

# DECISION AND ORDER

**Decision Issue Date**      Tuesday, July 13, 2021

PROCEEDING COMMENCED UNDER Section 45(12), subsection 45(1) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant(s): David Virgo

Applicant(s): Stambuk Homes

Property Address/Description: 737 Craven Rd

Committee of Adjustment File

Number(s): 20 113743 STE 14 MV (A0152/20TEY)

**TLAB Case File Number(s): 20 203234 S45 14 TLAB**

**Hearing date: March 24, 2021**

**DECISION DELIVERED BY C. Kilby**

## REGISTERED PARTIES AND PARTICIPANTS

<b>NAME</b>	<b>ROLE</b>	<b>REPRESENTATIVE</b>
Stambuk Homes	Applicant	
James Silver	Owner	
David Virgo	Appellant	
Efthemios Tsirtsimpis	Party	Frank Di Giorgio
Vasilios Patsiatzis	Party	Frank Di Giorgio
Jessica Rust	Participant	
Ozren Stambuk	Participant	Frank Di Giorgio

## INTRODUCTION

This is an appeal to the Toronto Local Appeal Body (**TLAB**) by David Virgo (**Appellant**) from a decision of the City of Toronto (**City**) Committee of Adjustment (**COA**), Toronto and East York Panel (**Appeal**).

In a decision mailed on September 22, 2020 concerning the property known as 737 Craven Road (**Subject Property**), the COA approved an application for 11 variances from the City comprehensive Zoning By-law 569-2013 (**Zoning Bylaw**) in relation to the proposed construction of a new two-storey dwelling at 737 Craven Road (**Application**). Mr. Virgo, who resides immediately north of the Subject Property, appealed the decision.

The TLAB set a 'virtual' Hearing date of March 24, 2021 and the sitting was convened by way of the City's WebEx platform. In attendance in support of the Appeal were Mr. Virgo and Jessica Rust (Participant), who resides immediately south of the Subject Property. Opposing the appeal and present for the Hearing were the owners of the Subject Property: James Silver, Vasilios Patsiatzis (Party) and Efthemios Tsirtsimpis (Party) (**Owners**), Ozren Stambuk (Participant), designer of the project and owner of Stambuk Homes (Applicant), and Frank Di Giorgio, representing Mr. Patsiatzis, Mr. Tsirtsimpis and Mr. Stambuk.

The City did not participate in this Appeal and there were no other Parties or Participants in attendance.

I advised that as per Council's direction, I had visited the site and walked the neighbourhood prior to the Hearing. I also advised that a Hearing before the TLAB is a Hearing *de novo* and all evidence in support of the Application would have to be presented anew notwithstanding the COA's decision in this matter. I advised that I had reviewed the pre-filed materials in the Appeal but that the evidence to be heard and referenced is of importance.

## BACKGROUND

### Preliminary Issues

A number of preliminary matters were canvassed at the outset of the Hearing. In respect of each issue, I exercised the discretion available to me under the TLAB's Rules of Practice and Procedure (**Rules**), particularly under Rule 2, to enable the Hearing to proceed in a just, expeditious, and cost-effective manner.

### *Standing*

According to the TLAB People List, the Applicant in this matter is Stambuk Homes, Mr. Stambuk's home design company. Mr. Stambuk elected Participant Status

**Decision of Toronto Local Appeal Body Panel Member: C. Kilby  
TLAB Case File Number: 20 203234 S45 14 TLAB**

for the purposes of this Appeal and filed the required paperwork to appear as a Participant and be represented by Mr. Di Giorgio.

There was some misunderstanding about Mr. Stambuk's professional designation. The materials filed with the TLAB indicated that Mr. Stambuk is an architect. Mr. Stambuk clarified at the Hearing that he is not an architect, but that he designs houses under a BCIN number. Since Mr. Stambuk was not presented as an Expert Witness to provide professional opinion evidence, little turns on the particulars of his professional designation. He was clearly able to speak to the issues he addressed in his evidence. I find that there was no intent to mislead the TLAB on this point.

Mr. Silver, who is listed as an owner of the Subject Property, was not registered as a Party or a Participant and did not file disclosure in advance of the Hearing. Mr. Silver attended the Hearing by telephone from Arizona but had to leave for a portion of the day for work. When he returned, Mr. Silver asked to give evidence on the Application. I sought submissions from Mr. Virgo and Ms. Rust, who did not oppose allowing Mr. Silver to speak at the Hearing. Since he has a direct interest in the outcome of the Appeal, and in the absence of opposition from Mr. Virgo or Ms. Rust, I exercised my discretion to allow Mr. Silver to speak to the Appeal, to be cross-examined by Mr. Virgo, and to cross-examine Ms. Rust, for whose evidence he was present. The other Owners were present but did not provide evidence during the Appeal.

Mr. Di Giorgio, who has experience in municipal matters and zoning bylaws, represented the Applicant and made submissions to the TLAB in favour of the Application as a representative rather than as a witness.

Notwithstanding formalities, I consider the Owners, Stambuk Homes, and Mr. Stambuk to be aligned in interest in respect of this Appeal. I was advised at the Hearing that all were represented by Mr. Di Giorgio. During the Hearing, I treated them as being essentially one Party in support of the Application and opposing the Appeal, and I will refer to them collectively as the "Applicant" herein.

Ms. Rust has lived immediately south of the Subject Property for over 20 years. Mr. Virgo and Ms. Rust oppose the Application in their capacity as abutting neighbours, and offered their views about the impacts of the proposed dwelling on their enjoyment of their properties. They also presented information about the character of the neighbourhood to advance their position that the proposed dwelling does not conform to the Official Plan (**OP**). Neither Mr. Virgo nor Ms. Rust was qualified as a local knowledge expert witness.

*Land Use Planning Expert*

On March 18, 2021, I dismissed a written Motion brought by Mr. Virgo to exclude the report and evidence of the Owners' proposed Expert Witness Loren Xhaferi. I ruled that the question of whether or not Mr. Xhaferi was qualified to give expert evidence would be determined at the outset of the Hearing. The proposed Expert Witness report remained in the TLAB file, and Mr. Xhaferi was directed to submit a curriculum vitae and certain missing information by March 22, 2021. On March 21, 2021, Mr. Di Giorgio filed

**Decision of Toronto Local Appeal Body Panel Member: C. Kilby  
TLAB Case File Number: 20 203234 S45 14 TLAB**

an update advising the TLAB that the proposed Expert Witness would not be called to ensure a more expeditious Hearing.

In light of the withdrawal of the proposed Expert Witness at a relatively late stage, Mr. Di Giorgio explained at the Hearing that the Owners wished to rely on the evidence of Mr. Stambuk to explain the background to the Application and the variances sought. In addition to Mr. Stambuk's filed Witness Statement, Mr. Di Giorgio sought to rely on Mr. Stambuk's plans of the proposed dwelling, which were before the COA. The Applicant also requested that the factual evidence compiled by Mr. Xhaferi be admitted into the record.

In order for all in attendance to have clarity on the evidence to be entered, Mr. Di Giorgio circulated an email containing the proposed evidence, and I adjourned the Hearing for a short recess so that the information could be reviewed. Following the break, I sought submissions from Mr. Virgo and Ms. Rust, who had no concerns with the photographs, building plans, or non-opinion material contained in the Expert Witness Statement being entered into evidence. The materials were entered into evidence on the basis that no weight would be given by the TLAB to the proposed Expert Witness' opinions contained therein.

I exercised my discretion and ruled to allow Mr. Stambuk to act as a witness on behalf of the Applicant rather than as a Participant. In this role, Mr. Stambuk did not ask questions of any other Party or Participant and submitted to cross-examination by Mr. Virgo.

### **Zoning Variances**

The property is zoned R(d0.6)(x741)(ZZC). The variances sought are listed in the table below.

	<b>Zoning Bylaw Provision</b>	<b>Proposed Variance</b>
1	A canopy, awning or similar structure may encroach in a front yard or rear yard 2.50m if it is no closer to a side lot line than the required side yard setback.  Chapter 10.5.40.60.(2)(B)(i)	The front overhang will encroach 1.27m and will be located 0.45m closer to the north side lot line than the required setback.
2	Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no closer to a lot line than 0.6m.  Chapter 10.5.40.60.(3)(A)(iii)	The front stairs will be located 0.45m from the north side lot line.
3	Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no closer to a lot line than 0.60m.	The rear stairs will be located 0.58m from the north side lot line.

**Decision of Toronto Local Appeal Body Panel Member: C. Kilby  
TLAB Case File Number: 20 203234 S45 14 TLAB**

	<b>Zoning Bylaw Provision</b>	<b>Proposed Variance</b>
	Chapter 10.5.40.60.(3)(A)(iii)	
4	The maximum permitted height of all front and rear exterior main walls is 7.50m.  Chapter 10.10.40.10.(2)(A)	The height of the front and rear exterior main walls will be 8.18m.
5	The maximum permitted height of the first floor of a detached house above established grade is 1.20m.  Chapter 10.10.40.10.(6)	The first floor of the detached house will have a height of 1.73m above established grade.
6	The maximum permitted floor space index of a detached house is 0.60 times the area of the lot (101.83 m <sup>2</sup> ).  Chapter 10.10.40.40.(1)(A)	The detached house will have a floor space index equal to 1.28 times the area of the lot (218.09 m <sup>2</sup> ).
7	The minimum required rear yard setback is 7.50m.  Chapter 10.10.40.70.(2)	The detached house will be located 6.51m from the rear (east) lot line.
8	The minimum required side yard setback is 0.90m.  Chapter 10.10.40.70.(3)(A)(i)	The detached house will be located 0.45m from the north side lot line.
9	Roof eaves may project a maximum of 0.90m provided that they are no closer than 0.30m to a lot line. Chapter 10.5.40.60.(7)	The roof eaves will project 0.23m and will be located 0.22m from the north side lot line.
10	Roof eaves may project a maximum of 0.90m provided that they are no closer than 0.30m to a lot line.  Chapter 10.5.40.60.(7)	The roof eaves will project 0.23m and will be located 0.23m from the south side lot line.
11	The required parking space must have a minimum length of 5.60m.  Chapter 200.5.1.10.(2)(A)(ii)	The parking space will measure 5.46m in length.

## **MATTERS IN ISSUE**

Do the proposed variances from the Zoning Bylaw, individually and cumulatively, satisfy the four tests under the *Planning Act*?

## JURISDICTION

### Provincial Policy – S. 3

A decision of the TLAB must be consistent with the 2014 Provincial Policy Statement (**PPS**) and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area (**Growth Plan**).

### Variance – S. 45(1)

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

## EVIDENCE

The following materials were tendered and marked as Exhibits:

- Exhibit 1: Proposed Building Plans titled “New - May 5, 2020”
- Exhibit 2: Photographs contained in Folder titled “737 Craven Road – Houses of Interest”
- Exhibit 3: Witness Statement of Ozren Stambuk
- Exhibit 4: Expert Witness Report (non-opinion evidence only)
- Exhibit 5: David Virgo Consolidated Disclosure and Witness Statement
- Exhibit 6: Jessica Rust Participant Disclosure
- Exhibit 7: Witness Statements

Mr. Di Giorgio, Mr. Stambuk, Mr. Virgo, Ms. Rust and Mr. Silver were all affirmed.

## Background

737 Craven Road is located near Coxwell Avenue and Gerrard Street in Toronto. The Subject Property is located on a block of Craven Road that is bound by railway tracks to the north and Fairford Avenue to the south, and which slopes downward from north to south. There are houses on the east side of the street only.

Mr. Virgo characterized Craven Road as consisting predominantly of small-sized homes. He offered that Craven Road is the largest congregation of under 500 ft<sup>2</sup> homes in Toronto, and that these small dwellings contribute to the character of the neighbourhood. Much of this information came from articles submitted in Exhibit 5 rather than from data from a study of the neighbourhood. Mr. Virgo described the Subject Property as having a large lot for the neighbourhood, with reference to other floor space

index (**FSI**) variances granted in the neighbourhood. Based on the survey contained in Exhibit 1, the lot at 737 Craven Road is 7.62m wide and 22.28m deep with a lot area of 169.7m<sup>2</sup>.

*Proposed Dwelling: Context and Features*

Mr. Stambuk explained that he had been retained by the Owners to design the proposed dwelling for the Subject Property. He outlined some key factors that contributed to the design: grading, the integral garage, and consultations with City Planning. Mr. Stambuk stated that he designed the proposed dwelling based on what the COA had previously approved in the area.

In light of the sloped grade of the Subject Property (visible in photographs in Exhibits 2 and 6), the basement was situated closer to grade to reduce the amount of excavation and shoring required for the construction of the proposed dwelling. This resulted in the inclusion of the basement in FSI, which Mr. Stambuk and Mr. Di Giorgio argued would not be the case if the basement was below grade.

Another key element of the proposed design is the garage, which was specifically requested by the Owners. Mr. Silver made it clear that he considers the garage to be a key design element of the proposed dwelling. Mr. Stambuk explained that the garage arose in part from the presence of a fire hydrant in front of the Subject Property which prevents street parking there. To his mind, this meant that a garage and driveway would not displace a street parking space and would add parking where it may otherwise be limited. Mr. Virgo and Ms. Rust challenged this evidence, asserting that street parking is generally available close to the Subject Property.

Irrespective of street parking considerations, Mr. Stambuk indicated that it is common to include a garage in the design of a new house. Mr. Stambuk admitted on cross examination that new homes built on Craven Road do not always have a garage, although he has designed homes on other streets in the neighbourhood with garages. Mr. Virgo offered that there are 13 integral garages on Craven Road from Queen Street to the railway tracks at the north end of the Subject Property's immediate block. Mr. Virgo characterized the integral garage in the proposed dwelling as "one of few" on the street.

With reference to emails in Exhibit 3, Mr. Stambuk described his communications with the City Planner who reviewed the plans for the proposed dwelling in advance of the COA Application, Kasia Kmieć. Mr. Stambuk explained the various modifications he made to the original house design in response to concerns raised by Ms. Kmieć.

## **Variations**

Evidence heard in respect of each of the variations sought in the Application is summarized below.

### *1. Canopy Encroachment*

Mr. Stambuk explained that this variance results from the presence of the basement window which makes the required side yard setback 0.9m rather than 0.45m.

He described it as “part and parcel” of the side yard setback variance. Mr. Di Giorgio described this variance as “indiscernible” in terms of size and impact on adjacent neighbours.

## *2. Front Stairs Encroachment*

Mr. Stambuk explained that the design of the proposed dwelling made this variance more logical than adhering to the required setback, given the location of the north side wall. Mr. Di Giorgio submitted that this variance would not have an undue adverse impact on property to the north. He noted that City staff had not identified the variance as problematic.

## *3. Rear Stairs Encroachment*

Mr. Stambuk asserted that this variance was very small and would be practically undetectable once the stairs were built.

## *4. Exterior Main Wall Height*

Mr. Stambuk pointed out that the height of the proposed dwelling is not near the maximum allowed height. The variance requested for the front and back walls is relatively small and arises from the flat roof design. He explained that this variance is also due to the design of the house, particularly the ceiling heights above the garage. Mr. Virgo criticized the basement ceiling height as uncommonly high for Toronto basements.

## *5. Height of First Floor Above Grade*

The proposed front door is 1.73m above street level. Mr. Stambuk pointed out that this height is comparable to the height of Mr. Virgo’s front doorsill, from which Mr. Stambuk took his cue. Mr. Stambuk offered that many of the basements of other homes on the street are closer to grade than the front door, including Mr. Virgo’s house. Mr. Stambuk described the sought variance as a compromise, having already modified the height of the entranceway at the request of City Planning. Several of the photographs in Exhibit 2 are of homes with stairs leading up to front doors above grade, although these were not canvassed in detail during the Hearing. It is unclear where they are situated in relation to the Subject Property.

## *6. Floor Space Index*

The FSI sought in this Application is 1.28 times the area of the lot, more than double the maximum set by the Zoning Bylaw. Mr. Stambuk asserted that the FSI is large because the basement is included. Mr. Stambuk estimated that excluding the basement, the FSI would be 0.92, with approximately 1700 ft<sup>2</sup> of above-grade floor space. Mr. Stambuk asserted that the basement design is largely utilitarian and built around the parking space in the attached garage. He explained that he could have made certain design changes that would have lowered FSI while actually increasing the amount of floor space in the proposed dwelling, but he did not wish to use such means of creating a different FSI figure.

**Decision of Toronto Local Appeal Body Panel Member: C. Kilby  
TLAB Case File Number: 20 203234 S45 14 TLAB**

Mr. Stambuk cited the small lot size of the Subject Property as an impediment to meeting the Zoning Bylaw requirement of a 0.6 FSI. He asserted that no one would construct a new dwelling small enough to fit within the 0.6 FSI limit for this zoning category. He speculated that existing homes on the street have a higher FSI than 0.6, although there was no corresponding evidence in that regard.

Exhibit 4 (Expert Witness Report) includes a table listing nine properties in proximity to the Subject Property where the COA granted a FSI variance. The table was described in Exhibit 4 as “an analysis of floor space index approvals by the Committee of Adjustment withing [sic] a 500m radius of 737 Craven Road during the last ten years.” The table lists other instances where a FSI greater than 0.6 have been approved, including on Craven Road. Corresponding COA decisions were not supplied by the Applicant.

Mr. Di Giorgio focused on the first four properties listed in the table as being in the immediate neighbourhood of the Subject Property: 569, 741, 781 and 783 Craven Road. Mr. Di Giorgio drew the TLAB’s attention to 783 Craven Road, which received approval for a FSI of 1.58 times the area of the lot, including the basement.

Mr. Virgo supplied his own analysis of FSI variances granted in the neighbourhood over the past 10 years, compiled in a table included in Exhibit 5. Mr. Virgo explained that he asked the City for all variance requests in the area (Mr. Virgo estimated approximately 130) and examined those relating to FSI (65 per the table in Exhibit 5). He focused on those addresses within a 500m radius of the Subject Property, including properties on Craven Road (16 identified in the table). Anything outside this radius was not discussed in detail in Mr. Virgo’s table, although the FSI information was retained. Mr. Virgo also supplied the underlying COA decisions. Mr. Virgo calculated the median and mean FSI variances for the total sample and for Craven Road in particular and submitted that the FSI sought in the Application represents a 30% increase over the medians and means.

While Mr. Virgo understood that small lots might necessitate a higher FSI than 0.6, his view was that the FSI of 1.28 requested is out of character with the neighbourhood and too largely massed to reinforce the physical characteristics of the neighbourhood or the compact form desired by OP policy. Based on his calculations, Mr. Virgo felt that a FSI of 0.9 might be more in keeping with the character of the neighbourhood, although Mr. Di Giorgio cautioned against comparing FSI approvals for semidetached houses (included in Mr. Virgo’s sample) with the present Application.

Ms. Rust also took issue with the increase in FSI requested by the Application. She felt that if granted, the proposed dwelling would be the largest on the street and would detract from the character of the community. In her view, the above-grade basement would always cause the proposed dwelling to present as large and would be inconsistent with the area streetscape. Ms. Rust referred to concerns articulated by Ms. Kmieć about the FSI in the email communications included in Exhibit 3 (Appendix A, page 5).

### *7. Rear Yard Setback*

Mr. Stambuk stated that the rear yard setback variance arises because of the lot's depth. The absence of windows at the side of the proposed dwelling indicated that there would be no adverse impact on privacy for the neighbours. Mr. Stambuk also reported that the City did not ask the Applicant to conduct a shadow study and did not raise shadow as a concern with the proposed dwelling design. Mr. Stambuk offered that there would not likely be a major impact on sunlight given the orientation of the proposed dwelling, a point which Mr. Silver echoed. Mr. Di Giorgio submitted that an Appellant with sunlight concerns would be expected to produce a sunlight study.

Mr. Di Giorgio explained that the depth of the lots on Craven Road made it difficult to stay within the front and rear yard setback regulations. He explained that the Owners considered what would be most appealing from a streetscape perspective, and chose not to deviate from the front yard setbacks.

Mr. Di Giorgio directed the TLAB to other projects on Craven Road listed in the table in Exhibit 4 which required front or rear yard setback variances, including 569 Craven Road, located south of Fairford Avenue, one block south of the Subject Property, and 783 Craven Road, which received approval for a FSI of 1.58 times the area of the lot and a rear yard setback variance of 6.49m. Mr. Di Giorgio pointed out that 783 Craven Road's rear yard setback obstructs views, but was approved.

Mr. Stambuk indicated it was more important to abide by the front yard setback than the rear yard setback. In his experience, front yard setback variances are rarely approved. He stated that it would not make sense from a design or cost of construction perspective to design the house in a way that would eliminate the rear yard setback variance. Mr. Stambuk noted that the dwellings on either side of the Subject Property are not at their maximum rear setback.

The TLAB was directed to photos in Exhibit 2 of the rear yard of the Subject Property and neighbouring properties. Mr. Stambuk explained that the proposed dwelling would extend two metres further back from its current position, which aligns with the rear wall of Ms. Rust's residence.

With reference to photographs of the rear yard in Exhibit 5, Mr. Virgo stated that the rear yard setbacks are respected all the way south from his home to Fairford Avenue. He said if the proposed dwelling is constructed, his southern views would be blocked by a large wall. He felt that the proposed dwelling would be built at the expense of the neighbours' and community's enjoyment of their properties.

Ms. Rust described the impact she would experience from the construction of the proposed dwelling as a decrease in views and enjoyment of her property. She referred to photographs in Exhibit 6 on which she demarcated the proposed rear wall of the dwelling to be constructed, as viewed from her property. Ms. Rust was concerned that if permitted, the proposed dwelling would reduce the available green space enjoyed by all the neighbours. She expressed concern that the Applicants had not provided a sunlight study to address the impacts of the proposed dwelling on neighbouring properties.

An additional point of concern for Ms. Rust, echoed in Mr. Virgo's Notice of Appeal and in the neighbours' witness statements included in evidence, was the potential impact of the decreased rear yard setback on a silver maple tree at the rear of Mr. Virgo's lot. Ms. Rust was concerned by the absence of an arborist study relating to the protection of that tree.

#### *8. Side Yard Setback*

Mr. Stambuk explained that this variance is required because of a small window on the north basement wall of the proposed dwelling. The required setback becomes 0.90m rather than 0.45m solely because of that window. Mr. Stambuk stated that City Planning did not require the window to be removed and clarified that the side yard setback is only measured in relation to the window on the proposed dwelling, and does not take into account the window on Mr. Virgo's south basement wall.

Mr. Virgo is concerned about the reduced side yard setback in terms of loss of light to his south-facing basement windows and the potential impacts of the construction of the proposed dwelling on his home.

#### *9. and 10. Roof Eaves – North and South*

Mr. Stambuk explained that these variances resulted from the width of the gutter and roof overhang to protect the exterior north and south walls. It was noted by Mr. Di Giorgio that this variance is small, and possibly represents a benefit to the neighbouring properties.

Ms. Rust expressed concern about her home's retaining wall, as her property is four feet below the Subject Property. She is concerned that reducing these setbacks may cause damage to her property, as are other neighbours through statements in evidence. In response to these concerns, Mr. Stambuk explained that the gutters proposed for the roof eaves would drain water to the front or rear of the proposed dwelling, thereby preventing adverse water effects to neighbouring properties.

#### *11. Parking Space Length*

Mr. Di Giorgio pointed out the relatively small size of the variance sought for the proposed parking space. He submitted that by integrating the parking space onsite, the Application fulfilled a direction in the OP under Policy 3.1.2 which indicates a preference for onsite parking and minimal interference with surrounding properties.

### **The Four Tests**

In addition to variance-specific evidence, the Parties spoke to the variances cumulatively with regard to the four tests.

Mr. Di Giorgio asserted that the Application had been examined by City Planning staff whose role is to ensure that new development meets the general intent and purpose of the OP and the Zoning Bylaw. He submitted that the lack of opposition from City Planning staff, and the approval by the COA, indicate that the Application meets these standards and that the variances sought are reasonable.

*Maintain the General Intent and Purpose of the OP*

The Subject Property is in an area designated as *Neighbourhoods* by the OP. Policy 4.1.5 of the OP states that “development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood”, and provides policy direction as to an analysis of geographic neighbourhood and development assessment criteria.

The Applicant did not present a geographic neighbourhood study area as directed in Policy 4.1.5 of the OP. Instead, Mr. Di Giorgio referred to the ‘immediate’ geographic area framework in the OP, drawing the TLAB’s attention to similar developments on Craven Road near the Subject Property. Mr. Di Giorgio presented photographs and FSI variance approvals relating to similar properties to demonstrate that there is precedent for this Application, and opined that the proposed dwelling reinforces the physical character of the neighbourhood. He also submitted, with reference to current photographs of the Subject Property, that the massing of the proposed dwelling would be in keeping with its adjacent neighbours to north and south.

Mr. Virgo argued that the proposed design does not fit into the “minimalist” character of the neighbourhood. He believes that the FSI variance sought for the proposed dwelling results in its massing and associated variances. He referenced the table of FSI variances included in Exhibit 5, which he characterized on cross-examination as setting out the “prevailing trend.” Upon questioning by the TLAB, Mr. Virgo described certain built characteristics of the neighbourhood, including homes close to the sidewalk, stairs near the sidewalk, homes close together, generally small lots, and an eclectic building typology.

Ms. Rust felt that doubling the FSI would result in a house that stands out as inconsistent with other houses on the street.

Mr. Silver offered 569 Craven Road and 571 Craven Road as examples of the contemporary style being built in the neighbourhood, and of the increasing density on the lots.

*Maintain the General Intent and Purpose of the Zoning Bylaw*

Limited evidence was offered in respect of this test beyond the Applicant’s reliance on the City Planning review and COA approval of the Application.

*Desirable for the Appropriate Development or Use of the Land*

Mr. Di Giorgio described the Application as an improvement to the site and reinvestment in the area. Mr. Stambuk interpreted City Planning’s non-opposition to the Application and the COA’s approval of the Application as affirmation that the proposed design is desirable.

*Minor*

Mr. Di Giorgio submitted that the test for minor is whether impacts fall within an acceptable range. He agreed that neighbourhood change is required to be sensitive but

argued that change is possible even if unacceptable to the local community. Ultimately, Mr. Di Giorgio submitted that the variances are minor in that they will not result in undue adverse impacts of a planning nature and that the variances sought are small in numeric value.

Mr. Stambuk indicated that the various design modifications implemented were in response to comments from City Planning and asserted that the revisions were sensible in the context of the design as a whole.

Mr. Silver indicated that his interests as the owner and future resident of the Subject Property should be given more weight than those of his neighbours.

## **ANALYSIS, FINDINGS, REASONS**

I have given Mr. Virgo and Ms. Rust's evidence weight, as they are the abutting neighbours to the Subject Property who will experience impacts on their enjoyment of their properties. Less weight was given to the statements filed on behalf of other neighbours who did not attend the Hearing.

I also find Mr. Stambuk's evidence credible and I accept his experience as a designer although he was not presented as an expert in land use planning.

As an owner and future resident of the Subject Property, Mr. Silver's evidence can also be given some weight to the extent it relates to the four tests.

### **Provincial Policy**

The variances must be consistent with and conform to higher level Provincial Policies. These policies speak to larger planning matters for the entire province, including those relating to environmental protection and increasing the mix and supply of housing. The Growth Plan more specifically discusses having sufficient housing supply that reflects market demand in the Greater Golden Horseshoe, as well as intensification and compact development patterns in urban centers. The OP implements these policies at a more local level, through standards set by the Zoning Bylaw.

The Applicant's evidence did not address the provincial policies directly, however, it highlighted the desirability of infill development in this neighbourhood and on the Subject Property, as well as advocating for quality design of any new housing stock. I find that insofar as the Application is about the redevelopment of an under-used lot in an urban center, it is consistent with and conforms to these policies.

### **The Four Tests**

An Appeal to the TLAB is a Hearing *de novo*. An Applicant must lead evidence to establish that the variances sought satisfy the four tests set out under section 45(1) of the *Planning Act*. The question before the TLAB is whether or not the Applicant has discharged its evidentiary burden in this case.

Mr. Di Giorgio submitted that Mr. Stambuk's engagement with City Planning, the lack of opposition by City Planning to the Application, and the approval of the COA is persuasive evidence that the Application meets at least two of the four tests, and weighs in favour of granting the Application.

There is no doubt that Mr. Stambuk worked diligently with City Planning to modify the design of the proposed dwelling. The Applicant described City Planning as having no concerns with or not opposing certain variances, particularly the side yard setback and FSI variances. Ms. Kmiec's email dated March 11, 2020 (Exhibit 3, Appendix A, page 5) reveals that she assessed the proposed dwelling design with reference to her own research about the other houses on Craven Road. I find that Ms. Kmiec assisted the Applicant to modify its design in order to address the most problematic variances originally sought.

The TLAB cannot defer to the review conducted by City Planning or make findings based on the City's non-opposition to an Application. The Applicant must provide the TLAB with sufficient evidence to demonstrate that the Application meets the relevant statutory requirements.

Applicants are not required to retain a land use planner to provide expert testimony on the four tests, however, they must present planning evidence as to how the proposed dwelling fits into, and is comparable with, the neighbourhood characteristics as directed by the policy requirement in the OP. I find that in this case, there was insufficient evidence in this regard.

## **The OP**

The evidence put before the TLAB, including testimony and photographs, reveal Craven Road to have certain physical neighbourhood characteristics related to built form and streetscape. The Subject Property is located on a block bound to the north by railway tracks. Photographs reveal dwellings in close proximity to each other, of varying appearances and styles. There are dwellings only on one side of the street.

Policy 4.1.5 of the OP states that development in *Neighbourhoods* will respect and reinforce the existing physical character of the geographic neighbourhood, including in respect to the following criteria which I find most relevant to this Application:

- (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; and
- (g) prevailing patterns of rear and side yard setbacks and landscaped open space.

Policy 4.1.5 states that proposed development in a *Neighbourhood* will be materially consistent with the prevailing physical character of properties in the Subject Property's immediate and broader contexts and describes "prevailing" as determined by the most frequently occurring form of development in that neighbourhood. Where there is a mix of physical characters in a neighbourhood, the OP allows for development

whose physical characteristics exist in substantial numbers within the geographic neighbourhood, so long as the physical characteristics of that 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.

The Applicant did not provide a geographic neighbourhood study area as directed by the OP to demonstrate how the proposed dwelling, and the variances sought, fit into the broader and immediate context of the Subject Property. While Mr. Xhaferi's report in Exhibit 4 refers to a geographic study area, in his absence, the TLAB did not hear evidence about that study area, how it was delineated, or its characteristics. Exhibit 4 did not offer explanatory examples, analysis of photographs, or property data regarding the study area.

OP Policy 4.1.5 also provides that where there is significant difference between the broader context and the immediate context, the immediate context will be considered to be of greater relevance. At the Hearing, Mr. Di Giorgio focused on the immediate context of the Subject Property, drawing the TLAB's attention to photographs of other properties on Craven Road which received approval for FSI variances, and to the COA approval table compiled by Mr. Xhaferi in Exhibit 4. This focus may have been appropriate; however, I was unable to compare the immediate context to a broader context in order to make a finding in this regard. Moreover, the evidence presented by the Applicant was insufficient to establish the prevailing character of the neighbourhood for the criteria listed above.

#### *4.1.5(c) - prevailing heights, massing, scale, density and dwelling type*

The FSI variance sought in this Application was the main point of contention between the parties, and to some degree, it creates the need for the other variances sought. Based on the evidence given about the other variances, I find that the Application is driven, on a holistic level, by the FSI variance.

Numerically, the variance for FSI is significant in that it more than doubles the maximum permitted FSI in the Zoning Bylaw. However, the analysis is not purely mathematical. On its own, FSI is not a measure of massing or scale; what is significant is its deployment on the lot. In this case, that deployment on the lot respects the zoning performance standards of building height, depth, and length. However, the proposed dwelling exceeds the allowed side and rear yard setbacks within this zoning category, and requires variances for the first floor and exterior wall heights. These measures influence massing and need to be assessed in the context of the neighbourhood.

The Applicant suggested that the size of the FSI variance is unduly influenced by the inclusion of the basement, which would normally not be counted in the total FSI calculation. The Applicant submitted that the basement's inclusion in FSI in this case is the result of the grading of the Subject Property and construction considerations, an unavoidable consequence of the site's characteristics. Mr. Stambuk tried to distinguish the basement from above-grade living space by reference to its utilitarian design. I cannot accept this distinction. In Exhibit 1, the basement plans include a bedroom and bathroom. Moreover, the basement adds enough height to the proposed dwelling above grade to necessitate two of the variances sought. I find that the basement's inclusion in

FSI is not merely a technical variance, as it contributes to the massing impact of the proposed dwelling as it is situated on the lot.

In order to demonstrate that the FSI variance conforms to the OP, the Applicant highlighted examples from the table of COA FSI approvals within a 500m radius of the Subject Property listed in Exhibit 4. A new development at 569 Craven Road was highlighted for the TLAB as having particular precedential value due to its similar design. In his absence, the TLAB could not ask Mr. Xhaferi questions about this table, including whether it is comprehensive, what sources of information were consulted, and the methodology used to create the analysis. This is particularly important because Mr. Virgo's table, which also lists FSI variances within 500m of the Subject Property, contains more examples than what Mr. Xhaferi compiled.

Ultimately, the examples provided by the Applicant during the Hearing establish that there are precedents on Craven Road for a larger FSI; however, 741, 781 and 783 Craven Road are of limited assistance as their lot areas are smaller than the Subject Property, and, with one exception, the FSI sought is under 1.0 times the area of the lot. I find that the existence of selected examples of larger FSI, while useful, is insufficient to demonstrate the prevailing physical character of the neighbourhood, particularly when assessed against different lot sizes.

More specifically, of the 65 examples in Mr. Virgo's table, only two addresses were granted a FSI variance greater than what is sought in this Application:

- 783 Craven Road was granted a variance for a 1.58 FSI, and the decision of the COA mentions the different treatment of the above grade basement under the different applicable zoning by-laws. The lot at 783 Craven Road is 111m<sup>2</sup>, which is smaller than the Subject Property.
- 433 Ashdale Avenue was granted a variance for a 1.44 FSI in 2014 for the construction of an addition to the existing one storey detached dwelling. However, in 2015, the owners of 244 Ashdale Avenue applied to build a new three-storey detached dwelling which would have had a FSI of 1.027. This Application was denied. Therefore it is unclear on the evidence whether the FSI of 1.44 was actually realized at that address.

The examples compiled by Mr. Virgo are not all relevant. Not all the applications included were granted permission by the COA. 245 Highfield Road, a semi-detached home, sought a FSI variance of 1.27 which was approved, but which is less relevant to the detached house proposed in this case. On Craven Road, most of the applications were granted, based on my review of the COA decisions provided, except for 681 Craven Road, which sought a FSI variance of 0.735.

Based on the evidence presented, I was unable to test Mr. Virgo or Ms. Rust's assertions about the size of most of the homes on Craven Road. Furthermore, I was unable to assess whether the properties highlighted by Mr. Di Giorgio represent a significant presence of the sought FSI and massing on the Subject Property's block and, therefore I was not presented with sufficient evidence to assess the prevailing physical character of the neighbourhood.

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

Mr. Di Giorgio submitted that the inclusion of parking on the Subject Property fulfils OP Policy 3.1.2. However, I find that in this case, Policy 3.1.2 (4)(e), which encourages limiting new surface parking and vehicular access between the front face of a building and the public street or sidewalk, works against this argument.

The evidence was that integral garages are not always included in new homes built on Craven Road, although there are examples. Mr. Virgo offered evidence that such garages are not a common condition on the Craven Road, however, there was insufficient information to verify this claim. In the absence of a neighbourhood study, I cannot determine whether the proposed integral garage conforms to the OP.

*4.1.5(g) prevailing patterns of rear and side yard setbacks and landscaped open space*

Mr. Stambuk explained that the rear yard setback variance is required to accommodate the proposed dwelling on the lot while respecting front yard setbacks. Some evidence was led to establish precedent for a rear yard setback reduction on the Subject Property's block, including photographs looking north from the rear yard of the Subject Property. Mr. Virgo's photographic and oral evidence characterized this variance as unusual. Ms. Rust presented illustrations of how the proposed rear yard setback would interfere with the shared rear amenity space around the Subject Property.

With respect to potential impacts to the silver maple tree on Mr. Virgo's property, I note that Urban Forestry did not express concern with the Application or require any conditions.

I find on the evidence that although there are examples of reduced rear yard setbacks on the same block as the Subject Property, those examples do not sufficiently establish the prevailing patterns of rear yard setbacks in the immediate or broader context. Accordingly I find that the proposed rear yard setback variance does not conform to the OP. This information is also relevant to whether the proposed variance is minor in terms of impact on sunlight and views, although I was not referred to any OP policies which speak to the preservation of sunlight or view planes within the private realm of adjacent buildings.

The photographs presented by the Applicant and the oral evidence of Mr. Virgo suggest that homes are close together in the neighbourhood, which may mean that reduced side yard setbacks are an existing condition. However, without more detailed evidence on this point, I cannot assess what the prevailing side yard setback condition is in the neighbourhood.

The neighbours expressed concern about the potential for water damage to their properties caused by the side yard setback and roof eaves variances. I find there was insufficient evidence to establish a basis for this concern and prefer Mr. Stambuk's evidence on the issue.

## Conclusion on OP

The Application, assessed on a cumulative basis, centers around the large FSI variance. I have explained why the evidence presented about similar FSI variances in the neighbourhood is insufficient to establish that the Application conforms to the OP, as required by the *Planning Act*. In addition, the absence of evidence about the geographic neighbourhood prevents me from assessing how the other variances fit into the character of the neighbourhood. That assessment is always important, but is particularly so in this case, where Craven Road has certain distinguishing characteristics from its broader context. On the evidence presented, I cannot find that individually and cumulatively, the variances maintain the general intent and purpose of the OP.

Section 45(1) of the *Planning Act* is instructive as to the tests the Applicant must meet. The Applicant must show how all the variances requested meet all four tests. I find that the rear yard setback variance fails to meet the test of maintaining the general intent and purpose of the OP. In addition, I find that the variance for FSI fails to meet the test of maintaining the general intent and purpose of the OP. Since these key variances which relate to massing fail to meet one of the statutory tests, the Application as a whole fails, and it is unnecessary for the TLAB to consider the remaining tests under the *Planning Act*.

## DECISION AND ORDER

The Appeal is allowed and the Decision of the COA mailed on September 22, 2020 in COA Case File Number 20 113743 STE 14 MV (A0152/20TEY) is set aside.

X 

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C. Kilby  
Panel Chair, Toronto Local Appeal Body