TORONTO

Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, January 29, 2021

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): DIXIL PROPERTIES INC

Applicant: DOMUS ARCHITECTS

Property Address/Description: 1982 ISLINGTON AVE

Committee of Adjustment Case File Number: 17 265659 WET 04 MV (A0994/17EYK), 17 265553 WET 04 MV (A0993/17EYK)

TLAB Case File Number: 18 131764 S45 04 TLAB, 18 131762 S45 04 TLAB

Hearing dates: **17 December 2018**
26 July 2019
18 November 2019

DECISION DELIVERED BY S. GOPIKRISHNA

APPEARANCES

NAME	ROLE	REPRESENTATIVE
DOMUS ARCHITECTS	APPLICANT	
DIXIL PROPERTIES INC	APPELLANT/OWNER	JOEL FARBER
MUSTAFA MASTER	PARTY (TLAB)	
BRIARCREST MANOR	PARTY (TLAB)	KELLY OKSENBERG
CITY OF TORONTO	PARTY (TLAB)	MATTHEW LONGO AND ELLEN PENNER

INTRODUCTION AND BACKGROUND

Dixil Properties is the owner of 1982 Islington Ave, located in Municipal Ward 2 (Etobicoke Centre) in the City of Toronto. It applied to the Committee of Adjustment (COA) for variances to build a six storey building, and a four storey building; the COA heard both applications on 8 April, 2018, and refused both applications. The Applicants appealed the COA decision to the Toronto Local Appeal Body (TLAB) on 5 May, 2018. The City of Toronto (City), Mustafa Master, and Briarcrest Manor (an Apartment Complex in the vicinity of the Subject property) elected for Party Status, in response to the Appeal.

A few days before the Hearing commenced, Dixil Properties indicated that it will withdraw from the Appeal respecting the six storey building, while going ahead with the Appeal respecting the four storey building. The Appellants also came to a Settlement with Briarcrest Manor before the commencement of the Hearing. Ms. Kelly Oksenberg, Counsel for Briarcrest Manor, participated in the Hearing held on 17 December, 2018, to confirm that Briarcrest Manor had settled with the Appellants, and to answer any questions about the conditions requested by her client, as part of the Settlement.

I visited the Site on three different occasions, prior to each of the Hearing dates, to inform myself about the Community.

MATTERS IN ISSUE

To construct a four-storey building on the grounds of 1982 Islington Avenue.

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

1. Section 1, By-law 13048 & Section 1, By-law 15073
An office use is not a permitted use.

2. Section 320-93
The maximum permitted building height is 14 m.
The proposed building will have a height of 19.48 m.

3. Section 320-18.C.
A minimum of 65 parking spaces are required.
A total of 19 parking spaces will be provided

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 of the Greater Golden Horseshoe for the subject area ('Growth Plan').

Variances – 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 (OP);
- 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

The proceeding respecting 1982 Islington was heard over three days- December 17, 2018, July 26, 2019 and November 18, 2019. After the Hearing commenced on December 17, 2018, I was informed that Briarcrest Manor, the owner of the property next door, at 263 and 265 Dixon Road, had settled with the Appellants, and would recommend conditions to be added if the Appeal were allowed, but would not be participate in the Hearing, by way of calling witnesses.

The Appellant said it would be relying solely on the evidence of Mr. Adam Litavski, a land use planner, while the City stated that it intended to call two witnesses, Ms. Vanessa Covello in the area of land use planning, and Ms. Kristen Flood, with respect to Heritage matters. Mr. Mark Rapus, a planner working for the Toronto Region Conservation Authority (TRCA) specializing in natural heritage matters, was originally intended to testify on behalf of the City, and submitted a Witness Statement, but was ultimately not called upon to give evidence.

Mr. Litavski was sworn in, and recognized as an Expert Witness in the area of land-use planning.

Before reciting the evidence, it is pertinent and important, to define the expressions "Subject Land" and "Subject Property" for the purposes of understanding the evidence. For the purposes of this discussion, the "Subject Lands" refer to the entire lands, including the Subject Property, on which the existing building stands. The Subject Lands are a large parcel of land, with an area of 6270 sq. m., municipally known as 1982 Islington Ave.," generally" located southwest of the Islington Ave and Dixon Road Intersection. The "Subject Property" is restricted to the existing building at 1982 Islington Avenue, and the land on which this building exists. The Subject Property is described to be 165 m south of Islington and Dixon Avenues, with 76.67 m of frontage on the west side of Islington Ave., and can be accessed from a driveway off Islington Ave.

Mr. Litavski said that the Applicant had originally submitted plans for two buildings to be constructed side-by-side on the Subject Land, by the side of the Subject Property, one with four floors, and the other with six floors. However, the Appellant was withdrawing the six storeyed building "because the OP did not allow for more than a building with four floors". In other words, the Appeal before the TLAB would be restricted to the variances respecting the four storey building.

Mr. Litavski began with a description of what has been described as the Subject Lands earlier in this Section. To reiterate, he said that the Subject Lands are a 6270 sq. m. parcel, municipally known as 1982 Islington Ave.," generally" located southwest of the Islington Ave and Dixon Road intersection. He added that the Subject Lands are 165 m south of Islington and Dixon Avenues, with 76.67 m of frontage on the west side of Islington Ave., and can be accessed from a driveway off Islington Ave. Secondary access to, and from Dixon Road, is offered through the neighbouring property to the west (263 and 265 Dixon Road), with a shared access driveway across the Subject Lands, which is protected by an easement. This neighbouring property is owned by Briarcrest Manor, which had elected for Party Status in this proceeding. According to Mr. Litavski, the Subject Property is isolated from the "low-rise buildings to the south" of the Subject Lands, and "has no connections" to the latter, notwithstanding their being grouped together in the "Neighbourhoods" category.

TOPOGRAPHIC DETAIL OF THE SUBJECT LAND
LOT 21, CONCESSION A
FRONTING THE HUMBER
CITY OF TORONTO

PLAN SHOWING TOPOGRAPHIC DETAIL OF
PART OF LOT 21, CONCESSION A
FRONTING THE HUMBER
CITY OF TORONTO
(FORMERLY CITY OF ETOBICOKE)

SCALE 1:300

TOM A. SENKUS, O.L.S.

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METRIC
DISTANCES SHOWN ON THIS PLAN ARE IN METRES AND CAN BE CONVERTED TO FEET BY DIVIDING BY 0.3048.

NOTES AND LEGEND

Symbol	Meaning
□	DENOTES SURVEY MONUMENT PLANTED
■	DENOTES SURVEY MONUMENT FOUND
SIB	DENOTES STANDARD IRON BAR
IB	DENOTES IRON BAR
WIT	DENOTES WITNESS
OU	DENOTES ORIGIN UNKNOWN
CC	DENOTES CUT CROSS
OHW	DENOTES OVERHEAD WIRE
HP	DENOTES HYDRO POLE
DIA	DENOTES DIAMETER
MH	DENOTES MANHOLE
CB	DENOTES CATCH BASIN

BOUNDARY DATA TAKEN FROM DOCUMENTARY AND FIELD EVIDENCE.

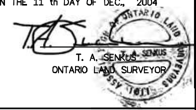
AREA = 0.627 ha (1.55 Acres)

ELEVATION NOTE
ELEVATIONS ARE GEODETIC AND ARE REFERRED TO CITY OF TORONTO BENCHMARK No.E688 ELEVATION 150.706 METRES

BEARING NOTE
BEARINGS ARE ASTRONOMIC AND ARE REFERRED TO THE NORTHERLY LIMIT OF PLAN 66R-8447 HAVING A BEARING OF 84°31'00"E.

SURVEYOR'S CERTIFICATE
I CERTIFY THAT:
THE FIELDWORK WAS COMPLETED ON THE 11 th DAY OF DEC., 2004

DATE: JAN. 14, 2005
REVISED DEC. 11, 2015
REVISED NOV. 8, 2017



T. A. SENKUS
ONTARIO LAND SURVEYOR

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FILE: 04-102
CAD FILE: ISLINGTON1962-TOPO-REVISED

ISLINGTON AVENUE (ROAD ALLOWANCE BETWEEN CONCESSIONS A AND B FRONTING THE HUMBER)

CONCESSION A — LOT 21 — FRONTING THE HUMBER — HUMBER RIVER

POYNTER DRIVE (BY REG'D PLAN M-974)

LOT 90 — PIN 07395-0107(LT); LOT 91 — PIN 07395-0111(LT); LOT 92 — PIN 07395-0112(LT); LOT 93 — PIN 07395-0113(LT)

REGISTERED PLAN M-974

PART 1, PART 2, PART 3, PART 4, PART 5 — PLAN 66R-8447

BLOCK X — 1 FOOT RESERVE; BLOCK Z — 1 FOOT RESERVE

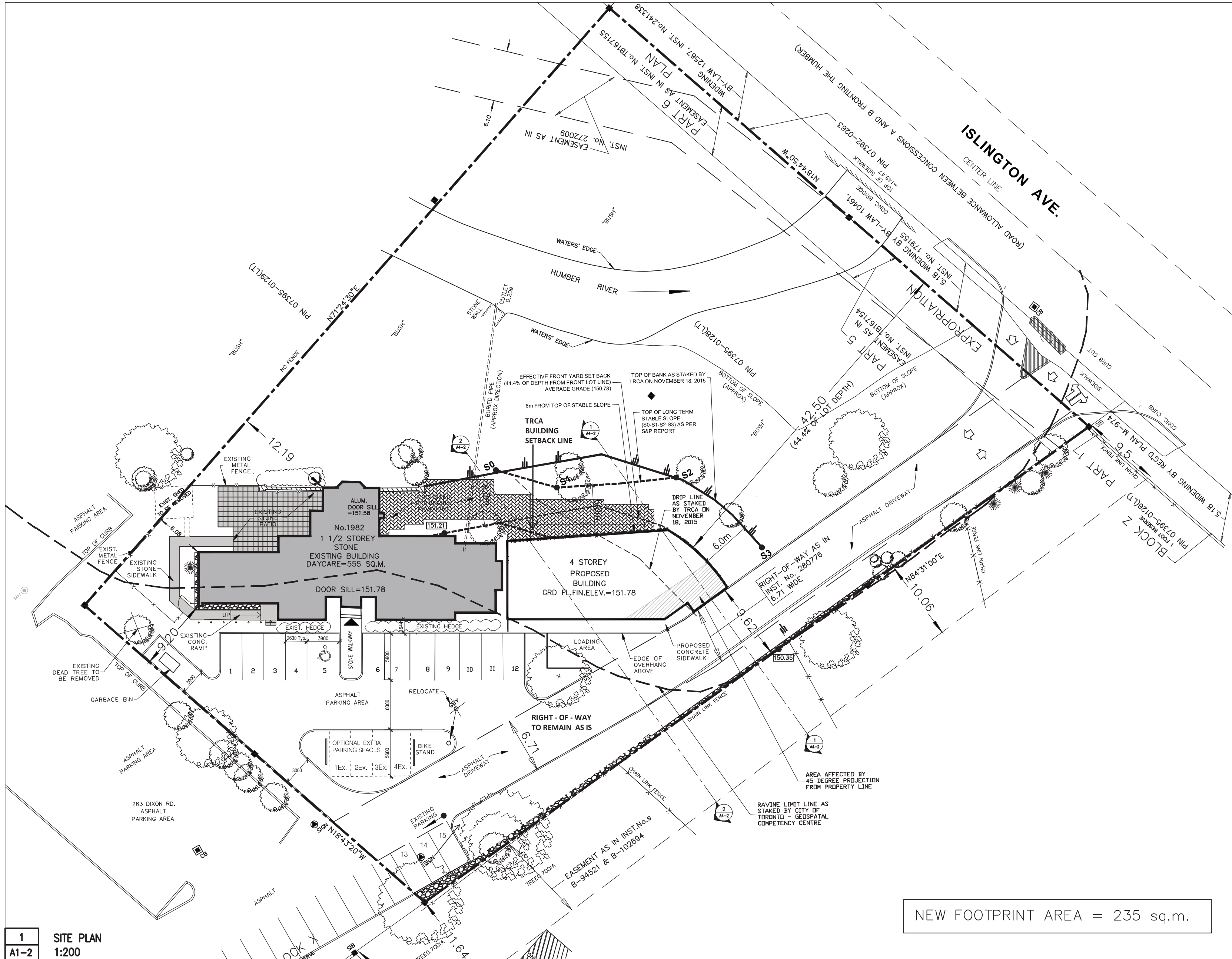
N71°24'30"E 95.73; N18°44'30"W 76.67; N84°31'00"E 98.38; N18°43'20"W 54.36

RIGHT-OF-WAY AS IN INST. No. 280776 6.71 WIDE

EASEMENT AS IN INST.No.s B-94521 & B-102894

No.1962 1 1/2 STOREY STONE DWELLING

SITE PLAN AS SUBMITTED BY APPLICANT
FOR THE PROPOSED FOUR STOREY BUILDING
ADDRESS: 1982 ISLINGTON AVE



REVISIONS

No.	DESCRIPTION	DATE: Y/M/D
1	SUBMITTED FOR PPR	2018/08/14

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Contractor to field verify all existing conditions.

Written dimensions shall take precedence over scaled dimensions. Contractors shall field verify and be responsible for all dimensions and conditions on the job. The architects shall be informed in writing of any variations from the dimensions and conditions shown on the drawings. Shop drawings shall include field verified dimensions and be submitted to the architects for review before proceeding with the fabrication.

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CONSULTANT:

ONTARIO ASSOCIATION OF ARCHITECTS
DOMENIC ANTHONY MEFFE
LICENCE 4023

DOMUS architects
A PARTNERSHIP OF CORPORATIONS

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Tel. (416) 249-6687
Fax. (416) 249-8894
E-mail: info@domusarchitect.com

PROJECT TITLE:
1982 ISLINGTON AVE. DEVELOPMENT

PROJECT LOCATION:
1982 Islington Ave., Toronto, Ontario,

SHEET TITLE:
SITE PLAN 4 STOREY

DRAWN BY:	CHECKED BY:	SCALE:
VG	DM	AS INDICATED

ISSUED FOR:
-

PROJECT NO:	SHEET NO:
07103	A1
ISSUE DATE: 2018.07.25	CADD FILE NAME:

Mr. Litavski described the layout of the Subject Lands, and said that a portion of the Property fell within the Humber Creek Valley, and that the Humber Creek flowed across the north-east quadrant of the property, below Islington Ave. He added that there is "a substantial grade change from the main tableland portion of the Subject Lands , down to the creek level. Mr. Litavski stated that large portions of the Humber Creek Valley have thick vegetation, and are "well treed", which provide a thick cover, and screening between the "tableland" portion and Islington Ave. He said that the Subject lands are occupied by a single building, which was converted for Office and Commercial uses, since 1961, notwithstanding being originally constructed to be a large, "stately country home"

Mr. Litavski provided a list of present tenants, who include:

- Domus Architects- the Applicants in this case
- Michael K. Quickly, B.A, B.C.L, L.L.B- Barrister & Solicitor
- Jungle Learning School/Day Nursery
- W. Glenn Orr, QC- Barrister
- Alternative Rehabilitation Services- Massage Therapists
- Scott O'Neill, L.L.B.

Mr. Litavski explained that the building on the Subject Lands was added to the City of Toronto's Heritage Registry list on September 27, 2006., but it had not been designated pursuant to Part IV of the *Ontario Heritage Act*, R.S.O 1990(as amended). He noted that the listing in the Heritage Register referred to the building as "an outstanding example of English Country Manor architecture", and that this property had been home to several prominent families, including being used as the President's Country Retreat by the A.V.Roe Aircraft Company, after World War II. Mr. Litavski added that, the listing also notes "that over the last few decades, most of the original charm has been lost."

Mr. Litavski then narrated the changes to zoning and uses in the existing Heritage building on the Subject Land.

According to Mr. Litavski, in 1961, the entire Subject Lands were rezoned by By-law 13048 of the City of Etobicoke code from R2 to CL – Limited Commercial by the Township of Etobicoke. The CL zone normally permits a wide variety of uses including a range of residential uses (including single family homes, duplexes, apartment buildings and dwelling above a business) as well as a wide range of commercial uses including offices (both business and professional), banks, retail, service commercial, restaurants, etc. Permitted institutional uses include schools, colleges, day nurseries, libraries, etc.

However, Site-specific By-law 13048 limited the range of permitted uses to institutional, restaurant and/or private club.

In 1965, the former Township of Etobicoke adopted Site-specific Zoning By-law 15073, which added a nursing home as a permitted use, so long as "a minimum of 8 parking spaces were provided, the parking was paved, and the existing building was not enlarged, nor expanded". The Subject Property has since been used as a nursing home for many years;

over this period of time, several minor variance applications were approved to reflect the Subject Property's changing use. On May 24, 1979, Minor Variance A-156/79 was approved to permit an audiovisual education centre for the training of hairdressers. This approval was limited to one year, and was set to expire November 14th, 1980. On April 16, 1981, the Committee of Adjustment (COA) approved Minor Variance A-149/81 extending the previous use approval for a further year, set to expire on December 31, 1983.

The use of the Subject Property changed again in 1983. The owners of the Subject Lands at that time leased the Subject Property to a real-estate firm- on February 17, 1983 the COA approved Minor Variance A-49/83, allowing the Subject Propert to be used as a real-estate office for the term of the lease. This approval was set to expire on January 10th, 1986. The real-estate office extended their lease by one year, and on February 20, 1986 the COA approved Minor Variance A-61/86 extending the previous approved office permission to January 31, 1997.

In 1997 an Application was submitted to the COA to permanently permit the previously approved temporary permissions. The COA approved the application, and noted:

"*In the subject minor variance Application Number A-341/97, the applicant proposes to utilize the building **and the land** for general offices, including a real estate office, for an unlimited time period*" (emphasis added)

By way of an editorial note, the expression "and the land" is bolded, because this expression became the topic of dispute between the Parties at a later stage.

According to Mr. Litavski, the COA did not apply any conditions in approving minor variance A-341/97, and the approval was not explicitly tied to any plans, or to the existing building. Mr. Litavski then described the submission of a site plan application, by the Appellant in 2015, seeking permission for a 6-storey office/residential building. Mr. Litavski said that at some point, during the time when the Application file was open , City Staff asked for the submission of a Heritage Impact Assessment (HIA), prepared by a certified heritage architect, and had advised that a 6-storey proposal would require an Official Plan, as well as a Zoning By-law Amendments. According to Mr. Litavski, the City had stated that in the absence of the HIA, they would not process the site plan application. The required HIA Statement was never submitted, and the Applicant did not apply for an Official Plan Amendment, or a Zoning By-law Amendment. In a letter dated August 1, 2017, City Staff informed the Applicant that they had closed the Site plan application file.

Mr. Litavski added that in November 2017, the Applicant submitted two minor variance applications – one to permit the mixed office/residential 6-storey proposal envisioned in the previously submitted site plan approval application, and one to permit a reduced 4-storey proposal with offices, daycare and restaurant uses proposed in the new building, with the existing building used for daycare. Both plans showed an identical building footprint. Apart from the reduced height, the 4-storey application did not propose any residential uses, and showed less parking.

Mr. Litavski said that he agreed that with the City Staff's assessment that a 6-storey proposal would require an Official Plan Amendment, and that the COA TLAB are not the appropriate venues to seek such a permission.

He then spoke to the 4-storey proposal, currently before the TLAB. According to Mr. Litavski, what the Applicant proposed was to retain the existing building in its entirety, and to construct a new building immediately east of it. By way of an editorial comment, it is important to note that the new building will not be an addition to the existing building, but a completely distinguishable, separated building.

The 4-storey proposal considered by the COA proposed a restaurant on the main floor of the new building, and relocated the offices in the current building(i.e. from the existing building) into the new building. The existing building would instead be used entirely as a daycare. A total of 19 parking spaces were proposed. This plan also proposed to reduce the width of the mutual driveway serving 263-265 Dixon Road from 6.71m to 6.00m.

A PICTORIAL REPRESENTATION OF THE EXISTING AND PROPOSED BUILDINGS TO BE BUILT SIDE BY SIDE AT 1982 ISLINGTON AVENUE

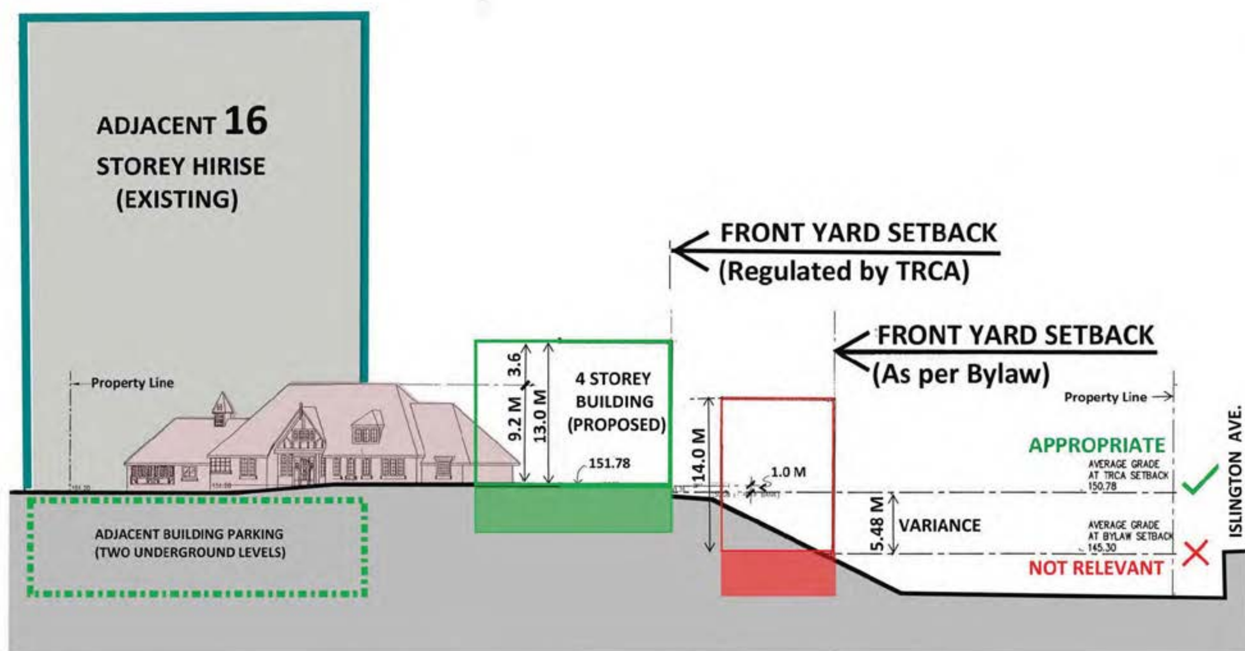
On June 12, 2018, the Applicant filed revised plans with TLAB- according to Mr. Litavski, these plans amended the footprint, by moving a substantial portion of the building further away from the adjacent residential properties, as well as the proposed loading area away from the Valley setback. The revised Site Plan continued to offer 19 parking spaces, but in a different arrangement.

The aforementioned application was further revised on September 19, 2018, to ensure that the new building's footprint was a minimum of 6m from the long-term-stable-top-of-bank (henceforth referred to as the "edge of ravine") of the Humber Creek valley, protecting an existing large tree next to the mutual driveway, with revisions of the mutual driveway to maintain its existing 6.71m width.. The number of proposed parking spaces was reduced to 15, notwithstanding the Site Plan's (filed with the amended application) demonstrating that 19 parking spaces could be created.

Mr. Litavski emphasized the fact that in his opinion, the entire Subject Lands are subject to the Etobicoke Zoning Code and By-laws 13048, and15073 of the former City of Etobicoke, and is not subject to By-law 569- 2013 of the City of Toronto. Mr. Litavski recited the variances, which are noted in the "Matters in Issue" Section:

The new 4 storey building has a proposed height of 19.48 metres (height calculated from average grade to top of roof deck) and the stairwell tower has a height of 22.48 metres (height calculated from average grade to top of stairwell tower roof)

PICTORIAL REPRESENTATION OF THE BUILDING HEIGHT AND SET-BACK ISSUES



SECTION A - A (Height & Setback Issue)

Mr. Litavski asserted that the proposal is consistent with the PPS (2014), as well as the Growth Plan (2017), because it results in reinvestment, and rejuvenation within an existing urban area.

Mr. Litavski stated that the Site is designated "Neighbourhoods", before addressing the question of how the proposal maintained the general intent and purpose of the Official Plan (OP). He said that the objective of the OP is to respect, and reinforce the existing physical character of the Neighbourhood; however, he said that the OP is silent on specific performance standards such as density, lot frontage, lot area, etc., except the number of storeys, which it limits to four, in the lands designated "**Neighbourhoods**".

Mr. Litavski then recited Policies 2.3.1.1, 3.1.2.1, 3.1.2.4, 4.1.1, 4.1.3 and 4.1.5 from the OP, and opined that the collective intent and purpose of these policies is to address how the proposal would help protect the stable character of the established residential community. He pointed out some of the unique features of the land as follows:

- The lack of any connection to the Neighbourhood to the south which their designation (i.e. Neighbourhoods) implies they are a part of;
- The reality is that they "function as part of the Apartment Neighbourhood that surrounds them";
- The physical separation from the Islington Ave. street frontage because of the Humber Creek Valley
- The foliage within the valley completely screens any development on the Subject Lands from Islington Ave. ;
- The foliage along the southern property line that helps to screen and further isolate the Subject Lands from the Neighbourhood to the south.

Mr. Litavski conceded that some recommendations of the OP (such as orienting development to the street, having direct access and views to the sidewalk) could not be satisfied by the proposal. However, Mr. Litavski stated that the Proposal met the general intent and purpose of Built Form Policies by:

- Appropriately locating new development within the site's constraints, while "properly-preserving and framing the Humber Creek Valley", and preserving the existing heritage-listed building
- Offering an appropriate transition to the neighbourhood located at the south of the property;
- Maintaining appropriate levels of privacy, sunlight and skyview for the neighbourhood to the south;
- Ensuring no adverse shadow impacts on the neighbourhood to the south;

Mr. Litavski asserted that the proposal did not destabilize the neighbourhood, and discussed how the OP's emphasis on the "prevailing building type" ensures that development cannot destabilize established low-density residential neighbourhoods through the introduction of building typologies, heights, densities, etc. that "irreparably change the character of the area". He asserted that the relative isolation of the Subject Property, and the Subject Land, from the existing neighbourhood , would ensure that the proposed new development

will not in any way destabilize, alter, or threaten the existing character of the low-density residential area to the south. Mr. Litavski concluded that the new 4-storey building, as proposed, will fit harmoniously within its existing and planned context.

Mr. Litavski next addressed the question of how the proposal would fulfill the Cultural Heritage Policies in Chapter 3 (Policies 3.1.5.6-, 3.1.5.26- 3.1.5.29) of the OP. After reciting the Policies, Mr. Litavski stated these policies would be implemented through the Site Plan Approval process.

Mr. Litavski discussed how a Heritage Impact Assessment (HIA) would have to be submitted as part of the Site Plan application, pursuant to Schedule 3 of the OP. He reiterated that while the existing building is on the City's Heritage Register, but has not been classified into any specific category (i.e. Categories A, B or C). Mr. Litavski opined that since Heritage Buildings came under the purview of the *Heritage Act* , any issues related to heritage should be examined by a tribunal with expertise in heritage matters. He suggested that any issues resulting out of heritage matters, and specific concerns about the impact of the new building on Heritage features, could be addressed at the Site Plan approval stage. However, Mr. Litavski asserted that the new 4 storeyed building would be sensitive to, and complimentary, of the existing heritage manor.

Mr. Litavski then spoke to the Natural Heritage Policies, and said that the OP also provides policy direction regarding the preservation of the City's Natural Heritage System (which the Humber Creek Valley is part of,) as well as to protect the development from natural hazards. Mr. Litavski then referenced Policies 3.4.8, 3.4.12, and concluded that none of the variances requested relate to required setbacks from natural hazards or environmental features. He reiterated that any required setback can be established, "and fine-tuned through the Site Plan Approval Process". Mr. Litavski insisted that, given that the Appellant would work with the Site Plan Approval Process, to address issues to their satisfaction, that the development as proposed, would ensure and protect public safety, as well as the integrity of environmental features. In support of the latter, Mr. Litavski referred to a Geotechnical Slope Study, prepared by Shaheen & Peaker Ltd. from 2007, which had been submitted with the Applicant's 2015 site plan application. In addition, he also referred to a Natural Heritage Impact Study, and Ravine Stewardship Plan dated November 2015 (revised June 2016) prepared by Kuntz Forestry Consulting. Mr. Litavski added that a site visit had been conducted by Toronto Regional Conservation Authority (TRCA) on November 18, 2015, "which had examined the limit of contiguous vegetation, and confirmed both the stable-top-of-bank and more restrictive long-term-stable-top-of-bank".

Mr. Litavski stated that the proposed Site Plan presently before TLAB shows that the new building will be setback a minimum of 6m from the long-term-stable-top-of-bank. In support of the decision of a minimum setback of 6 m, Mr. Litavski referenced the proposal for the plans submitted as part of the application for a 6-storey Site Plan in 2015 (Kuntz Study), which also showed the same minimum 6m setback.

Mr. Litavski referenced Section 8.4.8 of the TRCA's Living City Policies for Planning and Development in the Watersheds of the Toronto and Region Conservation Authority (2014) ,

to conclude that "development shall be set back from the greater of ,10m (ten metres) from the long-term stable top of slope, and any contiguous natural features and areas that contribute to the conservation of land". However, according to Section 8.4.9, setbacks can be modified, if "the development also occurs within TRCA Regulated Lands", subject to approval from the TRCA, and established the 6 m setback to be appropriate for the four (4) storey building.

Mr. Litavski emphasized the fact that Mr. Marc Rapus , a planner with the TRCA, in his correspondence dated February 25, 2016, did not object to the proposed setback ,and supported the findings of the Kuntz Study. Specifically, Mr. Rapus' letter commended the Kuntz Study "*The NHIS is well done, and staff can generally agree with the findings and support the recommendations provided*". Based on these communications and studies, Mr. Litavski concluded that he was confident that "recommendations which will be appropriately confirmed through the Site Plan approval process".

Based on this assessment, Mr. Litavski concluded that the proposal maintained the intent and purpose of the OP.

Mr. Litavski addressed how the proposal maintained the general intent, and purpose of the Zoning By-Law. He reiterated that the proposal needed three variances, namely:

- A use variance;
- A height variance; and,
- A parking variance

After reiterating that By Law 569-2013 did not apply to the Subject Land, Mr. Litavski said that the applicable By-Law was the former City of Etobicoke's Site Specific By-law 13048 (as amended by By-law 15073) which zoned the property CL-Limited Commercial, but only permitted restaurant, private club, institutional or nursing home uses on the Subject Lands. He added that office uses have been permitted via minor variance since at least 1983.

Mr. Litavski expressed disagreement with the City's interpretation of the minor variance approval A-341/97, because in his perspective, the word "land" appearing in the COA decision applied to the entire Subject Lands (as opposed to the Subject Property) which meant an "Office use" was appropriate anywhere on the land surrounding the existing building, including the proposed, new building.

Mr. Litavski said that while the Subject Lands are zoned Limited Commercial, the general intent and purpose of the site-specific Zoning By-law (as varied) is to acknowledge the Subject Lands' unique character, recognize existing historical uses, and permit only those uses that are compatible with the surrounding low density and apartment residential uses.

According to Mr. Litavski, "there is very little difference between general office uses, and many of the institutional uses already permitted by the site-specific zoning". He said that such institutional uses are exemplified by administrative offices, record keeping/archival offices and City departmental offices. He dwelt on the history of the building on the Subject Lands , and emphasized that in his perspective, general office uses had been permitted on

the Subject Lands "for over 35 years, through a minor variance", without causing conflict "all this time". Mr. Litavski added that in his opinion, the general intent and purpose of the Zoning By-law will continue to be met, irrespective of "whether those office uses remain in the existing building, within an expansion of the existing building, within a replacement of the existing building, or within additional buildings". Mr. Litavski concluded this discussion by stating that he could not think of any planning rationale for why office uses cannot be permitted across all the Subject Lands, and that the use variance maintained the intent and purpose of the By-Law.

Mr. Litavski next spoke to the height variance and how it maintained the intent and purpose of the Zoning By-Laws. He referred to the definition of "height" as per the Etobicoke Zoning Code:

"*The perpendicular distance measured from the average of the natural, unaltered grade at the intersection of the side lot lines and the minimum front yard setback to the highest point of a flat roof surface or to the point halfway up the surface of a pitched roof.*"

Mr. Litavski reiterated how the grade of the lot of the Subject Lands changes considerably between the Islington Avenue frontage, to the bottom of the Humber Creek Valley, and then back up to the tableland portion where the new construction is proposed. Specifically, the average grade at the front yard setback is 145.30m ASL (Above Sea Level), whereas the first-floor grade level of both the new, and existing building is 151.78m ASL. Mr. Litavski emphasized that "measured from the first-floor grade level, the height of the new building is 13.00m to the main roof level, and would comply with the by-law requirement. The height to the top of the stair tower would be 16.00m. Because of the site's unique topography, the practice of measuring from average grade adds an extra 6.48m to any building height".

Mr. Litavski said that the general intent and purpose of a By-law's height restriction is to ensure that the building fits in, and that its scale does not overwhelm its context, which is "an extension of the desire to respect and reinforce the character of the surrounding area". He said that the proposed four-storey building would comply with the By-law, "were it not for the Humber Creek Valley, and the change in grade down to Islington Avenue". He also emphasized that only a small portion of the building – i.e. an enclosed stairwell tower, exceeds the 14m limit, resulting in the requested variance.

Lastly, Mr. Litavski spoke to the variance respecting the parking. He said that the general intent and purpose of the By-law's parking requirements are to ensure there is an adequate supply of parking spaces to meet demand. He said that while the former Etobicoke Zoning Code requires a minimum of 54 spaces, only 15 were proposed in this proposal. Explaining the rationale behind this conclusion, Mr. Litavski said notwithstanding the lack of applicability of Bylaw 569-2013 to the Subject Lands, the By-Law reflected the City's "most recent thinking regarding appropriate parking rates", and that this this By-law's parking calculations had been relied upon to conclude that a minimum of 15 parking spaces are needed. In addition, Mr. Litavski cited the support of the City of Toronto's Transportation Planning Staff whose report dated March 1, 2018 states: "*Given that the applicant [demonstrated] that the*

proposed parking supply satisfies the minimum parking requirements of Zoning Bylaw 569-2013, we have no objections to the above Variance".

Based on this evidence Mr. Litavski concluded that the proposal maintained the intent and purpose of the Zoning By-Laws.

Mr. Litavski then spoke to the test of appropriate development. He opined that the requested variances will permit the renewal and re-investment in a heritage-listed property, while preserving the listed structure in-situ, and in its entirety. Intensifying the site as proposed, will bring more people to the property who will be able learn about, experience and enjoy the heritage listed structure which is otherwise hidden from Islington Ave.

On the basis of this analysis, Mr. Litavski concluded that the variances were desirable for the appropriate development or use of the building.

Lastly, Mr. Litavski spoke to the test of minor.

He reiterated that intensifying the Subject Lands, as proposed would result in more visits from community members, who would be able to learn and "enjoy the Heritage listed structure, which is otherwise hidden". Mr. Litavski added that the magnitude of change, in and of itself, is not sufficient to determine if the proposal meets the test of minor. He argued that the real test lay in assessing the impact of the proposed changes, and that the proposed general office uses are "minor" in this case, because "they are a mere extension of the uses currently permitted- administration, records keeping etc.". He reiterated that since office uses have been permitted via variance approvals on the Subject Lands for over 35 years, this would simply be an extension of an existing lawfully permitted use into the new building. Mr. Litavksi again reiterated that the height, as represented, is "being artificially inflated by 6.48 m because the difference between "average grade" and "the grade of the tableland", and said that the actual main building height is only 13m with a 16m tall stairwell tower, projecting no more than 2m beyond the 14m height limit. He asserted that there would be no shadow impacts upon the neighbourhood to the south, or on the apartment buildings to the west, given the separation. The proposed 16m tall stairwell tower will not result in any additional overlook condition.

Speaking to the parking variance, Mr. Litavski reiterated that while there was an ostensibly significant difference between the required 54 parking spaces, and the proposed 15 parking spaces, the latter had been obtained through adherence to parking standards listed in By-law 569-2013; he interpreted this to mean that the parking was commensurate with other offices in the vicinity of the Subject Lands, as well as By-Law 569-2013 itself.

Mr. Litavski reiterated that he "failed" to see how the re-affirmation of an office permission that has legally existed for 35 years via minor variance, and a height variance that has been inflated by 6.48m due to unique grading, and a parking variance triggered the need for both an Official Plan, and Zoning Amendment. He insisted that "it is entirely appropriate for this proposal to proceed by way of minor variance".

Lastly, Mr. Litavski criticized the City's recommendation for an OPA, and an ZBA on the basis of a "vague justification" about the proposal being a "complex development subject to a number of policies, regulations and bylaws." He said that the City also asserts that the proposal would also require Site Plan approval, TRCA approval, Ravine Bylaw approval, Heritage Preservation Services approval, and the review of Archeological Potential and impacts to the Natural Heritage System. Mr. Litavski argued that these approvals would be needed even "if no zoning relief were sought". He linked this conclusion to the test of minor by stating that these approvals, individually or cumulatively, were not to be interpreted as a measure of the overdevelopment of the Subject Lands, before reiterating how these approvals could be addressed at the Site Plan approval stage.

Mr. Litavski then provided a synopsis of the recommended conditions for approval, including conditions requested by Briarcrest Management, which had initially opposed the Appeal, but came to a Settlement with the Appellants. They included provision of parking and loading spaces in accordance with the submitted drawings by the Appellant to the TLAB, demarcation of parking spaces from the existing Right-of-way for 263 and 265 Briarcrest Dr., and the installation of signage along the right-of-way to indicate that no parking, or stopping shall be permitted.

Mr. Litavski was then cross examined by Mr. Longo on behalf of the City. In his cross examination, Mr. Longo asked Mr. Litavski if the Appellant was agreeable to the conditions requested by the City's Traffic, Forestry and Heritage departments, to which Mr. Litavski agreed. Mr. Longo then asked Mr. Litavski to state if he could agree that no variance has been granted by the COA at this site for the construction of a new building at any point in time". To this, Mr. Litavski questioned the premise, because "there is no Zoning Standard which requires a variance just to construct a building". . The next question was if any of the variances granted by the COA, in the numerous applications before it concerned modifications, to the exterior of the building, to which Mr. Litavski replied in the negative. Lastly, Mr. Longo asked if any of the variances granted had concerned themselves with cultural, or natural heritage issues, to which Mr. Litavski again replied in the negative.

The next set of questions focused on the interpretation of the COA decision dating back to 1997, which had allowed office uses in the existing building. Mr. Longo's questioning took the position that the approval of office uses was restricted to the building, as it existed in 1997, while Mr. Litavski was unwavering in his interpretation that office uses were permitted throughout the "lands" at 1982 Islington Avenue. Mr. Litavski agreed with Mr. Longo that an HIA was necessary to make modifications to any building, which had been placed on the Heritage Register, even if it had not been classified into a specific group (i.e. "A", "B", or "C", where different standards apply for modification or demolition).

Mr. Litavski also agreed with Mr. Longo that there was no scope for public input into measures to protect the natural and cultural heritage issues, if the proposed HIA is to be introduced no earlier than the Site Plan approval stage. The next set of questions from Mr.

Longo focused on the Heritage Policies, and how they recommended a 10 m setback from the ravine.

Mr. Longo emphasized that the OP was written more from a qualitative perspective, than a quantitative perspective, and suggested that where the OP mentioned numbers, it was important to "pay close attention" to those numbers. Mr. Longo pointed out that Mr. Litavski himself had carefully adhered to such numbers, when they had been mentioned in the OP, because he had recommended against the originally proposed six storey building because in the "*Neighbourhoods:*" designation, because buildings could not have more than 4 floors . Mr. Longo's question focused on what he saw as an inconsistent approach in the Appellant's planning approach - the recommendation about erecting a building no higher than four floors was followed closely resulting in the very elimination of a six-storey building, while the same OP's recommendation for a 10 m separation between the building and the edge of ravine was not being adhered to.

Mr. Litavksi said that he disagreed with the premise of the question, and said that it was more important to pay attention to the Zoning By-law, rather than the OP to determine the issue of separation between the building and the edge of ravine. However, Mr. Litavski agreed with Mr. Longo that By-Law 569-2013, which did not apply to the Site, recommended a 10 m setback, and that the Etobicoke By-Law did not specify any such setbacks. Mr. Litavski added that the 10 m setback, had been reduced to 6 m, with the consent of the TRCA, and insisted that the separation of 6 m was consistent with public safety standards, and consequently aligned with the public interest. Mr. Farber, counsel for the Applicant, objected to Mr. Longo's reference to the 569-2013 By-Law Standard in 5.5.10.40.70 sub(c), which refers to a 10 m setback, because "it did not appear in any Witness Statement". Mr. Longo's response was that in cross-examination, one can refer to documents that were not disclosed in discovery, and that the By-Law 569-2013 was familiar to planners such as Mr. Litavksi. After I ruled that the question could be admitted because cross-examination allows for questions to be asked without prior disclosure, Mr. Litavksi reiterated that By-Law 569-2013 did not apply to this Site, and that one could not rely on By-Law 569-2013 to come to a conclusion about what the appropriate setback could be.

Mr. Robert Anstie, who lives at 2 Pride Court, was the next witness to testify. Speaking on "behalf of the neighbours", Mr. Anstie said that the local residents were significantly concerned about visitors parking on the neighbouring streets, and the consequent impact on the physical safety of the residents. Mr. Anstie cited the example of Pride Court, which did not have sidewalks, and asked how cars parking, and driving on Pride Court would impact the local residents, who were accustomed to walking on the streets Mr. Anstie also expressed a concern that as a result of the height of the proposed building, he and his neighbours would no longer be able to see the crest of the existing "Heritage Building" that existed at the Site. He was also concerned about how the "lovely heritage home" would not be visible, even from Islington Avenue, notwithstanding the unique topography, which allowed for the existing building to be clearly visible from the street. There were no questions asked of Mr. Anstie, by way of cross-examination.

Ms. Covello, an Assistant Planner with the City, was then sworn in, and recognized as an Expert Witness in the area of land use planning. She commenced with a general overview of the neighbourhood, and completed the overview, before the completion of the Hearing. By way of editorial comment, her evidence is not recited in the Decision, because she was replaced by a different Witness, for reasons stated in the next paragraph.

Given the intervals between successive Hearings, and the issuance of this Decision, it may be pertinent to briefly what happened between 19 December, 2018 (the time of the first day of Hearing), and 26 July, 2019 (the second day of the Hearing)

I scheduled a teleconference on 17 April, 2019, to address the issue of how many more days of Hearing to complete the proceeding . At this teleconference, Ms. Ellen Penner, Counsel for the City, stated that it needed to change its planning witness, Ms. Covello with Mr. Tony Lieu. As it emerged at the Hearing, Ms. Covello had proceeded on parental leave at some point in time, after the first day of this proceeding . Subsequently, the City brought forward a Motion on 2 May, 2019, seeking to substitute Ms. Covello with Mr. Lieu as their Expert Planning Witness. Given that the Appellants did not object to the substitution of Ms. Covello by Mr. Lieu, I approved the substitution through an Interim Decision dated 7 May, 2019.

At the next Hearing held on July 26, 2019, Mr. Lieu took the stand, and was recognized as an Expert in the area of land use planning.

Mr. Lieu recited the history of the various applications, which is not reproduced here because it is not significantly different from the account provided by Mr. Litavski. Mr. Lieu's description of the site, and location is not reproduced here because the information proffered closely aligned with the information given by Mr. Litavski

Mr. Lieu discussed the reasons why he was not prepared to support the approval of the project. He noted that the proposed building lay within the 10 metre setback from the edge of the ravine, and said that a natural HIA was mandatory to determine the impact of the less-than-10 metre setback, which could be necessarily required in the case of a Zoning Amendment. He said that an Official Plan Amendment would also be required since these applications propose a building within the 10 metre setback from the long term stable top of slope, contrary to Policy 3.4.8 of the Official Plan.

Mr. Lieu then referenced a Heritage Preservation Report submitted by Heritage Preservation Services (HPS) Staff dated March 1, 2018, which explained that insufficient information had been submitted by the Appellants to determine if the proposal meets the City of Toronto's Official Plan heritage policies.

Mr. Lieu explained that in order to determine if the proposal was compatible with the Heritage Preservation Policies, the City of Toronto's HPS (Heritage Preservation Services) required the submission of an HIA ,prepared by a qualified heritage consultant in accordance with the City of Toronto's Heritage Impact Assessment Terms of Reference. He acknowledged that such an HIA had been submitted in 2015, but was found to be inadequate be-

cause of the lack of follow up information from the Appellant in response to questions from HPS. Mr. Lieu said that there were major concerns about the proposal's ability to maintain the intent and purpose of the Heritage Policies, due to the lack of availability of this crucial document.
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Mr. Lieu then discussed how the proposal related to the Provincial Policies, specifically the PPS (2014), and the Growth Plan (2017). He said that while the applications propose a form of intensification, which is promoted in both the PPS and Growth Plan, the Implementation and Interpretation Section of the PPS states that the OP is the most important vehicle for implementation of the PPS. Asserting that the OP is the best vehicle in the interests of comprehensive, integrated and long-term planning, Mr. Lieu referred to Sections 2.1 and 2.6.3 of the PPS, and Sections 4.2.2, and 4.2.7 of the Growth Plan to emphasize the importance of the protecting the Heritage Lands. He then dwelt on how the lack of a detailed HIA and Conservation Plan in the proposal before the TLAB did not offer any guarantees that that the Heritage lands on which 1982 Islington lands stood would be protected if the Appeal were allowed. Mr. Lieu said that he was not sure if the proposal was consistent with the PPS, and Growth Plan because of insufficient information about the preservation of Heritage Policies, which in turn resulted from the lack of submission of any documents relevant to Heritage, including "Heritage Impact Assessment, Conservation Plan and Natural Heritage Impact Assessment".

Mr. Lieu next addressed the question of if, and how, the proposal maintained the intent of the OP. Specifically referring to Policy 3.1.5 (Heritage Conservation Policy), he emphasized the building's appearing on the City's Heritage Register, and reiterated how an HIA , as required in Schedule 3 of the OP, is necessary to assess the potential impacts and identify mitigation strategies, where necessary for the proposed alteration, development or public work. On the basis of Policies 3.1.5.22 and 3.1.5.23, Mr. Lieu highlighted the importance of demonstrating, that the proposal in question would minimally impact the existing building on the Heritage Register to the satisfaction of the City. He then referenced Policy 3.1.5.26 which a states that "new construction on, or adjacent to, a property on the Heritage Register will be designed to conserve the cultural heritage values, attributes and character of that property and to mitigate visual impact and physical impact on it."

Mr. Lieu next addressed Section 3.4 of the OP, which focuses on the Natural Environment- He highlighted Policy 3.4.8 which specifies a setback of 10 m, or more from the top of slope, as a result of the s existing or potential natural hazards such as top-of-bank of valleys, ravines and bluffs. He concluded that, in the absence of information which the Applicant had not made available to the City, the reduced setback from the top-of-bank was not justifiable, and did not maintain the intent and purpose of the Official Plan.

Mr. Lieu then referred to Policy 2.3.1 of the OP, and how it mandated that development should reinforce and respect existing physical character of buildings, streetscapes and open space patterns in the Neighbourhoods Zone where the Site is located. He then discussed Policy 4.1.3 which allowed the operation of "small-scale, retail, and office uses" in properties in *Neighbourhoods* that legally contained such uses prior to the approval date of this Official Plan", followed by a discussion of how "new" small scale uses may be permitted through

only through a Zoning By-Law Amendment . Noting that the proposal did not satisfy these conditions, Mr. Lieu concluded that the proposal did not maintain the intent of the OP by virtue of the fact that there was no evidence of any of the Policies, including the natural Heritage policies being satisfied by the proposal.

Mr. Lieu explained how a Zoning Amendment would better assess the compatibility of the proposed small scale uses with the needs of area residents, noise and parking impacts, as mandated by the OP, before discussing the proposal's ability to maintain the intent, and purpose of the Zoning By-Law.

Mr. Lieu then spoke to how the proposal did not maintain the intent and purpose of the Zoning By-Law. He said that the general intent and purpose of the Zoning By-laws are to regulate the use of the land to ensure that development both fits on a given site, within its surrounding context, such that impacts on adjacent properties are minimized. Emphasizing that the Subject Property is zoned Limited Commercial Zone (CL) under the former City of Etobicoke Zoning Code, with specific reference to By-laws Nos. 13048 and 15073. Mr. Lieu added that the proposal for a 4-storey office building, seeks to obtain an office use, where an office use is not permitted. He added that in the past, the CL zoning was amended on the property to provide office related uses, within what was formerly a residence in the *Neighbourhoods* designation. In contrast to Mr. Litavski's conclusions about how the COA decision of 1997 had extended office uses to the entire "lands", Mr. Lieu vociferously insisted that the permissions were restricted to the building, and not the lands surrounding the building.

Mr. Lieu interpreted the COA decision of 1997 to mean that the existing building would not be enlarged, or expanded. He distinguished between the Application before the COA in 1997, and the Appeal to the TLAB, because the former requested for the approval of new uses within an existing building on the property, whereas the Applicant, sought to extend approved uses to a new building, in the Appeal before the TLAB. He emphasized many times that a Zoning By-law Amendment (ZBA) was required to assess the appropriateness of the project, and that in the absence of such information being made available by the Appellant, his conclusion was the proposal did not maintain the purpose and intent of the By-law.

Mr. Lieu then spoke to how the proposal did not fulfill the test of the appropriateness for the development of the Subject Lands, because of insufficient information. He highlighted how the Applicant failed to provide necessary documentation as requested by the City, had impeded decisions on a number of important issues, and had resulted in the closure of the previous file by the City. He concluded that there was insufficient information to determine that the development was appropriate for the site. Lastly, Mr. Lieu said that the process of securing variance approval did not satisfy the test of minor because no clear answers had been obtained about a number of important issues.

Ms. Kristen Flood, an Assistant Heritage Planner with the City of Toronto, was the next witness to testify for the City. After being recognized as an Expert in the area of Heritage Planning, Ms. Flood described her concerns about the Appellant had not provided suffi-

cient information to help the City arrive at a conclusion about important matters, and cited Natural and Cultural Heritage as examples. She reiterated how the documentation that had been submitted by the Appellant in 2016 had not responded to questions raised by the Heritage Department, and not had been updated by the Appellant despite numerous attempts to obtain the information. Her evidence is not recited in detail because it repeated and reiterated the points made by Mr. Lieu with reference to Heritage Matters. The majority of her evidence specifically addressed the OP, and pointed out the risks of approving the application on the basis of scant information.

The Cross-Examination of the City's Witnesses by Counsel for the Appellant focused on:

- Demonstrating the appropriateness of the Appellant's preferred methodology of having the TLAB approve the requested variances by restricting itself to the use, proposed height and parking without reference to the Cultural and Natural Heritage features.
- The City's preference of simultaneous OPA and Zoning Amendment processes was cumbersome, and "bureaucratic" without no value added but amounting to extra drudgery, to which the City's Witnesses steadfastly disagreed.
- The 6 m setback from the ravine was appropriate based on the studies by Sheehan (2008), and Kuntz (2015), because the latter in particular, had been reviewed by the TRCA, who not only agreed with the results, but commended the study as being "well done"

The City's witnesses disputed the Appellant's suggestions that the Heritage matters could be dealt with the Site Plan Approval stage, because there was no scope for input from the community members, some of whom had testified in this Hearing, and had expressed concerns about the impact of the proposal. They also explicitly stated that any evaluation of the proposal had to be "holistic", instead of compartmentalizing the proposal topics into categories that could be decided immediately by the TLAB, and others that could wait until the Site Plan Approval process, when the issues are all interconnected. The City's witnesses also disagreed with the studies referenced by the Appellant, because of the time lapse between when the Studies were conducted, and the commencement of the COA applications.

On August 1, 2019, the Appellant sent an email to the TLAB, seeking to introduce a new Heritage Impact Assessment, dated February 2019, for the Subject Lands, and give evidence about the same. On August 19, 2019, the City brought forward a formal Motion asking that the HIA not be taken into consideration. Notwithstanding the City's well-argued objections to the inclusion of the HIA, I granted the Motion to admit the HIA, for reasons explained in the "Reasons and Findings" Section

On November 26, 2019, Mr. Dominic Meffe, the President of Domus Architects, the Appellants, took the stand to give evidence about the new HIA. Mr. Meffe's evidence in chief focused on the conclusions of the study which are listed later in this Section. The HIA was prepared by ERA Architects, and is dated 31 January 2019. This report has the following chapters- Introduction, Background Research and Analysis, Assessment of Existing Con-

dition, Heritage Policy Review , Statement of Significance, Description of Proposed Development, Development Impacts and Mitigation, Conservation Strategy and Conclusion. Mr. Meffe recited various sections, and excerpts from the HIA, but did not provide any additional commentary. The highlights of the HIA, with specific relevance to Heritage matters recites Section 2.6 of the PPS, Section 4.2.7 of the Growth Plan, and Section 3.15 of the Official Plan, with a specific reference to Policies 22-25, and 26-29. The Report describes the proposed development as:

"The proposed four-storey building is sited approximately 1.2 metres to the southeast of the existing heritage building. The proposed building is curvilinear in plan, with frontage onto a surface parking lot. There are no physical connections proposed between the two structures. The new building is proposed to be clad in a mixture of stone veneer and curtain wall glazing, with decorative wood screening applied along portions of all elevations between the ground and fourth-storeys. Vehicular access to the Subject Site is provided via the driveway at the southern edge of the property. Surface parking is provided along the southern edge of the Subject Site"

The Report then asserts that the proposed development, as described in Section 5.1 of the Assessment, "*conserves the on-site heritage building while accommodating intensification of the Subject Site. While the proposed development will change the context of the heritage building, no connections are contemplated between the two structures, limiting impact on heritage fabric*".

The Mitigation Measures are described as:

The proposed development incorporates a number of design considerations intended to mitigate impacts on the cultural heritage value of the existing building. These mitigation measures, outlined below, ensure that the proposed development conserves the cultural heritage value of the Briarcrest Estate:

- *The material treatment, including the use of curtain wall glazing and stone veneer, breaks up the massing of the proposed development to reduce its visual weight while ensuring it is distinguishable from the heritage building; and*

- *The use of decorative wood screens and stone veneer relates to the warmth of the heritage building's materiality. Further, the top of the decorative wood screens registers the datum line established by the lower ridge line of the heritage building's roof*

Lastly, the "Conservation Strategy" is described as:

As the proposed development does not require any modifications to the on-site heritage building, a conservation strategy is not required. In order to protect the on-site heritage property during excavation for the proposed building, and to minimize potential disruption of the heritage property's foundation during construction, the heritage building will be protected and regularly monitored.

Mr. Meffe also stated that any other issues that were not covered here would be addressed by the Site Plan Process. He was critical of the "bureaucratic process" and requests for information from the Heritage Department, about heritage issues.

The City's cross examination was brief, and established that Mr. Meffe did not have any specific expertise in heritage matters.

ANALYSIS, FINDINGS, REASONS

I begin my analysis with a brief reference to the Motions that were brought forward during the course of this proceeding - as stated earlier, this may be pertinent, given that the Hearings were held months apart, as well as a significant time gap between the completion of the Hearing, and the issuance of this Decision.

The Hearings were held on three days (17 December, 2018, 26 June, 2019 and November 18, 2019); the proceeding included two Written Motions, both from the City- the first asked to substitute their Expert Witness, while the second asked for the exclusion of a Heritage Information Assessment (HIA) from the Appellants- it may be noted that the Appellants asked to introduce an HIA, by way of an email (as opposed to a formal Motion) after the City took the Witness stand to oppose the Appeal . I briefly list the reasons for my rulings on the aforementioned Motions herewith- With respect to the City's first Motion to substitute their Witness, (filed in April 2019), I granted the Motion for Witness substitution, because the Appellants did not object to the City's substitution of Ms. Covello with Mr. Lieu.

With respect to the City's second Motion to exclude the HIA put forward by the Appellant, in August 2019, I refused the Motion, and allowed the Appellants to introduce the HIA into the record, as well as bring forward a witness to provide evidence about the HIA. I found more merit in giving the Appellant an opportunity to respond to the City's consistent demand for the submission of an HIA, than any prejudice caused to the City's case, given that there would be a two month gap between the time of the submission of the HIA, and the resumption of the Hearing in November 2019. I reiterate that it seems inherently contradictory to point out that an HIA was not submitted by the Appellants, emphasize the importance of the HIA to the outcome, and then attempt to prevent the Appellant from meaningfully responding to the submission of an HIA on the grounds of prejudice.

The Appeal respecting 1982 Islington Ave. is unusual because of how the positions of the Parties evolved over the course of the proceeding , including some about turns- I think that it is important for me to state where their positions finally rested, because this forms the basis for my Decision.

The Appellant's original position was that the Heritage related matters did not have to be ruled on by the TLAB, because they are under the purview of the *Ontario Heritage Act.* After the City's Heritage Expert Witness testified on the second day of the proceeding that the Heritage Staff, could not arrive at a recommendation because of the lack of a HIA, the Appellant asked to introduce a HIA study, prepared in January 2019, and asked for an opportunity to provide evidence, as discussed in the Evidence Section. However, the evidence

provided by the Appellant, recited the conclusions stated in the HIA, rather than explaining, or expanding on the conclusions of the HIA, with specific reference to how the proposal satisfied the heritage related Policies, in Chapter 3 of the OP. The Appellants continued to insist that any other information pertaining to Heritage matters could be addressed at the Site Plan stage.

The City initially said that it would call Mr. Mark Rapus of the TRCA as a witness, but did not eventually call on him. The Appellants first claimed that their position was exonerated, because the City wouldn't call on Mr. Rapus to give evidence, then declared later that Mr. Rapus would be "summonsed", and apparently changed their mind again, because Mr. Rapus did not appear as a witness before the TLAB.

I note that I heard from two planners, Messrs. Litavski and Lieu about planning matters, including natural heritage issues, and Ms. Flood , an Assistant Heritage Planner with the City, whose testimony raised questions about the proposal's ability to fulfill Heritage Policies, as stated in the OP. Their evidence, in conjunction with evidence about the HIA from Mr. Meffe, constitutes the corpus of evidence before me that has been analyzed to come to a Decision.

It would be appropriate for me to list, and discuss important principles that have been used to arrive at the final Decision.

1) The onus of proving the case rests solely with the Applicants/Appellants. Disproving the opposition's case does not automatically mean that the Applicants' case has been proven.

2) Public interest is an important factor that needs to be examined in TLAB decision making process- however, no single Party, or Parties represent the sum total of public interest.

3) The TLAB has the responsibility, and the mandate of examining traffic, and heritage issues, as these inform planning matters, to arrive at Decisions in Appeals, where such matters are material, and relevant . Within the scope of the TLAB's mandate as defined by the Planning Act, the Zoning By-laws, and the OP, the TLAB has to consider heritage, traffic and planning matters as mutually interacting, moving parts of the same machine, as opposed to separable components, which can be shipped to different destinations for further processing.

4) It may be specifically emphasized that heritage is indisputably a planning matter, as can be seen from the detailed discussion of various policies focusing on the retention of natural and cultural heritage features in Chapter 3 of the Official Plan. The fact that the Conservation Heritage Board hears matters pertaining to the *Ontario Heritage Act*, is not to be interpreted to mean that the TLAB can be restricted from examining heritage matters to make decisions. TLAB's statutory jurisdiction empowers a Panel Member hearing an Appeal for a variance approval to assess all applicable OP policies- to ignore Chapter 3 of the Official Plan is a virtual abdication by the Member of their duties. Given its statutory mandate and powers, the TLAB cannot shirk from, let alone relinquish its responsibility of evaluating heritage related questions, where appropriate, to come to Decisions.

5) The Official Plan is a living and breathing example of how the whole is more than the sum of the individual policies. Section 5.6.1 of the OP advises the reader to "Policies in the Plan should not should not be read in isolation or to the exclusion of other relevant policies in the Plan. When more than one policy is relevant, all appropriate policies are to be considered in each situation"

6) A Party's allegations of bureaucratic micromanagement against the Planning Department, or any other City Department, does not absolve the Party in question, of the need to submit reports to satisfy the latter that the proposal meets the department's guidelines. All Parties are required to submit reports on request, by various City departments, to provide meaningful and pertinent information, that allows the department to come to a final decision about the proposal.

7) The parking variance requested is a consequence of the proposed building's requesting a variance for the approval of office uses. As a matter of common sense, and natural consequence, the Parking variance would not be required, if the variance for office uses were to fail. In other words, the parking variance can be deemed to have automatically failed, should the variance requesting office use fail the four tests under Section 45.1of the Planning Act.

A very important question that needs to be addressed, before analyzing the evidence, is the crux of the City's position- namely, is the information before the TLAB sufficient to arrive at supportable findings? This question is important to answer because adequate information is necessary for an Adjudicator to desist from having to make leaps of faith across gaps in facts, on the basis of guesswork, however well intentioned, and intelligent

There are two identifiable, significant instances in this Appeal, where the sufficiency of information is central to the final decision- the first is adequacy of information about heritage issues, natural and cultural. The second issue is an analysis of the COA decision of 1997 to arrive at a decision about permissible uses on the land.

The Appellants claim that the studies submitted by them, namely a Geotechnical Slope Study, prepared by Shaheen and Peaker Ltd in 2007, and a Natural Heritage Impact Study, and Ravine Stewardship Plan dated November 2015(revised June 2016), prepared by Kuntz Forestry Consulting, are sufficient to answer any important and pertinent questions pertinent to heritage matters- the Appellants explicitly state that the HIA requested by the City, after the initial application was filed with the COA in 2018, is little more than a bureaucratic exercise. They concede that the existing building encroaches into the 10 m setback set by Policy 3.4.8 of the OP, ("*with portions of it actually sitting on the stable-top-of-bank limit- i.e. a 0 m setback*"), but argue on the basis of the Kuntz Report, that the 6 m separation between the proposed building and the edge of ravine is "adequate", and that "the TRCA is in agreement" with the conclusion. To buttress their point, they highlight the fact that the TRCA conducted a site visit on November 18, 2015, before drawing attention to a "no objection" report from the TRCA, dated February 25, 2016 provided by Mr. Marc Rapus,

Senior Planner with the TRCA, who says "*The NHIS is well done, and staff can generally agree with the findings and support the recommendation provided."* The Appellants then assert that "*Though written for the 2015 Site Plan Application, the current proposal before the TLAB respects the 6m setback. It is sufficiently similar* (to the proposal before the TLAB) *that the studies will offer similar findings and recommendations which will be appropriately confirmed through the Site Plan Approval process."*

However, in the absence of evidence from Mr. Rapus, I find that he could not have addressed the COA application, resulting in the TLAB appeal before me, because the COA application was filed in 2018, while his opinion letter is dated February 2016. I note that the Appellants had adequate opportunities to summons Mr. Rapus, and contemplated calling him, before changing their mind. The Applicants refer to Mr. Rapus' comment from 2016, and assert that the applications before the COA in 2015, and 2018, are similar enough for the comment found in Mr. Rapus' letter dated February 2016 application, to be extrapolated, and applied onto the Appeal before me. There is no explanation offered behind this assertion because no evidence was offered in support- I would have to depend solely on the Appellants' assertion of similarity between the two applications, at face value, for me to arrive at the conclusion that the proposal maintains the intent, and purpose of the Heritage Policies. In the absence of specific evidence, I find that the similarity, if not equivalence of the two applications has not been demonstrated.

I find that there is insufficient information to determine if the proposal before me satisfies the Heritage Policies in Chapter 3 of the OP.

Another interesting difference in interpretations of the Appellants, and the Opposition, was the decision made by COA in 1997, in permitting employment uses, in the Heritage Building. While the COA's approval of the application is not in dispute, the Appellant interprets the expression "building and the land" to mean that the **entire land** or what I described as the Subject Lands at the beginning of this Decision, at 1982 Islington has been approved permanently for office use. Based on this assertion, they take the position that the Appeal before the TLAB is merely the extension of the earlier decision by the COA. However, the City disputes this interpretation by drawing attention to the qualifier "*In order to be permitted to proceed with the project, as indicated on the floor plans filed with the application*", which appears in the text of the decision, and concludes that the permission to run an office permanently is restricted to the building as it existed in 1997 and the land on which the Heritage Building stands (or the Subject Property, as described at the beginning of this Decision). There is no indication about whether the expression "land" refers to what the existing building stands on, or the entire **lands** of the property.

Prima facie, the language used by the COA panel in their decision of 1997 is a riddle- on the one hand, the decision refers to the use of the "building and land", and imposes no conditions, but refers to the Site Plan in the commentary, without a specific "condition".

However, a closer reading of the COA decision of 1997 reveals that it distinguishes (however subtly) between the "lot" and the "land". The "lot" is described as "Part of Lot 21, Concession A, fronting the Humber, Etobicoke" in the first paragraph of the COA decision, and

has a "frontage of 76.61 m, and an area of 0.63 ha" , as stated at the end of the second paragraph. The reference to an area of 0.63 ha (hectares) is consistent with the area of the Subject Lands, which was stated to be 6270 sq. m. in area by Mr. Litavski, as is the frontage of 76.61m.

The "land" on the other hand, is described as "situated on a ravine, backing onto Humber Creek" in the second paragraph, and is "affected" by "By-Law Number 13048, as amended by By-Law Number 15,073". It is also interesting to note that the decision always uses the words "land" and "building" together as a phrase- the expression "building and land" appears three times on Page 1 of the COA decision of 1997, while the last two paragraphs refer to a "building", "on the land"; In my mind, the latter references to a "building" "on the land" elucidate the connection between the building and the "land"- the latter (land) is what the former (building) stands on. The COA decision states that it is the building (and the land on which it is built) as "backing onto Humber Creek", a feature that was verified through my Site visit. On the other hand, the lot (Subject Land) does not "back" onto the Humber Creek because the latter passes through the lot.

Based on these distinctions arrived at between the " lot" and the" land" through correlating difference pieces of information found in the COA decision of 1997, I find that what the COA refers to as "land" is restricted to the actual land on which the existing building stands, or the "Subject Property" as defined at the beginning of the Evidence Section. The "lot", on the other hand, is found to be synonymous with the Subject Land, on the basis of the analysis above. Consequently, I find that the office use, governed by "By-Law Number 13048, as amended by By-Law Number 15,073", is applicable only to the existing building (Subject Property), and not the entire lot (Subject Land).

I now have to analyze the proposal's ability to fulfill the four tests specified under Section 45.1 of the Planning Act, in light of the fact that there is insufficient information about the heritage aspect, and my finding that the approved employment uses are restricted to the existing building, and the land on which the building has been built.

I am in agreement with the Appellants that the proposal is consistent with the PPS (2014), and the Growth Plan (2017), because of reinvestment and rejuvenation. On this topic, I disagree with the City's contention that since the OP helps implement the higher provincial level policies, a proposal which fails the test respecting the OP is not consistent with the higher level Provincial Policies by extension- this reasoning puts the cart before the horse.

On the test respecting the OP, I reiterate that there is insufficient information to come to a supportable decision. The fact that the TRCA has not issued an opinion on the COA application that has resulted in the Appeal before me, coupled with the lack of evidence about the equivalence of the two applications (i.e. the one that the TRCA commented on, and the Appeal in front of me) means that it is not possible determine if the proposal maintains the intent and purpose of Policy 3.4.8, which states an explicit requirement for 10 m separation

Notwithstanding my Decision to admit the HIA dated February 2019 into the record, and allowing the Appellants an opportunity to address the impact of the proposed building on the existing building through providing evidence, I find that I am no more informed about the impact, before admitting the HIA into the record. There was no commentary provided on the conclusions from the HIA, which were recited by way of evidence.

There is no explanation of how the proposal satisfies Policy 4.1.5 of the OP, which requires us to be alert to the impact of the proposal on "conservation of heritage buildings, structures and landscapes" in the vicinity of the proposal. There is no information to respond to Policy 3.1.5.5, which advises that proposed alternations must be such that the integrity of the heritage property's cultural heritage value and attributes will be retained. Lastly, there is nothing in front of me which demonstrates that the proposal fulfills Policy 3.1.5.26, which discusses how development next to a property on the Heritage Register, needs be designed, so as to mitigate visual and physical impact on the Heritage Building- the HIA has a tangential reference to the Policy, and has not even attempted to answer the question- the importance of this question is underscored by the community residents raising this as a question in their evidence.

At this stage, it is important for me to highlight another interesting aspect of the Appellant's evidence- the Appellant reiterated numerous times that the Site was classified as being appropriate for Office Uses as a result of the COA decision of 1997. They also stated that their proposal, if approved, was to build a second building on the Subject Lands, which the offices at the existing building on the Site would relocate, and the existing building in turn would become home to a new restaurant. Notwithstanding the ostensible creation of new employment opportunities on the Subject Lands, it is important to note that the Appellants did not make any references to Employment Policies in the Official Policy, to justify their proposal. While I respect the rights of the Appellants to put forward their case as they deem appropriate, I find it that the paucity of relevant evidence precludes any reliance on Employment Policies in the Official Policy to arrive at the final Decision.

The proposed height of the building to be constructed prevents the existing Heritage building from being seen from the streets by the local residents- the requested height variance contradicts the requirement of Section 4.1.5 of the OP to respect heritage buildings, as excerpted earlier.

Mr. Litavski interpreted several OP policies, without reference to the Heritage Policies, because the latter are not a planning matter. This approach contradicts Principle 5, stated earlier in this Section, which resonates with the advice found in Policy 5.6.1 to read the policies as a whole. The conclusions drawn on the basis of a questionable approach are not accorded any weight.

On the basis of the above discussions and findings, I find that the proposal does not maintain the intent and purpose of the OP.

Coming to the test respecting the Zoning By-Laws, I reiterate that the Subject Land is not subject to the City of Toronto Zoning By-law No. 569-2013. The building (and the land on

which it is built) is subject to By-law Nos. 13048 and 15073. It may also be noted that By-law Nos. 13048 and 15073 permit specific Commercial Uses and Nursing Home in the existing building ***by way of a Zoning By-law Amendment*** as opposed to a COA decision

Along the lines of "what is good for the goose is good for the gander", the Appellants argue that the proposed building should allow general office uses, because they have been allowed in the existing building. I disagree with this submission, because my finding based on what was allowed under consecutive COA decisions restricted the use to the existing building and land, and consequently excludes the land on which the Appellants propose to construct the proposed building.

I also disagree with the notion about the existing building, and the proposal having a goose-and-gander relationship, because there is a difference in the sizes and heights of the buildings , numbers of storeys, as well as separation from the edge of the ravine. Further, the nearest neighbour for the existing building is the apartment complex at Briarcrest Estate, whereas the nearest neighbour for the proposed building will be the existing heritage building, which is its immediate neighbour. While the existing building has little influence on its neighbour (i.e. the apartment complex) , the impact posited by the proposed building on the existing building is significantly different- the heritage building will no longer be visible as a result of being eclipsed by the proposed building.

The Appellants depicted the requested height variance to be a "technical variance" which is a consequence of the unique topography of the Site. The authority cited in support of approving the technical variance, the OMB decision from ***115 Dupont Holdings Limited v. City of Toronto*** (***2018 CanLII 14254, ON LPAT***) , is distinguished from this Appeal, because the cited authority does not have to address environmental factors, or heritage buildings , which are crucial to this Decision. In addition, the proposal that was approved by the former Ontario Municipal Board, was the result of a Settlement between the Appellant, and the City of Toronto. Likewise, the well-known Fred Doucette case (***Fred Doucette Holdings Ltd. v. Waterloo, [1997], O.J. No 6292, 32 O.R.(3d) 502***) was cited in support of their contention that a "*variance under s.45(1) related to use is appropriate where the proposed variance does not significantly alter the use of the land*". The Appeal before me is distinguished from Fred Doucette, by the existence of a Heritage Building in the vicinity of the proposed development.

Based on the above findings, I find that the proposal does not maintain the intent and purpose of By-laws 15073 and 13048, and an office cannot be consecutively permitted. I also find that the requested height variance does not maintain the intent and purpose of By-law 320-93.

I now consider the test of whether the requested variances are minor.

Determining the impact is a major component of the test of minor. The Appellants relied on the well-known De Gasperis decision (***DeGasperis v. Toronto (City) Committee o Adjustmen***t ***2005] O.J..No. 2890, 12 M.P.L.R. (4th) 1***) to demonstrate the importance of im-

pact, and why a significant numerical increase (as has happened in the case of the height variance) is not sufficient by itself for a variance to fail the test of minor. Following the reasoning of DeGasperis, and the discussion of the importance of impact, I find that the variances respecting office uses, and increased height should be refused, because there is inadequate information about fulfilling the natural heritage policies, and clearly impacts the visibility of the heritage building from the adjacent streets I am not convinced by the Appellants' choosing to focus on the fact that the Heritage Building in question, has not been classified as a Category A, B or C building, despite its appearing on the Heritage Register, to justify the lack of discussion about the heritage policies. Such categorization impacts only the demolition, or modification of the building in question, but does not impact the determination of the impact on the Heritage Building by a proposal in the vicinity- in other words, the fact that the Heritage Property has not been classified results in a theoretical difference, but with no practical implication.

To reiterate what was stated earlier, the Appellants depicted the requested height variance to be a "technical variance" which is a consequence of the unique topography of the Site. This perspective does not justify the resulting impact on the community, where the neighbours cannot experience, or enjoy their cultural heritage. From this perspective, the height of the building does have a negative impact on the community, and does not meet the test of minor

I therefore find that the proposal does not meet the test of minor.

Lastly, there is the test of appropriateness, where public interest plays an important role.

I take this opportunity to dwell on the methodology that has been followed by the Appellants, and express my concerns on the proposed methodology, before returning to the variances.

As stated earlier, I have a fundamental disagreement with the Appellant's approach to corralling heritage issues from the proposal, and asking to withhold any discussion on them until the Site Plan stage, knowing fully well that community members are excluded from providing input at the Site Plan Approval stage. In other words, the process preferred by the Appellants deliberately excludes the community, with full cognizance of the consequences. I find that this rearrangement of steps to exclude the community goes against the very grain of public interest. From my perspective, the process prescribed by the Appellants requires the TLAB to relinquish the responsibility, as well as jurisdiction of examining live issues to make Decisions. This is not merely a question of "passing the baton" of responsibility to the Site Plan Approval process- I would be in dereliction of duty by following this process by not exercising due diligence. Thus, the serous procedural issues with the methodology raise questions about the resulting proposal's ability to satisfy the test of appropriate development.

In addition, I find that the proposal does not fulfill the test of appropriate development because of the indeterminable impact of the proposal on Heritage matters, both cultural and

natural, and brushes off the height variance as a technical variance without considering the issue of the visibility of the heritage property from the exterior of the property. .

Based on this discussion, I find that the proposal, with specific reference to Variances 1 and 2, respecting the office Use, and building height, respectively cannot be approved.

As stated in the recital of important principles for decision making at the beginning of this Section, the parking variance is essentially the consequence of the proposed office use in the new building, and/or the restaurant use in the existing building. This approach implies that the dependent variance (i.e. parking variance in this case) would not be required, and consequently not approved, if the independent variance (office use variance) fails.

However, it is important to apply the ***Gasperis*** Decision, (which requires every variance to independently pass each of the four tests, to be approved) to the parking variance, and ensure that the result would be no different from using the common sense approach, discussed above.

The evidence put forward by the Appellants in favour of the parking variance, does not make any reference to By-Law 320-18C which governs the Site, and prefers to rely on the requirements needed if By-Law 569-2013 were in place. The lack of applicability of By-law 569-2013 to this Site was explicitly mentioned by Mr. Litavski in cross-examination. The approach of relying on a By-law that is not applicable to the Site, with np reference to a By-Law that is applicable ,does not align with a logical decision making process, and is therefore given zero weight. The result is that there is no evidence to support the Appellant's assertion about the parking variance satisfying the intent, and purpose of By-Law 320-18C. The lack of evidence about maintaining the purpose of the applicable By-Law, makes it difficult to determine whether the parking variance meets the test of minor, or appropriate development.

I note that there were no issues expressed with the appropriateness of the existing parking serving the existing office uses in the Heritage Building- consequently, there is no need for increased parking, unless a new use is established, or an existing use is extended to a new building. As a result, the parking variance clearly does not meet the test of maintaining the purpose of the Zoning By-law, and does not offer adequate information about meeting the test of minor, and appropriate development. Irrespective of the result of the test maintaining the purpose and intent of the OP, I find that the parking variance is to be refused because it has not met at least three of the four tests under Section 45.1 of the Planning Act. Since a variance has to pass all four tests under Section 45.1 to be approved, it is evident that the parking variance would have to be refused by failing at least three of the four tests under Section 45.1

Given that none of the variances has passed the four tests under Section 45.1 of the Planning Act , I find that the Appeal respecting 1982 Islington Avenue is to be refused, and herewith confirm the decision of the Committee of Adjustment, dated March 8, 2018.

I take this opportunity to note the civility between the Parties, and how the Hearing proceeded smoothly notwithstanding the Motions brought forward by the City, and the eleven month gap between the beginning and the end of this proceeding. I would like to commend the Parties for their civility and courteousness.

I also acknowledge the length of time taken to issue this Decision after the completion of the proceeding. Besides the challenges resulting from COVID-19 after the completion of the proceeding, I also had to resolve technical issues pertaining to the audibility of the Hearing tapes, before verifying key pieces of evidence. Some of the counsel and witnesses who participated in this Hearing were soft-spoken, resulting in audio recordings which I found to be faint, and difficult to follow to verify evidence. Notwithstanding my exhorting witnesses and counsel to speak louder for recording purposes at the time of the Hearing, there was a challenge with clarity of the hearing tapes. It took quite a bit of effort to work with the TLAB Staff for help with amplifying the sound levels such that I could hear the audio tapes clearly, including accessing hearing equipment at the TLAB office. The challenge of physical accessing the facility to hear the audio tapes, amidst the lockdowns, contributed to my taking longer than expected to issue this Decision. I sincerely regret the inconvenience caused to the Parties, and wholeheartedly thank the TLAB staff for their patience and assistance in this matter.

DECISION AND ORDER

1. The Appeal is refused in its entirety, and none of the requested variances are approved. The order of the Committee of Adjustment dated March 8, 2018 with respect to 1982 Islington Ave is herewith confirmed.

So orders the Toronto Local Appeal Body.

X

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body