

DECISION AND ORDER

Decision Issue Date Tuesday, February 18, 2020

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): CAROLYN PASCOE

Applicant: ANDREW DEANE

Property Address/Description: 347 Cortleigh Blvd.

Committee of Adjustment Case File: 19 121451 NNY 08 MV (A0162/19NY)

TLAB Case File Number: 19 161087 S45 08 TLAB

Hearing date: Wednesday December 5, Thursday, January 30, 2020

DECISION DELIVERED BY T. YAO

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Gino Di Geso, Silvana Colavecchia	Owners	Ian Andres
Tony Volpentesta	Expert Witness	
Carolyn Pascoe	Appellant	Robert Brown
Darren Sukonick	Party	

INTRODUCTION

Gino Di Geso and Silvana Colavecchi wish to demolish their two storey house at 347 Cortleigh Blvd and build a new three storey detached house. They require the following variances to build this planned home:

Table 1. Variances sought for 347 Cortleigh			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	Lot coverage	35%	39%
2	Building height	10 m	10.525 m
3	Height side main walls	7.5 m	7.91 m
4	Number of storeys	2 stories	3 stories
5	Building length	17 m	22.71 metres.
6	Building depth	19 m	22 metres.
7	Front yard setback	10.59 m.	9.86 metres.
8	Side yard setback	1.8 m	West side, building and front porch: 1.23 metres; East side, building and front porch: 1.22 metres
9	Front platform landing	10.59 m.	Encroaches 3.75 m into the front yard setback;
Variances from Zoning By-law 7625¹			
10	Building height	8.8 m	11.76 m
11	Number of storeys	2 stories	3 stories
12	Finished first floor height	1.5 m	3.37 m

On May 8, 2019, the Committee of Adjustment approved the application; Carolyn Pascoe, the neighbour to the east, appealed and so, the matter comes before the TLAB.

Background

According to Darren Sukonick, a neighbour who made himself a party to Ms. Pascoe's appeal, the plan examiner missed the front yard setbacks for the porch

¹ Because the current by-law still has appeals outstanding, the plan examiner must study the proposal under both by-laws; this accounts for the duplication in height and number of stories. As an agreed fact, the height has a different methodology; under the present by-law, it is measured from "established grade"; under the former by-law it is measured from the level of the road.

landing (Variance #9). Therefore, a new plan examination was made (Table 1). There is no change from what was proposed at the Committee of Adjustment. Mr. Andres, the Di Geso/ Colavecchi family's lawyer, asked me to make an order under s.45(18.1.1) for greater certainty that this hearing is properly constituted and I do so.

EVIDENCE

I heard from Tony Volpentesta, the owners' planner, who I qualified as able to give opinion evidence in the area of land use planning. Ms. Pascoe the appellant, and Mr. Sukonick, owner of 4 Alexandra Wood, gave evidence on their own behaves.

MATTERS IN ISSUE

The variances must meet all four tests under s. 45(1) of the *Planning Act*: that is, whether they individually and cumulatively:

- 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.

In addition, I must find the variances are in conformity with higher level Provincial policies. Since this hearing involves only the physical dimensions of one single detached dwelling, for example, its setback from the side lot lines, I do not believe those policies have much applicability and do not consider them further².

ANALYSIS, FINDINGS, REASONS

The proposal

The key variance is the third storey, where only two stories are permitted. Mr. Andres says the family wishes to have a multigenerational dwelling to accommodate one spouse's parents.

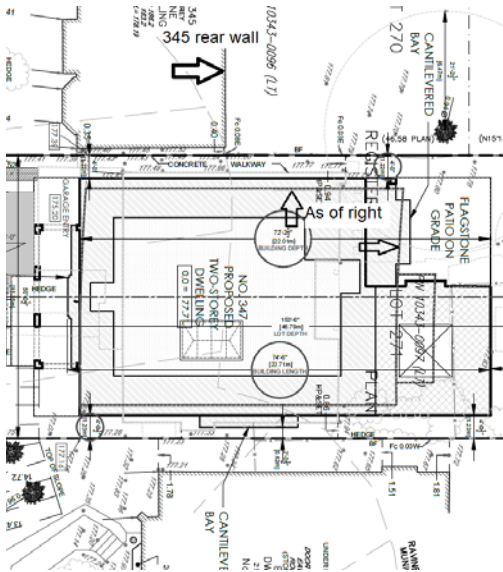
By way of background, two other features should be pointed out. The design has a front porch extending side wall to side wall. This accounts for the need for variance #8. This porch is mostly within the 2.5 m exemption from the front yard setback requirement, but a central part of the porch (a kind of landing) falls outside this 2.5 m, thus variance #9, the subject of the new plan examination as mentioned earlier. In addition, the porch has an extensive roof, supported by large pillars, all within the exemption. Although very prominent, no special variance is needed.

² For example, the Provincial Policy Statement promotes planning authorities to plan for intensification where there is water, sewage, gas and electricity, which would cover every parcel in Toronto.

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 19 161087 S45 08 TLAB

I turn to the building length. The “main” building falls mostly within the 17 m limit; however, there is a family room that juts out at the rear, which accounts for the need for variances 5 and 6. The architect has placed this room away from Ms. Pascoe’s house and there is only a ground level patio on her side. This patio does seem to have a foundation and is close to a large tree on Ms. Pascoe’s lot (site plan; tree is the black dot). The rear addition was objected to by both neighbours although Mr. Sukonick objected to it more because his lot is crossways to the Di Geso/ Colavecchi lot.

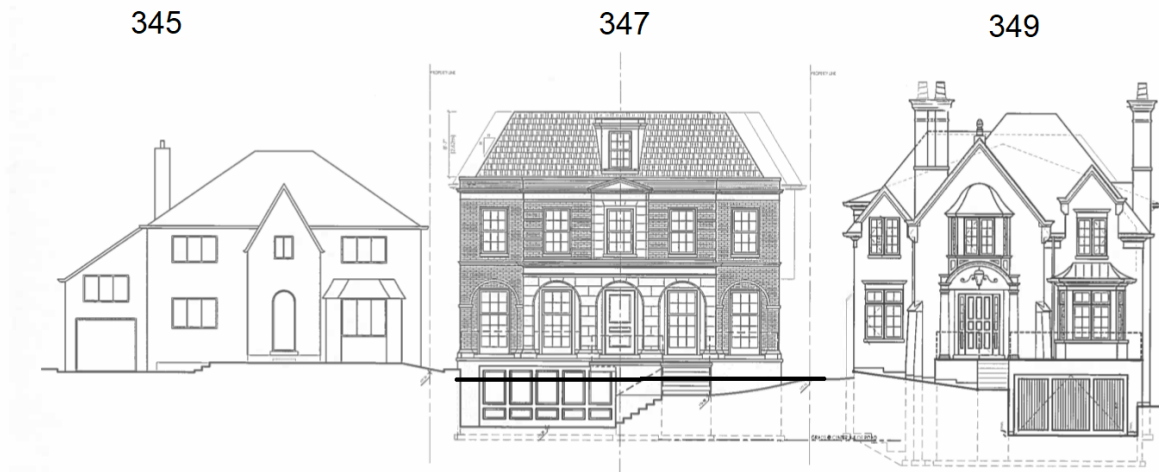
Although that family room was described as “20 feet high” and is undimensioned on the plans, it appears to be about halfway between finished second floor level (11 feet 8 inches above established grade) and finished third floor level (21 feet, 10 inches). Thus, it is not 20 feet high, nor is it an ordinary one storey rear addition. Its rear wall is 22.525 from the front wall of the building.



A note on established grade (the baseline for measuring height)

Mr. Volpentesta said that because of topography, there was a 2.6 m difference between the previous North York method of measuring building height and the current method in City-wide

Zoning By-law 569-2013. This is because the land rises from the road for odd numbers (south).



Thus, the three houses:

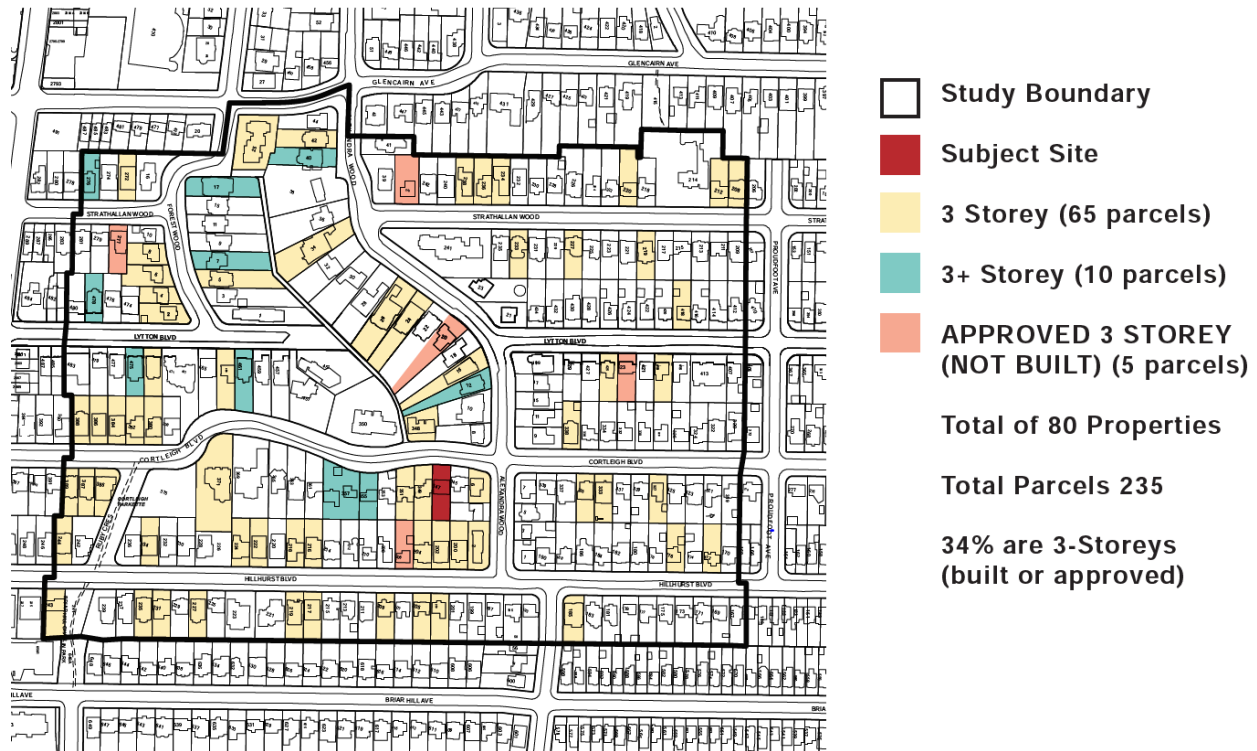
- Pascoe; (345 Cortleigh)
- Di Geso/Colavecchi; (347 Cortleigh); and

- Warner; (349 Cortleigh)

are all perched on a slight hill. Ms. Pascoe has a garage at what the ordinary person calls “at grade”, whereas the Di Geso/ Colavecchi and Warner garages are cut into the small hill. (Please see architect’s representation on previous page).

The Di Geso/ Colavecchi plans show that the bottom of the garage is roughly at the level of the road surface and from there, there are 11 steps to get to established grade (heavy black line) and thence another three or four steps to get to the finished level of the first floor. Thus, the first floor of all three houses is already more than a half storey or so above the road surface.

I accept Mr. Volpentesta’s estimation of the 2.6 m difference. Thus, subtracting 2.6 m from the proposed building height of 11.6 m gives 9.0 m, which is only .2 m above the by-law minimum of 8.8 m and thus the true issue is whether to give approval to a third storey. The height variance of 10.525 m results from the owners’ desire for a 10.5 foot high first floor and two 9 foot ceilings. Mr. Andres indicated that there might be some manipulation of these ceiling heights, should I choose to grant a third floor but not the 10.525 m. As it turns out, this issue is not necessary to consider.



Source: Exhibit Book, prepared by Bousfields, p 210 of 1048

Neither of the neighbours has any third storey windows, which **might** be the sign of a habitable third floor level. Even if there were some, the slant of the roof of 345 and

349 would severely limit the usable space. The slant of the roof at 349 is more vertical, which allows more usable volume. Notwithstanding the family's understandable motive to provide for their parents, this third storey variance is highly visible, and forms an important element of the streetscape in comparison to other houses.³

The study area and Mr. Volpentesta's count of three storey houses

What the plan examiner considers a three storey house needs to be explained. The "first" floor is the one nearest established grade. Second and third floors are what you would expect. A "three plus"-story house is one like the proposed, in which the basement (both in layperson's and plan examiner's language) is the garage level, with three levels above. Mr. Volpentesta counted "three plus" as any house with three stories where any portion of the basement could be seen from the street. However, the plan examiner does not use language like "three plus"; so, this phraseology is meant to convey that in this neighbourhood, because of changes in grade, there can be three storey homes that are unusually imposing — giving the appearance of four levels of habitable space. The appearance issue comes into play in considering the intent and purpose of the zoning by-law and the Official Plan.

In his discussion of the delineation of his study area, he noted that These lands are situated near the boundary line between the former City of Toronto and former City of North York. North York (but not Toronto) had a limit on the number of storeys. Since harmonized By-law 569-2013 in most instances simply carried forward the old standards, the two-storey limit continues to be applied for Cortleigh. The former City of Toronto (e.g. streets south of Hillhurst, such as Briar Hill and St Clements) has a height limit in metres but not by number of stories. So, moving north one encounters larger lots but there is a number of storeys limitation that I consider is an important feature of the neighbourhood.

In the architect's rendering on page 4, I note that neither neighbour has had a ~~minor~~ variance application within the last ten years and is thus both homes constitute a "two storey" house, based on the evidence. Although the house to the right has a peak roughly similar to the proposed house and features prominent chimneys, I would find that its massing is more similar to Ms. Pascoe's house (the end house on the left) than with the proposed dwelling.

"Three plus" stories houses

Mr. Volpentesta found:

³ The importance of this zoning provision has been recognized in 8 Haddington Ave (Member G. Burton) in which she rejected converting a third-floor attic to habitable space without any change in appearance.

- 155 two-storey houses;
- 70 three stories (new and approved);
- 10 three plus stories.

If the “three plus” is considered a separate typology, these form only about 6%⁴; too few to form a prevailing pattern in reference to the Official Plan test in s. 4.1.5:

4.1.5 Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular:

...

c) prevailing **heights**, massing, scale, density and **dwelling type** of nearby residential properties;

I recognize that a “three plus”-storey design needs a lot with a grade change which descends towards the street and the denominator would be a subset of the 235 lots. I had no evidence on how many such lots are in the study area. I also note that this section of Cortleigh is the highest land on the street, which seems to be to be an inapt location to seek this variance.

Three stories

There are 34% of these dwelling units (including the ‘three pluses’), which is a large number. Although Mr. Volpentesta did not offer this evidence, I have looked at just the block face and the opposite side and counted 18 three stories out of 33, which is more than 50%.

The Plan says, “the proposed development within a Neighbourhood will be materially consistent with the prevailing physical character of properties in both the broader and immediate contexts”. The prevailing character of the broader context is the most frequently occurring form of development, which is two storey. I do not consider this to be a neighbourhood with a mix of physical characters.

In my view, the map of three and three plus houses suffers from a fundamental defect in that reliance is placed on “faux” third stories. Mr. Volpentesta said that he included these in his tallies in a subjective fashion, but always erred on the side of conservatism. However, careful as he was, it strikes me that a variance cannot be based on architectural details instead of the intention of the by-law, which is to limit actual third floor habitable space.

This is reinforced by an examination of Mr. Volpentesta’s compilation of Committee of Adjustment approvals (not reproduced in this decision). He has gathered 24 decisions, including the May 2019 Di Geso/ Colavecchi application. All were

⁴ The 10 ‘three pluses’ were revised to 14 when Mr. Volpentesta had a break between sessions.

approvals; the Committee did not turn down anybody in the study area. Seventeen of 24 are third storey approvals. This is a very small number for a ten year period for 235 properties. Yet there is plenty of evidence that people in this area are actively renovating or replacing historic homes.

If the application was post-2013, it needed two approvals, like this application. There are only three “two-by-law” applications at the Committee of Adjustment out of 17, including #347 Cortleigh. Thus, while the Di Geso/ Colavecchi family was successful, this type of “two-by-law” approval seems to have dropped off after 2013. This is true both for absolute numbers (3 out of 235) and as a rate (3 post-2013; 14 pre-2013). I find that this confirms that the application does not meet the intent of the zoning by-law, which is clearly to limit homes to two stories, as much as this may be disappointing for the Di Geso/ Colavecchi family. At the end of the day, they bore the onus of satisfying me as to the four tests, which they failed to do.

Only a trigger for a public process

Perhaps because he recognized the weakness of these planning numbers, Mr. Volpentesta “switched gears” and suggested that the two/three story classification was merely a trigger for a public process:

I’m actually talking about height in a multifaceted way, because you’re dealing with height in this instance in geodetic terms and you’re also dealing with height in stories. So, the restriction from two to get to the proposed three stories, it’s also important in how we address it. I’m going to switch gears here and speak specifically to the height in stories for just a second. It’s not strictly speaking a numerical upper limit; it just becomes a threshold that would trigger a public process . . .to determine whether it is appropriate and in this case, based on all the issues at hand . . .you have to look at the totality. The threshold has been met in terms of a public process.

Again, I disagree. The Planning Act test of the general intent and purpose of the zoning by-law is critical. If the threshold is not exceeded, not only is there no public process but the Chief Building Official is obligated to give zoning clearance. The Official Plan demarcates this “upper limit” set by the zoning by-law as presumptively compatible in terms of this test; it is not just an off-on switch to invoke the Committee of Adjustment process.

Tree and ravine issues

The applicants propose to deal with these as conditions of approval, **after** planning permission is given by the TLAB. This issue was engaged in the following cross examination:

Mr. Sukonick: The property is governed by ravine and natural features, correct?

Mr. Volpentesta: Yes, it is. That part of the applicability of that City of Toronto permitting system, review system, was also involved in how the design happened et cetera. I'm not intimately aware of how that unfolded. That was largely carried through by the architect and not by me.

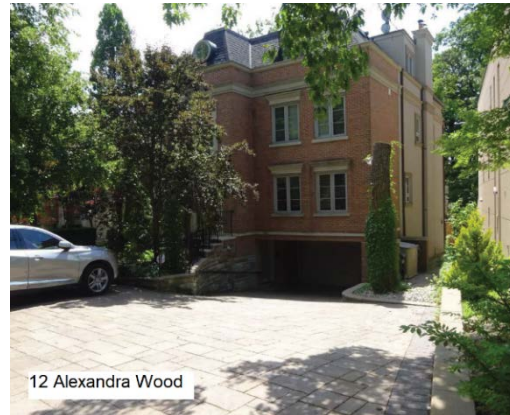
Mr. Volpentesta then admitted that Ms. Pascoe's tree and the owner of #349's trees might be impacted but that the City had a "painstaking process" to protect private trees. I disagree. When and if a permit is applied for to injure those trees the forestry General Manager will assume that the TLAB has reviewed all the downstream effects of any variance since the TLAB is a specialist in planning. These effects include the consideration of Environmental policies in the Official Plan that speak to matters such as the preservation of trees. When no arborist report is available, the TLAB is unable to perform this function.

Some specific three storey designs

As a pedestrian on Sabbaths, Mr. Sukonick has a "30 to 40 years" familiarity with this neighbourhood. He purchased 4 Alexandra Wood in 2003, partly because of its "key lot" location, backing onto the rears of odd numbered lots on Cortleigh. Moreover, as a onetime Bay Street lawyer who now builds high-end custom homes, which he says he tries to "tuck into" neighbourhoods, he claims he has a great familiarity with the design compromises necessary to redevelop in an established neighbourhood. As this kind of evidence verges on "planning opinion", I note that he did not seek to be qualified to give opinion evidence and I did not treat his observations as such.

I also note that much of his evidence was adduced through cross examination of Mr. Volpentesta, who did offer himself as an expert witness. Mr. Andres made frequent objection to the lack of detail in the two neighbours' witness statements, and Mr. Sukonick indeed conceded he drafted much of Ms. Pascoe's statement. I disallowed these objections; a neighbour does not have to advise the opposing lawyer that he will read carefully the material filed in support of the application. Where Mr. Sukonick did state something in the nature of a value judgement, it was in response to questions by Mr. Andres, as in the next paragraph.

Mr. Sukonick wanted to comment on which new houses seem "sensitive", responding to the neighbourhood context, and those which in his opinion are "out of step". Taking him to the photo of 40 Alexandra Wood, Mr. Andres asked him to admit it represented a design like what is proposed. Mr. Sukonick said:



Because of the way the driveway ramps down and because the bottom the garage is not visible from the street, it is below grade, in my view, as I walk by, it has a lesser impact. So yes, it's four floors. It's four floors that are sunken down from the grade level.

I also reproduce the photo of 12 Alexandra Wood (right, also with a sunken driveway) because the photo shows a third storey less obscured by foliage.

[This house] predating my experience. It is an anomaly. . . .an old development, we have no information as to how that got approved.”

Mr. Volpentesta's chart categorizes 276 Strathallan Wood as a “three plus”-storey house. Mr. Sukonick asked Mr. Volpentesta about the small dormer windows and obtained the following reply.

Mr. Volpentesta Yes there are windows within the roofline. In terms of the determination when we looked at this, through our several site visits, we considered that ah the equivalent of a third floor level, inclusive of windows within a roofline. Whether or not that is livable space or not I couldn't make my own independent determination, but I characterized that, as I do with the proposal, as a floor, or the equivalent of a floor level within a roofline.

Mr. Sukonick: And um did you review the Committee of Adjustment decision that relates to this?

Mr. Volpentesta: I did not. [meaning that he did not review it for the hearing December 2019]



After more discussion, Mr. Volpentesta asserted that he **thought** he reviewed the 276 Strathallan Wood Committee of Adjustment decision five months previously. It discloses the owners sought (June 2017) neither:

- a “# of storeys” variance under 569-2013; nor
- a “# of storeys” variance under the former North York By-law.

I conclude that the third floor is not habitable, and the third floor windows are merely decorative. The TLAB shouldn't be making planning decisions based on whether a constructed element is decoration.

The final example, 217 Hillhurst, is not in Mr. Volpentesta's Table of Committee of Adjustment decisions, so I presume it was approved prior to May 2007, which is the earliest date recorded in this table. Mr. Sukonick called 217 Hillhurst “insensitive”. I agree, and I find it illustrates what is sought to be prevented by the zoning by-laws.



Conclusion

I find that the third storey variances fail to maintain the intent and purpose of the Official Plan and zoning by-law. As such they are not minor nor is the package of 12 variances suitable for the appropriate development of the land. They do not cumulatively respect and reinforce the existing physical character of the neighbourhood.

DECISION AND ORDER

I make the order referred to on page 3, finding the changes to the original application are minor. The variances in Table 1 are not authorized.



X

Ted Yao
Panel Chair, Toronto Local Appeal Body