

# DECISION AND ORDER

**Decision Issue Date**      Wednesday, May 26, 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): SHIN YEONG KANG

Applicant: SOUVIK MUKHERJEE

Property Address/Description: 120 HENDON AVE

Committee of Adjustment Case File: 20 143409 NNY 18 MV

**TLAB Case File Number: 20 202821 S45 18 TLAB**

**Hearing date**                      April 21, 2021

Final submissions received      May 7, 2021

**DECISION DELIVERED BY T. YAO**

## APPEARANCES

Name	Role	Representative
Souvik Mukherjee	Applicant	
Katambini Pandey	Expert witness	
Dr. Carolyn Winsborough	Expert witness	
Shin Yeong Kang	Appellant	
City of Toronto	Party	Jason Davidson
Michael Romero	Expert Witness	
Sungeae Choi	Participant	

## INTRODUCTION

Mr. Mukherjee's property at 120 Hendon Ave has a large garage at the rear. Not only it is a double garage, but it has a second storey with enough head room to stand up in (Figure 1). He wishes to change the existing peaked to a flat roof, with a reduced height, but still higher than permitted by the zoning. Since this is new construction, Mr. Mukherjee needs a variance from the maximum height 4 m (13.1 ft).



Fig. 1. Second storey interior

He seeks a new flat roof height of 5.69 m (18.7 ft). The City planner, Mr. Romero, suggested that he lower the roof to 5.35 m and limit the size of windows (facing Mr. Kang, the neighbour to the east). Mr. Mukherjee refused the first suggestion but accepted the second. The height of 5.69 m plus a condition as to window size was approved by the Committee of Adjustment. Mr. Kang appealed, and so this matter came to the TLAB.

## MATTERS IN ISSUE

The variances must be consistent with and conform to higher level Provincial Policies. The 2020 Provincial Policy statement and the Growth Plan for the Greater Golden Horseshoe discuss high level issues such as land use coordination, employment, housing infrastructure, climate change and resource management. Ms. Pandey, Mr. Mukherjee's planner, asserted that these "big picture" policies are not useful for this particular application, and I agree.

S. 45(1) of the *Planning Act* requires that the variances must individually and cumulatively:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- be desirable for the appropriate development or use of the land; and
- be minor.

The legal obligation to demonstrate these four tests are on the person seeking the variance, in this case, on Mr. Mukherjee.

### **S 45 (2) of the *Planning Act***

I wish to address as a preliminary matter -- s. 45(2), which allows the enlargement of a non-conforming use. Although she did not mention this section of the *Planning Act*, I feel Ms. Pandey (Mr. Mukherjee's planner) wished me to use the legislative intent of this section to bolster her argument on compatibility. Section 45(2) reads:

Other powers

45(2) In addition to its powers under subsection (1), the committee, upon any such application,

(a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,

(i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a [similar use] continued until the date of the application to the committee, . . .

The precondition here is that the use must be a lawful use **for a prohibited purpose** on the day the by-law was passed. Mr. Kang (a neighbour) researched the North York zoning by-law, out of "curiosity", and found that the subject building was built after the passage of the by-law. However, the use, that of a residential ancillary building, was lawful before, on the day of passing and after the zoning by-law was passed back in the early 1950's (for North York Township). Thus, the initial premise is not established; and we are thrown back to the usual test under 45(1). In fairness to the parties, no one required a formal 45(2) analysis. I mention it here for completeness and I do not need to discuss this clause further.

### **EVIDENCE**

I qualified Ms. Pandey and Mr. Romero as expert witnesses in land use planning, Dr. Winsborough as an expert witness in shadow studies, and Mr. Kang as an expert witness in architectural technology. Ms. Choi, Mr. Kang's neighbour, also testified on her own behalf. She was the only non-expert to testify.

### **ANALYSIS, FINDINGS, REASONS**

Previously Mr. Mukherjee applied for a height variance of 6.65 m (21.8 ft); refused by TLAB Member Talukder on October 25, 2019. She heard two of the same witnesses that I heard (Ms. Winsborough and Ms. Pandey). Although she rejected the height variance, Member Talukder allowed rear and side yard setback variances (please see Table 1 below). Member Talukder attached plans to her decision in respect

to the height decision. In the end, she too was unsatisfied that Mr. Mukherjee discharged the onus on him.

<b>Table 2. Variances requested before Member Talukder</b>			
		Required	Proposed
1.	Height	4 m (13.1 ft)	6.65 m (21.8 ft)
2.	Rear yard setback	3.35 m	1.02 m
3.	Side yard setback (to Kang property)	.3 m	zero

In a subsequent review, the former Chair upheld Member Talukder's decision.

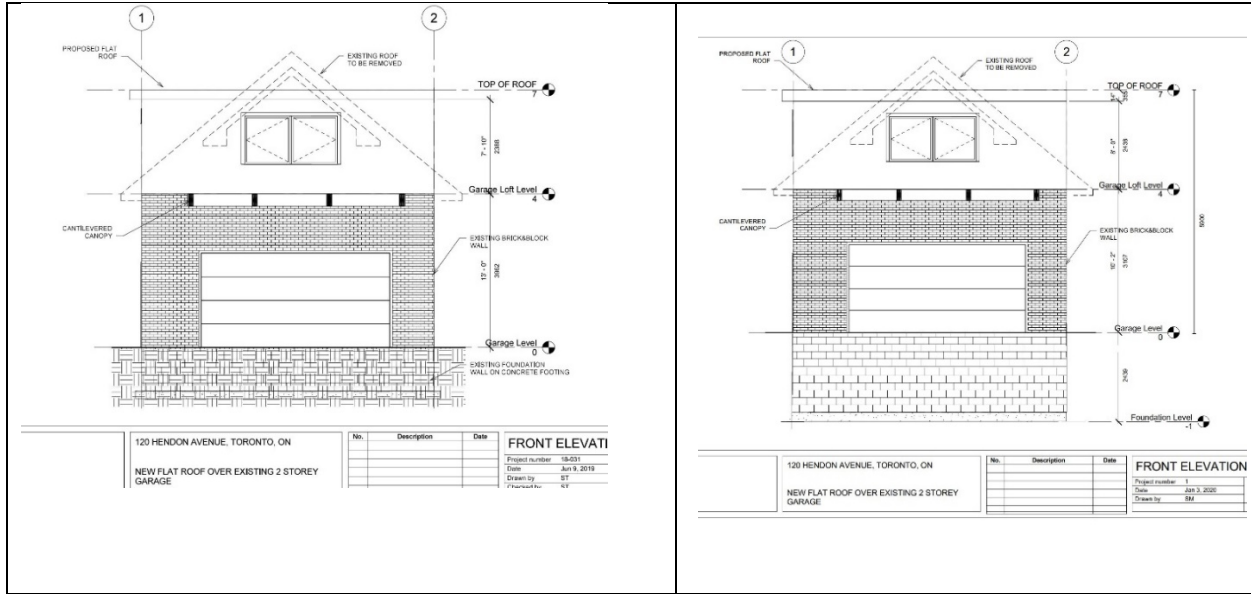
### **This application**

Some five months after Chair Lord's decision, Mr. Mukherjee applied again, this time for the single height variance of 5.9 m. Mr. Mukherjee says he drafted the second set of plans himself to save money. Except for an additional plan showing the basement layout, they appear to be the same drawings, but with the vertical dimensions changed.

The description of the proposed work stated: "Remove existing sloped garage roof, replace with new flat roof construction." The plan examiner advised that the plans were incomplete, and it is not clear to me what was Mr. Mukherjee's response.

**Figure 3. Comparison of front elevation plans.  
Left: previous TLAB application; right: present application**

**Decision of Toronto Local Appeal Body Panel Member: T. YAO**  
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The previous plans submitted to Member Talukder are dated June 2019, while the new plans are January 2020. The author of the left-hand plans is “ST”. Neither set of plans contain a cross section, which would more clearly indicate what is to be done. The ST and Mukherjee plans do not show a dimension for the height of the peaked roof, a matter I will discuss in the next section on page 6.

**Table 4. Comparison of interior heights**

	First set of plans	Second set of plans
Vertical dimension of roof	Not marked	.355 (1.2 ft)
Vertical dimension of loft	2.388 m (7 ft 10 in)	2.438 m (7 ft 10 in)
Vertical dimension of first floor	3.962 m (13 ft)	3.107 m (10.2 ft)
Total of above dimensions	6.350 m (20.8 ft) Excluding roof thickness	5.9 m (19.4 ft) Excluding basement
Basement	none	2.439 (8 ft)
Height variance sought	6.65 m	5.69 m



Figure 4. Sample basement

Mr. Mukherjee evidently also intends to build a full basement. He has disclosed pictures of possible basement ideas (Figure 4, left) which appears to have a food preparation area. He said in written submissions:

The basement pictures (which are older pictures of 118 Hendon Ave and 120 Hendon Ave) were going to be for me to demonstrate how one could use a space for living even though it is less than OBC requirements. Due to the lack of time, I did not get that far in my examinations.

The proposed basement is so poorly presented that none of the witnesses talked about it, including Ms. Pandey, his planner. In my view the explanation of what was intended was confusing for her, the neighbours, the City and me.

It is unclear how the present garage floor, presumably slab on grade, is going to be handled. Plan 2020-6, showing the east wall next to Mr. Kang, will need to be underpinned, tricky to construct, since there is a zero setback and Mr. Kang will presumably not allow trespass on his property. I'm not sure if there will be eavestroughs. The planning and engineering considerations of this development go beyond shadowing and privacy and the plans lack sufficient detail for me to attach as a mitigating condition.

### **The height of the existing roof**

This is a key consideration. Mr. Mukherjee has access to his own garage and could easily measure the height of the peak with a tape measure, but he has not done so nor marked it on the present plans. Mr. Davidson, the City lawyer, believing that the plans were reliable, attempted to scale them and thought the peak was 7.5 m, but I place no reliance on this as he was not a witness. Mr. Kang testified he estimated the peak at "6.3 to 6.5 m tall." Mr. Kang has 10 years' experience as an architectural technician.

In his Reply to Kang submissions, Mr. Mukherjee wrote, "I used 6.7 m as a conservative figure which I arrived at from the first plan I submitted in 2018 which was prepared by an architect." Mr. Mukherjee also submitted that Dr. Winsborough "very clearly" said that the existing peak height is 6.7 m. This is not what the transcript says.

Mr. Davidson. . .how exactly did you create this model, um unless you went and measured the heights et cetera?

Dr. Winsborough: Ah sure. I received the information for the dimensions of the building from Mr. Mukherjee and I inputted them in my model, and I did some manual calculations as well to come up with kind of how this is determined based off of what the model projections are. It's from a program.

Based on all this, the witness I have the most confidence in is Mr. Kang. He is the only one to testify under oath to this fact and who has seen and estimated the peak. Using Mr. Kang's numbers, the proposed flat roof will be 0.6 to 0.8 m (2.0 to 2.6 ft) lower than the existing peak. Member Talukder refused a height variance of 6.65 m, which if authorized, would have created a new roof **higher** than what exists.

Perhaps ST thought the roof would be removed so there was no point in accurately documenting its dimensions. However, ST had an obligation to accurately mark the dormer's placement. The decision maker has different needs from the contractor. I find that the plans prepared by ST are insufficient for me to determine impact and this is a serious flaw in Mr. Mukherjee's presentation.

### **Official Plan intent**

It is accepted that the intent of the Official Plan is to allow change but limit it to development that “**respects and reinforces the physical character**” of the surrounding area. The following are verbatim statements from the Official Plan:

2.3.1 Some physical change will occur over time as enhancements, additions and infill housing occurs on individual sites. A cornerstone policy is to ensure that new development in our neighbourhoods respects the existing physical character of the area, reinforcing the stability of the neighbourhood.

And:

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

(c). . .prevailing heights, massing, scale, density and dwelling type of nearby residential properties.

(e) prevailing **location, design and elevations** relative to the grade of driveways and garages.

In order to apply these sections, there is a two-part test. The planner must first “delineate” a geographic area (the “neighbourhood”) and second, ascertain its physical characteristics. For an ancillary building, this was not an easy task, since statistics on ancillary buildings are not available and aerial data do not come with measurements. Therefore, neither planner was able to follow the policy direction in 4.1.5. Nonetheless

the Official Plan obliges them to ascertain certain metrics such as “prevailing heights” etc. in the neighbourhood.

Ms. Pandey stated:

We see there is intensification going in the neighbourhood. It has been existing in co-harmony with the neighbourhood since 1953. So, in my planning opinion, the structure was already there and so it is a continuation of the old form. And refurbishment of the old structure from a sloped roof to a flat roof.

Mr. Romero stated:

47. The intention of [the Official Plan policy, as described above, is to ensure that three aspects of garages are considered: **the location, the design, and the elevation**. [these are words in the Official Plan] This policy ensures that a garage appropriately respects and reinforces the character of a neighbourhood and fits within the streetscape.

48. As mentioned above, my review included over 70 Committee of Adjustment/TLAB decisions. A review of these decisions has shown that there have been no variances granting an approval for increased ancillary structure height.

Following the directive in the Official Plan, I consider first the **location**. Mr. Romero said that although there were other detached garages, particularly on Hendon Ave, the most prevalent form of development was one and two storey homes with integrated garages. Ms. Pandey said:

The impact on the streetscape is negligible.

Mr. Romero said that:

The massing can be seen from the street

and that the presence was “noticeable.” On Hendon, there are many bungalows with side driveways leading to rear garages. The porosity of the streetscape makes even limited views a consideration. The Official Plan requires change to be “sensitive, gradual and to fit the existing neighbourhood”<sup>1</sup>. “Gradual” implies that the change is not abrupt or create marked departures. I find this rearrangement of massing at this rear yard location does not respond to this sentence in the Official Plan. It will look bulkier, and the bulk is already large. It is a marked departure from what exists in other rear yards.

I next consider the **design**. “Elevations” in (e) refers to established grade and is meant to prohibit below grade garage driveways and I do not see this as applicable here. Below, Figure 5, is side view provided by Mr. Mukherjee to Ms. Pandey.

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<sup>1</sup> Physical changes to our established Neighbourhoods must be sensitive, gradual and “fit” the existing physical character.



Mock Up Provided by Client of Current vs Proposed



To begin with Ms. Pandey conceded that the garage is unique<sup>2</sup>, and by inference, cannot meet the test of fitting in with a prevailing neighbourhood characteristic. Mr. Romero went further and looked at the flat roof design versus the present attractive (my word) peaked roof. He said that other principal buildings have a pitched roof, and this form of design is favoured in the zoning by-law since a principal building with a peak roof can be 10 m high whereas a flat roof building can be only 7.2 m high. A peak roof “breaks” the upper-level massing, he said, whereas a flat roof has all the massing “more towards the top.”

Mr. Kang said, in reference to the existing roof:

The impacts of this height are mitigated by the fact that the existing garage has a roof that slopes away from the lot line.

Ms. Pandey said that this is a “continuation of the old form.” I disagree with her. The flat roof has a greater impact on the two closest neighbours than a peaked roof. The plans show that the loft floor will be relocated some 2 to 2.6 feet below the present one. The second-floor interior space will be much more usable, with greater potential

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<sup>2</sup> She said, “So [s. 4.1.5 of the Official Plan] says the development will respect and reinforce the existing physical character. The existing physical character is an existing integrated garage. [i.e., all the other houses have integrated garages.] **The situation is unique.** Where the structure has already been existing since 1953 and the owner is trying to replace the sloping roof with a flat roof. In my planning opinion, when we assess any application, whether it respects, we judge it on compatibility. The compatibility is also measured in terms of privacy and shadow study -- I’m not an expert on shadow study, but I have read the reports, which say that two hours of shadow will be there, which is not an excessive amount compared to the other municipalities.”

for more intense activity than its present storage use. I consider the design is not in conformity with the Official Plan in terms of being sensitive, gradual and fitting in.

Turning to **elevation**, which I interpret as heights, Ms. Pandey relied on the shadow studies to dismiss height concerns. Mr. Romero reviewed the words of s. 4.1.5, and found (as did Ms. Pandey), that the prevailing characteristic was integrated garage and the few detached garages that do exist, are not of the height, massing or scale of the existing garage.

In conclusion, the Official Plan directs me to look at nearby garages, none of which have these characteristics of either the present structure or proposed one. I find that the Official Plan policy of respecting and reinforcing the physical characteristics of the neighbourhood is not met.

### **Restricted window size as a condition**

Mr. Romero recommended to the Committee of Adjustment that the height be limited to 5.35 m **and** the windows be restricted in size.

. The proposed windows on the east and west elevations shall be limited in size to 0.61 metres in length and 1.219 metres in width.

Mr. Mukherjee rejected the height limitation but was willing to accept the window condition and added that if Mr. Kang wanted, he would install frosted glass. Mr. Kang pointed out that frosted glass as a permanent condition was unenforceable.

In *Degasperis*, the Court rejected an offer by Degasperis's lawyer to restrict an 87 m<sup>2</sup> balcony (3.8 m permitted) to 32 m<sup>2</sup> by screens and other measures. In criticizing this offer, Justice Matlow said:

This too repeats many of the same errors described above. The focus is on impact. There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive [dealing with a distinct rationale for each of the four tests]. Despite section 45 (9) of the Act, the restriction imposed requiring screening of the balcony and use of only "about 32 square metres" is beyond the scope of the Board's authority. The use that can be made of a balcony does not change the fact that the balcony still remains a balcony. As well, the notion that the restricted use of the balcony could or would be effectively enforced is unreasonable. *Vincent v. Degasperis*, 2005 CanLII 24263 (ON SCDC)

I am in agreement with Justice Matlow that in this instance a condition should not be used to "fix up" or mitigate a variance that does not meet one of the *Planning Act* tests.

### **Zoning intent.**

Before finding whether or not the intent of the zoning bylaw is maintained, the decision maker has to ascertain its intent. This is done by looking at the relevant sections and trying to find what is the purpose behind those sections.

This is a garage, so the first relevant concept is “ancillary”, which is defined as:

naturally and normally incidental, subordinate in purpose or floor area, and exclusively devoted to a permitted use, building or structure.

Since the principal building use is residential, the zoning by-law sees the garage as an ancillary in purpose and floor area. In the Chapter on residential buildings the By-law has a section entirely devoted to ancillary buildings, starting with “general” provisions and working through specific topics. The general section says:

- Reg.10.5.60.1 (2) “An ancillary building cannot be used for living accommodation.” “Living accommodation” is not defined, so it has its ordinary meaning of where a person sleeps, eats and bathes on a regular basis.
- Reg.10.5.60.1 (3): an ancillary building can have food preparation or sanitary facilities, but not both.

Next follow regulations on location, setbacks, separation which are not relevant. Then we come to “Height”.

- Reg. 10.5.60.40 (2) states the maximum height of an ancillary building is 4 m.
- Reg. 10.5.60.40 (3) An ancillary building cannot have more than one storey. (A basement is not a storey for this purpose).

There are three further regulations on floor area, encroachments and coverage.

Reg. 10.5.60.50 limits the floor area of ancillary buildings to 40 m<sup>2</sup>, for lots under 12 m frontage. The property has a frontage of 10.95 m and the garage is 7.569 x 7.671 or 58 m<sup>2</sup>.

Reg. 10.5.60.70 deals with eaves that encroach into a zone .15 m from the lot line. The existing eaves project **into** Mr. Kang’s lot.

Reg. 10.5.60.80, limits the coverage of ancillary buildings to 10% of the lot area (50.7 m<sup>2</sup>) and 58 m<sup>2</sup> exceeds this.

Taking all the above into consideration, I find that the legislative intent is for relatively small, ancillary buildings, perhaps used for storage of vehicles or garden

implements. They are relatively short in height, restricted to one storey. They are prohibited from locating in front yards. If they are in rear yards, they can be afforded some relaxation from side yard and rear yard setback requirements. Finally, they are not to be used for human habitation. I now turn to the evidence.

Mr. Romero said that the zoning intent was to maintain a consistent pattern of relatively small ancillary buildings and thereby mitigate impacts on neighbours:

The height provision for ancillary structures, . . . is to maintain a consistent pattern of development between adjacent properties. This provision is also intended to mitigate issues related to overshadowing, privacy, and overlook.

I agree with Mr. Romero. Ms. Pandey relied on Dr. Winsborough's shadow studies, from which she found a "negligible" impact. Mr. Kang's shadow study showed some shadowing, for example between 3 and 4 PM on September 21. Impacts should not be offloaded on the neighbours. In the previous TLAB decision, Mr. Lee (another neighbour who did not appear in this hearing) said he has planted cedars to mitigate the impact and Dr. Winsborough said that she regarded continuation of such cedars are being part of her conclusion of no difference in impact. I consider the overlook, privacy and shadow evidence was unreasonably minimized.

Under the zoning by-law the intent is to restrict the highest point to 4 m. The side wall is already 3.962 m, and Mr. Mukherjee proposes to increase it to project another 1.73 m<sup>3</sup> (5.6 ft). Most people would not welcome a neighbour erecting a blank wall this high when it is already on their property line. It would have an unacceptable adverse impact on them.

In cross-examination of Mr. Romero, Mr. Mukherjee said, "So are we squabbling over 34, 35 cm? My understanding is that the wall height is 5.3 m with the same roof. . ." . Mr. Romero's answer was, "No, it's not, because there is a distinction between where the wall height is and what's proposed, even in some of those images from 5.69 to 5 m to maximum wall height is 70 cm, so it's not insignificant."

This interchange misses the point. The variance process is not a bargaining exercise. The legislation says that the proponent must establish on the balance of probabilities that the variance meets the four tests, including maintaining the general intent of the zoning by-law.

In concluding this section, the scheme of the Zoning By-law is to relegate ancillary buildings to secondary roles, in terms of height, location, floor area, and use. I find that the zoning intent is not maintained.

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<sup>3</sup> 5.69 – 3.962 = 1.728

## Minor

The word “minor” connotes a qualitative as well as quantitative assessment. Justice Matlow stated, “It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is **too important** to be considered minor. (**Vincent v. Degasperis**, 2005 CanLII 24263 (ON SCDC), par 12, my bold.)

The development sought here is not just a comparison between 5.35, 5.69 and 5.9 m. The purpose is a flat roof, which greatly increases the usability of the second storey and creates a space which is hard to ensure remains ancillary. This is too important to be considered minor, especially because the construction is on the lot line, contains a basement proposal and the preexisting ancillary building is already very large. My finding is that the variance is not minor in importance.

## Desirable for the appropriate development of the land

It is difficult to find this is desirable for the appropriate development, when the other three tests are not met. I have found that this development will have impacts on the neighbours, which I regard as unacceptably adverse. The request is for a variance to one of the most noticeable performance measures -- height. I have doubts about the adequacy of the planning of the basement, which was not discussed with Ms. Pandey. The repurposed and not-to-scale plans, whose author did not testify, leave me with doubts. I return to the question of onus. I am not of the opinion that this variance is desirable for the appropriate development of the land or structure.

## Conclusion

I find the variance satisfies none of the tests set out in the *Planning Act*.

## DECISION AND ORDER

I allow the appeal and set aside the Committee of Adjustment decision. The variance to allow a height of 5.69 m for an ancillary building is not authorized.



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Ted Yao  
Panel Chair, Toronto Local Appeal Body