Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, June 15, 2021

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

Appellant(s): JOEL WEINBERG

Applicant(s): IDA EVANGELISTA

Property Address/Description: 193 WINNETT AVE

Committee of Adjustment File Number(s): 19 243701 STE 12 MV

TLAB Case File Number(s): 20 175379 S45 12 TLAB

Hearing date: Friday April 30th, 2021

Deadline Date for Closing Submissions/Undertakings: May 14, 2021

DECISION DELIVERED BY A. Bassios

REGISTERED PARTIES AND PARTICIPANTS

Applicant	Ida Evangelista
Appellant	Joel Weinberg
Appellant's Legal Rep.	Amber Stewart
Party	Bruce Van Lane
Party	Deirdre Van Lane
Expert Witness	Sean Galbraith

INTRODUCTION

This is an appeal by Joel Weinberg (Appellant) of the Toronto and East York Panel of the City of Toronto (City) Committee of Adjustment's (COA) refusal of an application for variances to alter the existing two-storey detached house by constructing a third storey addition and a rear three-storey addition with a ground floor deck and a third storey balcony.

The subject property, 193 Winnett Ave, is located at the western edge of the Humewood-Cedarvale neighbourhood, on the east side of Winnett Ave, just north of Vaughan Rd. It is designated *Neighbourhoods* in the Official Plan (OP) and is zoned RM(f12.0; u2; d0.8)(x252) & R2 (BLD) under City of Toronto Zoning By-law 569-2013.

The COA had before it two variances; for a floor space index equal to 1.34 times the area of the lot, and for a reduced rear yard setback of 7.4m. The COA refused the variances on July 15, 2020, and the Owner/Appellant filed an Appeal with the Toronto Local Appeal Body (TLAB). The application before the TLAB has been revised from that submitted to the COA, eliminating the variance for a reduced rear yard setback and reducing the requested FSI variance.

The TLAB is requested to authorize one variance:

1. **Chapter 10.80.40.40.(1)(A), By-law 569-2013**

   The maximum permitted floor space index is 0.8 times the area of the lot (126.37 m^2).

   The altered detached dwelling is proposed to have a floor space index equal to 1.19 times the area of the lot (191.58 m^2).

The hearing of this Appeal occurred by Electronic Hearing on April 30, 2021. In attendance at the virtual Hearing were: Joel Weinberg (Appellant); Amber Stewart, legal counsel for the Appellant; Sean Galbraith, expert witness for the Appellant, Mr. Bruce Van Lane and Ms. Deirdre Van Lane, Parties to the Appeal.

I advised that I had reviewed the pre-filed material and had conducted a site visit of the subject property and surrounding neighbourhood, but that it is what is heard at the Hearing that is of the most importance.

BACKGROUND

There is a history to this matter involving a few turns.

In 2019, the Owner had begun construction on the basis of a building permit issued by the City, but construction extended beyond the authorized permit and outside the By-law, and he was issued an Order to Comply by the City. Variances to facilitate the partially completed construction were refused by the COA. Subsequent to the COA hearing, the Owner modified the structure partially in accordance with a building permit to construct a two-storey single detached dwelling that was issued by the City without requirement for any variances. The structure currently exists as an unfinished three-storey structure. The variance that is before the TLAB is to authorize that space that was identified as "attic space" in the City-issued building permit be permitted to be used as habitable third floor space. The existing structure will require alteration to comply with either the issued building permit or the plans submitted to the TLAB.

Two Motions have previously been filed on this matter; one to extend timelines for Parties to submit Document Disclosures and Witness Statements, and a second for an adjournment of the Hearing. Both Motions were focused on obtaining a clear understanding of the variance(s) requested and a finalized site plan and elevations on the basis of which the Parties could prepare their Disclosures and Witness Statements for the TLAB proceedings.

The Witness Statements of Mr. and Ms. Van Lane were received the evening before the Hearing. Counsel for the Appellant conveyed her concern that she and the Expert Witness, Mr. Galbraith, had not had full time to review the Witness Statements. Ms. Stewart indicated she would not strenuously object to the admission of the Witness Statements of the Van Lanes but requested of the TLAB that additional latitude be granted with respect to Reply evidence and that they be given enough time, perhaps over the lunch break, to review the Witness Statements.

The Hearing proceeded on this basis, and I appreciate Ms. Stewart's constructive cooperation on this issue.

MATTERS IN ISSUE

I was reminded by counsel for the Appellant of my duty to consider the requested variance on its merits, and of the existence of case law that directs that a request for a variance "after the fact" is to be evaluated as if the construction was not in existence. At the same time, though, the neighbours and the TLAB are asked to recognize that denial of the FSI variance to allow the third floor to be habitable space would not scale back the proposal as a building permit has already been issued, albeit that the exterior shell

of the building would still require some modification to comply with the approved building permit.

JURISDICTION

Provincial Policy – S. 3

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

Variance – S. 45(1)

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

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

EVIDENCE

Mr. Weinberg addressed the TLAB to explain the circumstances surrounding the history of this application. His Witness Statement was marked as Exhibit 1.

Mr. Weinberg is a small independent home builder. He acknowledged that he made a mistake in building the basement and roof framing to the dimensions he was seeking from the COA instead of complying with the building permit that had been issued at the time. He advised that he had submitted a series of building permit revisions to reduce the as-built conditions. He advised that the house, as built, would have to be reduced in length to comply with either the building permit, or the plans submitted to the TLAB. He apologized to his neighbours, the Van Lanes, the City and the TLAB for his regrettable decision to build without authorization. Mr. Weinberg confirmed that he intends to build what is shown on the TLAB plans and will not submit a further application to the COA beyond what is before the TLAB.

Expert Witness

Mr. Galbraith was qualified as an expert in land use planning and provided evidence on behalf of the Appellant. His Expert Witness Statement was marked as Exhibit 2 and the Document Book filed by Amber Stewart on March 2, 2021, was marked as Exhibit 3 with the Visuals component marked as Exhibit 4. The late filing Document Disclosure filed by Amber Stewart, which is a visual exhibit comparing the TLAB submitted drawings

with the building permit drawings, was marked as Exhibit 5. A shadow study submitted as a late filing was marked as Exhibit 6.

It was Mr. Galbraith's opinion that the proposed variance is consistent with the policy objectives of the PPS and conforms to the policies of the Growth Plan.

Mr. Galbraith identified the neighbourhood boundaries he used for the purpose of evaluating the application – marked in red in the figure below. Mr. Galbraith considered the entirety of the area outlined, containing 1,692 lots, as the neighbourhood. He described the neighbourhood as consisting "primarily of a range of 1-3 storey detached houses, semi-detached houses, duplexes, triplexes or other multi-unit dwellings". In his opinion, the neighbourhood is not static, and is experiencing new construction and re-investment through renovations, additions, or entirely new builds "consistent with the character of the area".

Mr. Galbraith reviewed the site and area photographs, some of which show the current condition of the partially constructed dwelling on the subject property.

Mr. Galbraith described the subject site in its immediate context. He advised that it is a regularly shaped lot that is narrower than typical lots on the street which are generally in the 9m frontage category, while the subject property has a frontage of 6.13m. He noted that there are a number of lots with similar frontages as the subject property in the area.

Mr. Galbraith provided a detailed history of the evolution of the applications, plans and construction at the subject property. He described the extent to which the proposal had been reduced, compared to the application that had been before the COA. He advised that since the COA Decision, the City has issued a building permit for a fully Zoning By-law compliant two-storey single detached dwelling, in accordance with which the Owner has proceeded to modify the structure. The proposal before the TLAB is to permit the approved "attic space" – the third floor – to be used as habitable space. Mr. Galbraith advised that there were minor changes from the plans and drawings approved via the building permit and those before the TLAB, none of which trigger any variances.

Mr. Galbraith advised that both the building permit plans and the TLAB plans differ from the current as-built condition and that what is shown on the building permit drawings has not been completed on the site. The rear massing currently on the site, he advised, is non-compliant and modification has not been commenced pending the outcome of this TLAB Hearing.

The four tests

The General Intent and Purpose of the OP

Mr. Galbraith addressed the first test under s. 45(1) of the *Planning Act*. It was his opinion that the proposal meets the relevant urban design policies of the OP in that it is

located and organized to fit with its existing context and/or planned context (Policy 3.1.2). He noted that the proposal is for a three-storey building, a building typology which exists, or is approved, within the neighbourhood and the immediate context. In his opinion, the massing is respectful of existing built forms in the area.

The proposed development does not trigger any variances other than FSI, which Mr. Galbraith opines, indicates that its length, height, massing and other proportions are appropriate for the property and provides for anticipated scale relationships with its neighbouring properties. No variances are required for building height or length, which lead Mr. Galbraith to conclude that shadow impacts are entirely as anticipated by the Zoning By-law.

In reference to OP chapter 4.1, Mr. Galbraith advises that physical changes to established *Neighbourhoods* must be sensitive, gradual and generally "fit" the existing physical character. OP Policy 4.1.5 states that:

> *4.1.5 Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular:*
>
> *a) patterns of streets, blocks and lanes, parks and public building sites;*
> *b) prevailing size and configuration of lots;*
> *c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;*
> *d) prevailing building type(s);*
> *e) prevailing location, design and elevations relative to the grade of driveways and garages;*
> *f) prevailing setbacks of buildings from the street or streets;*
> *g) prevailing patterns of rear and side yard setbacks and landscaped open space;*
> *h) continuation of special landscape or built-form features that contribute to the unique physical character of the geographic neighbourhood; and*
> *i) conservation of heritage buildings, structures and landscapes.*

Text in Policy 4.1.5 identifies the considerations for delimiting a geographic neighbourhood and states that the physical character of the geographic neighbourhood includes the physical characteristics of the entire geographic area in proximity to the proposed development (the broader context) and the physical characteristics of the properties that face the same street as the proposed development in the same block and the block opposite the proposed development (the immediate context). It goes on to require that proposed development within a *Neighbourhood* will be materially consistent with the prevailing physical character of properties in both the broader and immediate contexts. In instances of significant difference between these two contexts, the immediate context will be considered to be of greater relevance.

Mr. Galbraith advised that, in his opinion, there is no significant difference between the physical characteristics of the immediate context and the broader context.

Mr. Galbraith referred to OP Policy 4.1.8 and advised, that in his opinion, the Policy provides that the intent of the Zoning By-law standards is to ensure that new development is compatible with the existing physical character of neighbourhoods. In his opinion, this policy recognizes that new development built to the permissions in the By-law may be different than existing development, but those differences can exist in a compatible manner. He stated that the physical form of the proposed development is in compliance with the zoning envelope.

> *OP Policy 4.1.8. Zoning by-laws will contain numerical site standards for matters such as building type and height, density, lot sizes, lot depths, lot frontages, parking, building setbacks from lot lines, landscaped open space and any other performance standards to ensure that new development will be compatible with the physical character of established residential* Neighbourhoods*.*

In reference to the shadow study (Exhibit 6), Mr. Galbraith highlighted what he referred to as the "worst case scenario" of March/September to show that there is no difference between the shadow cast by the proposal before the TLAB and the dwelling which could be built in compliance with the already approved building permit. Mr. Galbraith stated that the shadow does not change between the two alternatives because the massing does not change between the "as of right, no variance" version and the plans before the TLAB because the only variance is for FSI. He reiterated that the "requested variance does not change the shadow". He further opined that "a building this massive is contemplated by the By-law, (it is) effectively as intended by the Zoning By-law".

Mr. Galbraith noted particularly that the revised proposal requires only one minor variance, for the FSI. He asserted that the proposed structure itself, as a 2-storey building, could be built entirely as-of-right and opined that this is confirmed by the building permit issued by the City. He further concluded: "As such, the built form of the building is entirely in keeping with the existing and planned neighbourhood character for the area".

Mr. Galbraith concluded that it was his professional opinion that the proposed variance meets the general intent and purpose of the OP.

The General Intent and Purpose of the Zoning By-law

Mr. Galbraith advised that the RM zone is commonly found in the former City of York and provides permissions for single detached dwelling units up to apartment buildings. The specific zoning on the site specifies, however, a maximum of two dwelling units, minimum lot frontage of 12m, and FSI of 0.8. The only variance that is requested is for FSI, although Mr. Galbraith did document in his Witness Statement that the existing frontage is 9.13m. The By-law does not regulate the number of storeys but sets a maximum height of 11m. The height of the proposal is 9.9m.

Mr. Galbraith advised that FSI is the ratio of building gross floor area to the area of the lot. He advised that, in his opinion, the general intent and purpose of a maximum floor space index provision is to ensure that a proposed new building is appropriately massed for its context and does not create an over-building of the property. Mr. Galbraith

contended that, as no other variances are required to facilitate the revised proposal, and the proposed building is otherwise entirely permitted as-of-right, in his opinion the proposed FSI would not create any impacts on neighbouring properties that are not already contemplated by the Zoning By-law. As such, he did not consider the proposed development of the property to be an "over-build".

He provided a chart of FSI variances that had been granted by the COA, or on appeal. (Exhibit 3 Tab 24). In addition, he referred to photographs contained at Tab 6 of Exhibit 4 to illustrate other three-storey, multi-unit or taller buildings in the neighbourhood. He asserted that FSI variances are commonly approved in the neighbourhood, both in the broader context and in the immediate context. Of the 65 FSI variances approved in the last 10 years within the neighbourhood, he advised that approved densities for detached dwellings have ranged from 0.81 to 1.28.

Mr. Galbraith reviewed plans for a development on a vacant former church property at 439 Vaughan Rd that fronts on to Vaughan Rd and immediately abuts the subject property on the south side. I was advised of the status of the applications to date - an application for single detached dwellings and semi detached dwellings had been approved by the COA and appealed to the TLAB. A revised application had, at the time of the Hearing, been submitted to the COA for revised variances. Mr. Galbraith advised that the FSI's requested for the proposed 12 new homes on the former church property ranged from 1.2 FSI to 1.65 FSI, with the semi-detached dwellings to be located fronting on to Vaughan Rd. The proposal is to construct four three-storey detached dwellings facing on to Winnett Ave, with FSI's ranging from 1.24 to 1.36 on the property immediately abutting the subject property.

Mr. Galbraith concluded that, in his opinion, the requested variance to permit an increase in FSI meets the general intent and purpose of the By-law.

Desirable for Development of the land

Mr. Galbraith asserted that reinvestment in the City's existing housing stock and expanding the range of housing options in established neighbourhoods, including new larger detached dwelling units is appropriate and desirable for the City, the neighbourhood and the property.

Mr. Galbraith explained that the variance applies to the floor area located "under the roof". In his Witness Statement, he asserted that in the event that the variance is not approved, no substantive external physical changes to the structure are required in order to comply with the Zoning By-law, including to the building's roof height or massing. In his opinion, "the variance facilitates a use of the otherwise legally permitted building in such a way to increase its utility and optimize an under-utilized property that is well suited for more intensive housing largely in accordance with the Zoning By-law".

It is Mr. Galbraith's opinion that the variance is appropriate and desirable.

Minor

Mr. Galbraith asserted that the requested variance is minor, from a quantitative and a qualitative point of view and in terms of its impact. He asserted that the development is largely identical to what would be permitted on the property as a two-storey plus attic house with no variances.

Mr. Galbraith concluded that, in his opinion, the four tests of s. 45(1) of the *Planning Act* had been met.

In a fairly lengthy exchange between myself and Mr. Galbraith regarding the purpose of a FSI maximum in the By-law, he agreed that the purpose of the FSI limit was to prevent over-building, or overdevelopment of the property. I understood from the discussion that it was his opinion that only when a proposal exceeds the frame that is provided by the setback requirements (front, rear and sides) along with the building length and height limitations, (what is known as the "building envelope" in planning terms), does the consideration of overdevelopment come into play.

Mr. Galbraith said he could conceive of a building at 11m, with a greater building length than the proposal before the TLAB that could result in a building with an FSI of 0.8 if there were cathedral ceilings and other void spaces. Such a building, he asserted, could be permitted as of right and granted a building permit with no variances required. He pointed out that his client has not proposed to build to the maximum height and length permitted by the By-law and commented that his client "had left square footage on the table". He questioned that there can be impact from approval of the requested variance when an identically sized building (two-storey with an attic) is already permitted. I asked, then, what would be the intent and purpose of an FSI maximum if the building envelope was, as in his opinion, the essential definer of permissible development. Mr. Galbraith responded that in his opinion the FSI maximum is there "just in case" and that there were parts of Toronto where the FSI is set at an unrealistically low level to trigger a variance process.

I asked Mr. Galbraith about the status of the development on the adjacent church property. I was advised that a revised application was before the COA. Mr. Galbraith opined that the church redevelopment changes the context for the subject property.

Mr. Van Lane asked Mr. Galbraith under cross examination if it was not to be expected that a utilization of existing attic space speaks more to a renovation of a building rather than a new build. Mr. Galbraith responded that the By-law does not make a distinction between renovation and new build.

Parties

The Document Disclosure of Mr. Bruce Van Lane dated April 29, Parts 1 and 2 was marked as Exhibit 7. His Witness Statement (April 30) was marked as Exhibit 8. The Witness Statement of Ms. Deidre Van Lane was marked as Exhibit 9.

Mr. Van Lane referred to photographs showing how their house, which is immediately to the north of the subject property, is dominated by the structure. In his opinion, it is

difficult to entertain that the massing on that house is not significant. He advised that most of the sky seen from the Van Lanes' back yard is obliterated.

Mr. Van Lane referred me to two TLAB cases for reference as where the Members found that the neighbour/ community witnesses' evidence to be more compelling than the Expert Witnesses in those matters. Mr. Van Lane referenced the Members' conclusions that an increase in building size should be grounded on more what is permissible as-of-right, on more than drawings attesting to construction feasibility.

Mr. Van Lane referenced former TLAB Chair Lord's Decision regarding 22 Birchview Blvd on a case with similar considerations as the one currently before me. Chair Lord's Decision references a pattern of activity designed to attract intervening permissions as part of a plan to advance the prospect of subsequent approvals.

Mr. Van Lane spoke at length regarding the attic space that is intended to be authorized as habitable space through the requested variance. In his opinion, the third floor has been built as habitable living space. He asserted that there are no roof trusses or wall required, that the roof is supported by roof joists. He asserted that the building permit was issued showing, in his opinion, unneeded and cosmetic wall ties to present the intended living space as attic for the purposes of gaining a building permit. In his opinion, the wall ties are manipulation for the purposes of gaining a permit and that the intent all along has been to construct habitable space. Mr. Van Lane asserted that the installation of wall ties makes no sense without a further purpose and that all the cross-ties could be removed within an hour with no structural effects at all.

Mr. Van Lane referenced former Chair Lord's Decision on 40-42 Elmer Ave and advised that he thought that Decision could be a model for this matter and that some compromise lesser than the request could be granted by the TLAB with the condition that the rear part of the proposal be shorter (less high) and shortened (not as long). I advised that if a compromise was something the Parties were willing to consider, the shape of that compromise is best discussed between the Parties rather than decided by the TLAB. I advised the Parties that the TLAB is bound to the duties of its mandate to adjudicate and make decisions according to the evidence heard.

A TLAB-led mediation was briefly proposed, but due to the late emergence of the suggestion at the end of the day during the last minutes of the Hearing, in acknowledgement that the Applicant has previously attempted to hold discussions with the Van Lanes that have not been reciprocated, and in light of the Applicant's concern at a potential further delay, I ruled that the Hearing would proceed to conclusion. I nonetheless encouraged the Parties to explore a possible settlement that would mitigate potential impacts on all Parties and advised that there would be a two week window before I began writing my Decision. I encouraged the Parties to use that time to explore whether a settlement between them was possible. I advised that if I did not hear from them within that time period that I would proceed to issue this Decision.

Under cross examination Mr. Van Lane was asked to acknowledge that a previous building permit that was issued in September 2020 shows a longer second floor and third floor than the plans before the TLAB and that the proposal before the TLAB results

in a building that is smaller than what can be done as-of-right. Mr. Van Lane did not concede this as, in his opinion, the FSI is still not compliant so the proposal should not be allowed. Mr. Van Lane was asked to acknowledge that the proposal before the TLAB has not maximized the building shell and that the Applicant has done better, being less impactful, than the original shell and he was also asked to acknowledge that the Applicant could elect to go back to a bigger building footprint, and that what the Applicant proposes through the TLAB plans is better for the Van Lanes. Mr. Van Lane acknowledged the reality of the issued building permit but reiterated that in his opinion the permit should not have been issued on the basis of attic space when it is habitable space.

Ms. Deidre Van Lane's Witness Statement was entered as Exhibit 9. Ms. Van Lane challenged Mr. Galbraith's definition of the neighbourhood and advised that, in her opinion, the neighbourhood is more properly defined as Winnett and Arlington Avenues north from Vaughan Rd to the pedestrian connection between the two through Arlington Parkette. Ms. Van Lane asserts that there are no three storey houses within the area she identified as the neighbourhood area.

Ms. Van Lane addressed the massing of the proposed houses on the pending redevelopment of the church property and noted that the third storeys, unlike the proposal on the subject property, are stepped back. In her opinion, in the event the proposal on the church property is approved, the proposal on the subject property would be the only house in the immediate context at three storeys with no setback. In her opinion, this massing would not respect the existing physical character of the neighbourhood.

ANALYSIS, FINDINGS, REASONS

I note that the existing lot frontage on the subject property is 6.13m, whereas the By-law standard is 12m. No variance has been requested for lot frontage. I did not hear evidence on the matter of the lot frontage.

As was noted in the first Motion Decision, the matter before the TLAB is to be heard as a Hearing "de novo" pursuant to section 45(18) of the *Planning Act*, meaning that the entire application that was before the COA is being considered anew. The burden is on the Applicant to prove its case. The Applicant is required to satisfy the TLAB that its application satisfies the four statutory tests mandated by s 45(1) of the Planning Act.

First, a short note regarding the history of prior building permits and actual construction on the property. I am cognizant of counsel's reminder to consider the requested variance on its merits, and of the existence of case law that directs that a request for a variance "after the fact" is to be evaluated as if the construction was not in existence. I refer to the fact that a structure has already been substantially constructed on the property only to address the choice that was highlighted for the Van Lanes and the TLAB in the Hearing. The Van Lanes were reminded that the Applicant has had two permits issued, one of which reflects a longer building, with a greater potential imposition on their property. If the variance for FSI is not granted, counsel stated that

her client would not have a reason to go to the expense of reducing the rear of the existing structure on the property, that he would most likely revert to the building permit issued in September 2020, which reflects a larger structure than the proposal currently before the TLAB. As the concern of the Van Lanes throughout this process has been the imposition of what they regard as a very large building next door to their home and property, this would be a regrettable outcome for all Parties as the Van Lanes would likely experience a building larger than the proposal before the TLAB and the Applicant would not be able to utilize any of the space within the structure that has already been constructed, at some expense. Agreement between the Parties regarding settlement discussions has not come to pass and therefore this matter has proceeded to Decision as a disputed appeal.

General Intent and Purpose of the Official Plan

Mr. Galbraith, in his evidence, cited Official Plan Policy 4.1.5. Under this Policy, I consider sub c) to be the most pertinent criterion for the consideration of an FSI variance.

> *4.1.5 Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular…:*
>
> *c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;*

Massing, scale and density are all architectural terms having to do with the size and relationship of a building to what surrounds it. In this context, massing refers to the general perception of the shape and form, as well as size of a building. Scale refers to a building's size in relation to something else, for example an adjacent building or a person. Density, in this context, means the size of the building in relation to the lot on which it is located. FSI is the numerical indicator used in the By-law to represent what the OP refers to as "density".

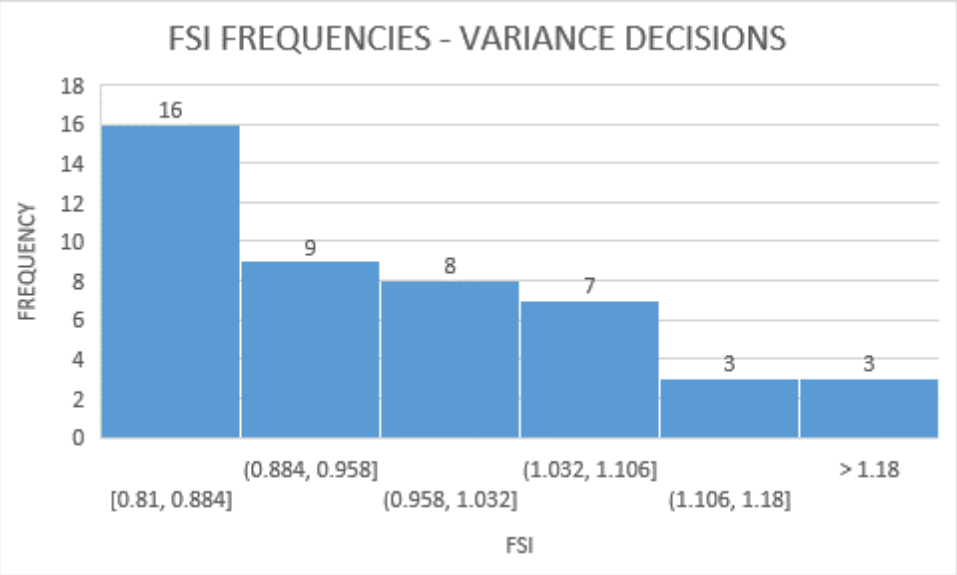
Policy 4.1.5 restricts the determination of material consistency with the prevailing physical character to those physical characteristics listed in the Policy. The three physical characteristics listed in OP Policy 4.1.5 which I find relevant to this matter are scale, density/FSI and Massing.

DENSITY/FSI

I have considered the data contained in Tab 24 of Exhibit 3 (Document Disclosure of Appellant). This data documents approvals for variances granted by the COA, or on appeal. It is therefore likely to over-represent the larger houses in the neighbourhood as it does not capture those redevelopments that have proceeded without FSI variances, i.e., are within the maximum allowed by the By-law. Even a sample thus skewed towards the upper end of the actual on-the-ground prevailing density can be a useful snapshot of densities that have been approved in the neighbourhood.

Mr. Galbraith gave evidence that of the 65 FSI variances approved in the last 10 years within the neighbourhood, approved densities for detached dwellings have ranged from 0.81 to 1.28. This information does not greatly assist the TLAB in understanding what the ***prevailing*** density in the neighbourhood is, which OP Policy 4.1.5 defines as the *most frequently occurring.* It is the *prevailing* density that OP Policy 4.1.5. says development must respect and reinforce.

A simple graph of the data provided in the Appellant's Document Disclosure illustrates a frequency distribution of the provided FSI variances.



Note: categories = greater than the first number and inclusive of the second number
Source: Tab 24 of Exhibit 3 – Document Disclosure of Appellant
* Duplicate entry for 563 Arlington eliminated, included at the higher FSI Decision

From this simple analysis, it appears that FSI's lesser than the proposal (1.19) prevail in the sample data drawn from COA approvals. Only 3 of the 46 observations provided are of a similar magnitude to the proposal. I find that the evidence provided is insufficient to conclude that the proposal respects and reinforces the prevailing density of the neighbourhood, as is required by OP Policy 4.1.5.

OP Policy 4.1.5 provides that development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers within the geographic neighbourhood not be precluded, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood *and already have a significant presence on properties located in the immediate context **or** abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood.* The OP defines the immediate context as the properties that face the same street as the proposed development in the same block and the block opposite the proposed development. OP Policy 4.1.5 also states that in instances of significant difference between these two contexts, (broader

and immediate contexts), the immediate context will be considered to be of greater relevance.

I have been provided no analysis by any of the Parties to understand the prevailing density in the immediate context as defined by the OP. In his Witness Statement, Mr. Galbraith asserted that the there is no significant difference between the physical characteristics of the immediate context and the broader context. He particularly noted that OP Policy 4.1.5 states that in determining whether a proposed development in a *Neighbourhood* is materially consistent with the physical character of nearby properties, only the physical character of properties within the geographic neighbourhood in which the proposed development is to be located will be considered. This part of Mr. Galbraith's Witness Statement (paragraph 8.6.7.3 of Exhibit 2) continues as follows: *"The section, it is notable, does not say that only the physical character of the properties within the "immediate context" will be considered. Such properties are included in the consideration, but not are not given more weight in circumstances where there is no significant difference between the immediate context and broader context."*

In his testimony at the Hearing, Mr. Galbraith did reference that the proposed redevelopment on the adjacent church property would change the context. COA approvals were still pending for this redevelopment on the adjacent property. I was not, however, provided an analysis of how the adjacent proposal might change the *prevailing* density in the neighbourhood or the immediate context.

SCALE and MASSING

In her evidence, Ms. Van Lane asserted that the massing of the proposed structure would not respect the existing physical character of the neighbourhood. She referenced the third storey stepbacks incorporated into the proposal on the former church property and asserted that, in the event the proposal on the former church property was approved, the proposal on the subject property would be the only house at three storeys with no setback and therefore would not be in keeping with the physical character of the neighbourhood. Mr. Galbraith provided photographic evidence of examples of other three-storey structures in his neighbourhood study area but did not provide a fuller analysis of building massing that prevails in the study area.

I have been provided with a depiction of the scale of the proposal in relation to the property of Mr. and Ms. Van Lane by both the Applicant and the Van Lanes. The scale of the proposal is demonstrably unlike that of the Van Lanes' house. The OP, however, refers to the prevailing scale of nearby residential properties and I have not been provided with a sufficient understanding by any of the Parties of the prevailing scale of nearby residential properties or of the neighbourhood in general to evaluate the proposal in the required context.

FINDING: GENERAL INTENT AND PURPOSE OF THE OP

Mr. Galbraith relied on the assertion that the proposed structure itself, as a 2-storey building, could be built entirely as-of-right and opined that this is confirmed by the building permit issued by the City. He further concluded: "As such, the built form of the

building is entirely in keeping with the existing and planned neighbourhood character for the area". I do not accept this conclusion. The fact that a building permit has been issued is not a basis for interpreting the policy requirements of the Official Plan. In order to achieve authorization for the requested variance, the Applicant/Appellant is required to satisfy the TLAB that its application satisfies the four statutory tests mandated by s45(1) of the *Planning Act*.

The first of these tests is that the proposal maintain the general intent and purpose of the OP. Issuance of a building permit does not relieve the Applicant of this burden and does not in and of itself provide substantiation that the Policy requirements of the OP have been met.

I find that the Applicant has not provided sufficient evidence to conclude that the proposal respects and reinforces the prevailing massing and scale of the geographic neighbourhood (OP Policy 4.1.5 c)) and therefore I find that compliance with the general intent and purpose of the OP has not been established.

Further to the requirements of OP Policy 4.1.5 c) in the aspect of density, the evidence does not show that the proposal, at 1.19 FSI, falls within the prevailing density of the geographic neighbourhood. Density/FSI in the immediate context has not been analyzed. The proposed FSI has not been shown to be the prevailing, most frequently occurring, or even significantly represented, density in the neighbourhood.

Therefore, for the reasons above, I find that the Applicant has failed to demonstrate that the variance requested for density/ maximum FSI maintains the general intent and purpose of the Official Plan.

General Intent and Purpose of the Zoning By-law

Mr. Galbraith takes the position that the three-dimensional space defined by the maximum building length, maximum building depth, maximum height, and by the various setback requirements prescribed in the By-law – known as the building envelope – is "as of right". From his perspective, the FSI maximum is presented as a number with limited importance or meaning, as just a number, while the building envelope is relied upon as the primary reference for the consideration of potential overdevelopment. He referenced the fact that a building permit has already been issued for essentially the same exterior shell of the building as proof that the permitted dimensions of the building on the property are limited only, or primarily, by the building envelope parameters of the By-law. In Mr. Galbraith's opinion, his client "has left square footage on the table".

The building permit that has been issued is for a two-storey building with an attic space. Mr. Galbraith stated that the third floor over the existing footprint encloses all of the additional FSI within the roof/ attic space. I have referenced Exhibit 3, Tab 11a (TLAB Plans) to ascertain what percentage of the total gross floor area (GFA) of the proposed dwelling is contained by the third floor. Annotation on the Site Plan indicates that the proposed "new reduced third floor = 53.23m^2". (I note that the statistics on the site plan regarding floor area and FSI do not tally with the requested variance at 1.19 FSI or the

total GFA documented in the most recent Zoning Notice). If I am to understand that the additional GFA to be allowed by the variance is contained within the third floor/attic, the entire third floor, 33% of the total proposed GFA, has been labelled as "attic" for the purposes of obtaining a building permit.

I acknowledge that a building permit has already been issued for a structure essentially the same as the TLAB proposal, on the basis that the building plans technically complied with the By-law. This compliance is singularly and only on the premise that one third of the potential habitable space, the entire third storey built generally to habitable standards, is to be left unused. The scenario on which the building permit was issued is arguably neither plausible nor practical. The cost, materials, time and effort to construct a full third storey for use as attic storage space makes this proposition unrealistic in most circumstances. The Applicant has relied on this building permit to argue that, since the structure resulting from the building permit complies with the By-law, no adverse impacts can be adduced from an approval of the requested variance as the built form would not change at all. Thus, the built form is presented as a *fait accompli* by Mr. Galbraith with no adverse effects resulting from the change of use within the structure.

The applicant argued, in essence, that if a building permit can be obtained for a building shell, on whatever premise that includes substantial "void" space within, then it is that physical form that is, by definition, permissible. The use to which the interior space is to be put thereafter is presented in this approach as an adjustment within this "approved" structure, not a **prior** consideration to be applied to the maximum size, scale and massing of the building. I do not agree with the opinion of Mr. Galbraith in this regard which I find relies on an overly narrow interpretation of the intent and purpose of the Zoning By-law. The purpose of a density/ FSI maximum in the By-law is specifically and purposefully to regulate the size and scale of physical form on the lot; it is not a postscript to the other requirements of the By-law. It seems redundantly obvious to state that if the ultimate intent of use for the third floor had been included, the building permit would not, and could not, have been issued.

In my discussion with Mr. Galbraith regarding the intent and purpose of the FSI maximum set in the Zoning By-law, I queried his proposition that the building envelope sets the limits of how large a building can be and asked, then, what is the purpose of a separate FSI maximum standard in the By-law? Mr. Galbraith responded that the intent of the FSI maximum in the By-law is set, in some circumstances, at an unrealistically low level to trigger a variance process "just in case". Ms. Stewart in her closing statement referred to this discussion and framed the intent of the FSI maximum in the By-law as a means to provide an added level of control to the parameters set by the building envelope, to "shape" and "sculpt" the proposal, and referred to the reductions her client has made to the FSI and to the size of the proposal as a demonstration of how the FSI standard is supposed to work.

I agree with Ms. Stewart in this regard; the intent and purpose of the FSI maximum in the By-law is to assert an additional level of control beyond that which is provided by the By-law building envelope parameters – height, length, depth, and rear, front and side yard setbacks.

There would be little purpose to the inclusion of an FSI limitation in the By-law if it were indeed subservient to the other parameters set out in the By-law. Mr. Galbraith provided the TLAB with his opinion that the general intent and purpose of a maximum floor space index provision is to ensure that a proposed new building is appropriately massed for its context and does not create an over-building of the property. The plain intent and purpose of the FSI maximum in the Zoning By-law is to limit the total amount of floorspace on the property, allowing that total amount of floorspace to be positioned on the site according to design and within the limits represented by the other requirements of the By-law. In most circumstances, as in this case, the FSI maximum in the By-law is set at a value less than that which reflects a total build out of the building envelope, signifying an intent to limit total floor space within the parameters of the building envelope. For a dwelling with a conventional deployment of habitable GFA, as in this proposal before me, the intent of the By-law in this circumstance is that one may build to the maximum of one, or multiple, of the building envelope parameters, but that one would be limited from always building to the maximum of *all* of them by the overriding limitation of an appropriate FSI maximum. A variance to an FSI standard remains a privilege and not an entitlement, presumption, or technicality, even in situations where it is the only variance requested. I draw no inference from the issuance of a building permit on the basis of a use profile which is different than the proposal before me.

The FSI variance request must be considered in the light of the four tests mandated in s. 45(1) of *Planning Act*. The method employed is to test the proposal against the policies of the OP, the intent of the Zoning By-law, whether the proposal is appropriate for the desirable use of the land, and an assessment of adverse impacts. In other words, does the application represent good land use planning? In the normal course of events, only then would a building permit be issued to reflect the proposed FSI if the variance is granted. In this case, the sequence of approvals has evolved differently, with more than one building permit having been issued in advance of the variance adjudication.

It is a fact that the Applicant was able to obtain a building permit to build a house with at least one third of its total floor area as unusable space. This reality, however, does not predetermine a continuing conclusion that such an exterior is as-of-right. It is as-of-right only so long as the unusable space remains unusable. That a building of such size and scale can be permitted engages a certain flexibility in the By-law. The tests for approving the variance remain steadfast, however, and involve an independent evaluation of the proposal's compatibility with the physical character of the neighbourhood and the scale, massing and density of the physical form, the conclusion of which is not predetermined by the prior issuance of a building permit. The intent and purpose of the Zoning By-law is to set performance standards to ensure that new development will be compatible with the physical character of established residential *Neighbourhoods.*

The justification for the FSI variance was, in summary, that the building itself had already been approved via a building permit process and that the conversion of attic space within the building to habitable space via a FSI variance would not alter the built form and there would therefore be no adverse impacts. This approach regards

habitable GFA not as the creator of the building footprint and dimensions, but as the result of the building's dimensions. I do not ascribe to this approach. The intent and purpose of an FSI maximum is for form to follow function, not the other way round.

FINDING: GENERAL INTENT AND PURPOSE OF THE ZONING BY-LAW

The foundation of Mr. Galbraith's evidence on behalf of the Applicant is that because a building permit has already been issued for the physical form of the proposal, the proposal must necessarily be in compliance with the intent and purpose of By-law. Mr. Galbraith's opinion must be regarded with some respect, and this is a credible planning opinion. However, for the reasons outlined above, it is not one that I can support. As I have explained, this approach relegates the consideration of a FSI maximum, in a two-part process, to a subservient and secondary consideration which I find to be contrary to the intent and purpose of the By-law.

If I set aside Mr. Galbraith's opinion that the issuance of a building permit for the built form substantiates that the TLAB proposal is in compliance with the general intent and purpose of the By-law, which I have, there is thereafter insufficient analysis in the evidence before me to find that the intent and purpose of the By-law has been maintained. I therefore find that the second test of s.45(1) has not been met.

DESIRABLE AND MINOR

In considering the applications for variances from the Zoning By-laws, the TLAB must be satisfied that the applications meet all of the four tests under s. 45(1) of the *Act*. An adjudication that that even one of the four tests is not met is sufficient for the requested variance to be denied. In this matter, I have found that, for the reasons outlined above, the first two tests (general intent and propose of the OP and the Zoning By-law) have not been met.

For the same reasons, I find that the evidence that the proposal is desirable for the appropriate development of the land is insufficient for the purpose of meeting the third test.

For the same reasons, I find that the evidence asserting no adverse impact, and that the proposal is minor, is insufficient for the purpose of meeting the fourth test.

DECISION AND ORDER

The Appeal is dismissed. The Committee of Adjustment decision noted above is final and binding, and the file of the Toronto Local Appeal Body is closed.

X 

Ana Bassios
Panel Chair, Toronto Local Appeal Body