

DECISION AND ORDER

Decision Issue Date Tuesday, February 16, 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): CITY OF TORONTO

Applicant: SETLESS ARCHITECTURE

Property Address/Description: 5 WADSWORTH BLVD

Committee of Adjustment Case File: 19 242062 WET 05 MV

TLAB Case File Number: 20 112603 S45 05 TLAB

Hearing date: Friday, December 04, 2020

DECISION DELIVERED BY A. Bassios

APPEARANCES

NAME	ROLE	REPRESENTATIVE
SETLESS ARCHITECTURE	APPLICANT	
CITY OF TORONTO	APPELLANT	JASON DAVIDSON
LUCAS ROCKY DIBRATTO	OWNER/PARTY	EILEEN COSTELLO
CHERRI HURST	PARTICIPANT	
PAUL DINNER	PARTICIPANT	
JULIA DINNER	PARTICIPANT	
DAVID CURRIE	PARTICIPANT	
MARTIN RENDL	EXPERT WITNESS	
ALAN YOUNG	EXPERT WITNESS	

INTRODUCTION

This is an appeal by the City of Toronto (City) of the Etobicoke-York District Panel of the Committee of Adjustment's (COA) approval, on condition, of variances to construct a new detached dwelling with an attached garage.

The subject property, 5 Wadsworth Blvd, is located in the former Town of Weston (and former City of York). It is designated *Neighbourhoods* in the City Official Plan (OP) and zoned RD (f12.0; a370; d0.4) under the new harmonized City of Toronto Zoning By-law No. 569-2013 (By-law).

Three variances were requested:

1. Section 10.20.30.10.(1)(A), By-law 569-2013

The minimum required lot area is 370 m².

The lot area is 237 m².

2. Section 10.20.30.20.(1)(A), By-law 569-2013

The minimum required lot frontage is 12 m.

The lot frontage is 11.2 m.

3. Section 10.20.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index is 0.4 times the area of the lot (94.84 m²).

The new dwelling will have a floor space index of 0.65 times the area of the lot (154 m²).

The COA approved the variances requested and imposed a standard street tree condition.

The matter was appealed to the Toronto Local Appeal Body (TLAB) on February 4, 2020 and the hearing of this matter occurred by Electronic Hearing on December 4, 2020. In attendance electronically via WebEx were: Jason Davidson, the legal representative for the City which is the Appellant in this matter; Alan Young, expert witness for the City; Eileen Costello, legal representative for the Applicant; Martin Rendl, expert witness for the Applicant; and Paul Dinner, Julia Dinner, and David Currie, all elected Participant status in this matter. Cherri Hurst of the Weston Historical Society and Conservation District who elected Participant status was unable to attend.

The Hearing date originally set for this matter was June 4, 2020. On April 24, 2020, the TLAB issued a Notice of Postponement due to the COVID 19 pandemic Order, suspending timelines in the matter and advising that a new Notice of Hearing would be issued. On October 22, 2020, a Notice of Hearing (to be heard electronically) was issued, setting December 4, 2020 as the Hearing date, and detailing new deadlines for the filing of submissions.

I advised that I had reviewed the pre-filed material and had conducted a site visit of the subject property and surrounding neighbourhood.

BACKGROUND

The Applicant proposes to construct a new detached dwelling with an attached garage on the subject property. There is currently an ancillary structure, a garage, on the site.

The subject property, 5 Wadsworth Blvd, was previously joined with 7 Wadsworth Blvd. The separation of 5 Wadsworth Blvd and 7 Wadsworth Blvd was not accomplished through a severance process, but by means of a determination, in 2019, by the Land Registry Office that 5 Wadsworth Blvd exists as a separate lot. The “separation” of 5 Wadsworth and 7 Wadsworth creates a situation where neither lot is in compliance with the requirements of the Zoning By-law. The conditions at 7 Wadsworth have been addressed through a separate COA application.

Two of the variances requested for the subject property are to recognize the existing dimensions for lot area and lot frontage. The third variance request is to exceed the maximum floor space index.

MATTERS IN ISSUE

Underlying the application for variances is the emergence of 5 Wadsworth Blvd as a legal lot, without the benefit of a public process in which the neighbourhood would otherwise have had the opportunity to be involved. The process of how the subject property has been recognized as a legal lot, although deeply frustrating for the neighbours, is not a matter before the TLAB.

The mandate of the TLAB is to adjudicate whether the specific variances requested meet the four tests under s. 45(1) of the Act, referenced below.

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’).

Minor Variance – S. 45(1)

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;

- are desirable for the appropriate development or use of the land; and
- are minor.

EVIDENCE

Applicant

Ms. Costello (for the Applicant), in her opening statement described the matter as a request for three variances, only one of which, the floor space index (fsi), is a consequence of the proposal. The other two variances requested for lot frontage and lot area are a result of subject property being an existing and historical lot of record that does not meet the requirements of the By-law. She noted that her client has made significant changes to the original proposal to respond to the concerns of the City Planning Department and the neighbours.

Mr. Davidson (for the City) clarified that a representative from City Planning would not be in attendance and that Mr. Young would give expert land use planning evidence in support of the Appeal.

Mr. Rendl, retained by the Applicant, was called to provide opinion evidence in support of the application and I qualified him to provide expert opinion in land use planning. He based his testimony on his Expert Witness Statement which was marked as Exhibit A. Mr Rendl provided context for the subject property and the neighbourhood.

The configuration of the subject property differs from the prevailing lot pattern in the area, it is located on the south side of Wadsworth Blvd at a curve in the street. This curve gives the site an irregular pie shape because the lot's frontage (12.94 m) is four times greater than the width of the rear lot line (3.03 m). The subject property is outside the boundaries of the Heritage Conservation District Study which was underway at the time of the Hearing.

The area is a stable and mature neighbourhood. There is diversity in the size of lots, the age and architectural style of houses. Its physical character consists primarily of one and two storey detached dwellings. On the north side of Wadsworth Blvd, there are four walk up apartment buildings.

Mr. Rendl described the proposed dwelling to be built on the subject property. There are no variances for building height, setbacks from lot lines, building length or depth or any of the other By-law standards. The Applicant had addressed the concerns raised by Planning staff in the staff report to the COA and had eliminated the variances for side yard setback and building height that were part of the original proposal and also lowered the fsi variance requested from 0.8 to 0.65 times the area of the lot. (fsi is the ratio of total floor area of the building in relation to the area of the lot). He noted that the 0.65 fsi proposed for the subject site is within the range of COA approvals within the neighbourhood study area (between 0.41 and 0.97 fsi). It is his opinion that the

proposed dwelling is appropriately sized for the lot and he noted that it meets every standard except for the maximum fsi requirement.

In his opinion, the fsi number is a mathematical indicator that is driven in this case by the undersized lot and that an excess of building height, length, depth and fsi in combination would constitute overdevelopment, which is not the case here.

Mr. Rendl advised that the integrated garage proposed does not require a variance to the By-law. In some neighbourhoods, the Zoning specifically prohibits integrated garages, but that is not the case in this neighbourhood.

In Mr. Rendl's opinion, the requested variances are consistent with the PPS and the Growth Plan.

On the first test under s. 45(1), that the variances maintain the general purpose of the Official Plan (OP), Mr. Rendl addressed Policy 2.3 which states that *Neighbourhoods* are to be stable but not static. New development is to respect and reinforce the existing physical character of the area. Policy 4.1.5 establishes the criteria for considering physical character. Mr Rendl described the proposal's compliance with the criteria set out in Policy 4.1.5 and, in addition, focused on Policy 4.1.9 which he considers to be of particular relevance to the subject site. Policy 4.1.9 sets out how infill development on irregular properties is to be evaluated.

Policy 4.1.9

In established Neighbourhoods, infill development on properties that vary from the local pattern in terms of lot size, configuration and/or orientation will:

- a) have heights, massing and scale that are respectful of those permitted by zoning for nearby residential properties, while taking into account the existing form of development on the infill property;
- b) have setbacks from adjacent residential properties and public streets that are proportionate to those permitted by zoning for adjacent residential properties, while taking into account the existing form of development on the infill property;
- c) provide adequate privacy, sunlight and sky views for occupants of new and existing buildings by ensuring adequate distance and separation between building walls and using landscaping, planting and fencing to enhance privacy where needed;
- d) front onto existing or newly created public streets wherever possible, with no gates limiting public access;
- e) provide safe, accessible pedestrian walkways from public streets; and
- f) locate, screen and wherever possible enclose service areas and garbage storage and parking, including access to any underground parking, so as to minimize the impact on existing and new streets and on residences.

It is Mr. Rendl's opinion that the proposal complies with the requirements of Policy 4.1.9 and that the height, massing and scale of the proposal are respectful of those permitted by zoning for nearby residential properties and are consistent with that of other new two storey dwellings on Wadsworth Blvd and elsewhere in the neighbourhood. The north

side of Wadsworth Blvd, which is also in the immediate context, consists of two and three storey walk up apartment buildings which creates a unique diversity of physical character not found elsewhere in the Neighbourhood Study Area. It is Mr. Rendl's opinion that the proposed fsi variance would not result in a change that is out of keeping with the established physical character of Wadsworth Blvd and the area.

The current lot at 5 Wadsworth Blvd was created through a plan of subdivision approved on July 20, 1923. The lot's current size, frontage and configuration which give rise to the lot area and lot frontage variances therefore date back to 1923. Mr. Rendl acknowledged under cross examination that the neighbourhood has not built out according to the original plan of subdivision and that what currently exists does not always reflect the original lot lines.

The actual front lot line of the subject property is 12.94 m in length. The variance arises because the Zoning By-law defines lot frontage not as the actual physical length of the lot frontage (12.94 m) but rather because the lot frontage has an irregular shape, the lot frontage in this case is the horizontal distance between the side lot lines of a lot measured along a straight line drawn perpendicular to the lot centreline at the required minimum front yard setback. Based on this method of measurement, the lot frontage is 11.2 m.

The variances for lot area and lot frontage are to recognize this existing lot dimensions, which Mr. Rendl contends are part of the neighbourhood's existing physical character. In his opinion, the requested variances do not constitute a change that threatens the stability of the neighbourhood. In summary, it is his opinion that the variances maintain the general intent and purpose of the Toronto Official Plan.

It is also Mr. Rendl's opinion that the variances maintain the general intent and purpose of the applicable Zoning By-laws. The lot dimensions were established in 1923 and arise from the area's original lot fabric. The purpose of the requested variances is to recognize what already exists. Mr. Rendl referred to the general purpose of regulating built form – fsi, building height, building depth, etc. – as being to avoid overdevelopment of the lot, a building that is out of scale with its lot and surroundings. The proposed fsi, he noted, is entirely within the two-storey building envelope described by the By-law's requirements for height, length and setbacks.

Mr. Rendl advised that in his opinion the variances are desirable for the appropriate development of the land (the third test under s. 45(1)). The variances related to lot frontage and lot area allow an infill detached house to be built on an existing legal and underutilized lot. These variances do not introduce a new lot into the area, it has been a legal lot since 1923 and is an element of the area's original lot fabric.

The final test under s. 45(1) is the question of whether the variances are minor, which relies on the assessment of the nature and extent of any adverse impacts on adjacent properties. Mr. Rendl noted that in this proposal, the house's main windows are in the front and rear walls, locations with views that are consistent with normal house layouts. Windows on the east and west sides of the house are the normal and expected type and size of windows for side walls. This type of window layout is prevalent in the

majority of houses in the area. The side yard setbacks match the By-law's required setbacks which Mr. Rendl advised are intended to provide proper distance from side lot lines to provide for sunlight, views, air circulation and privacy. Accordingly, in his opinion, the proposed dwelling does not adversely impact the privacy or views of other properties.

In conclusion, it is Mr. Rendl's opinion that the variances meet all four tests under s. 45(1) of the Act, that they are consistent with the PPS and conform to the Growth Plan, and that they are appropriate for the development of the subject property.

Appellant

I qualified Mr. Alan Young to give professional opinion evidence in land use planning. He provided evidence on behalf of the City. His testimony was based on his Expert Witness Statement, which was entered as Exhibit F.

Mr. Young's description of the neighbourhood and immediate context of the subject property tallied, in general, with that of Mr. Rendl. Mr. Young concluded that the request for variances did not meet the criteria for approval and based his conclusions on an analysis of the physical character of the neighbourhood. In his opinion, the variances to permit the proposed new dwelling with a front integrated garage and with a 3-storey front appearance would result in a built form that does not respect the character of the Geographic Neighbourhood or the Immediate Context Area.

Although the proposed dwelling contains only 2 storeys as defined in the Zoning By-law, Mr. Young asserted it presents as 3 storeys when viewed from the street because there are two living levels above the garage (which does not count as a storey from the standpoint of the Zoning By-law) and there is a one storey-high, clerestory window which illuminates the entry level. He noted that existing buildings "would appear to be well within the maximum height" allowed by the Zoning By-law (11 m/3 storeys), while the height of the building proposed for the subject lands, although also in conformity with the Zoning By-law, is just below 11 m".

Mr. Young observed that no entirely new houses have been built in the geographic neighbourhood since the 1960s, although some of the existing houses have been expanded and transformed. Most (85 or 80%) do not have integrated or attached garages. The prevailing character is for parking to be located in private or mutual side yard driveways, sometimes leading to detached rear yard garages. There are only 9 integrated garages (8%) and 12 attached garages (11%) in the neighbourhood.

Mr. Young analyzed COA decisions going back ten years and noted that there were six approvals for minor variances to increase the permitted density above 0.4 fsi. All were for additions to existing houses or conversions of attic space; none involved an entirely new dwelling. The approved densities were in the range of 0.48 to 0.68 FSI. He noted that the average density within the immediate context (the block on which the subject property is located and that facing it) is higher due to the three apartment buildings located across the street from the subject property. In his opinion the "prevailing

density” that is determined according to the parameters set in Policy 4.1.5 of the OP is a density below 0.4 fsi (67% of lots). He concludes that the proposed density of 0.65 fsi does not respect and reinforce the prevailing physical character of the geographic neighbourhood, or of the immediate context, as is required by the OP.

It is Mr. Young’s opinion that the requested variance for density (fsi) does not satisfy the requirements of s. 45(1) of the Act; it is well above the By-law maximum and the prevailing densities and the proposed density, height and front integrated garage do not respect and reinforce the prevailing character of the neighbourhood or immediate context area. He asserts that, even though the proposed integrated garage and the height do not require variances from the By-law, a variance for “density” (fsi) is required, so the proposal as a whole has to respect the neighbourhood which, in his opinion, it does not.

With regard to OP Policy 4.1.9, Mr. Young did not agree that the Policy was applicable to this application. In his opinion, the lot is not so irregularly configured that you wouldn’t be able to develop according to the local pattern. He asserts that in this case, it is desirable to provide the same site standards as are applied generally in the neighbourhood and that the fact that it is not a classic rectangular lot does not qualify it for special consideration to make the lot “buildable”. It is Mr. Young’s opinion that Policy 4.1.9 applies only where relief is required to make the lot “buildable”. Under cross examination, he conceded that without any relief a dwelling of only 94 m² would be allowed on the subject property, and that there would be very few detached houses of that size built today.

Mr. Young also conceded that even without an integrated garage, the proposal would fail under his testimony that the fsi number is significantly higher than the prevailing densities (fsi). He also conceded that OP Policy 4.1.5 allows that there might be more than one prevailing character in a neighbourhood and that there is a second category of fsi’s between 0.4 and 0.6 in the geographic neighbourhood.

Participants

Mr. Curry advised that he was attending on behalf of the owner of 2 Wadsworth Blvd. who is 86 years old and could not attend. He referred to the statement he had submitted to the TLAB. Mr. Curry expressed his concern regarding what he referred to as conflicting surveys identifying the correct boundary between number 3 and number 5 Wadsworth Blvd. He stated that the owners of 2 Wadsworth Blvd are not opposed to something being built on the subject property, but they feel that a small lot should have a small house.

Mr. Dinner and Ms. Dinner (his daughter) made a joint statement to the TLAB, based upon Mr. Dinner’s filed statement. They are concerned that the proposed construction is excessively large for the lot, resulting in worsening drainage problems, blocking of sunlight to neighbours’ yards, and window placement that deprives neighbours of privacy. They state that the design shows a lack of respect for the neighbours. There is

a boundary dispute between the 3 Wadsworth Blvd (the Dinners) and the subject property. Mr. Dinner has provided a survey which he commissioned that shows that the proponent does not own all the land upon which their 1.2 m (side yard) setback relies. The Dinners are concerned that excavation for construction on the subject property will put the foundations of their home at risk. Ms. Dinner expressed her concern that the side windows on the west wall of the proposed dwelling would look into her bedroom window and that the proposal would create a house “that is basically twice the size of mine”. It is Ms. Dinner’s opinion that a house with 0.4 fsi is quite livable; as hers is.

ANALYSIS, FINDINGS, REASONS

A major point of contention for the Participants in the Hearing is the emergence of the subject property as a legal lot separate from 7 Wadsworth Blvd. This question of whether the lot is legally in existence as a separate lot, however, is not for the TLAB to adjudicate. The TLAB’s mandate under the Planning Act is to adjudicate appeals of COA variance decisions on the basis of whether or not they are able to meet the four statutory tests prescribed in s. 45(1). Similarly, the dispute regarding the boundary line between the subject property and 3 Wadsworth Blvd is not a matter for the TLAB to adjudicate. The City, the Appellant in this case, has not taken the position that the application is premature and has argued the matter only on the basis of the Planning Act provision, i.e., that the application does not meet the four tests.

This is not a consent to sever application, where the creation of a new lot is to be decided; the lot already exists. There are exemptions in the Zoning By-law to recognize undersized lawfully existing and vacant lawfully existing lots (10.5.30.11). The Applicant has not claimed these exemptions and has asked that the TALB approve variances to recognize the existing lot area and frontage. Absent an exemption, the variances for lot area and lot frontage would be required if *any* building were to be proposed for the subject property, no matter the building size or compliance with all other requirements of the By-law.

There is consensus that the subject property is an irregular lot which gives rise to what the Applicant’s representatives describe as unique planning circumstances. In the question of whether or not OP Policy 4.1.9 applies, I prefer the evidence of Mr. Rendl. I concur that the application presents an opportunity for infill on an underutilized lot; as referred to in the OP, “a lot that was passed over in the first wave of urbanization”. I therefore find that the variances requested for lot area and lot frontage are supportable to facilitate the use of the lot for residential purposes.

The variance requested for an fsi of 0.65 times the area of the lot is, as the Applicant asserts, a number that is driven by the smaller lot area. (Fsi is calculated as floor area divided by lot area). Mr. Young conceded that a 94 m² dwelling, which is the maximum the By-law allows as of right for a lot area of 237 m², is significantly smaller than any detached dwelling that would be built today. While I agree that some flexibility is to be granted to infill lots and irregular lots in order to achieve desirable development, I do not concur with Mr. Rendl that overdevelopment of a property is necessarily signified by a

combination of variance requirements – for height, or length, or depth and fsi. I agree with Mr. Rendl that numerous other variances are often associated with a request for an fsi variance, but the purpose of the fsi requirement is specifically to appropriately size a building on a lot, to restrict the full buildout of a building envelope that overwhelms the lot on which it is sited. I concur that some flexibility regarding the fsi index is reasonable given the undersized lot and the irregular lot shape, but I do not agree that function of the fsi index to regulate overdevelopment on the property is to be wholly abandoned.

Mr. Young's evidence was that the prevailing physical character of the geographic neighbourhood is characterized by fsi's below 0.4, and he confirmed under cross examination that the next most frequent category of fsi's is a group between 0.4 and 0.6 fsi. OP Policy 4.2.5 states that "While prevailing will mean most frequently occurring for purposes of this policy, this Plan recognizes that some geographic neighbourhoods contain a mix of physical characters. In such cases, the direction to respect and reinforce the prevailing physical character will not preclude development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers within the geographic neighbourhood, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood and already have a significant presence on properties located in the immediate context or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood". It is my opinion that some higher fsi number than the maximum allowed under the By-law could be warranted under this provision, and in these particular circumstances, but that potentially higher fsi is not without limitation.

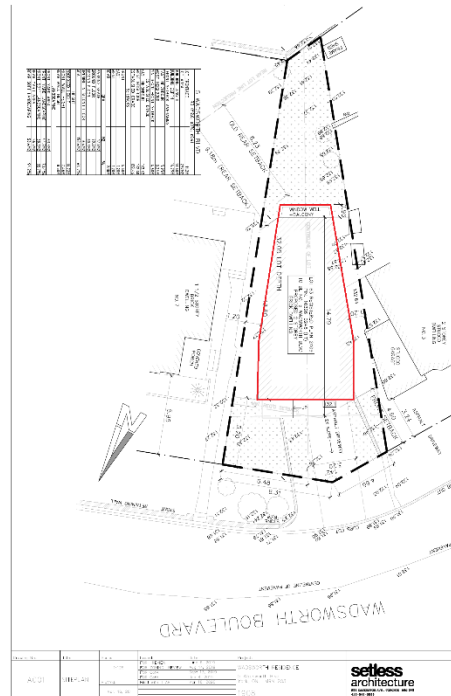
The City argues that the fsi requested is well above the By-law maximum and the prevailing densities (fsi's) and the proposal therefore does not respect and reinforce the prevailing character of the neighbourhood or the immediate context area. Fsi is a useful indicator to represent the relationship between a building and the lot on which it is located, but it is a mathematical representation and is not readily and simply translatable into a sense of physical character.

It is Mr. Young's opinion that the requested variance for density (fsi) does not satisfy the requirements of s. 45(1) of the Act; it is well above the By-law maximum and the prevailing densities and the proposed density, height and front integrated garage do not respect and reinforce the prevailing character of the neighbourhood or immediate context area. On the matters of height and the front integrated garage, while they might not be attractive features, or commonplace in the neighbourhood, they are matters that *are* regulated by the By-law and it would not be reasonable to refuse a variance for fsi on the basis of these features when they are By-law compliant and could occur as of right in any other application in the neighbourhood.

On the matter of the fsi variance, I concur with Mr. Young that the requested fsi does not satisfy the requirements of s. 45(1), not only on the basis of the fsi number itself, but also on the basis of how the number manifests on the lot, and the impact of the scale it therefore presents to the neighbours and the street. The Participants have clearly articulated this, characterizing the proposal as too much house on too small a lot.

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I have outlined the footprint of the proposed building on this site plan found in Mr. Rendl's Witness Statement in the diagram below.



The requested fsi is 0.65, the lot area is 237 m² and the total floor area proposed is 154 m². The subject property is approximately two thirds of the size of a compliant lot. For comparison, a fully compliant lot, at 370 m², at 0.4 fsi, would be permitted a total floor area of 148 m². (The garage, although it adds to the overall massing and scale of the building, is not included in the measurement of total floor area).

OP Policy 4.1.9 states that in established Neighbourhoods, infill development on properties that vary from the local pattern in terms of lot size, configuration and/or orientation and will, amongst other requirements, “have heights, massing and scale that are respectful of those permitted by zoning for nearby residential properties, while taking into account the existing form of development on the infill property”. I find that the scale of the proposal is excessive in context of the scale permitted by zoning and the nearby residential properties. I also find that the general intent and purpose of the Zoning By-law is not maintained with respect to the fsi requirement.

I find that the requested variance at 0.65 fsi fails the first two tests of s.45(1) of the Act in that it does not maintain the general intent and purpose of the Official Plan and it does not maintain the general intent and purpose of the Zoning By-laws. The requirements of s. 45(1) with regard to the requested fsi variance are therefore not met.

I find that the variances requested for minimum lot area and minimum lot frontage 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.

DECISION AND ORDER

The appeals from the decision of the Committee of Adjustment are allowed, in part, with condition:

1. Section 10.20.30.10.(1)(A), By-law 569-2013

The minimum required lot area is 370 m².

A lot area of 237 m² is approved.

2. Section 10.20.30.20.(1)(A), By-law 569-2013

The minimum required lot frontage is 12 m.

A lot frontage of 11.2 m is approved.

3. Section 10.20.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index is 0.4 times the area of the lot (94.84 m²).

The requested variance for a floor space index of 0.65 times the area of the lot (154 m²) is **not** approved.

CONDITION:

Where there is no existing street tree, the owner shall provide payment in lieu of planting one street tree on the City road allowance abutting each of the sites involved in the application. The current cash-in-lieu payment is \$583/tree.

X



Ana Bassios

Panel Chair, Toronto Local Appeal Body