

INTERIM DECISION AND ORDER

Decision Issue Date Tuesday, September 22, 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): ANDRIY DONCHENKO

Applicant: PETER HIGGINS

Property Address/Description: 183 CORTLEIGH BOULEVARD

Committee of Adjustment Case File: 19 141885 NNY 08 MV

TLAB Case File Number: 19 183751 S45 08 TLAB

Hearing dates: Thursday, February 20, 2020, Friday, February 21, 2020 and
Thursday, August 13, 2020

DECISION DELIVERED BY JUSTIN LEUNG

APPEARANCES

| Name | Role | Representative |
|------------------|-----------------|-----------------|
| Peter Higgins | Applicant | |
| Olga Timofeeva | Owner | |
| Andriy Donchenko | Appellant/Owner | David Bronskill |
| City of Toronto | Party | Derin Abimbola |
| William Black | Party | |
| Martin Rendl | Expert Witness | |
| Yishan Liu | Expert Witness | |
| Dana Anderson | Expert Witness | |
| Pamela Ororke | Participant | |

| Name | Role | Representative |
|----------------|-------------|----------------|
| Amy Lewtas | Participant | |
| David Matheson | Participant | |
| Scott Pennock | Participant | |

INTRODUCTION

This is an appeal from a decision of the North York Committee of Adjustment (COA) pertaining to a request to permit a series of 7 variances for 183 Cortleigh Boulevard.

The variances, if allowed by the Toronto Local Appeal Body (TLAB), would permit the construction of a new detached dwelling.

This property is located in the Lawrence Park South neighbourhood in the Old City of Toronto district of the City of Toronto (City) which is situated north of Hillhurst Boulevard and bounded by Mona Drive to the west and Avenue Road to the east. The property is located on Cortleigh Boulevard, south of Lytton Boulevard and north of Hillhurst Boulevard.

At the beginning of the hearing, I informed all parties in attendance that I had performed a site visit of this subject property and the immediate neighbourhood and had reviewed all materials related to this appeal.

BACKGROUND

The variances that had been requested are outlined as follows:

1. Chapter 10.20.40.10.(1), By-law No. 569-2013

The permitted maximum height of a building is 10.0 m.

The proposed height of the building is 10.46 m.

2. Chapter 10.20.40.10.(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 7.61 m.

3. Chapter 10.20.40.20.(1), By-law No. 569-2013

The permitted maximum building length is 17.0 m.

The proposed building length is 17.48 m.

4. Chapter 10.20.40.40.(1), By-law No. 569-2013

The permitted maximum floor space index is 0.35 times the area of the lot.

The proposed floor space index is **0.629 times** the area of the lot.

5. Chapter 10.20.40.70.(1), By-law No. 569-2013

The required minimum front yard setback is 9.33 m.

The proposed front yard setback is 8.71 m.

6. Chapter 10.20.40.70.(3), By-law No. 569-2013

The required minimum side yard setback is 1.5 m.

The proposed west side yard setback is 1.2 m.

7. Chapter 10.20.40.70.(3), By-law No. 569-2013

The required minimum side yard setback is 1.5 m.

The proposed east side yard setback is 1.2 m.

These variances were heard and approved at the June 20, 2019 North York COA meeting. Variance #4 was modified and then approved by the COA. The modified variance was:

4. Chapter 10.20.40.40.(1), By-law No. 569-2013

The permitted maximum floor space index is 0.35 times the area of the lot.

The proposed floor space index is **0.58 times** the area of the lot.

Subsequently, an appeal was filed on July 5, 2019 by the property-owners of 183 Cortleigh Boulevard within the 20-day appeal period as outlined by the *Planning Act*. The TLAB received the appeal and scheduled 3 days of hearings on February 20, February 21 and August 13, 2020 for all relevant parties to attend.

MATTERS IN ISSUE

The appellant/applicant, in recognizing the approval of 6 of their variance requests, contends that the modification of one of the variance requests was not pertinent on the part of the Committee. With such respects, they further believe that the original variance requests they had submitted should be approved by the TLAB. While that is the request as presented, the tribunal must, in accordance with requisite rules and regulations, hold a hearing *de novo* to assess the proposal in its entirety once more to determine if it constitutes good planning. As such, a determination will need to be made by the tribunal to determine if the revised variance request, along with the other variances that were previously approved, meet the threshold for provincial policy and the 4 tests for a variance approval as per the *Planning Act*.

The City and residents party to the matter articulate that the modified variance relates to floor space index (FSI) which they do not believe should be permitted as proposed by the appellant/applicant as they argue it does not meet the aforementioned 4 tests. The arguments and evidence of all parties involved will need to be assessed comprehensively to determine whether the original COA decision should be upheld or modified to ensure proposal is consistent with neighbourhood characteristics and development patterns.

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

On the first day of hearings, David Bronskill, of Goodmans LLP, legal counsel for the appellant, requested that his expert witness Martin Rendl, be called up to provide evidence in relation to the proposal. The other parties in attendance acceded to this request.

I indicated that, in review of the submitted materials to the TLAB including Mr. Rendl's curriculum vitae, that I was prepared to qualify him in the field of land use planning.

Mr. Rendl began by providing a character study of other recently built homes of this neighbourhood. This study, which had been included in the disclosure documents, is espoused by Mr. Rendl to demonstrate that the proposal at hand is not atypical of the aesthetics of this area. He further described that he assumes that the floor space index (FSI) variance and potential issues relating to it would be described by the opposing parties in attendance. Here, he critiques that his character study shows that the FSI is not easily discernible as it pertains to other recently built in-fill homes of this area. With this, he concludes that the merits of the proposal should not 'hinge' on the FSI variance request and that the overall cumulative impact of the proposal should be assessed.

In terms of planning policies, he describes that, in his opinion, the proposal is consistent with both the *Provincial Policy Statement (PPS)* and *A Place to Grow: Growth Plan for the Greater Golden Horseshoe*. These policies have then been delineated within the Toronto *Official Plan (OP)*. The OP, as it relates to local planning considerations, provides further provisions for urban intensification in existing Toronto neighbourhoods. In terms of the City's *Zoning By-law 569-2013*, while there are numerical standards contained in this document, the municipality is subject to provisions to allow for variances, or minor zone changes, to be applied for through the COA, as permitted by the *Planning Act*.

Mr. Rendl proceeded to discuss the FSI variance request. The request is for a building at 0.629 times area lot area while the zoning allows for 0.35 times. Again, he references the character study he had presented earlier as a means of showing that that the neighbourhood in question has houses which comprise a variety of FSI's, with some also greater than what the requisite zoning allows for. For the proposal at hand, he does not believe that there would be any difficulty in service and maintenance of this proposed house along its side property lines, with the setbacks for the proposed dwelling.

William Black, a party to the matter, then proceeded to cross-examine Mr. Rendl on the evidence he had presented to the TLAB. Mr. Black inquired about Official Plan Amendment (OPA) 320 and its policies, as he interprets, that any new in-fill development is to be complimentary to existing structures of that particular geographic neighbourhood. He inquired if Mr. Rendl has afforded consideration of OPA 320 in his assessment of this proposal. Mr. Rendl acknowledged that he has done so here. However, Mr. Black contends that in Mr. Rendl's Witness Statement he does not provide a comprehensive analysis of these respective OPA 320 policies. Mr. Rendl responds that this was unintentional as it would have been impractical for him to reference all planning policies and regulations in his disclosure documents to the TLAB. Furthermore, Mr. Rendl further explained that at the time he was retained by the appellant to provide planning opinion on this proposal, OPA 320 was still under appeal to the Local Planning Appeal Tribunal (LPAT). As such, he did not want to discuss in greater detail as the requisite planning document was not yet in full force and effect.

Mr. Black further assessed Mr. Rendl's Witness Statement to indicate that he inaccurately referenced the FSI for a proposal relating to an LPAT decision for 185 Cortleigh Boulevard. Mr. Rendl responded that he believed this to be an oversight on his part, and was not intended as a means of misleading the TLAB or the presiding member.

Mr. Black inquired about the average of FSI's that had been approved for other houses in this neighbourhood and how they relate to this subject proposal. He proffered an opinion that if this proposal is seeking to construct a new house which has an FSI consistent with other new built houses of the area, that it would need to reduce its other variance requests to achieve a built form which is compatible for the neighbourhood context. Mr. Rendl commented that he does not agree with this characterization and believes the proposal at hand is attempting to achieve a house typology which is a normative standard already existing in this neighbourhood.

Mr. Black proceeded to reference Ms. Dana Anderson's Witness Statement and her continuous that the FSI variance request will increase the negative shadow impact to neighbouring houses. Mr. Rendl responded that the shadow impact is typical of urban areas. He does not believe this proposal would result in a more substantial impact of shadowing to neighbouring properties.

Derin Abimbola, legal counsel for the City of Toronto, then proceeded with questions for Mr. Rendl. She commenced by inquiring if he had looked at properties which are part of the City of North York geographic area. He responded that he had not as he didn't believe it constitutes the study area for this subject property. She then inquired if OPA 320 has more specific language pertaining to density. Mr. Rendl acknowledged that, however, he further outlined that the OP document does not have specific numerical requirements to describe density.

Mr. Bronskill then proceeded with reply questions due to the line of questioning as presented by Mr. Black and Ms. Abimbola. He asked about the windows as proposed on the side walls and inquired about the impact to neighbouring property, of which is resided in by Mr. Black. Mr. Rendl responded that these proposed windows, in his opinion, will not create an increased privacy and overlook issue to the adjacent property. Mr. Bronskill then asked if there are specific requirements to ensure a house be constructed with a garage in the rear of property. Mr. Rendl responded that the City's policies are not prescriptive on such requirements and that a front facing garage is permissible.

Ms. Abimbola then asked if a shadow study can be undertaken for planning proposals. Mr. Rendl indicated that while a study could be done here, in his professional experience, such studies are usually conducted for more hi-rise structures. I stated that the City does have specific requirements or situations where shadow studies are required. Within this context, the City does not typically require them for low rise development proposals.

Participant David Matheson referenced 185 Cortleigh Boulevard as his property is directly across from it. That property had applied for a variance application which was refused by the COA. That property-owner proceeded with an appeal to the Ontario Municipal Board (reorganized now as the Local Planning Appeal Tribunal). There, they reached a settlement with the property-owners on the proposal. While this is so, Mr. Matheson believes that 185 Cortleigh Boulevard should not be given weight as the minutes of settlement were not sufficiently followed on the part of the property-owner.

The City planner Yishan Liu was then called to present evidence to the TLAB. As customary to this, I indicated that I had reviewed Ms. Liu's curriculum vitae and would be able to qualify her in the field of land use planning. Ms. Liu commented that the appellant had initially requested to change the FSI variance request to 0.629x. However, the COA ultimately chose to approve the FSI at 0.58x. She then proceeded to describe her study area and how she arrived at these defined parameters. Mass and scale of proposed houses is assessed within the context of 'prevailing' as espoused within OPA 320. Planning applications received prior to the passing of OPA 320, she stated, would have been assessed differently as such. Ms. Abimbola asked about FSI approvals on the nearby street of Strathallan Boulevard. Ms. Liu responded that there are, in her opinion, different planning considerations which have resulted in a differing housing typology taking hold there. She further outlined that Briar Hill Avenue, to the immediate south, also allows for higher density for houses on the south side of Briar Hill Avenue which acts to influence higher FSI's that are permitted there as well. With respect to OPA 320, a quantitative and qualitative assessment should be undertaken. In conducting such an analysis, Ms. Liu contends that the subject proposal would not be consistent with such policies.

On the second day of hearings, Ms. Liu returned to the stand to be cross-examined by Mr. Bronskill. He initiated his line of questioning by commenting that he believes that Ms. Liu's contention that inaccurate information was submitted as part of the application is without basis. She did further clarify that the proposal is for a two storey and not a three storey detached dwelling. Mr. Bronskill inquired that if certain variance requests, such as the setbacks, were reduced would that not impact the scale of the building from the front property line. Ms. Liu responded that the scale or density of the proposal is not assessed purely from the front property line but that an aerial analysis of the proposal had also been done to determine, in her opinion, that the proposal would not be within the prevailing character of the neighbourhood. Mr. Bronskill retorted that his interpretation was that the assessment of prevailing was not, in his opinion, to be done from an aerial perspective as well.

Mr. Bronskill asked if the attic area, which Ms. Liu initially believed to be livable space, has now been determined to be not the case. Ms. Liu acknowledged that subsequent submissions to the City have confirmed this.

Mr. Bronskill referenced Briar Hill Avenue in-fill development and how it would relate to the subject proposal. Ms. Liu responded that the context of Briar Hill Avenue due to a different lot fabric there means that it may not be an appropriate direct comparison to this proposal.

Mr. Bronskill asked if the OP does specifically provisions averaging for FSI's. Ms. Liu acknowledged this but did indicate that OPA 320 could be interpreted to assess prevailing densities of a neighbourhood.

Mr. Black requested that his expert witness, Dana Anderson of MHBC Planning, Urban Design & Landscape Architecture, be called to provide evidence to the TLAB.

I stated that in a review of Ms. Anderson's curriculum vitae, I would be able to qualify her in the field of land use planning.

She stated that in June 2019, she had been retained by Mr. Black to support the party on this TLAB matter. In commencing her testimony, she does not believe that the planners who had previously testified had sufficiently outlined the character of the neighbourhood. The study area that she has defined encompasses a larger geographic area than what Ms. Liu or Mr. Rendl had outlined in their previous testimony. The study area here was delineated also to consider the walkable component for the area. Her analysis also looked at details such as lot dimensions, landscaped area and building height for each lot as relevant assessment criteria.

Ms. Anderson noted that most properties of this area have a front driveway to a garage or rear positioned garages. She does acknowledge that there is a range of FSI and heights of houses in her study area. Her analysis as it relates to this proposal also included assessing previous COA decisions for other neighbouring properties. She also conducted a site visit where she 'frames' or takes pictures of each individual house and analyzes it in terms of its separation to adjacent houses, fit within the neighbourhood etc. This assessment is to determine if a house 'fits within the frame' of that respective

neighbourhood. With these assessment criteria, she does not believe the subject proposal would 'fit within the frame' due, in part, to a higher FSI variance request.

She further opined about OPA 320 and how it now acts to impact how in-fill development is assessed to ensure compatibility within existing neighbourhoods. The emerging context is not what is to be assessed in the review of in-fill development.

The massing of this subject proposal, in her opinion, does create a potential overlook issue onto adjacent properties. The FSI variance request with the other variances cumulatively creates a larger house which acts to disrupt the neighbourhood character.

Mr. Bronskill proceeded to provide questions on Ms. Anderson's testimony. He referenced the Witness Statement of Ms. Anderson and provided an overview of the roof design of houses in her study area. He proffered that the subject proposal would be similar to these other houses she had analyzed. Ms. Anderson acknowledged that, from a roof design perspective, there could be credence to that argument. However, within this dynamic, Ms. Anderson further opined that she does not believe that this subject proposal would thus be compatible as per the neighbourhood context.

Mr. Bronskill reiterated that there are no second storey balconies proposed here. He then inquired if Ms. Anderson would thus agree there is no negative overlook impact that would be created. She responded that there are impacts with regards to this proposal which can be further mitigated by the appellant.

Mr. Bronskill then referenced the broader and more immediate context, which had been described by Ms. Anderson and how they relate to an assessment of a variance proposal. Ms. Anderson responded that both assessment criteria are significant and are afforded equal weight and consideration.

On the third and final day of hearings, closing statements from the parties were presented to the TLAB. I indicated that a series of additional submissions had been made to the TLAB prior to this hearing date. One of these submissions entailed a request from the participant, Mr. Matheson, to make a closing statement. Mr. Bronskill raised an objection to this request and did not feel that a closing statement from a participant at this juncture was appropriate. In assessing the request and in accordance with TLAB *Rules*, I stated that I would not be granting Mr. Matheson a position to make closing statement.

Mr. Bronskill commented that the evidence as presented by Ms. Liu and Ms. Anderson appears to have focused principally on the FSI variance request. Their arguments, in his opinion, were applying a numerical analysis on the proposal. However, he submitted, it does not appear that the OP contains such assessment criteria. OPA 320 was crafted to ensure new development is compatible with what exists in established neighbourhoods. However, he contends that to be compatible does not mean that a new proposal must be the same as other existing houses in the area. The immediate context, or the houses which face the street line adjacent to the subject property, must also be assessed to determine the suitability of the proposal at hand.

The 'experience' of an individual viewing this proposed house at the street is not an element which can be analyzed through a numerical value analysis.

In referencing the previous cross-examination, Mr. Bronskill commented that it demonstrated that there have been errors by all the expert witnesses in terms of the numerical data used in their assessment of the proposal.

With regards to OPA 320, there have been planning application/proposals in the area which were approved both prior to and after the passing of this planning policy. He contends that all houses which were approved should be afforded equal consideration by the TLAB, irrespective of whether they were approved when OPA 320 was in full force and effect, or not.

Mr. Black stated that, based on the evidence as proffered over the two days of hearings, he believes that the TLAB should consider reducing the FSI request to within a 'range' of 0.51x to 0.55x. In addition, the immediate context should be the assessment criteria that should be afforded greater consideration on the part of the tribunal. Furthermore, he relays concerns with the testimony of Mr. Rendl and, what he believes, are deficiencies in the evidence he has presented to the TLAB. Mr. Black contended that the actual variance requests for some previous COA applications of the neighbourhood that Mr. Rendl had described had inaccurate numerical values. As such, he advised caution on the part of the tribunal in considering Mr. Rendl's evidentiary submissions.

Mr. Black recognized that this is a *de novo* hearing, however he commented that he believes the appellant is presenting a 'hybrid' proposal which differs from what had initially been presented to the COA.

Ms. Abimbola then provided her closing submissions. She did clarify that Ms. Liu's material on other approved COA applications of the neighbourhood was presented with accurate data. She further outlined that if an FSI request of 0.66x was approved, it is her opinion that it would act to impact the approval of any potential future planning application in this area. She further asserted that Mr. Rendl's testimony has not addressed all necessary facets on the planning merits for this proposal. In referencing Ms. Liu's testimony, she stated that if this proposal was approved as presented, it could result in a new house which would be largest of the area, in terms of scale and massing.

It is noted that some of the participants to this matter did not make oral submissions to the TLAB. As such, the tribunal does not have further statements to critique in relation to their participant status.

ANALYSIS, FINDINGS, REASONS

The proposal which has been presented to the tribunal acts to reappraise 7 variances requested which are to facilitate for the construction of a two storey detached dwelling. It is noted that the original proposal was approved by the COA, with the FSI variance request subsequently modified by the Committee. While the TLAB does recognize that this is a hearing *de novo* of the proposal in its entirety, as stipulated by the relevant legislation, it is noted that the *Planning Act* does further prescribe that the tribunal should also give consideration for the municipal authority and the decision it rendered and the related documents submitted at that juncture.

The 3-day proceedings provided a range of material and information to the tribunal. There were three expert witnesses, one representing the appellant, one on behalf of the city and the other representing one of the parties to the matter. Their testimony, while comprehensive in assessing all facets of planning elements on this proposal, did principally 'focus' on the FSI variance request and how it relates to the four tests for a variance approval, as per the *Planning Act*. This variance request was cited on several instances as substantial in nature. The potential approval of this request was seen to potentially act to influence the future development pattern for this neighbourhood. Here, the TLAB is tasked to ensure that this proposal is assessed in a deliberate and rationale manner taking into account the current and future development trends which will come to permeate this area as expressed throughout the proceedings.

The adjacent property of 185 Cortleigh Boulevard and its requisite in-fill constructed house was referenced by all parties to the matter, both in describing the positive and negative attributes they observed with this house. That variance proposal, which had been refused by the COA, was subsequently appealed to the Ontario Municipal Board and ultimately resolved through a settlement of all the parties involved, one of which is a participant in this current matter, Mr. Matheson. With this matter, two variance requests for both gross floor area (GFA) and driveway width were proposed. As the discussions transpired between the interested parties, the GFA variance request was reduced from 0.75 times the lot area requested to the following (along with a second variance request):

"TORONTO ZONING BY-LAW 438-86:

1. Proposed GFA (gross floor area) of 0.62 times the lot area (386.18m²) WHEREAS a maximum GFA of 0.35 times the lot area (217.84 m²) is permitted.
2. Proposed driveway width of 3.00 m whereas a maximum driveway width of 2.60 m is permitted."¹

¹ Ontario Municipal Board (2013, March). Decision and Order: 185 Cortleigh Blvd. Retrieved from <http://www.omb.gov.on.ca/e-decisions/pl121389-Mar-08-2013.pdf>

It is noted that, this house proposal was considered by the OMB at a time in which both OPA 320 and Zoning By-law 569-2019 had not yet been promulgated by the City. That tribunal would have assessed this matter while recognizing that such changes in the planning dynamic for the City had not yet been achieved. Still, this OMB decision can be afforded consideration by the TLAB as, most significantly, it is the adjacent property to this subject proposal and can act to provide a reference point.

Although there is no FSI variance request for 185 Cortleigh Boulevard, it is noted that the previous Zoning By-law 438-86 did not contain such a provision. As such, previously the regulation of the built form was achieved, in part, through regulation of the GFA. With the passing of Zoning By-law 569-2013, this contribution is achieved through as FSI regulation. For information purposes, the appellant for that OMB/LPAT matter is the same appellant (owner) for the subject proposal.

This OMB/LPAT decision and the related settlement which was reached is of relevancy to the matter at hand as the GFA variance request was reduced from 0.75x to 0.62 times the lot area. Commentary as to how the change to the proposal occurred was-described as follows:

“Mr. Romano testified that these design modifications are all in response to the issues that were raised at the COA meeting and have been developed through negotiation with the adjacent neighbours since that time. Mr. Romano stated that the original proposal had balconies at the rear that raised issues and that these concerns have all been removed with the new design that has the rear outdoor amenity space at ground level.”²

Although the expert witness here had testified that, in his opinion, the GFA variance request there was consistent with other recently constructed in-fill houses of the area, there is a recognition on the part of the OMB/LPAT that further discussions amongst the interested parties to achieve a more agreeable proposal can occur.

The expert witnesses at the current proceedings also committed their discussions to OPA 320 and how it would be interpreted in relation to the subject proposal. Terms such as immediate context and broader context were discussed extensively with ‘study areas’, as determined by each of these witnesses, presented to the TLAB as a means to support their arguments on this proposal.

² Ibid.

In the disclosure documents to the TLAB, the appellant, in referencing the FSI variance request, that the discussion at the COA was focused primarily on this variance while not giving sufficient consideration to the other variances being sought. The appellant, as well as their expert witness, Mr. Rendl, contend that the immediate and broader context of the neighbourhood is complimentary with this proposed house. Furthermore, they further argue that the four tests for a-variance, as per the *Planning Act*, does not require a quantitative assessment. Instead, a qualitative analysis is more appropriate. While, in their opinion, the discussion has been focused on the FSI variance request, it is argued that the parties to the matter have failed to consider the following elements, existing at 183 Cortleigh Boulevard, which make the proposal appropriate and consistent with planning directives:

a. The proposed front yard setback results in a front wall that is generally in line with the front walls of the adjacent homes.

b. The proposed length results in a rear wall that is generally in line with the rear walls of the adjacent homes.

c. The proposed side yard setbacks are consistent with the existing setbacks of the adjacent homes (between 1.05 metres and 1.22 metres)-

(while the opposing evidence suggested that the “pattern” of homes in the geographic context included side yard driveways, the photographic evidence indicates that there are many homes without side yard driveways. In any event, the zoning by-law does not require side yard driveways)

d. The proposed height results in a roofline that transitions between the adjacent homes. While slightly taller than the home at 181 Cortleigh Boulevard, the resulting height is slightly lower than the home at 185 Cortleigh Boulevard.

e. the proposed second floor is notched to push the 2nd storey massing further away from the home at 181 Cortleigh Boulevard.”³

³ TLAB (2019, August). Written Submissions of Andriy Donchenko. Retrieved from <http://app.toronto.ca/DevelopmentApplications/associatedApplicationsList.do?action=init&folderRsn=4604793&isCofASearch=false&isTlabSearch=true>

Here, Mr. Bronskill, legal counsel for the appellant, outlined that their assessment criteria of 183 Cortleigh Boulevard, and further delineated by their expert witness Mr. Rendl, would meet the immediate and broader context, if one were to apply a qualitative assessment. What is being expressed here is that to 'fixate' upon the FSI variance request is erroneous as it would not allow an individual to assess the proposal in a comprehensive manner. If this alternative assessment method was applied, both Mr. Bronskill and Mr. Rendl contend that one would find that the provincial and municipal planning policies would be conformed with here. This is of note as they equate that a similar situation is occurring with the subject proposal, here referencing 185 Cortleigh Boulevard, that the TLAB must apply the appropriate assessment criteria to ensure the laws are properly interpreted and upheld. If this is done, they further opine that the proposal would thus be compatible for the subject neighbourhood. The testimony of the City planner, Yishan Liu, and of the planning consultant Dana Anderson, on behalf of one of the opposing parties David Black, acted to present the subject proposal in a different perspective.

Ms. Liu's attendance at the TLAB was to support the City's position on this matter. As for reference purposes, she had authored the original staff report for this matter when it was initially submitted to the COA for its review and consideration. Staff had derived a position for the FSI variance request, that the Committee should not approve a request that is greater than 0.6 times the area of the lot. The report made specific reference to the FSI variance request; it did not directly act to support or oppose the other variance requests.

Ms. Liu's written and oral submissions to the TLAB are presented in that:

"66. Although I may not individually take issue with the other proposed variances for height, side yard setbacks, and building length, I would note that they are a cumulative result of the proposed FSI. The increased FSI results in a building length longer than other dwellings on the block, smaller side yards, and higher overall height as a result of increased ceiling heights within the roofline to accommodate the additional floor area in the third storey.

67. Therefore, the proposed FSI, side yard setbacks, and building height are an indication that the scale of the dwelling is not appropriately sized for the subject lot. Further, the scale of the proposed dwelling exceeds the scale of the overwhelming majority of dwellings within the neighbourhood, including those granted variances."⁴

⁴ TLAB (2019, September) Expert Witness Statement of Yishan Liu. Retrieved from <http://app.toronto.ca/DevelopmentApplications/associatedApplicationsList.do?action=init&folderRsn=4604793&isCofASearch=false&isTlabSearch=true>

While it is noted that Ms. Liu, in her own defined study area, did conduct a thorough research exercise on previously approved FSI's of other in-fill houses of this area, she did indicate that her quantitative approach was conducted within the context of OPA 320 and its assessment of the 'prevailing character'. As such, she deduced from this research that, in her opinion, this proposal would not act to reinforce nor respect the neighbourhood context. She further described that the study area and the requisite analysis which she undertook here is a typical means of critiquing such planning proposals. Furthermore, attempts had been made by staff to further revise the proposal with the appellant. However, the appellant has elected to file an appeal and strive now to reach an adjudicated decision on the matter.

Ms. Anderson, appearing to provide her expert planning evidence on a retainer from one of the parties Mr. Black, acted to further outline the approach as undertaken by Ms. Liu by describing the comprehensive 'character study' which Ms. Anderson undertook in relation to this matter. Her disclosure material and subsequent testimony to the TLAB focused on an 'Immediate Context Analysis' which involved a series of site visits to the subject property but also to the broader neighbourhood as well. These visits were done to document the housing stock of the area directly so as to formulate a means of analyzing the overall development pattern occurring here. With this, Ms. Anderson then distilled what she had collected here to assess it against the provincial and municipal planning policies. This assessment would also involve the term of 'prevailing character' and if the subject proposal would act to be complimentary to this character. More specifically, Ms Anderson further opines the specific components which should be analyzed here:

"9.8 Specifically, Policy 4.1.5 states (in part and as amended by OPA 320) that "Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood", including in particular:

- a) patterns of streets, blocks and lanes, parks and public building sites;
- b) prevailing size and configurations of lots;
- c) prevailing height, massing, scale, density, and dwelling type of nearby residential properties;
- d) prevailing building types;
- e) prevailing location, design and elevations relative to the grade of driveways and garages;
- f) prevailing setbacks of buildings from the street or streets;
- g) prevailing patterns of rear and side yard setbacks and landscaped open space;
- h) continuation of special landscape or built-form features that contribute to the unique physical character of the geographic neighbourhood; and,
- i) conservation of heritage buildings, structures, and landscapes;"⁵

⁵ TLAB (2019, September) Expert Witness Statement of Dana Anderson. Retrieved from <http://app.toronto.ca/DevelopmentApplications/associatedApplicationsList.do?action=init&folderRsn=4604793&isCofASearch=false&isTlabSearch=true>

Ms. Anderson's appraisal of the proposal, as result of her analysis of the neighbourhood characteristics, acted to inform her that the proposal would be of a scale and massing which would be inconsistent with this area. In addition, she contends that this type of in-fill development would not complement the development pattern which is occurring for this area. These opinions, as provided, is a recognition that 'stable neighbourhoods' are not static in nature and that polices such as the Toronto OP contemplate a certain degree of change which can occur in these areas. However, what Ms. Anderson states is that the City and other relevant stakeholders must be 'vigilant' in ensuring that any continued development in the area is compatible with the intricate planning policies which have been passed for this quadrant of the city.

The TLAB was presented with a fulsome and rational set of arguments by all parties on this proposal. The tribunal has acted to review these materials and opinions in a deliberative manner while also ensuring that components such as the *Planning Act*, *Places to Grow Act*, *Zoning By-law 569-2013* and *Toronto OP* were afforded the necessary attention.

With regards to the OMB/LPAT matter of 185 Cortleigh Boulevard, the TLAB has acted afford consideration of that matter as it had been presented to the TLAB here. Within this dynamic, the tribunal has found that a settlement proposal as reached with the parties in that matter, and approved by the adjudicator, was one in which the GFA variance request was reduced from the original request of the appellant. This was achieved, through a mediation process, to reach a building type which was more appropriate for all the parties who own or reside in properties of the neighbourhood. As such, the TLAB simply observes that a revision of the proposal at the tribunal is feasible to ensure requisite planning policies are upheld.

In terms of the arguments which had been presented to the tribunal, I find that the evidence as proffered by both the City planner, Ms. Lui, and planning consultant, Ms. Anderson, presented a rational and logical assessment on how this subject proposal-can respect and reinforce the direction of provincial and municipal planning policies. Although the appellant's legal counsel and their expert witness provided a critical analysis of what they perceived to be an inaccurate use of quantitative analysis in approaching this matter, the tribunal finds that the assessment which was conducted pertaining to the FSI variance request is connected to the variance requests and to the overall cumulative impact of this proposal. Moreover, the assessment of other built forms of the neighbourhood was done as a means of satisfying requirements as stipulated within OPA 320 to establish the 'prevailing character'. In achieving this, the expert witnesses were able to conclude that the subject proposal would not be within a range of acceptable building typography for this area.

As part of the review which the TLAB can undertake for such matters, other previous tribunal decisions of the area can be noticed and considered when adjudicating an appeal. A decision was issued in November 2018 for 163 Cortleigh Boulevard, as delivered by (now former) Member Gillian Burton. This appeal entailed two variance requests, one for FSI and for wall height. Ultimately, Member Burton concluded that the proposal met the four tests for variance and approved these variances. It is noted that the FSI variance requested there was for 0.633x, which, in

numerical terms, would not be dis-similar to the subject proposal. However, I find that the 163 Cortleigh Boulevard decision was for 2 variance requests, whereas the proposal at hand entails 7 variance requests. The overall cumulative effect being assessed here is greater than that of 163 Cortleigh Boulevard. As such, while the tribunal recognizes this previous TLAB decision-to directly connect both matters to one another would be without merit as the building scale and mass of both proposals are of a different intensity and magnitude.

While this adjudicated proceeding is a hearing *de novo*, as established in legal practice for administrative tribunals, the *Planning Act* does posit that the tribunal consider materials that were presented when the matter was being assessed at the COA. In review of all such disclosure documents, the TLAB finds that the proposal which had originally been approved by the COA meet the requisite tests and could be approved by the TLAB.

I find that altering the original approval as granted by the Committee would not be consistent with good community planning and maintaining the public interest. I find with the reduction of the FSI variance request, the proposal would continue to allow the appellant to construct a house which would adequately meet the needs of any future residents. I further find that to differ from the COA's decision would not result in a proposal which would delineate and implement the policies in section 4.5 of the OP, including the revisions introduced by OPA 320; the prevailing character of the area would not be maintained as a result.

In testimony at the 3-day TLAB hearing, as this must be assessed as a new series of proceedings, it was found that the majority of interested parties were concerned with the FSI variance request and not as substantively opposing the other variances. By maintaining an FSI variance which is below 0.6 times of lot area as prescribed in the City staff report, the tribunal believes the proposal will allow a house which will have a character that can reinforce the neighbourhood surroundings. However, the tribunal recognizes that the adjudicative authority here resides with the presiding member. I, in consideration of the matter comprehensively, find that permitting the original COA approval would maintain to the neighbourhood character positively.

I accept the applicant's evidence and find that in relation to the other 6 variance requests, apart from FSI, would also be appropriate as it would result in a house type that will be of the 'prevailing character' of the area.

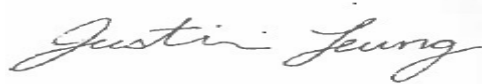
This approval does present an issue as a revised set of drawings, in relation to the decision as rendered by the COA, were not provided by the appellant afterwards. The appellant's revised drawings, as contained in their disclosure documents, pertain only to the proposal they have presented to the TLAB. In this context, the tribunal would want confirmation that this approval is completed in a satisfactory manner. As such, the requested variances will be approved conditionally on the condition that a revised set of drawings reflecting this approval (as outlined in Appendix 1) be submitted to the tribunal.

INTERIM DECISION AND ORDER

1. The appeal is allowed in part. The Decision of the Committee of Adjustment (COA) is confirmed and the appeal in respect of a further incrementally increased FSI is dismissed. The variances as identified in Appendix 1 are approved. This approval is further subject to the following condition:
 - a) The variances set out in Appendix 1 hereto are conditionally approved, subject to the Owner or Applicant:
 - i) The Owner or Applicant shall have a period of two (2) months from date of the issuance of this Interim Decision and Order to submit revised drawings reflecting this approval. Once such drawings are received, and reflect variances as described in Appendix 1, the TLAB may issue a final Decision and Order, with or without conditions.

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

X



Justin Leung
Panel Chair, Toronto Local Appeal Body

Appendix 1

List of proposed variances

By-law No. 569-2013:

1. Chapter 10.20.40.10.(1), By-law No. 569-2013

The permitted maximum height of a building is 10.0 m.

The proposed height of the building is 10.46 m.

2. Chapter 10.20.40.10.(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 7.61 m.

3. Chapter 10.20.40.20.(1), By-law No. 569-2013

The permitted maximum building length is 17.0 m.

The proposed building length is 17.48 m.

4. Chapter 10.20.40.40.(1), By-law No. 569-2013

The permitted maximum floor space index is 0.35 times the area of the lot.

The proposed floor space index is **0.58 times** the area of the lot.

5. Chapter 10.20.40.70.(1), By-law No. 569-2013

The required minimum front yard setback is 9.33 m.

The proposed front yard setback is 8.71 m.

6. Chapter 10.20.40.70.(3), By-law No. 569-2013

The required minimum side yard setback is 1.5 m.

The proposed west side yard setback is 1.2 m.

7. Chapter 10.20.40.70.(3), By-law No. 569-2013

The required minimum side yard setback is 1.5 m.

The proposed east side yard setback is 1.2 m.