3**).

   There were no comparison studies or any material evidence of the building as it existed prior to the subject renovations that are now sought to be recognized. Nor were there any neighbourhood examples or comparables offered.

3. On the requested height recognition for fencing above the third storey, he relayed that this was erected without building permission to reflect comments from the subject property's insurer. Apparently, some portion of rooftop mechanical equipment had 'blown off onto a neighbour's property' and the fencing was erected, on the roof edge, to prevent further consequences. An extended fence, to be set back on Staff's suggestion, would enclose new mechanicals to service Apartment 3 (which apparently had not had the benefit of the same over the past 5-6 years).

4. He addressed other variances as being a recognition of existing conditions:

   a. Front yard setback. While frequently saying the subject property residence's main front wall aligned with those of adjacent properties to the west, he later acknowledged this alignment comment did not include the porch projection on the subject property or the two-storey extensions covering that porch, on the floors above;
   b. Parking pad space and landscaped open space reductions. These variances under both by-laws recognized the need for width reductions given the undersized lot width and rear yard

depth. While he noted that Transportation Services were content with no parking spaces on-site, and the by-law exempted parking, the presence of rear yard trees on the lot line would further compromise parking stall width - as the trees were not proposed to be removed. He acknowledged not knowing of any other properties that had failed to provide compliant on-site parking or landscaped open space, or both.

5. In addressing the policy regime, Mr. Ryuck advised of consistency with the Provincial Policy Statements and the conformity to Growth Plan as both encouraged 'optimizing' the use of land, infrastructure and the encouragement of transit supportive intensification. He examined the OP polices, sections 2.4.3.1 and 4.1.5 and was of the view that the existing building respected and reinforced the neighbourhood and its stability, being of comparable height, built form, dwelling type, modest size and massing within a 'tight urban condition'. He opined that the building as it exists, including its massing, is not incompatible in terms of the character of the neighbourhood and 'fit' as a 'triplex'. He said and states within Exhibit 1 that secondary suites are aptly present in the balance of the neighbourhood. No example of two 'secondary suites' was provided as existing on any property.

6. In addressing the intent and purpose of the zoning by-laws, he was of the view that the 'R' and 'R2' zoning sought compatible built form, not identicality. He repeated that the fsi contained largely within the zoning envelope "was not an expansion of what is existing there today." And, previously, that what existed was not 'overdevelopment' in built form or a character departure. He expected no shadow impact but did acknowledge no shadow study basis existed as to gauge change under any conditions. In response to a question as to whether he had considered, in shadowing or overlook, the roof top fencing or proposed rear staircase, he responded that the height of the fence was never raised by Staff.

   He felt that qualitatively and quantitatively the variances were not unacceptable or inappropriate.

7. In addressing appropriateness, he advised that the reinvestment made in the property and its modest intensification was appropriate, in-line with the streetscape, and sensitive without shadow or overlook impact.

8. In addressing the minor test, he relayed the basis to be whether the relief requested was too large or too important? In his view, design features are not the test of being undesirable. With no massing, shadows or setback incidents of impact, he felt the proposed recognition that is sought to be acceptable. He felt the height increase to be minimal and in the absence of a length or depth variance the

building and built form existed pretty much within the envelop characteristic of the area. He felt any impact to be minor.

Mr. Ryuck concluded by urging the proposal was consistent, meritorious and, subject to the conditions from Planning, Transportation Services and Urban Forestry, worthy of approval.

There was no Representative or counsel present to provide submissions.

ANALYSIS, FINDINGS, REASONS

One view of the evidence would support the relief of the planner's recommendation: the COA refusal was unsupported with cogent reasons; no neighbours or the City carried forward objections that were earlier evident; only the Applicant called any evidence; professional expert planning opinion advice was in support of a reversal of the COA decision; there was no contrary advice.

Regrettably, I do not find the matter that simplistic.

The viva-voce evidence from the planner Ryuck was well prepared and presented, both in Exhibit 1, once received and read, and in oral testimony. He provided supported opinion evidence in respect of each variance requested, in greater or lesser detail, with reference to Provincial Policy, Growth Plan and the applicable tests.

As relayed under 'Issues', above, I am to consider the Application as if the building as it now exists, differed. I am to consider whether the requested variances seen through the lens of a fresh application, meet the myriad of considerations in law and policy pertaining to the subject property.

The planning evidence did not fully or even in a significant part start from this premise. Repeatedly, the planning evidence was based upon a comparison of the recognition of what is existing to what could be constructed on the subject property as-of-right. From that, opinions were advanced based on the applicable tests, including as to the measure of difference and implications.

The clearest example of this circumstance concerns responses to questions related to Variances 2 and 3.

Under By-law 569-2013, the City introduced a height restriction on "all front and exterior main walls" and "all side exterior main walls facing a side lot line," of 7.5 meters.

The Application seeks a height recognition of 10.2 m for these area performance standards.

The TLAB has repeatedly heard evidence in many Hearings that the purpose of this By-law standard is to prevent 'as-of-right' box construction to the maximum building permission in the By-law where the absolute height permission is 10 m. Further, that the By-law standard of 7.5 m serves to bring the Application itself, for an increase, under review in the circumstances.

The standard as applied generally prohibits flat roof buildings of three or more stories, depending on topography, that might otherwise be constructed as-of-right, to the maximum height permission of 10 m.

When I asked whether Mr. Ryuck if he accepted this expressed rationale for the main wall height regulation of 7.5 m, his answer was two-fold:

1. The purpose of the regulation is to limit massing to avoid an overwhelming structure;
2. Here, there is an existing flat roof that is in line with the overall height.

He went on to add that a common exception to the 7.5 m height limit, is to allow sloped, mansard or dormer roof additions, with exceedances above the 7.5 m limit.

The planner concluded his response in saying:

> "In my opinion, to look at massing it is more important to look at the overall height…Here, the height permitted by the zoning by-law (sic: 10 m) is not greatly exceeded by the existing building at 10.21 m: if the roof were 'pitched', there would be no height variance."

I find that the answer provided is both unresponsive to the expressed question and applying a wrong test in having regard to the existing main wall heights on all four sides of the building on the subject property.

I agree with Mr. Ryuck that the purpose of the regulation is to limit massing in a somewhat crude manner, as reflected in built form. I also agree with him in his subsequent comment that the existing three storey dwelling has the benefit of three storey homes west of the site, on Bridgman Avenue.

However, when asked again whether he ascribed to the intent of the By-law to prohibit three storey flat roof buildings, such as the unauthorized built form of the subject property, he again demurred:

> "There is no restriction on the number of stories in the by-laws applicable to this property. The control is by height. The 7.5 m applies to a flat roof but a slope would avoid that and get a house of similar height. I put more emphasis on overall height as a better indication of the supportive height restriction."

In my view, this exchange demonstrated that the planner was prepared to diminish the front, side and rear wall performance standard in favour of an intransigent support for the building as built.

I consider my task to be whether a justification has been adequately advanced to disregard the front, side and rear wall standards in an application requesting their elimination. That is, would an application on this or on a neighbouring property of two stories, have these standards waived to permit construction of a three storey flat roof building to a height of 10.2 m, being the point marginally in excess of the maximum permitted height demonstrated by the existing construction?

Regrettably, the evidence did not address that perspective, or provide any evidence on:

i) The height, age and design of the three storey example residences to the west or in the neighbourhood;
ii) Examples of COA decisions in the Study Area relieving of the general height regulation (10 m) or the specific main wall height regulation (7.5 m);
iii) The permitted height controls under previous zoning other than the 10 m limit, if any;
iv) Examples of the type of dwelling and its character attributes as being similar or compatible to the build form of other three storey flat roof buildings in the Study Area, if any;
v) Information on the building on the subject property as it existed prior to the 2014-15 construction.

The issue of height is compounded in several other ways:

1. The advice received that the construction undertaken in 2014-15 without a permit enclosed former open air balconies, or platforms, at the front of the building, over the open air porch projection, on both the second and third floors, the latter being described as the ‘all-new’ construction of a third floor via a ‘reconfigured’ roof.

   The planner repeatedly also stated that the main front wall of the dwelling on the subject property was ‘in line’ with those main front walls to the west. This fact, which did have a technical basis in the past, is used in support of Variance 5 to recognize and maintain an existing front yard setback condition from that required of 7.18 m to the requested setback recognition of 4.97 m.

   The distinction, however, is that the enclosure of the former open air balconies on the front of the building over the common porch features on the street, created an increase in massing forward of the main front walls of this former and adjacent in-line properties, above the first floor level.

   This increases massing.

2. Variance 1 under By-law 569-2013 requests an overall height exceedance from 10m to 10.21 m.

This increases massing.

3. Variances 10 and 11, requests recognition of the second and third floor additions to accommodate 'two additional proposed secondary suites'.

   As in 1, above, this is a consequent massing increase.

4. Variances 7, 8 under By-law 569-2013 and Variance 2 under By-law 438-86 request side and rear yard setback recognition and permissions and, in the latter By-law, a height exceedance increase to 10.8 m to accommodate external stairs.

   This increases massing.

5. Variance 1 and 6 contemplate recognition of rooftop enclosures above the third floor ceiling to a height of 12.4 m measured to the top of an existing screen fence located along the front and side perimeter of the existing building.

   This increases the appearance of massing.

It is clear from Mr. Ryuck's evidence that the proposed entirely new rear open air stairway, from grade to the roof, does not contribute to any increase in floor space index (fsi). On his admission, however, it would contribute to:

A reduction in rear yard landscaped open space (to 0 sq m) from a required 25% (Variance 9);

A potential increase in shadowing (although no shadow study was performed);

Overlook access from four levels.

Reduced parking space, turning movement and vehicle storage capacity (Variance 12 and Variance 2 under By-law 438-86).

It follows that the increase requested to recognize the front, rear and side main wall heights is intrinsically connected to changed height and massing, through: the appearance of increased bulk and built form; the streetscape implications of a reduced front yard appearance above the first floor level and the faux height appearance of perimeter fencing above the third storey; and the additional height and massing of an as yet unbuilt rear exterior stairs, rising four levels above grade.

I find that this combination of requests would create the appearance of an overwhelming structure on this narrow, corner, subject property.

While I agree with Mr. Ryuck that fsi alone is but a statistic that does not translate into a measure of height, massing or scale and may be employed on a site in different configurations, it is a zoning performance standard intended, as he said, to guide 'new construction'.

Here, the resultant fsi requested is 1.78x the lot area, up from that permitted as-of-right under zoning and greater still that the standard said to have been fixed on an earlier appeal to the Ontario Municipal Board (OMB) of 1.05x.

I accept the advice of the planner that the fsi recognition requested is substantially within the building envelop under zoning and under his approach, namely, that it is maintained within the existing building. As such, in his view, the fsi variance is 'just a number' and 'not a true indication of built form'.

He confirmed that there were no comparable examples of fsi existing or approved within his study area, the highest known being 1.23x at 342 Albany. On this basis, on this 'very narrow lot', he felt the proposed recognition of fsi - not involving any expansion – was not overdevelopment and the existing built form does not change neighbourhood character, is compatible and would have no adverse impact.

Again, at issue is not what is existing today on the subject property, but what is sought to be approved setting aside the presence of the existing illegal construction..

With respect, I disagree with the result that is supported, though not perhaps the description of the role of fsi as presented in this circumstance.

I also find that the resultant image of most of these above listed massing ingredients is readily ascertainable from the site photos presented and from the site visit. From an 'as built' perspective, I find that an examination of the completed structure reflects a distinct, unusual and wholly inconsistent visual image for the street.

I find that the OP requires that I give consideration to criteria raised by Mr. Ryuck to be examined as to whether the proposal, as framed by the variances, would 'respect and reinforce the existing physical character of each geographic neighbourhood' (section 4.1.5).

Despite not being available prior to the commencement of the sitting, I have read the Expert Witness Statement filed as Exhibit 1. I did not find therein or in the oral evidence any distinguishing discussion between the 'geographic' or 'immediate' neighbourhoods.

Whether or not that is required, the criteria to be examined include:

b) prevailing size and configuration of lots;

Mr. Ryuck testified this criterion was not applicable and provided no analysis of it. The subject property has two characteristics that the planner might have examined in greater depth under this criterion: location and lot size. As a corner property, its siting is deserving of description in terms of adjacencies, prominence

and comparables in terms of width, depth and development. I acknowledge that the surrounding uses were described and are diverse, with roads and a lane, a large college non-residential building, parking and rail facility proximity. There are, as well, abutting residential uses west and immediately north of the subject property. The site is not isolated; it is the north west corner property at the south east entrance on two streets to a contiguous identifiable neighbourhood. It is a narrow parcel with two prominent front and side streetscape contributors. In the absence of any comparable on these two measures, I find that the site is highly visible, and that the built form can contribute dramatically to the streetscape on both streets. I find that the height contribution both of the flat form roof and additional fencing could not be considered wholly 'sensitive' or a 'fit' with either the streetscape or the neighbourhood, in the absence of any analysis of comparable or similarly located or sized lots. Photographs of the subject property as built do nothing to alleviate this concern. No examples were provided of properties similar in character that required parking space size reductions and the complete elimination of any required landscaped open space.

> d) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;

Mr. Ryuck addressed this criterion from several perspectives, some of which are above described. While I can agree with the planner that the overall height excess to 10.2 m is small, I cannot agree that the manner of deployment of floor space is 'not inconsistent to other homes' by virtue of the limited height exceedance and the building length and depth being within the by-law regulation, as suggested.

I have found that the requests for massing flexibility and its 'recognition' in multiple ways permits of a structure that dominates this very narrow lot, including forward projections, roof top fencing and a proposed new four level access external stairwell. Not only was there no evidence to demonstrate Study Area comparable heights for three storey flat roof multiple apartment occupancies, there was no analysis with the appearance, fsi and character attributes of the proposed and existing. There were only rather vague references to other units containing 'units not unlike secondary suites' in a 'single detached built form'. This was neither compelling, demonstrative nor convincing. Here, a 'triplex' is proposed, on the evidence. While triplex may be a permitted use, as was testified, it is not either in function or appearance, proposed or existing, a single detached building form. Nor was the Application framed in the manner of permitting a triplex; rather, a second secondary suite is implied but only through a close reading of the documentation. There is no owner occupancy intended. The building as proposed and built has multiple entrances, multiple waste disposal receptacles, multiple gas and service lines, a proposed four storey external stair corridor and multiple car storage demands on, or encroaching upon, the public rights-of-way.

In my view, the existing use does manifest itself onto the public realm not as a single, detached dwelling unit, but a multiple occupancy building more

characteristic of an apartment building or rooming house. While I was told that a range of use permissions exist, including a triplex and apartments and an accessory unit, no information was provided on the policy or regulatory support for the introduction of 'two additional secondary suites'.

The implications of the request, Variance 10, are aptly demonstrated in the presentation of the existing building with enhanced second storey space, entirely new third storey space and a 'required' new, four level external access stairwell reportedly required by building and fire codes, to service the secondary suites on floors two and three, as well as provide roof access.

I find it disingenuous to call the proposal or the existing structure, albeit within the footprint of the original building, to be anything more than masquerading as a single detached dwelling that is therefore 'reflective of area character', 'not inconsistent' and 'reinforcing'. While I respect the opinion the words can generate, I remain unconvinced that a proper foundation has been laid to demonstrate that the objectives this criteria, above, have been met.

f) prevailing setbacks of buildings from the street or streets;

Mr. Ryuck stated that the front yard setback requested is an existing condition, that side yard reductions are common in the study area, that the 'roofline' is remaining unchanged and that these requests are compatible and consistent (not 'the same as') and have no adverse impact. With the exception of the streetscape change proposed by the elevated balcony enclosures and the absence of prior roofline advice, I agree somewhat with the planner that some of the requested variances are more observant of existing conditions, of longstanding character attributes.

g) prevailing pattern of rear and side yard setbacks and landscaped open space;

Mr. Ryuck described these variance requests (Variances 7, 8 and 9) as conflated by the very narrow lot, urban conditions, the requirement of Building Code and Fire Code regulations and the characteristics of tight urban conditions common in the Study Area. Despite this, no examples were provided of existing conditions or COA decisions, as described above, replicating the consequences of the proposed stairwell addition requiring setback relief and the complete elimination of all landscaped open space.

It seems inappropriate for the TLAB to support the intensification on such a narrow lot, with an additional residential unit and the consequent absence of amenity space, constrained parking and the highly visible use of the public boulevard for the storage of refuse containers and vehicle parking. Had the rooftop decking and fencing been tied to the provision of amenity space, some consideration might well have been given to its access and confinement in a less visible form than is requested to be recognized and is evident as existing and proposed relief. This, however, was not the case. The TLAB is left with a request to intensify the unit count, increase the massing by a four storey exterior stairwell in a prominent location with consequent parking space, setback encroachments and the complete loss of any rear yard amenity space.

The TLAB could comply with the suggestion of the Traffic Division to eliminate any attempt at or need for on-site or boulevard parking and require the boulevard space and rear yard to be returned to landscaped open space. These options are open to the owner and are not being pursued. To require them casts the burden onto City enforcement obligations, a less than satisfactory alternative.

In summary, I am not satisfied that many of the requested variances, identified above, meet the statutory test of maintaining the general intent and purpose of the OP. As well, the zoning by-laws are requested to be compromised on multiple fronts that are largely justified on the opinion that the existing condition has not generated any undue adverse impacts, measured either by the planner or objection from the public or any public agency, apart from the requested conditions, should the Application be approved.

The general zoning intent and purpose, in my view, is not fully met with particular reference to Variances 1,2,3,4,6,7,8,9,10,11 and Variance 1 under By-law 438-86. These aspects of concern are described and discussed, above.

Mr. Ryuck also addressed the tests of ‘desirable’ and ‘minor’. On the former, he described the benefit of property reinvestment and the desirability of residential intensification. On both these aspects, I agree that these are laudable objectives encouraged by provincial and municipal policy goals alike.

I disagree that the planner provided convincing evidence that the buildings size, character, setbacks and height exist in the neighbourhood and that what is proposed and existing would produce no shadows or overlook. There is no evidence beyond commentary to support these propositions.

As a consequence, I do not accept that the entirety of the relief requested is appropriate and not overdevelopment. I consider the fencing around the perimeter of the third floor roof to be offensive and out of character with neighbourhood norms. Its location, appearance, height, quality and quantity bear no relation to the stated purpose of protecting rooftop mechanical equipment. Correspondence reportedly received from the owner’s insurer, reference by the planner in oral evidence but not found in Exhibit 1, is less than convincing as a justification for the fortress like appearance of *ad hoc* roof fencing, on the perimeter of the building. That fencing proposed in plan or existing is abrupt, jarring, prominent, and excessively high. It is demonstrably unsuited to respecting and reinforcing the streetscape along both Bridgman and Dartnell Avenues.

I find multiple aspects of the requested relief undesirable in the circumstances, particularly the unauthorized third floor space conversion proposed and existing, the rooftop fencing, the proposed rear yard open air stairwell, four levels in height and, as well, the complete elimination of user amenity and compromised parking spaces.

I agree with the planner, Mr. Ryuck on the definition of whether a variance is minor: that it not be too large or too important and that there not be ‘no impact’ but that any impact be acceptable – i.e., including no ‘undue adverse impact’.

However, his opinion findings that there is no massing, shadow or setback impacts that are unacceptable based upon only a 20 cm overall height excess, no length or depth variance and substantial built form confinement within the building envelop, is less than comforting. It is selective, not perspective grounded in my view and fundamentally constrained in its approach as to whether these variances should be applied and approved absent existing construction.

The easiest solution is to reject the appeal in its entirety for lack of supported justification.

I have found that the massing produced by the variances is excessive, the contribution to shadowing of the height exceedance features (roof shape; rooftop fencing; proposed exterior stairs; enclosed balconies) is largely unsubstantiated and unproven and the reliance on the recognition as to what is built, to be a questionable standard or approach or value.

The tests of by-law compliance, desirability and whether they are minor were only dealt with cumulatively in the oral evidence. I am, however, satisfied that in the written and oral evidence, Exhibit 1, they were addressed individually and in a satisfactory form, although not necessarily in content. There is no technical objection on this basis.

I have reviewed the content of the recommended and owner accepted conditions of the Planning Department, Transportation Services and the Urban Forestry divisions of the City. These are contained in the TLAB record on file from the COA and are referenced acceptably in Exhibit 1.

They are considered first as to their contributory merit and whether they adequately protected against the concerns, above expressed, that the subject property would be and is overdeveloped, by existing and proposed improvements.

The conditions as proposed are acceptable contingent on the relief granted. They do not serve and do nothing, I so find, as approbation for the deficiencies expressed in the relief requested or provide for its amelioration.

In retrospect, the Application involves the recognition and enhancement of a building that is overdeveloped, in this Member's opinion, for the subject property.

In identifying multiple cumulative deficiencies, there remains whether the variances in their entirety should be refused, as was the case with the COA to whose decision regard must be had, or otherwise.

There are certain incontrovertible facts identified by the Planner, Mr. Ryuck, that bear on this consideration:

a) The building is built, largely within the template envelop for a single detached dwelling under applicable zoning;
b) A 'secondary suite' is a recognized permitted use addition;

c) The lot, an inner city property, is narrow and benefits or is constrained, depending on viewpoint, by public thoroughfares, on three sides.
d) Two sides of the subject property evidence resilient characteristics: a large low rise institutional presence and associated parking.
e) Certain variances reflect pre-existing conditions clearly in place since applicable zoning and prior to the unlawful construction: front, side and rear yard setbacks.
f) There has been no enduring neighbour complaint or City by-law enforcement and the illegal renovations that took place in 2014-15 have had a demonstrated existence for five (5) years or more.

I see little merit in the impatience of those who might demand an absolute refusal of all variances. While this is not the first time the subject property has sought relief from City planning standards, it is of unlikely benefit or stability to have the subject property continue in a state of sustained non-compliance or be subject to enforcement obligations detrimental to the owner and to the City, if such can be appropriately avoided.

In my view the subject property, by lot, plan and use regulation was intended to contribute to the City inventory of a single detached residential dwelling. In today's world, that use inclusion permits the addition of a 'secondary suite', subject to compliance with applicable law.

I see no basis to augment, on the subject property, additional dwelling units or additional rooms for let or hire, despite what has been reported as the existing use of the premises as "three apartments". Indeed, Mr. Mazzitelli's plans show three 'existing kitchens'.

I was left with the impression that the third apartment, in the 'new' converted third floor space, is a principle cause for the requested exterior four storey stair structure proposed for the rear yard. I find this latter addition unacceptable in contributing further massing, precedent, built form, detrimental streetscape aesthetic and compromises required for on-site standards as applicable for a residential neighbourhood.

To disallow the existing third floor and enclosed balcony spaces that have existed now without enforcement action for an extended period, simply encourages either the demolition of residential accommodation space, or the continuation of by-law offences requiring enforcement as well as the gratuitous interference with maintenance, sale and financing activities naturally and normally attendant aging structures in the City.

I choose to consider these matters in the spirit of addressing solutions, not creating or continuing problems but rather to search for solutions that, while not necessarily palatable to all, hopefully serve in the larger vein.

I had asked for three undertakings from the planner in a timely fashion to meet this Member's undertaking to produce a decision within 10-14 business days of the close of the sitting:

1. production of the OMB disposition PL020246;
2. production of the specific Building Code and Fire Code provisions requiring the as proposed rear stairs structure;
3. production of any materials available depicting the original building, its height, roofline, style.

None of this material was forthcoming in the timeframe requested and is therefore not referenced or employed, for or against this decision.

Parenthetically, the attestation by a professional witness (Form 6) accepting an overarching duty to be of service to the tribunal has been breached by such failure in this circumstance, without a timely explanation. The TLAB does not condone the sherking of this responsibility that is clearly owing under the Rules.

My consideration of the evidence, including that above recited, draws me to the following conclusions:

First, the height, scale and massing of the building and structures on the subject property, existing and proposed, constitute overdevelopment of the site.

Second, that overdevelopment manifests itself in undesirable attributes of built form, both existing and proposed.

Third, overdevelopment also includes the use of the property whether expressed as apartments, secondary suites (plural) or independent occupancy rooms or suites. Increased usage measured in dwelling accommodation leads to the demand for services and their on-site manifestation for parking, loading, waste disposal or other features whether deserving of multiple occupancies or consequent on the same.

I find that the desirability and support for intensification does not override the City-wide standard calling for good community planning.

Fourth, streetscape design and its attributes are important contributors to neighbourhood building, a sense of community and an appreciation of one's sense of place. Departures from the recognition of such attributes that constitute an unsightly aberration or disconnect are not to be encouraged. While life safety is always an exception, nothing in the evidence, the Exhibit, the TLAB file or the undertakings justified the rooftop perimeter fencing at the heights and locations proposed as being warranted or justified, on this detached residential property. The same applies to the proposed four storey open-air stairwell platforms.

Fifth, Ontario is said to have a planning led system. In this case, illegal construction has led the Application for relief. However, that Application is to be considered prospectively with the after-the-fact consequences relevant, if at all, to assist only in gauging matters of impact.

Finally, the role of TLAB is to discern a path consistent with principles of equity, fairness and the advancement of good community planning.

Applying these principles, I find that certain variances are supportable if the conditions applied are strictly observed, while others are not. The subject property has had a history of non-observance to standards and obligations incumbent upon and followed elsewhere by the citizenry of the City. It is equally open as not, given the findings herein, to deny all variances.

There was no evidence that the infractions sought to be recognized by the Application and refused by the COA were the derivative of inadvertence, incorrect or inadequate information or advice. The process for approvals was known, by virtue of the earlier application and appeal apparently resolved by the OMB.

The Applicant in this circumstance properly applied and pursued the recognition and further ambitions held for this now, currently, entirely, a rental property.

One task at hand is to ensure that the difficulties experienced by the site and visited on the City and the neighbourhood from the past, are not repeated.

To this end, I will recognize and maintain the exterior dimensions of the building on the subject property as it existed on February 27, 2020, subject to compliance with other conditions; the failure to abide by which will ensure the COA decision prevails and the approved variances supported herein, are lost.

INTERIM DECISION AND ORDER

1. **VARIANCES APPROVED**

The appeal is allowed in part and the variances from the list identified in **Attachment 1** are modified and those that are approved are in accord with the following list and content, and are subject to the Conditions identified in paragraph 3, CONDITIONS, of this Decision and Order:

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

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

The maximum permitted building height is
10.0 m.
The altered detached dwelling will have a height of 10.21 m measured to the top of the flat roof.

2. 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 7.5 m.
The height of the front and rear exterior main walls will be 10.21 m.

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

The maximum permitted height of all side exterior main walls facing a side lot line is 7.5 m.
The height of the side exterior main walls facing a side lot line will be 10.21 m.

4. Chapter 10.10.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index is 1.05 times the areas of the lot (155.52 m^2 as per Ontario Municipal Board decision PL020246.
The altered detached dwelling will have a floor space index equal to 1.78 times the area of the lot (264.8 m^2).

5. Chapter 10.10.40.70.(1), By-law 569-2013

The minimum required front yard setback is
7.18 m.
The altered detached dwelling will be located 4.97 m from the front lot line.

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

A minimum of 25% (9.3 m^2) of the rear yard must be maintained as soft landscaping.
In this case, 0% (0.0 m^2) of the rear yard will be maintained as soft landscaping.

10. Chapter 150.10.40.1.(3)(A), By-law 569-2013

A secondary suite is a permitted use provided that the entire building was constructed more than 5 years prior to the introduction of a secondary suite.
The entire building was not constructed more than 5 years prior.
One secondary suite shall be permitted.

11. Chapter 150.10.40.1.(3)(A), By-law 569-2013

One (1) secondary suite is a permitted use provided that an exterior alteration to a building to accommodate a secondary suite does not alter a main wall or roof that faces a street.
The second and third floor additions that alter a main wall and roof that faces the street as they existed on February 27, 2020, are recognized and may be maintained subject to the limitation that no more than two dwelling units, however defined, are permitted in the existing building.

12. Chapter 200.5.1.10.(2)(B), By-law 569-2013

The required parking spaces must have a minimum length of 5.6 m and a minimum width of 2.9 m.
One parking space will measure 2.6 m in width and 5.2 m in length, and the other parking space will measure 2.28 m in width.

2. Section 4(17)(b), By-law 438-86

The required parking spaces must have a minimum length of 5.6 m and a minimum width of 2.9 m.

One parking space will measure 2.6 m in width and 5.2 m in length, and the other parking space will measure 2.28 m in width

2. VARIANCES NOT APPROVED

The variances not allowed and for which the decision of the Committee of Adjustment is confirmed that are from the list identified in **Attachment 1** are disposed of as is indicated below; for greater certainty roof-top enclosure fencing (existing and as proposed), a second accessory suite (Apartment 3), and an external tiered stairway are expressly not permitted:

6. Chapter 10.5.40.10.(3)(C), By-law 569-2013

Structures may enclose equipment used for the functional operation of the building, if the building has a height greater than 15.0 m.

In this case, the building height is 10.21 m, and will have rooftop enclosures. **NOT APPROVED**

7. Chapter 10.5.40.60.(1)(D), By-law 569-2013
A platform without main walls, attached to or less than 0.3 m from a building, with a floor higher than the first floor of the building above established grade may encroach into the required rear yard setback 1.5 m if it is no closer to a side lot line than 1.3 m.
The rear platform structure will encroach 2.39 m into the required rear yard setback and will be located 0.1 m from the east and west side lot lines. **NOT APPROVED**

8. Chapter 10.5.40.60.(3)(A)(iii), By-law 569-2013
Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no closer to a lot line than 0.6 m. The rear stairs will be located 0.1 m from the west side lot line. **NOT APPROVED**

3

1. Section 4(2)(a), By-law 438-86
The maximum permitted building height is 10.0 m.
The rear stair and platform structure will have a height of 10.8 m, measured from the average elevation along the side lot lines. **NOT APPROVED**

3. CONDITIONS

The following **Conditions** apply to the variances identified in paragraph 1 of this Decision and Order and apply to the existing building in place on February 27, 2020. In the event of the demolition of the existing building so defined, the variance approvals and conditions herein shall lapse:

a.) **Urban Forestry and the TLAB**: for site improvements involving regulated private or public trees, including the delineation of walkways, parking pads, the removal of a parking enclosure with access to Bridgman Avenue and the returning of the Dartnell Avenue boulevard and east side yard of the subject property to soft landscaped open space, shall require:

1. Submission of a complete application for a permit to injure or remove a City owned tree(s), as per City of Toronto Municipal Code Chapter 813, Trees Article II Trees on City Streets.

2. Submission of a complete application for a permit to injure or remove a privately owned tree(s), as per City of Toronto Municipal Code Chapter 813, Trees Article III Private Tree Protection

b.) **Community Planning and the TLAB**: for the screening of rooftop mechanical equipment:

1. no roof top screening is to be visible from street grade and is only allowed solely as a weather shelter to rooftop mechanical equipment, if recommended or required by the equipment manufacturer;

2. any screening erected under this condition b.) is to be no more than one (1) metre in height and shall be set back from any edge of roof a distance of not less than 1.5 m;

3. existing 'mechanical' screening/fencing on the roof of the subject property as of February 27, 2020 is to be permanently removed and neither replaced, relocated nor extended.

c). **Transportation Services and the TLAB**: to provide for the possibility of on-site parking and to protect for the function of the adjacent lane along the north limit of the subject property to satisfy the Official Plan requirement of a 5 m wide right-of-way:

1. maintenance of a 0.98 m setback from and along the rear property line, such setback to be free of any buildings or structures but remain available for laneway access to permitted parking, parking pad installation at grade or soft landscaped open space and vegetation;

2. application for boulevard permit parking, if required, to facilitate the parking pad permission included in this Decision and Order;

3. removal, adjacent the westerly limit of Dartnell Avenue (and any sidewalk) and including the entire east side yard of the subject property, of any other hard surfacing material at grade and the removal of any ramp access onto the municipal boulevard, and the return thereof, except for a 1.5 m wide walkway, to soft landscaping and vegetation free and clear of above grade obstructions, and except as may otherwise be permitted by permit.

d). If within a period of **six (6) months** from the date of issuance of this Decision and Order, the Conditions imposed by this paragraph 3. b).3 and 3. c).3 are not completed as attested to by an affidavit of the owner or authorized representative, the Variances Approved under paragraph 1 and the Conditions related thereto under paragraph 3 are revoked and the decision of the Committee of Adjustment is re-instated such that the appeal is refused and none of the variances are granted.

4. **FINAL ORDER**

Forthwith following expiry of the period set in Condition 3 d). or any extension thereof granted in writing by the TLAB, the TLAB shall issue a Final Order and Decision in accordance with the terms of this Interim Decision.

If difficulties arise in the implementation of this decision and order, the TLAB may be spoken to.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord

Attachment 1
REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

1. Chapter 10.10.40.10.(1), By-law 569-2013
The maximum permitted building height is 10.0 m.
The altered detached dwelling will have a height of 10.21 m measured to the top of the flat roof, and a height of 12.04 m measured to the top of the screen fence enclosing the roof top mechanical equipment.

2. 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 7.5 m.
The height of the front and rear exterior main walls will be 10.21 m.

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

The maximum permitted height of all side exterior main walls facing a side lot line is 7.5 m.
The height of the side exterior main walls facing a side lot line will be 10.21 m.

4. Chapter 10.10.40.40.(1)(A), By-law 569-2013
The maximum permitted floor space index is 1.05 times the areas of the lot (155.52 m^2 as per Ontario Municipal Board decision PL020246.
The altered detached dwelling will have a floor space index equal to 1.78 times the area of the lot (264.8 m^2).

5. Chapter 10.10.40.70.(1), By-law 569-2013 The minimum required front yard setback is 7.18 m.
The altered detached dwelling will be located 4.97 m from the front lot line.

6. Chapter 10.5.40.10.(3)(C), By-law 569-2013
Structures may enclose equipment used for the functional operation of the building, if the building has a height greater than 15.0 m.
In this case, the building height is 10.21 m, and will have rooftop enclosures.

7. Chapter 10.5.40.60.(1)(D), By-law 569-2013
A platform without main walls, attached to or less than 0.3 m from a building, with a floor higher than the first floor of the building above established grade may encroach into the required rear yard setback 1.5 m if it is no closer to a side lot line than 1.3 m.
The rear platform structure will encroach 2.39 m into the required rear yard setback and will be located 0.1 m from the east and west side lot lines.

8. Chapter 10.5.40.60.(3)(A)(iii), By-law 569-2013
Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no closer to a lot line than 0.6 m. The rear stairs will be located 0.1 m from the west side lot line.

9. Chapter 10.5.50.10.(3)(B), By-law 569-2013
A minimum of 25% (9.3 m²) of the rear yard must be maintained as soft landscaping.
In this case, 0% (0.0 m²) of the rear yard will be maintained as soft landscaping.

10. Chapter 150.10.40.1.(3)(A), By-law 569-2013
A secondary suite is a permitted use provided that the entire building was constructed more than 5 years prior to the introduction of a secondary suite. The entire building was not constructed more than 5 years prior to the proposed introduction of the two additional proposed secondary suites, including the front second and third storey additions.

11. Chapter 150.10.40.1.(3)(A), By-law 569-2013

A secondary suite is a permitted use provided that an exterior alteration to a building to accommodate a secondary suite does not alter a main wall or roof that faces a street.
The second and third floor additions, rear exterior stair structure, and roof top fences will alter a main wall and roof that faces the street.

12. Chapter 200.5.1.10.(2)(B), By-law 569-2013
The required parking spaces must have a minimum length of 5.6 m and a minimum width of 2.9 m.
One parking space will measure 2.6 m in width and 5.2 m in length, and the other parking space will measure 2.28 m in width.

1. Section 4(2)(a), By-law 438-86
The maximum permitted building height is 10.0 m.
The rear stair and platform structure will have a height of 10.8 m, measured from the average elevation along the side lot lines.

2. Section 4(17)(b), By-law 438-86
The required parking spaces must have a minimum length of 5.6 m and a minimum width of 2.9 m.

One parking space will measure 2.6 m in width and 5.2 m in length, and the other parking space will measure 2.28 m in width