

# DECISION AND ORDER

**Decision Issue Date** Tuesday, June 08, 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): DENNIS OLEARY

Applicant(s): BATTAGLIA ARCHITECT INC

Property Address/Description: 117 IMPERIAL STREET

Committee of Adjustment File

Number(s): 20 114233 STE 12 MV

**TLAB Case File Number(s): 20 208322 S45 12 TLAB**

**Hearing date: May 4, 2021**

**Deadline Date for Closing Submissions/Undertakings: N/A**

**DECISION DELIVERED BY JUSTIN LEUNG**

## REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Battaglia Architect Inc.	Applicant	
Iraj Firouzy	Owner/Party	Sarah Hahn
Dennis O' Leary	Appellant	
Bill Ford	Participant	

## INTRODUCTION

This is an Appeal from a decision of the Toronto-East York Committee of Adjustment (COA) relating to a Variance for 117 Imperial Street (subject property).

The Variance had been applied for to the COA to permit the construction of a two-storey detached house with an integral garage, a rear basement walkout and a rear first floor deck.

This property is located in the Yonge-Eglinton neighbourhood of the City of Toronto (City) which is situated south of Tranmer Avenue and bounded by Oriole Parkway to the west and Duplex Avenue to the east. The property is located on Imperial Street, south of Tranmer Avenue and north of Chaplin Crescent.

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

## **BACKGROUND**

The Application consists of the following requested Variance:

### **1. Chapter 10.20.40.40.(1)(A), By-law 569-2013**

The maximum permitted floor space index of a detached house is 0.60 times the area of the lot (267.55 m<sup>2</sup>). The detached house will have a floor space index equal to 0.69 times the area of the lot (307.68 m<sup>2</sup>).

This Variance was heard and approved at the October 8, 2020 Toronto-East York meeting.

Subsequently, an Appeal was filed on October 20, 2020 by Dennis O'Leary. The TLAB received this Appeal and scheduled a Hearing on May 4, 2021 for all relevant Parties to attend.

## **MATTERS IN ISSUE**

The Appellant, Dennis O'Leary, contends that, at the COA, issues had emerged relating to procedural fairness and natural justice which had inhibited his ability to participate in the COA meeting when they were discussing this Variance proposal. He further states that the Applicant had made abrupt changes to their proposal directly preceding the COA meeting which did not afford him, and other interested Parties, sufficient time to properly assess the revised proposal and to adjust their comments accordingly. Finally, the Appellant argues that the drawings that have been provided to the City are inaccurate and that there may be additional Variance requests which have not been properly identified by City staff.

The Applicant's legal counsel responded that they have submitted drawings and other related materials to the TLAB which accurately reflect what their client is proposing at this property. They further contend that erstwhile attempts have been made to engage and discuss the proposal with local residents just prior to the

scheduled COA meeting. In addition, they argue that the proposal constitutes good planning and that the TLAB should uphold the approval of the COA.

Here, the TLAB will need to analyze the proposal as presented to determine if it, in its current form, meets normative standards as established in related Planning legislation and policies. The Tribunal would also look to ensure that proper procedures have been adhered to in the handling of this Application at the Appeals stage so as to preserve and uphold the public interest.

## **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').

### **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 *Planning 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

## **EVIDENCE**

The Hearing commenced with opening statement by the Appellant Dennis O'Leary. He indicated that there were other residents who were in attendance at the Hearing, who are not registered Participants and Parties. However, he stated that his Appeal was filed in conjunction with these other residents. Mr. O'Leary proceeded to outline that the original proposal had a higher FSI Variance, along with other Variances that were requested. However, directly preceding the COA meeting, the Applicant had elected to revise their proposal to only request the FSI Variance. In relation to this, Mr. O'Leary contends that the revised proposal brought before the COA did not contain revised drawings. As such, he argues that City staff have not been able to review this revised proposal to, in his opinion, sufficiently determine if only one Variance request is necessary to facilitate for this proposed in-fill house.

Mr. O'Leary further stated that he believes that the Variance request before the TLAB constitutes 'institutional or density creep' as its potential approval could result in future Variance proposals for even greater FSI variance requests on other neighbourhood properties. He goes on to argue that the TLAB should not approve this Variance request as he believes there are actually other Variances which have not been identified as part of this proposal.

The study area as proffered by the Applicant's Expert Witness is also questioned by Mr. O'Leary. He states that he believes the study area should be limited to Imperial Street as it is a street which possesses unique attributes. He also cites 123 and 125 Imperial Street which had FSI Variance requests of 0.67 and .0667. It is argued by Mr. O'Leary that those approved Variances meet the four tests for Variance, as per the *Planning Act*, and that the Variance request before the Tribunal now for 0.69 would not be compatible or consistent with the neighbourhood characteristics.

Mr. O'Leary stated there was a person in attendance who he intended to call to provide Expert Witness testimony to the TLAB. However, he did note this person had not registered with the Tribunal prior to this Hearing, as per *TLAB Rules*.

I indicated that I would only be able to permit registered Parties and Participants to actively participate in this Appeal matter. The *TLAB Rules* stipulate that interested parties must register with the TLAB in order to provide testimony to the Tribunal on an Appeal. With regard to Expert Witnesses, they must also have been presented to the Tribunal prior to the scheduled Hearing and disclosure documents outlining their testimony also need to be submitted, in accordance with the *Rules*. As such, I stated that while the other residents which Mr. O'Leary had identified are permitted to observe the Hearing, they would not be able to participate directly in this matter.

Sarah Hahn, legal representative for the Owner, proceeded with her opening statement. She states that the Appellant has not submitted any disclosure documents and does not have an Expert Witness. She further describes that the Appellant had not been an active participant at the COA meeting where this matter was initially assessed at. She contends that her client has attempted to address public comments relating to this proposal by reducing it to one Variance request. Ms. Hahn stated that Jonathan Benczkowski, her proffered Expert Witness in land use planning, would be providing testimony to the Tribunal which would materially demonstrate that this proposal meets the four tests for Variance, as per the *Planning Act*, and constitutes good planning.

Mr. O'Leary stated that, due to my ruling that unregistered Parties and Participants could not actively participate herein, he would have to present evidence to the TLAB himself. He proceeds to reiterate that he believes the drawings before the Tribunal are not substantively similar to those which had been provided at the COA meeting.

Mr. O'Leary then presented the Applicant's site plan to the Tribunal and raised issues with how it had been drafted. He contends that the front yard setback provided here is not accurate and that the proposed in-fill house here actually protrudes to a greater magnitude into the front yard. As a result, this proposed house would not be 'in line' with the two adjacent houses. With this, he also questions if the front yard setback would be compliant with the requisite Zoning By-law.

With respect to the building height, Mr. O'Leary outlines that he had reviewed the Applicant's drawings and found that there are grade differentials in the front and rear portions of this proposed house. As such, he raises concerns that the building height for this proposed house would also not be Zoning compliant.

Mr. O'Leary then presented a Microsoft Excel spreadsheet to the TLAB which comprises all houses which had been assessed in the study area contained in the *Expert Witness Statement* of Mr. Benczkowski. The spreadsheet assesses the FSI of these houses and compare it to the subject proposal. His analysis of FSI for all new built houses in this study area finds there is a mean (average) is 0.67. With this, Mr. O'Leary argues that this proposals FSI request of 0.69 would be greater than what has previously been approved for this local area.

Ms. Hahn then proceeded to cross-examine Mr. O'Leary. She inquired as to the issues which Mr. O'Leary had previous described during the COA meeting. Mr. O'Leary responded that he was at his cottage property and had technical difficulties which prevented him from participating in the COA meeting. Ms. Hahn then inquired as to why Mr. O'Leary had not submitted written comments to the COA. Mr. O'Leary responded that he, along with some other local residents, had initially approached the Owner here to discuss their issues with the proposal and had attempted to discuss the possibility to reduce the FSI Variance request from 0.69 to 0.67. However, this discussion, and the written material related to it, was not submitted to the COA as he did not believe it to be pertinent to the Committee and its deliberations. Mr. O'Leary further commented that the Owner did not appear willing to accept the proposal from him. He went on to describe that the Committee had imposed a condition that the building depth of this proposed house would not exceed that of the adjacent property of 119 Imperial Street. However, he continues to have concerns about the rear facing deck and if it is Zoning complaint.

Ms. Hahn asked if Mr. O'Leary saw a difference between a renovation of an existing house and a new build. Mr. O'Leary acknowledged that there is. She then asked if he believed that City staff had not reviewed the revised proposal that had been brought before the COA. Mr. O'Leary responded that it does not appear that this has occurred. She then asked that if the City staff had not provided additional comments on the revised proposal, could that be interpreted that they had no concerns with the proposal. Mr. O'Leary responded that he could not speculate on this as, he contends, the original proposal which had several Variance requests was not supported by City staff. As a result, the Applicant had removed the other Variance requests and reduced the FSI to 0.69. However, while there is no Planning staff comments available, he cannot comment as to whether or not staff are now supportive of this revised proposal.

Ms. Hahn then requested than Mr. Benczkowski take the stand to provide Expert Witness testimony. I indicated that I had review Mr. Benczkowski's curriculum vitae and would be able to qualify him in the field of land use planning. Mr. Benczkowski commenced by requesting that 3 exhibits be entered to form part of the record. I marked the following:

- Exhibit A: Document Book
- Exhibit B: Expert Witness Statement
- Exhibit C: Zoning By-law extract within Document Book

Mr. Benczkowski then referenced a document that had been submitted yesterday to the TLAB which was to address issues raised relating to zoning compliance for this

proposed house. Mr. O'Leary raised an objection to allowing this material being accepted by the TLAB at this juncture. I responded that this document had not been submitted in accordance with *TLAB Rules* and as such, would be excluded from this Hearing.

Mr. Benczkowski then continued with his testimony to the TLAB. He outlined that the subject property is situated within an RD Zoned area. There is currently a 2-storey detached dwelling on the site. The subject property has a lot frontage of 9 metres and an FSI of 0.6, as per Zoning designation RD 1402, which this property is subject to. Mr. Benczkowski goes on to describe a provision within this Zone which permits a house, built prior to October 1953, to have an addition built to it which would not exceed an FSI of 0.69. In addition, it also stipulates that the addition cannot result in an increase of the building height of the existing house and the side yard setbacks. Mr. Benczkowski does highlight that this provision relates to a proposed addition, and the subject proposal is for a new in-fill house. However, he believes it is relevant to this matter and he would return to this issue later on in his testimony.

Mr. Benczkowski then outlined that the original proposal had 5 Variance requests, which related to FSI, building height, height of exterior main front and rear walls, and height of exterior main side facing walls. He went on to explain that, according the previous Zoning By-law, building height was measured to the midpoint of pitch of the roof. However, with the more recently adopted Zoning By-law 569-2013, it is measured to the top of the pitch of the roof.

The Applicant elected to make revisions to their proposal prior to the COA and proceed with one Variance request for FSI of 0.69. Mr. Benczkowski notes that this is permissible for the Applicant to do, and is not improper as alluded to by Mr. O'Leary.

With regards to Planning staff not providing comments on this proposal, Mr. Benczkowski underscores that staff had provided no comments on the original proposal, which had 5 Variance requests. He acknowledged that their subsequent revised proposal would not have been reviewed by staff just prior to the COA meeting. However, as this matter has now been appealed to the TLAB, he contends that City staff would have reviewed it recently. With this, City staff have elected not to be party to this matter and, as such, Mr. Benczkowski surmises that they don't have concerns with this revised proposal as well.

Mr. Benczkowski references a memo which was provided by City Urban Forestry staff which indicates Urban Forestry staff do not have concerns with the proposal.

Mr. Benczkowski then proceeded to outline his defined study area. This study area is bounded by residential properties which abut the commercial properties and apartments along Eglinton Avenue West to the north, Chaplin Crescent to the south, Duplex Avenue to the east and Eastbourne Avenue to the west. This area was selected as all the properties have RD Zone designation and all properties are within walking distance to the commercial/retail businesses along Yonge Street and to the Yonge-Eglinton area. He also studied all COA decisions for this study area for the last 10 years.

Mr. Benczkowski describes his study area as comprising detached bungalows, 2 and 3 storey dwellings. There is smaller side yard setback between the dwellings. The built form is diverse with newer houses which are typically larger with integral garages.

He then presented a photo study of houses along Imperial Street. Mr. Benczkowski contends that this demonstrates that the building type for this street is not homogeneous but is varied and diverse.

With regards to the *Provincial Policy Statement (PPS)*, Mr. Benczkowski describes this PPS as acting to regulate land development in Ontario. Here, he argues that the subject proposal is consistent with this policy document.

With regards to the *Growth Plan for Greater Golden Horseshoe*, this subject property is located within a built-up area. The Growth Plan promotes intensification while also ensuring that complete communities are achieved. Here, he finds that this proposal is consistent with this policy document as well.

He then outlined Toronto's *Official Plan (OP)* in relation to the subject proposal. He cites the 'Neighbourhood' policies in the OP and states that while an established neighbourhood is stable, it may permit some change over time. While so, that change must act to respect and reinforce the overall character of that particular neighbourhood. With regards to the OP's 'built form' policies, he outlines that the policy does contemplate for in-fill housing, while recommending that such development be complimentary to the neighbourhood it is being located within. The front yard setback of these proposed in-fill houses should also be consistent with other houses along that particular street it would be situated on. In relation to this, Mr. Benczkowski proceeded to describe the front yard setback of the two adjacent houses to this subject property. He then determined the mean (average) of these two properties which informs on what the front yard setback would be for this proposal's in-fill house.

With regards to the grade differential as referenced by Mr. O'Leary, Mr. Benczkowski explains that there are differences in terms of grade on a property. However, the 'established grade' is determined by averaging the two different grades on the property. This calculation would be used by City staff to determine building height.

Mr. Benczkowski also indicated that there will be no second storey balcony and there are only side windows on the east elevation of the proposed house. Those windows are also, as explained by Mr. Benczkowski, positioned at the bathroom and bedroom and will not create overlook or privacy issues to the adjacent properties.

He goes on to describe *Official Plan Amendment 320 (OPA 320)* and how it acts to further define and regulate in-fill development in established neighbourhoods. While OPA 320 has introduced some quantitative assessment methods to analyzing in-fill development, Mr. Benczkowski contends that qualitative assessment methodologies continue to be relevant when assessing Planning proposals. Here, he concludes that the OPA 320 'development criteria' are met as it relates to the subject proposal.

He then outlined a study he had conducted of Variances which had been approved in his defined study area. He focuses on the FSI for the houses of the area

and argues that you must assess each house and its individual attributes to determine if its FSI is appropriate or not.

Returning to discuss the subject proposal, Mr. Benczkowski contends that, besides the FSI Variance, that the other elements of this house comply with Zoning provisions. He also states that FSI is only one element used to regulate the massing of a house and that other Zoning instruments, such as building height and side yard setbacks, are deployed as well. The proposed house, in maintaining a consistent front yard setback with adjacent properties, has resulted in the house sitting being shifted 'back' so it encroaches more into the rear yard of the property. He also concludes that the overall intent of the Zoning provisions has been maintained with this subject proposal.

Mr. Benczkowski finds that the proposal is minor in nature and will not create an adverse impact for the neighbourhood. In terms of desirability of this development, Mr. Benczkowski argues that this proposal will result in an in-fill house which will be compatible for this neighbourhood and will not constitute a form of 'over-development'.

I asked Mr. Benczkowski about the Memo issued by Urban Forestry and if he believes it is indicating they have no concerns with the proposal. Mr. Benczkowski responded that he interpreted the Memo as such, however, it appears Urban Forestry staff have included provisions to address any potential negative issues relating to trees on the site if they occurred later on.

I then inquired about comments which had been raised by Mr. O'Leary about potential inaccuracies with the material which had been presented by the Applicant relating to this proposal. Mr. Benczkowski responded that he believes the material provided to the TLAB is accurate and appropriate. He further explains that there is only one Variance request necessary to facilitate this subject proposal.

I asked about Mr. O'Leary's argument that the FSI Variance request of 0.69 was above what had previously been granted for other houses along Imperial Street. Mr. Benczkowski responded that, and as had been presented in his testimony, FSI is unique in that it assesses a range of factors, including building height and side yard setback, to determine the massing of a house. Due to each lot having different characteristics, this could result in scenarios where a smaller lot could have a house with a higher FSI. He also references again that there is only Variance request for FSI, while all other elements of the proposal are consistent with Zoning provisions. As such, he surmises this proposal would not constitute an 'overbuild' for this site.

Mr. O'Leary proceeded to cross-examine Mr. Benczkowski by inquiring if he resided in this neighbourhood. Mr. Benczkowski responded that he did not. Mr. O'Leary then asked if he had been paid by the Applicant to support their proposal. Mr. Benczkowski responded that the Applicant had retained him as an Expert Witness, however, he had not received direction from them on how to orient his testimony. He is acting to provide evidence to the TLAB which is based on his own professional Planning background and expertise.

Mr. O'Leary then asked if the FSI Variance request here would exceed what is currently existing along Imperial Street. Mr. Benczkowski stated that FSI is not to be



assessed individuality but must analyze the totality of the proposal and all Zoning provisions related to said proposal.

Mr. O'Leary then inquired about the accuracy of the drawings as presented to the TLAB. Mr. Benczkowski responded that he had not prepared these drawings but the dimensions on the drawings were derived and confirmed from the legal survey. Mr. O'Leary then asked if it is accurate to state that the front portion of the proposed house will protrude further into the front yard in relation to the adjacent properties. Mr. Benczkowski responded that he does not believe this is accurate and that the drawings that he has presented to the TLAB demonstrate that the proposed house sitting will result in a front yard setback consistent with the adjacent properties.

In his closing remarks, Mr. O'Leary stated that he while he is a lawyer by training, he is not practicing within the field of Planning law so is not acclimatized to Planning principles and policies. He had anticipated that one of his neighbouring residents, who is also a Licensed Architect, would be called to provide testimony. However, the Tribunal had made a finding that this would not be permissible. While so, Mr. O'Leary expressed concern that if this proposal were approved, that it could result in additional properties with Variances requesting a higher FSI in this neighbourhood.

Ms. Hahn provided closing remarks where she commenced by indicating that she does not believe Mr. O'Leary, as the Appellant, has provided actual Planning grounds as it relates to his Appeal. There were no disclosure documents and no Expert Witness proffered in support of his Appeal as well. With regards to the assertion that the Expert Witness Mr. Benczkowski is paid for his services, Ms. Hahn opined that any potential conflict or bias on the part of Mr. Benczkowski is unfounded as he is required, as a Registered Professional Planner, to provide professional Planning opinion evidence to the Tribunal. She continues by dismissing assertions made by Mr. O'Leary that there are other potential Variances needed as it relates to this proposal. Ms. Hahn contends that if additional Variances were required, her client would have to return to the COA and that, in her summation, the COA would not be favorable in assessing such Variance requests.

I inquired about Mr. Benczkowski's statement about Zoning provisions which allow for houses built prior to a certain date being permitted to construct an addition with an FSI of 0.69 and if this was being used to justify the subject proposal. Ms. Hahn responded that she doesn't believe that was what was being argued. Instead, Mr. Benczkowski was simply referring to that Zoning provision to demonstrate that their proposed in-fill house would be similar to what the Zoning By-law would permit in this neighbourhood.

This marked the conclusion of the Hearing with no further submissions being made to the Tribunal.

In further review of this matter after the Hearing, I requested clarification from the Applicant regarding the drawings provided to the TLAB. I inquired if these drawings had been presented at the COA meeting. The Applicant's legal counsel Ms. Hahn responded that they had not been provided to the COA.

## ANALYSIS, FINDINGS, REASONS

This Appeal matter encapsulated several issues which were presented by the Appellant, who stated he was informally acting to represent several other local residents who were opposing this Variance request. The Applicant, as represented by legal counsel, responded that, while understanding there were local concerns on this Appeal, argued that these issues were not germane here as they were not Planning related. The legal counsel continued by stating that the TLAB should exercise its authority in assessing this Appeal based solely on Planning legislation and policies, and should not be influenced in its analysis through non-Planning matters that have been presented by the Appellant.

The Appellant also raised concerns about the drawings which were submitted to the TLAB and contended they were materially different from what was presented at the COA meeting. He questioned if the single Variance request being proffered here was the only one which would be needed to permit the construction of this in-fill house. His issues were presented within the context that the TLAB would have erred in its authority if it were to permit this Variance request, due to other mitigating circumstances surrounding this proposal.

In assessing this proposal, the TLAB notes that, as per its *Rules*, can only review the proposal which has been brought before it. The Tribunal, as per related legislation, conducts *de novo hearings*. This means that the TLAB must assess proposals brought before it anew and, with Variance proposals, must determine if the proposal before it meets the four tests for Variance, as per the *Planning Act*, and to further determine if the proposal constitutes good planning. The TLAB, while acknowledging there may be other issues which are of local residents' concerns, must act in accordance with these established conventions to ensure that the Tribunal operates properly and to minimize opportunities by which an 'err' in the interpretation of the law may occur.

The Appellant, who presented their material and arguments to the TLAB, had provided a table, composed in Microsoft Excel, to assess FSI of houses in the study area which had been proffered by the Expert Witness Mr. Benczkowski. Here, the Appellant Mr. O'Leary opines that the data that he has gathered and assessed acts to demonstrate that the mean (average) of FSI for houses in this study area to be 0.67. With this, he underpins his Planning arguments to state that the subject proposal which is requesting a Variance of 0.69 FSI would not be in keeping with the prevailing development pattern of the local area. He feigns caution that if this Variance request were permitted, that a potential 'density creep' could occur whereby future property-owners will seek to build in-fill houses which are of increasing FSIs which, in his opinion, would act to destabilize this stable residential neighbourhood. It is noted that Mr. O'Leary's principal arguments against this proposal were supported by this Excel spreadsheet as presented to the Tribunal. It is further noted that in the oral testimony as proffered by Mr. O'Leary, he did not provide specific reference to the four tests for Variance, as per the *Planning Act*, as it related to his arguments in opposition to this proposal. Furthermore, in the addendum which was attached to the 'Notice of Appeal-Form 1', it is noted that it references only 3 of the tests, with the 4<sup>th</sup> test relating to 'general intent and purpose of the Official Plan being maintained' not being assessed. While the TLAB recognizes that residents or 'lay' persons can participate in the Appeal

process, it is further appreciated that all Parties must be properly prepared when engaging in an Appeal matter.

Expert Witness Mr. Benczkowski provided a comprehensive appraisal of the subject proposal and how, in his opinion, it acts to meet the four tests for Variance, as prescribed by the *Planning Act*. In response to the evidence as provided by Mr. O'Leary, he describes that Planning staff had raised no objections to this revised proposal. On the City's *Application Information Centre (AIC)*, it is noted no Planning staff report is posted. Only Urban Forestry staff had provided a memo on this Variance proposal.

As has been established in other TLAB hearings which I have previously presided over where City Legal and Planning staff have been in attendance, it has been explained to the Tribunal that if Planning staff do not provide a report on the Variance Application, that this can be interpreted that they do not have concerns with the

proposal. Moreover, and as was discussed in a recent TLAB matter which I presided over for 60 Meadowvale Drive (TLAB File NO. [20 116476 S45 03 TLAB](#)), City staff are generally provided instruction from City Council on whether to attend an Appeal hearing or not. The non-attendance of City staff for this matter can be reasonably deduced that they don't have any further concerns with the proposal from a public interest perspective. It is noted that Mr. Benczkowski provided similar testimony to the TLAB to support his opinion evidence that City staff were in support of this proposal.

Relating back to this proposal, Mr. Benczkowski, through his testimony, described that the RD Zoning designation, which applies to this property, has a provision which outlines those certain properties which have structures built prior to 1953 are permitted to build an addition so long as the FSI did not exceed 0.69. I had inquired if they were contending that this provision was applicable to the subject proposal, which was for a new in-fill house. Legal counsel Sarah Hahn responded that this was not, in her opinion, what Mr. Benczkowski was asserting. Instead, she argued that his testimony here was to demonstrate that the FSI Variance for 0.69 for an in-fill house would not be a substantial departure to what is permitted in the Zoning By-law which allows an addition which could be increased to 0.69 FSI for mid-20<sup>th</sup> century-built houses. Mr. Benczkowski had also noted that the current house on the site does predate 1953 as well.

Mr. Benczkowski, in his testimony, in responding to the evidence as provided by Mr. O'Leary, accentuated to the Tribunal that the subject proposal here is only requesting one Variance for FSI. However, when assessing other in-fill houses in the study area he had prepared, he notes that several of these houses also, in conjunction with the FSI Variance request, had other Variances for elements such as building height and property setbacks. As such, Mr. Benczkowski argues that the overall scale and impact of those other houses is substantively greater than the subject proposal.

The testimony described above acts to provide a countenance to the evidence as proffered by Mr. O'Leary. Here, Mr. O'Leary indicated that the mean of 0.67 FSI for houses as derived from Mr. Benczkowski's study area is the numerical value which must be upheld for newly built houses in this local area. Here, it is demonstrated that the Zoning provisions for this area have contemplated for a 0.69 FSI. Furthermore, the

absence of City staff comments or active participation in this matter further illustrates that the City, as per established policies in the handling of COA applications, is also not concerned with this proposal.

Mr. O'Leary, while presenting an Excel Spreadsheet depicting FSI data for the local area, did not expound further on this data to discuss how this subject proposal did not meet Planning merits. He did present a singular argument that the mean (average) FSI of houses in the area should not be 'exceeded'. However, he did not provide additional testimony to explain how he arrived at this position from a Planning perspective. As such, the test pertaining to the 'general intent and purpose of the Zoning By-law' is shown to be met here as the FSI Variance request for 0.69 would not be dis-similar to a prospective home-owner building an addition which increased their house size to 0.69 FSI as well. Furthermore, another test for 'is it minor in nature' is being materially met here as the proposal only contains one Variance request while all other elements of this proposal will meet Zoning provisions.

As had been described earlier in this document, the addendum document which Mr. O'Leary provided to the TLAB did not assess the test as it relates to the 'general intent and purpose of Official Plan is maintained'. His oral evidence proffered to the TLAB also did not specifically reference Toronto's *Official Plan (OP)* either. Contrary to this, Mr. Benczkowski, as expressed in his *Expert Witness Statement* and in his oral testimony, provided a detailed analysis of the OP policies, especially those which pertain to in-fill development.

Mr. Benczkowski, directly proceeding his testimony relating to the OP, also expounded upon the *Provincial Policy Statement* and the *Growth Plan for the Greater Golden Horseshoe* to accentuate how this proposal is consistent with provincial policies. With regards to the OP, his assessment of the 'Neighbourhood' and 'Built form' policies were that they, in recognizing the attributes of established residential areas, also contemplates that there will be incremental development activity which may occur as well. While so, such development must be done in a manner which respects and reinforces the prevailing characteristics of those local areas. Mr. Benczkowski posits that this proposed in-fill house is indicative of the regeneration and reinvestment which occurs in local neighbourhoods. Furthermore, and as advanced in the neighbourhood photo study which he presented in his oral testimony, he argues that this local area has a diverse grouping of house styles, composing both older houses and newer in-fill houses.

The testimony of Mr. Benczkowski then proceeded to the 'Development Criteria' of the OP, or also known as *Official Plan Amendment 320 (OPA 320)*. Mr. Benczkowski's argument that OPA 320 tenets were being met with this proposal and can be distilled into the following comments, which formulated his *Expert Witness Statement*:

"I. 4.1 (5)(c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties – In this neighbourhood, the prevailing characteristics in terms of height, massing, scale and density is mixed. Original dwellings are typically lower in density than replacement dwellings. In terms of the range of approved variances over a ten-year period, almost all replacement

dwelling required an FSI/GFA variance. The proposed height, massing and scale of the property is as per the Zoning By-Law. The scale and height of the proposal is modest in relation to other replacement dwellings in the neighbourhood. This includes the immediate context of the Subject Property, which will contribute to the prevailing character in the neighbourhood]"<sup>1</sup>

Mr. Benczkowski's oral testimony emulates the written comments provided above. He argues that the proposed in-fill house is consistent with other in-fill houses which have been built in this local area in the last decade. He surmises that it is

appropriate to compare this proposal to other in-fill houses in the local area context so as to properly frame this proposal. Here, he advances his professional opinion that his

analysis herein has determined that OPA 320 policies are being adhered to with this proposal.

It is noted that Mr. Benczkowski's *Expert Witness Statement* material focuses more on the in-fill houses of the local area context, and utilizes these as an assessment criteria in relation to the subject proposal. While so, it places less emphasis on analyzing the proposal as it relates to existing housing stock of this local neighbourhood. For reference purposes, OPA 320 does contain policies which require a proposal to be assessed as it relates to both the immediate and broader context. While so, and as noted earlier in this document, the Appellant Mr. O'Leary has not presented testimony on OP policies specifically. Furthermore, his cross-examination of Mr. Benczkowski also did not critique his testimony on the OP either.

Absent any other evidence from the other Parties on this issue, I would find that the test relating to 'general intent and purpose of the Official Plan is maintained' has been met with this proposal. Mr. Benczkowski has formulated a rationale study area by which to determine that the policies of OPA 320 are being met by this proposal. This in-fill house has been shown to not be a 'destabilizing' element if it were to be introduced into this neighbourhood. Mr. O'Leary's contention that the study area be restricted to Imperial Street is unorthodox as, and has been established in other TLAB Appeals, a study area is structured to analyze several streets and neighbourhood blocks. This is done to ensure the 'immediate and broader contexts', as prescribed by OPA 320, can be properly assessed and disseminated.

Mr. Benczkowski, as it relates to the test of 'desirable for the appropriate development or use of the land', contends that this in-fill house will result in a dwelling which will meet the needs of a family. In terms of the building type proposed, it would be consistent with other diverse building types which currently exist in the area. Finally, he finds that the Variance request here to be consistent with other approved Variances relating to other in-fill houses of this local neighbourhood. In relation to this, it is noted that Mr. O'Leary, as part of his addendum to his Appeal form, did express his opinion on the FSI Variance request as follows:

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<sup>1</sup> Benczkowski, J. *Witness Statement of Jonathan Benczkowski*. January 2021, pp. 10

“The applicant misrepresented to the Committee without evidence that the ‘average’ coverage on the street was 0.67, whereas the average is considerably lower than that. 0.67 represents the maximum previously allowed by the Committee on the street.”<sup>2</sup>

However, this runs contrary to the oral evidence which Mr. O’Leary presented to the TLAB where, in the Excel spreadsheet he provided at the hearing, he argued that the mean (average) of houses in the local area was an FSI of 0.67. The written and oral submissions of Mr. O’Leary appear to be in conflict with each other. Furthermore, and as had been expressed earlier in this document, this is a *de novo hearing* so what occurred at the COA meeting has no direct bearing on this Appeal.

Mr. Benczkowski had stated that the FSI of an in-fill house can be impacted by other variables such as lot size. For example, a house on a smaller lot could result in a higher FSI. Moreover, the study area as proffered by him showed that several in-fill houses had requested multiple Variances, whereas this subject proposal is only requesting one Variance. Whether the proposal is different than what had been originally proposed by the Applicant is irrelevant as the Tribunal must assess the proposal and materials currently before it. Within this context, I find that the test for ‘desirable for the appropriate development or use of the land’ is also met here. This proposal is to demolish an existing house and replace it with a new in-fill house. No additional residents are being introduced to this residential neighbourhood. In addition, while the proposal could potentially be ‘above’ the mean of 0.67 FSI of existing in-fill houses, it is recognized that this proposal is only requesting the one Variance for 0.69 FSI while complying with all other provisions of the Zoning By-law. As such, its impact to the neighborhood has been minimized as a result.

With the material that has been presented to me, I find that the Applicant’s arguments pertaining to this proposal to be more persuasive. They have provided a well-prepared and rationale set of arguments as to how this proposal meets the four tests for Variance, as per the *Planning Act*, while also meeting other requisite Planning policies and legislation. Moreover, they have acted to present their oral and written submissions to the TLAB properly and in accordance with its *Rules*.

With regard to the Appellant, while the Tribunal recognizes potential local resident concerns relating to development, it is noted that an Appeal to the TLAB must be done in a formalized and structured approach which is the convention of administrative Tribunals. Arguments presented must also be limited to Planning principles so as to ensure the TLAB does not deviate from its jurisdiction and authority.

As such, I conclude that the subject proposal constitutes good planning, and I do not find that the arguments posited by the Appellant to overturn the decision of the COA to be sufficiently compelling or convincing.

In dismissing the Appeal herein, I recognize that the drawings which were before the TLAB had not previously been provided at the COA stage. As such, and as a discretionary measure to maintain the public interest, I find that the inclusion of a

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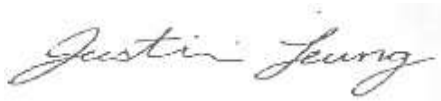
<sup>2</sup> O’Leary, Dennis. *Notice of Appeal: Schedule ‘A’*, October 2020, pp. 2

condition for a review of the drawings to determine substantial conformity would be appropriate here.

## **DECISION AND ORDER**

The Appeal is refused, and the Committee of Adjustment (COA) Decision, dated October 8, 2020 is upheld. The Variance is permitted, subject to the condition as contained in the original COA Decision Notice and subject to the condition that the building must be constructed substantially in accordance with plans attached herein as Appendix 1.

**X**

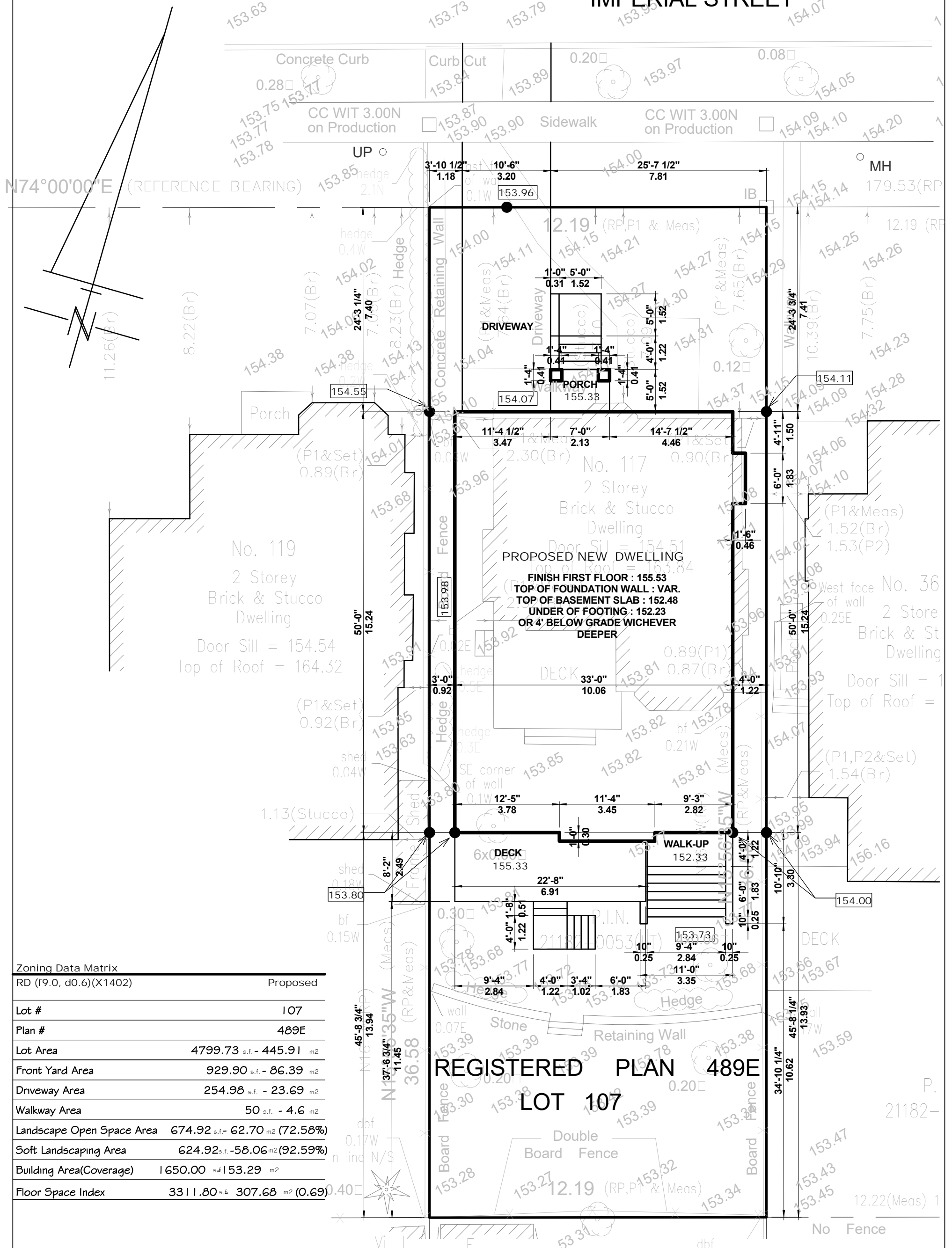


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Justin Leung  
Panel Chair, Toronto Local Appeal Body

## Appendix 1-Plans

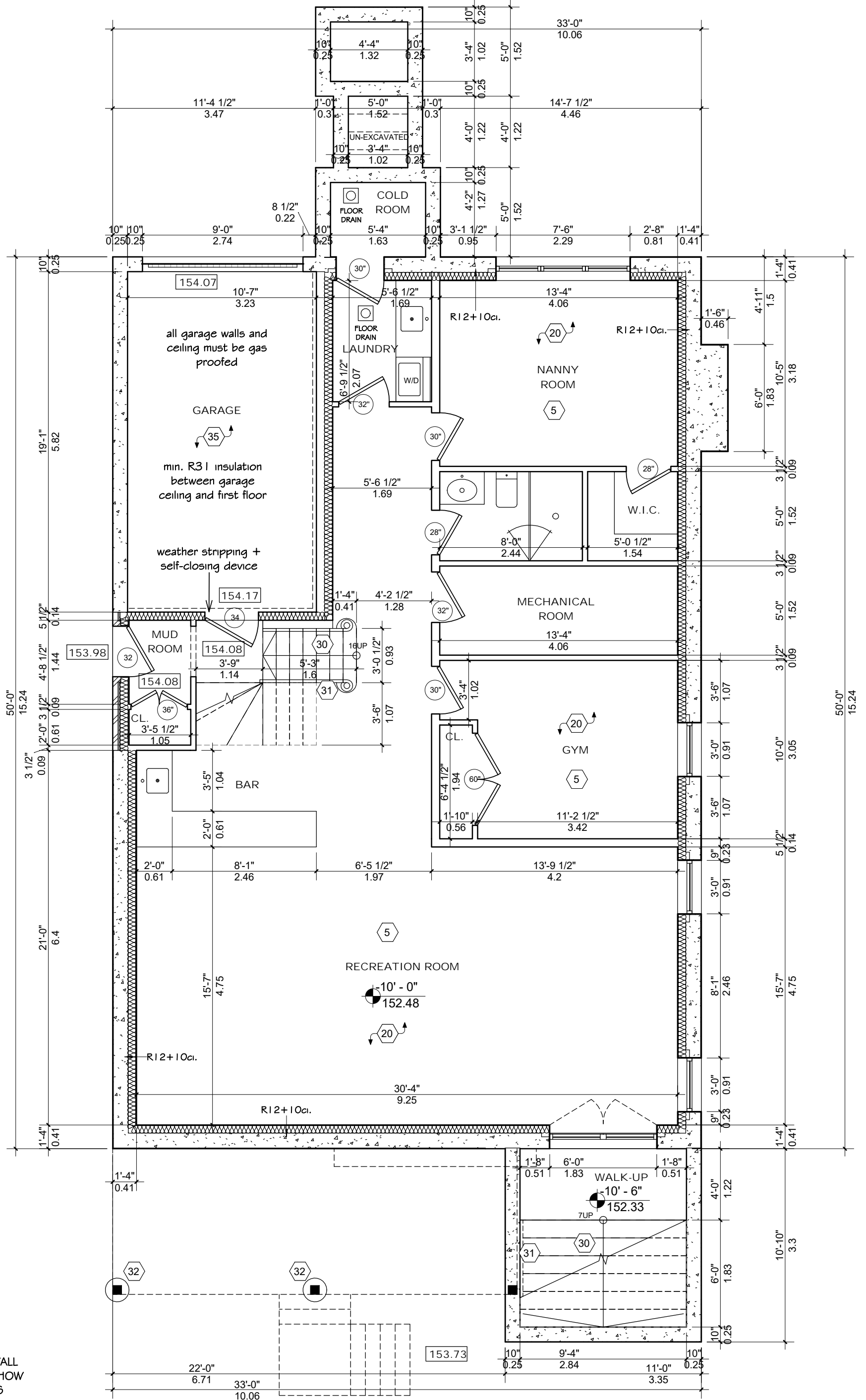
# IMPERIAL STREET



Zoning Data Matrix	
RD (F9.0, d0.6)(X1402)	Proposed
Lot #	107
Plan #	489E
Lot Area	4799.73 s.f. - 445.91 m <sup>2</sup>
Front Yard Area	929.90 s.f. - 86.39 m <sup>2</sup>
Driveway Area	254.98 s.f. - 23.69 m <sup>2</sup>
Walkway Area	50 s.f. - 4.6 m <sup>2</sup>
Landscape Open Space Area	674.92 s.f. - 62.70 m <sup>2</sup> (72.58%)
Soft Landscaping Area	624.92 s.f. - 58.06 m <sup>2</sup> (92.59%)
Building Area(Coverage)	1650.00 s.f. - 153.29 m <sup>2</sup>
Floor Space Index	3311.80 s.f. - 307.68 m <sup>2</sup> (0.69)

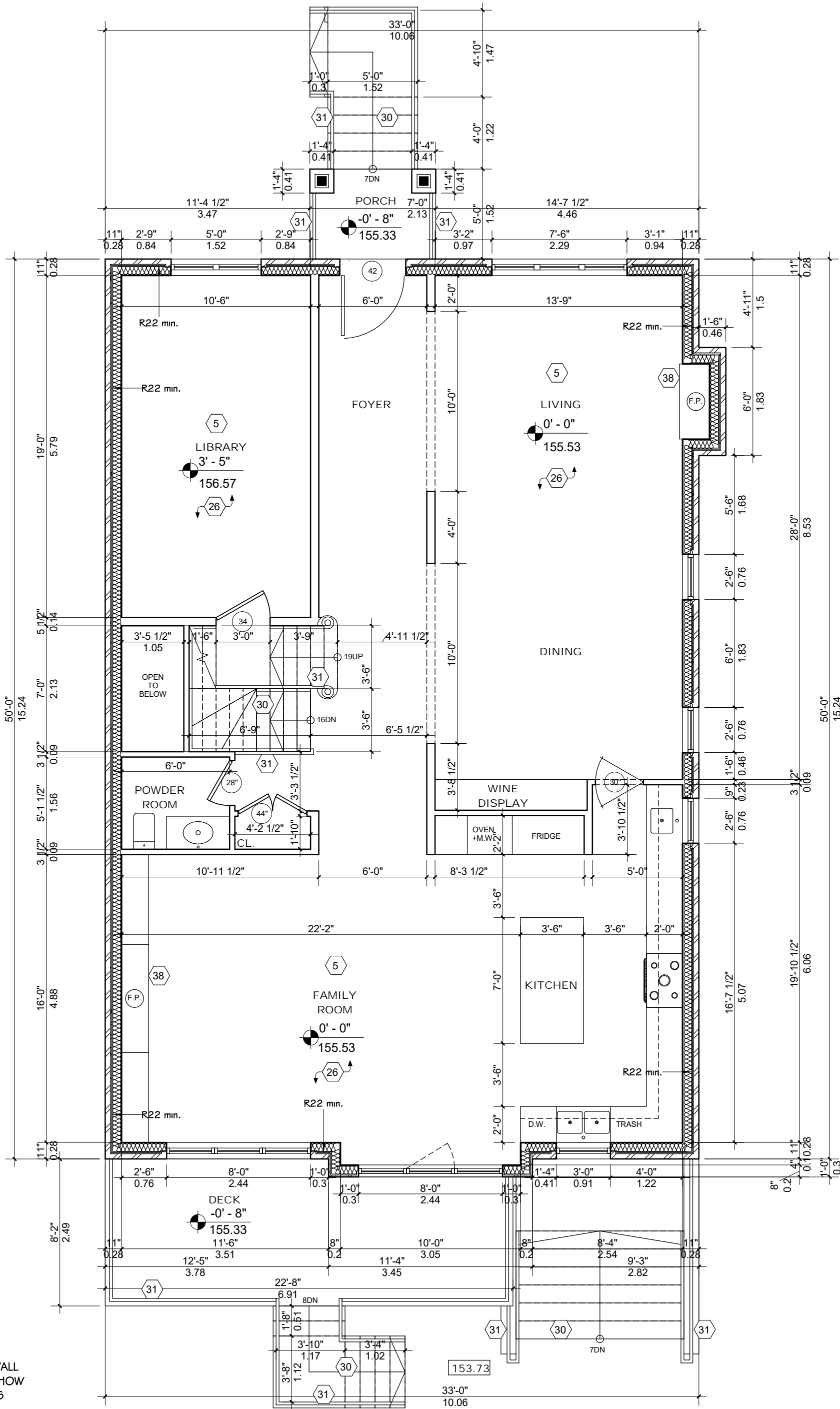
designed by:  <div style="text-align: center;"> <b>ALI SHAKERI</b>            T.416 8213960   <b>ARCICA INC.</b>            326 SHEPPARD AVENUE EAST,            M2N 3B4 TORONTO, ONTARIO         </div>	Project: <div style="text-align: center;"><b>117 IMPERIAL STREET</b></div>	Revisions: NOV 20,2020-Draft DEC 23,2020-Draft 2 DEC 24,2020-issued for TLAB 1	1. ALL WORK SHALL BE CARRIED OUT IN STRICT ACCORDANCE WITH THE REQUIREMENTS OF THE LATEST REVISION OF THE ONTARIO BUILDING CODE. 2. VERIFY ALL DIMENSIONS PRIOR TO CONSTRUCTION. 3. DO NOT SCALE DRAWINGS. 4. ALL DIMENSIONS AND INFORMATION SHALL BE CHECKED AND VERIFIED ON THE JOB AND ANY VARIANCES OR DISCREPANCIES MUST BE REPORTED TO F&A ASSOCIATES BY PHONE AND SUBSEQUENT WRITTEN CONFIRMATION PRIOR TO COMMENCEMENT OF THE WORK. 5. USE ONLY LATEST REVISED DRAWINGS OF THOSE THAT ARE MARKED " ISSUED FOR CONSTRUCTION". 6. ALL STRUCTURAL DESIGN MUST BE REVIEWED AND APPROVED BY CERTIFIED STRUCTURAL ENGINEER PRIOR TO CONSTRUCTION.
	Drawing:  <div style="text-align: center;"><b>SITE PLAN</b></div>	Scale:  <div style="text-align: center;">3/32" = 1'-0"</div>	





NOTE:  
ALL INTERIOR WALL  
DIMENSIONS SHOW  
FACE OF STUDS

designed by: <div>ALI SHAKERI T.416 8213960</div> <div>ARCICA INC. 326 SHEPPARD AVENUE EAST, M2N 3B4 TORONTO, ONTARIO</div>		Project: 117 IMPERIAL STREET	Revisions: NOV 20,2020-Draft DEC 23,2020-Draft 2 DEC 24,2020-issued for TLAB 1	1. ALL WORK SHALL BE CARRIED OUT IN STRICT ACCORDANCE WITH THE REQUIREMENTS OF THE LATEST REVISION OF THE ONTARIO BUILDING CODE. 2. VERIFY ALL DIMENSIONS PRIOR TO CONSTRUCTION. 3. DO NOT SCALE DRAWINGS. 4. ALL DIMENSIONS AND INFORMATION SHALL BE CHECKED AND VERIFIED ON THE JOB AND ANY VARIANCES OR DISCREPANCIES MUST BE REPORTED TO F&A ASSOCIATES BY PHONE AND SUBSEQUENT WRITTEN CONFIRMATION PRIOR TO COMMENCEMENT OF THE WORK. 5. USE ONLY LATEST REVISED DRAWINGS OF THOSE THAT ARE MARKED " ISSUED FOR CONSTRUCTION". 6. ALL STRUCTURAL DESIGN MUST BE REVIEWED AND APPROVED BY CERTIFIED STRUCTURAL ENGINEER PRIOR TO CONSTRUCTION.
Drawing: BASEMENT PLAN		Scale: 3/16" = 1'-0"		
Page: A 02		THIS UNDERSIGNED HAS REVIEWED & TAKES RESPONSIBILITY FOR THIS DESIGN, & HAS THE QUALIFICATIONS & MEET THE REQUIREMENTS SET OUT IN THE O.B.C. TO BE DESIGNER Ali Shakeri BCIN #24574 F&A Associates Ltd. BCIN #30998		



NOTE:  
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DIMENSIONS SHOW  
FACE OF STUDS

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T.416 8213960

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Project:  
**117 IMPERIAL STREET**

Drawing:  
**MAIN FLOOR PLAN**

Scale:  
**3/16" = 1'-0"**

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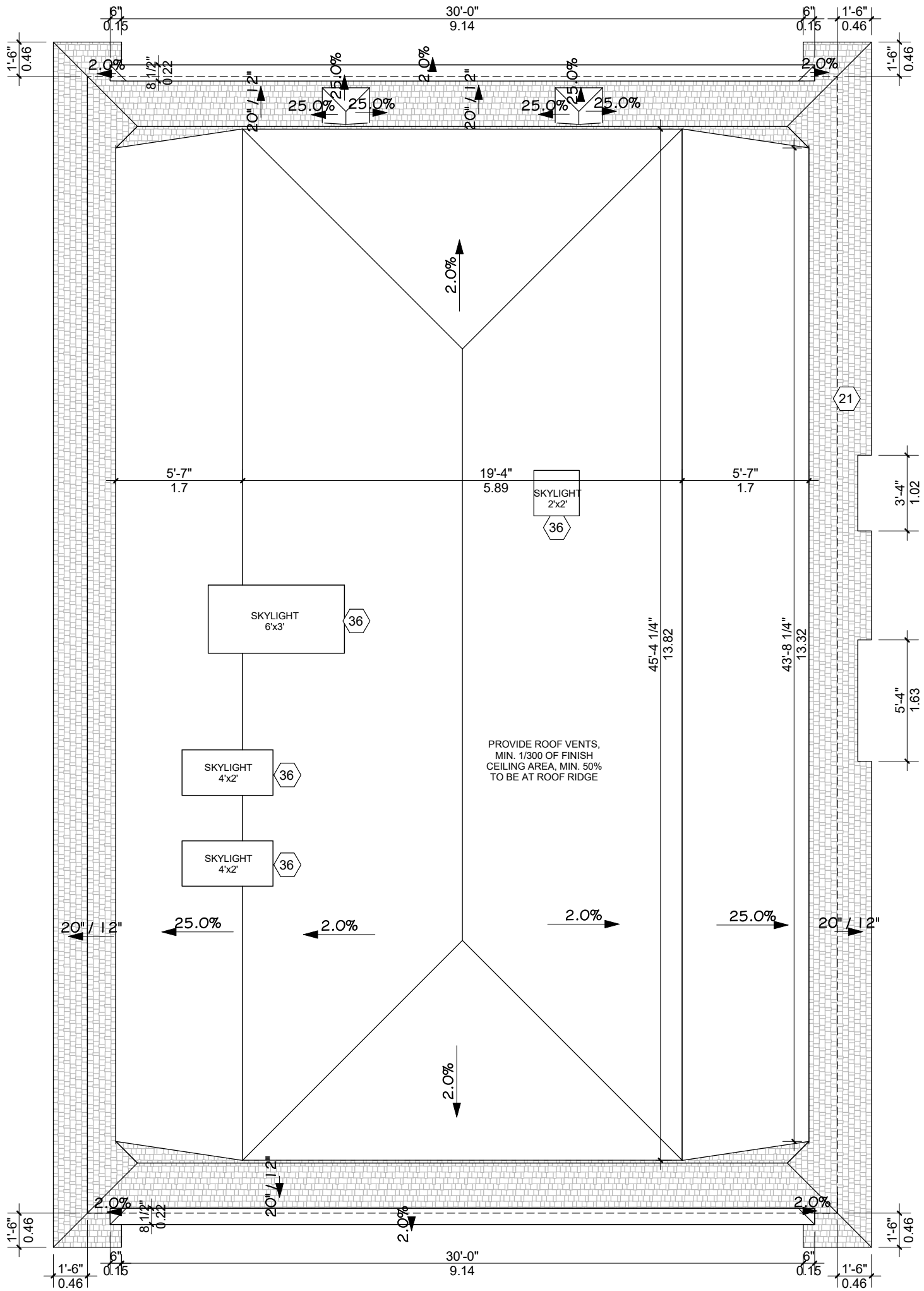
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TOTAL ROOF AREA : 1840.74 S.F.  
FLAT ROOF AREA : 920.34 S.F. (50%)



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Drawing:

ROOF PLAN

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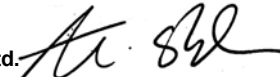
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Project:

**117 IMPERIAL STREET**

Drawing:

**MAIN ELEVATION(NORTH)**

Scale:

**3/16" = 1'-0"**

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Project:		Revisions:
117 IMPERIAL STREET		NOV 20, 2020- Draft DEC 23, 2020- Draft 2 DEC 24, 2020- issued for TLAB 1
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REAR ELEVATION(SOUTH)		
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3/16" = 1'-0"	A 07	<p><b>All Shakeri</b>  <b>BCIN #224574</b>  <b>F&amp;A Associates Ltd.</b>  <b>BCIN #30998</b></p>
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GLAZED AREAS:

1. AREA OF EXPOSED BUILDING FACE:	1205.73	SQ.FT.
2. PROPOSED GLAZED AREA:	81.56	SQ.FT. (6.8%)

**ALI SHAKERI**  
T.416 8213960

117 IMPERIAL STREET

SIDE ELEVATION(EAST)

3/16" = 1'-0"

A 08

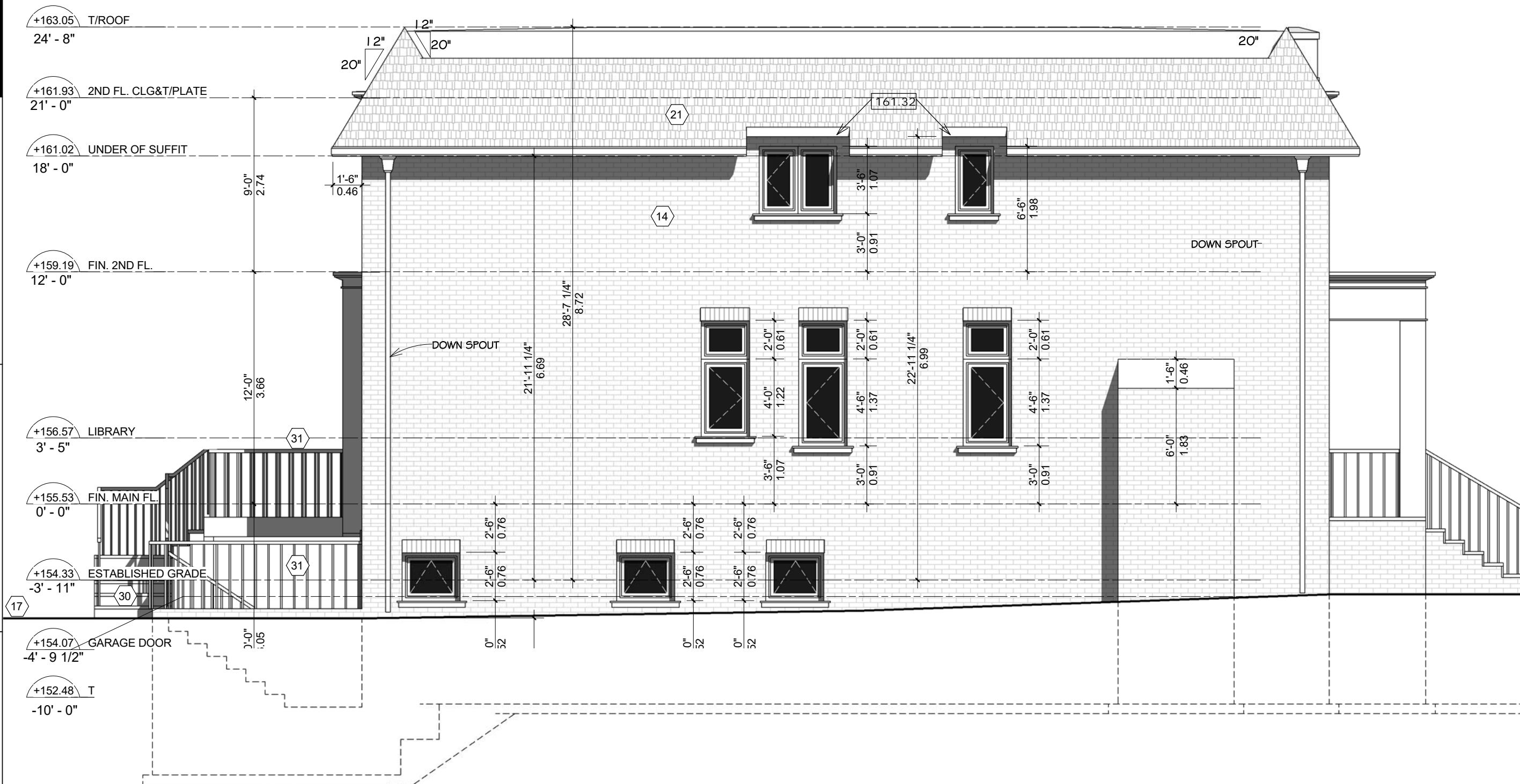
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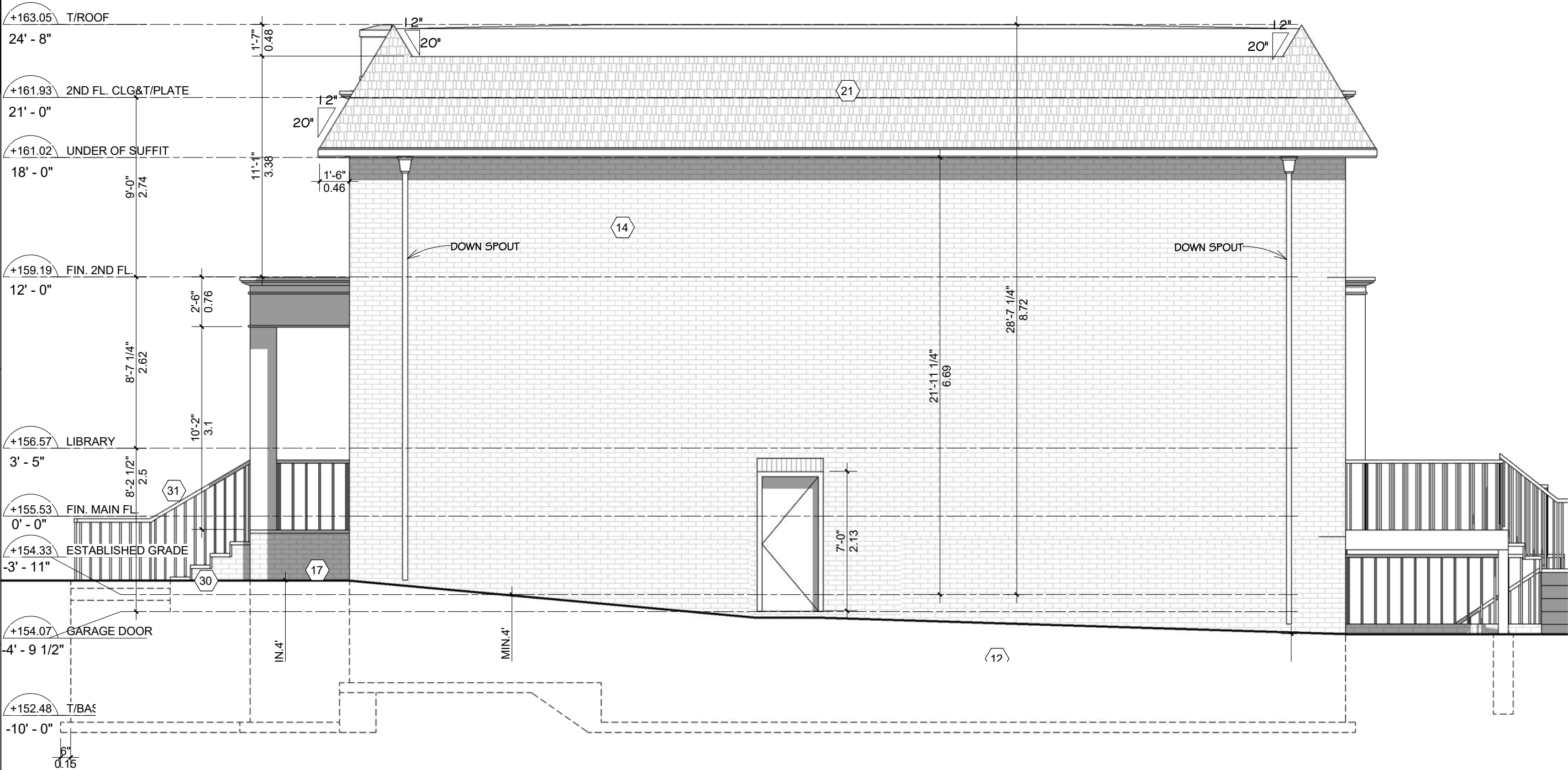
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Project:

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Drawing:

SECTION 1-1

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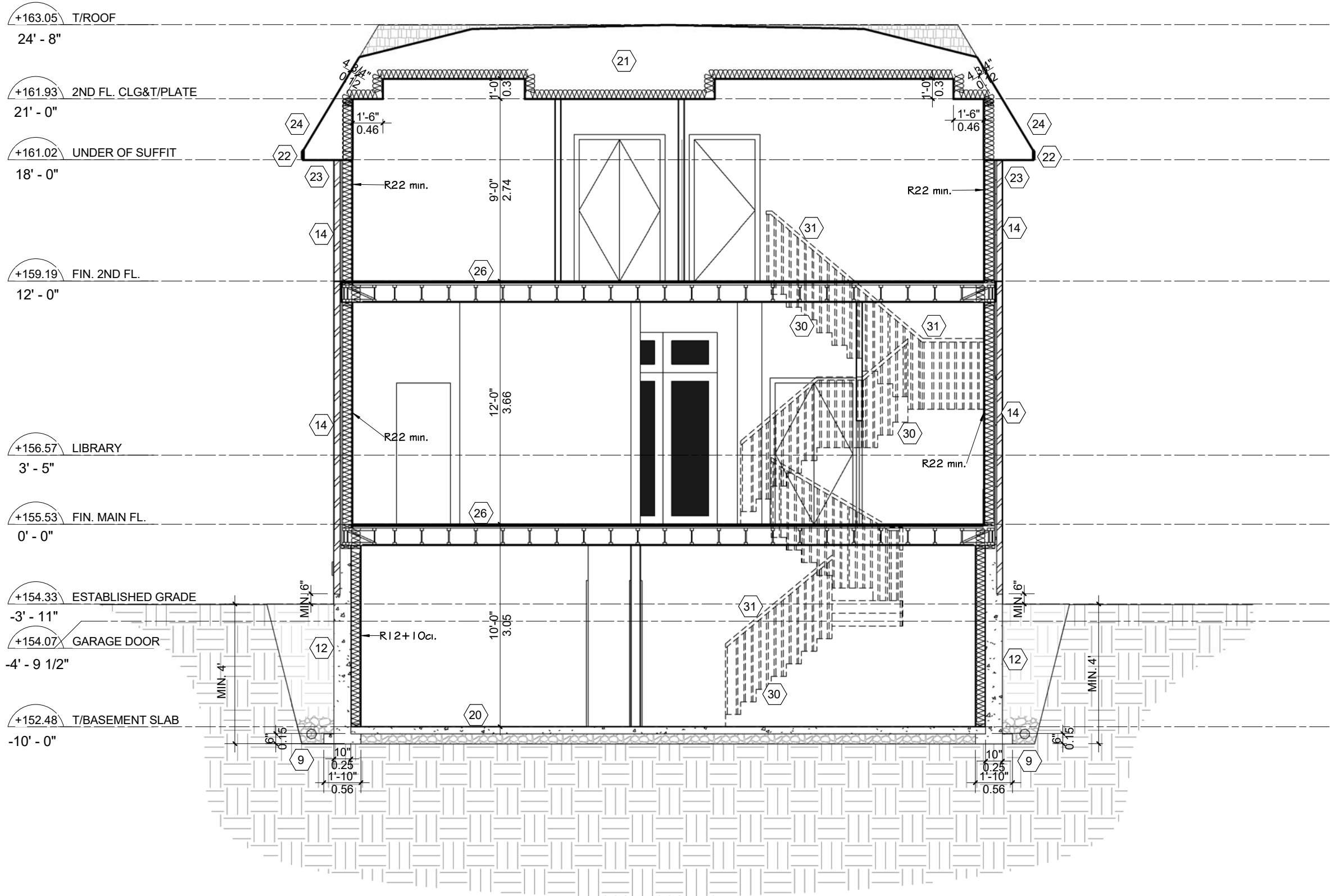
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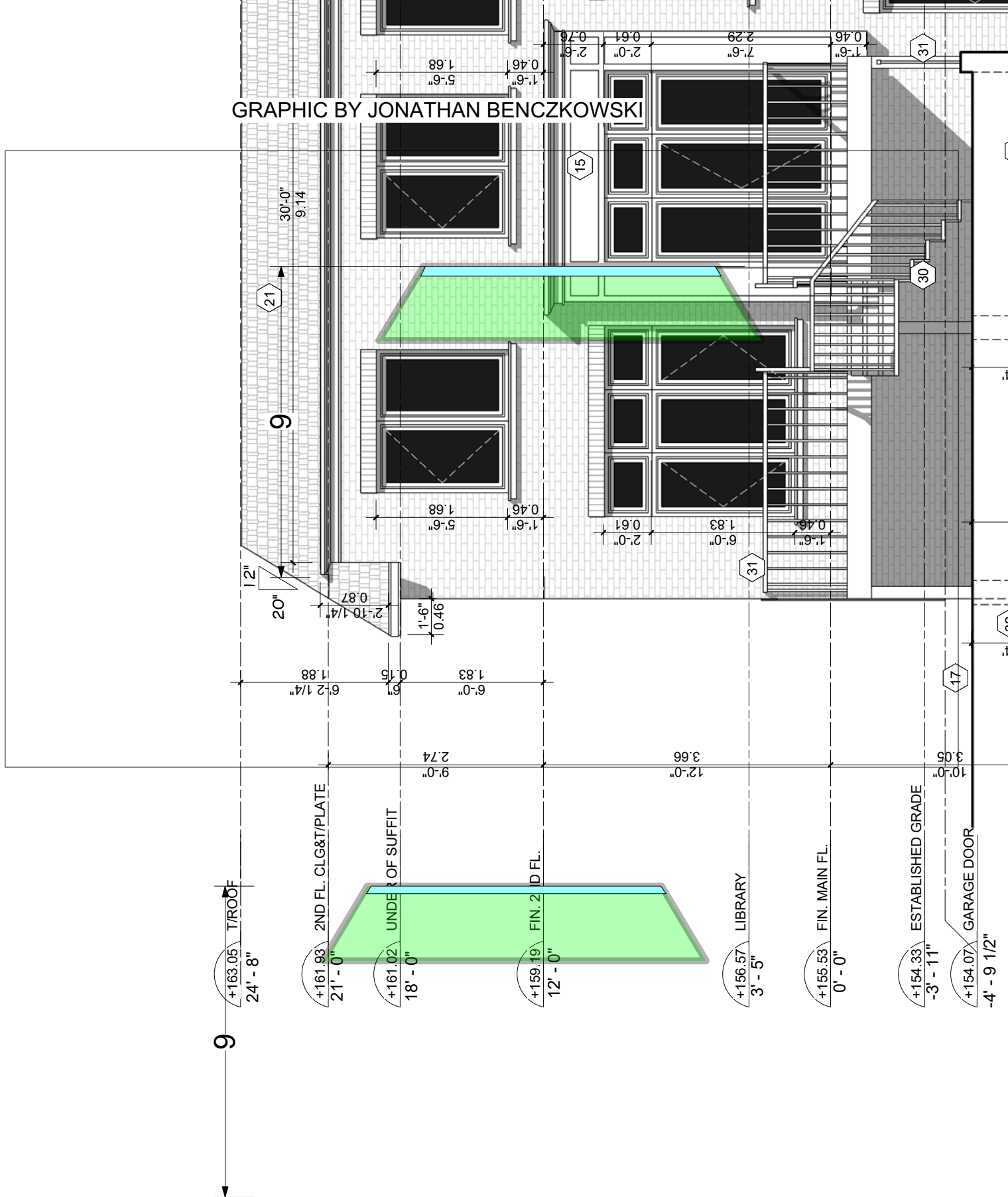
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GRAPHIC BY JONATHAN BENCZKOWSKI



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Project:

**117 IMPERIAL STREET**

Drawing:

**REAR ELEVATION(SOUTH)**

Scale:

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