

# DECISION AND ORDER

**Decision Issue Date**      Tuesday, November 09, 2021

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

**Appellant(s): SEAN FRANKFORT**  
**Applicant(s): HICKS DESIGN STUDIO**  
**Property Address/Description: 251 DUNVEGAN RD**

**Committee of Adjustment File**  
**Number(s): 19 261249 STE 12 MV (A1304/19TEY)**  
**TLAB Case File Number(s): 20 203202 S45 12 TLAB**

**Hearing dates** (the TLAB cancelled some days on consent of parties): Day 1 Mar 11; Day 2 April 26; Day 3 May 10; Day 4 June 15; Day 5 June 21; Day 6 Aug 11; Day 7 Aug 17; Day 8 Oct 12, all in 2021

**DECISION DELIVERED BY T. YAO**

## APPEARANCES

NAME	ROLE	REPRESENTATIVE
Hicks Design Studio	Applicant	
Sean and Jodi Frankfort (Owners)	Appellant	Paul Demelo
Bruce Bostock	Expert Witness	
Michael Goldberg	Expert Witness	
City Of Toronto	Party	Derin Abimbola
Marsha Glicksman, Harry Glicksman	Parties	Eileen Costello, Jasmine Chung

George Krieser	Party	Ian Andres
Peter Kuntz	Expert Witness	
Peter Daniels	Party	Amber Stewart
Franco Romano	Expert Witness	
Kees Van Winters	Party	

## **Introduction and Overview**

### **Overview of the main findings**

The Frankfort family wishes to demolish their house and construct a new one with extensive improvements at the rear, consisting of a slightly raised rear terrace, privacy walls, a cabana and inground swimming pool. The basement plans have been through several iterations in part to avoid injuring or removing a boundary tree jointly owned by the Frankforts and the neighbours, Kriesers.

On September 16, 2020, the Committee of Adjustment refused the application; the Frankforts appealed, and so this matter comes before the TLAB.

The Frankforts request the following variances (set out on the next page in Table 1). This Table also reflects the changes in requested variances that have occurred during the course of the TLAB hearing: Among the nine variances find building length is determinative because:

- It is not in keeping with the character of the neighbourhood and therefore contravenes s. 4.1.5 of the Official Plan;
- It is not minor; and
- This over-long building has a “knock on” effect — it causes more excavation in the rear yard. Although this excavation is outside the tree protection zones – the minimum “no-go” areas, I concluded that cutting roots in those areas - even outside the formal no-go area - does not provide a suitable environment for growing trees, contravening 3.4.1.d of the Official Plan.

In conclusion I dismiss the Frankforts’ appeal.

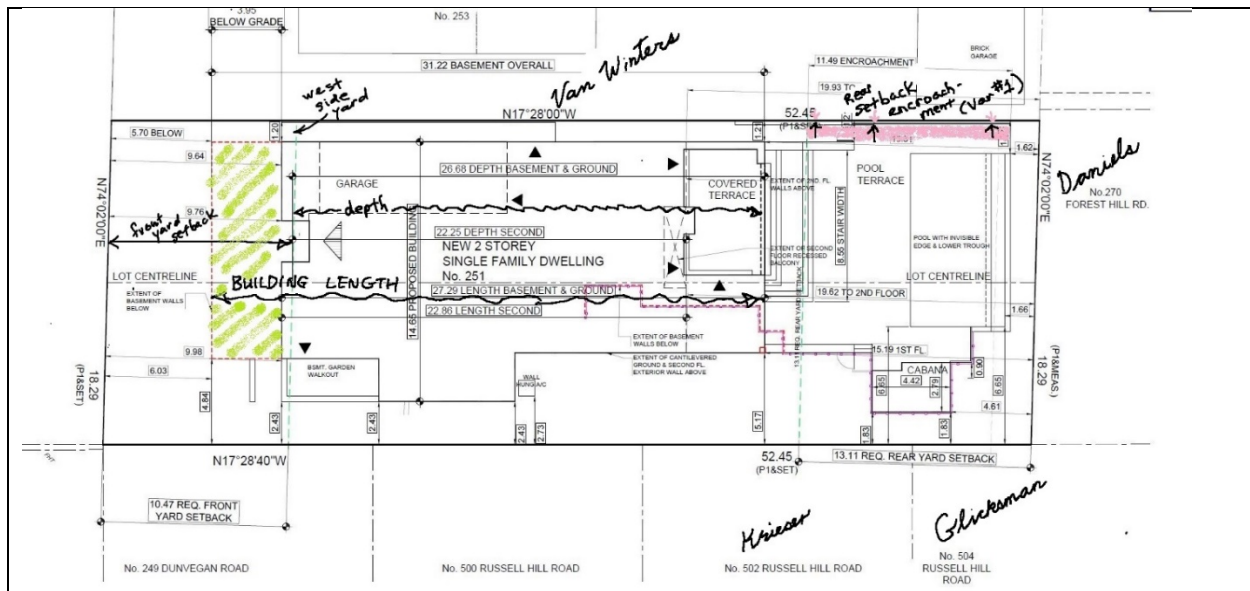
Table 1. Variances sought for 251 Dunvegan Rd Variances from Zoning By-law 569-2013			
		Required	Proposed
1	Rear yard walkout terrace, and separate lower pool terrace encroachment	Max. encroachment. 2.5 m; min. side yard 1.7 m	These terraces encroach 11.49 m into rear yard setback and the pool terrace is slightly above grade, resulting in a west side yard setback of 0 m
2	Width exterior stairs between the upper and lower terraces	2.0 m	8.55 m wide
3	Building height	7.2 m	8.97 m
4	Building length	17 m	31.22 m
5	Building depth	19 m	26.68 m
6	Floor space index	0.35 times area of the lot	0.59 times area of the lot
7	Second storey balcony	4 m <sup>2</sup>	5.85m <sup>2</sup>
8	Front yard setback	10.47 m	9.64 m
9	West side yard setback	1.8 m	1.2 m

In Figure 2, I illustrate some of these variances. The “building length” is the distance from **front basement wall** to **rear basement wall**, which in this case, includes basement rooms under the front lawn (lime green hatched in Figure 3, next page), contributing to the 31.22 m overall building length.

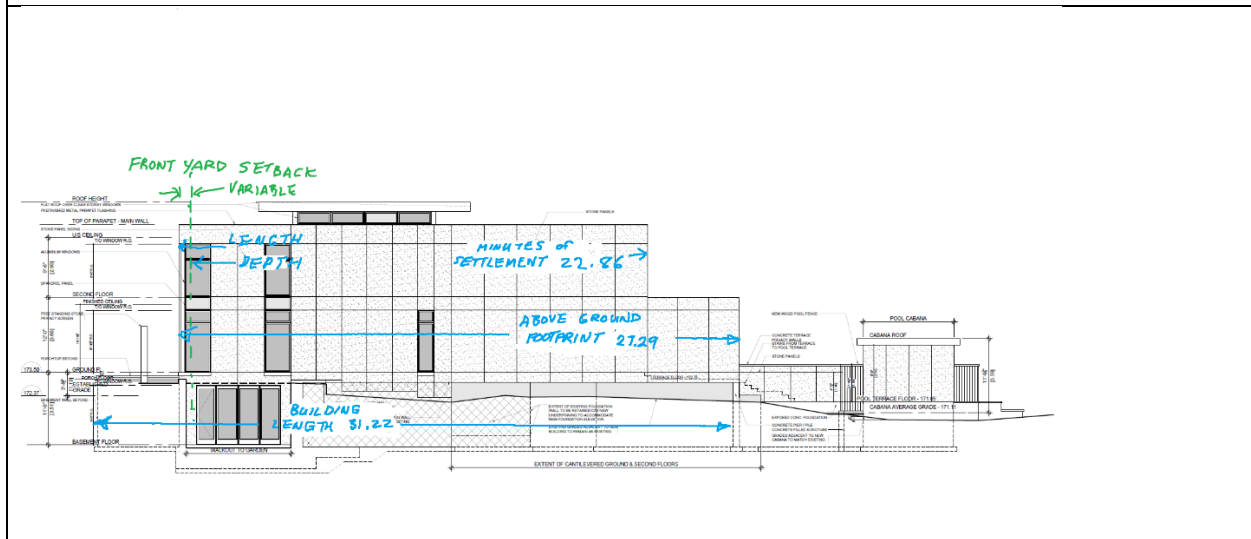
There is also a **front yard setback** exceedance, i.e., the front portion of the ground floor projects 0.83 m into the front yard setback. This is a separate variance from length, since the plan examiner determines front yard setbacks on the basis of above ground walls only.

**Figure 2. Pictorial depiction of some of the variances.**

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The pink strip at the rear illustrates Variance 1; the west side yard setback of 0.0 m. In Figure 3 is a cross section showing the three lengths by floor.

**Figure 3. Cross section with building lengths by floor****Site Visit****MATTERS IN ISSUE**

Higher level documents (the Provincial Policy Statement and the Greater Golden Horseshoe Growth Plan) must be considered, but they contain a high level of generality. For example, the Provincial Policy Statement discourages lot creation on prime agricultural land and prefers municipal water and sewage over private systems, not applicable to a lot in Forest Hill. In this case the higher level policies are not determinative.

The requested variances must comply with s. 45(1) of the *Planning Act*, and must cumulatively and individually demonstrate that they:

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

The proponents (the Frankforts) must demonstrate to the decision-maker that the tests are met on the balance of probabilities; there is no right to a variance.

## **EVIDENCE**

With respect to planning evidence, I heard from Michael Goldberg and Franco Romano, both of whom I qualified as able to give opinion evidence in the area of land use planning. With respect to tree evidence, I heard from Bruce Bostock and Peter Kunz, both of whom I qualified as able to give opinion evidence in arboriculture. Mr. Van Winters, a neighbour, testified on his own behalf and was the only non-expert to testify.

## **ANALYSIS, FINDINGS, REASONS**

### **The Parties**

The properties of the families taking part in this appeal are shown in previously discussed Figure 2 (Note north is to the right and Dunvegan Rd to the left). The Glicksmans settled with the Frankforts and entered into Minutes of Settlement part-way into the hearing, and thus changed from opposition to support for the project. This was only a partial settlement. This left the remaining opponents:

Mr. Van Winters, the Dunvegan neighbour;

the Danielses, the rear neighbours; and

the Kriesers, back-to-side neighbours living on Russell Hill Road, (this street is outside of Figure 3 and would be towards the bottom.)

The City of Toronto lawyer, Ms. Abimbola, was present throughout. She did not attend with a witness and did not cross-examine. Her role was to ensure that certain conditions would apply in the event of approval. She said, “the City takes no position”.

A red oak (Tree 28) is shared between the Frankforts and. Kriesers, approximately 150 years old and according to arborist Peter Kunz, could live to be 500 years old. I accept his estimate of the tree’s age, which was not challenged. Notwithstanding, there was a difference in opinion whether the City’s minimum tree protection measures would protect it in the medium to long term, that is, after a tree injury permit was issued, construction completed and the tree deposit returned.

### **Analysis of s. 4.1.5 of the Official Plan of the City of Toronto**

The applicable Official Plan policy is:

- 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; . . .
  - h) continuation of **special landscape** or built-form **features** that contribute to the unique physical character of the geographic neighbourhood; and

### The neighbourhoods

Mr. Goldberg's neighbourhood is the diagonal shape between the Kay Gardner Beltway and Old Forest Road, a couple of blocks south of Eglinton Ave. Mr. Romano looked at roughly the same area. This is the "broader" context. The difference between the two planners is that Mr. Romano concentrated on the "**immediate context**", i.e., the block containing 251 Dunvegan and the proximate context (adjoining block). Mr. Goldberg did not break down his data in those terms but generalized from large to small areas in a "qualitative" fashion". The Official Plan requires "material consistency with **both contexts** <sup>1</sup>, and Mr. Romano, taking his cue from these words, concluded building length would not respect and reinforce the prevalent massing in the immediate context.

### FSI and Height

Mr. Romano did not strenuously dispute either of these. Mr. Goldberg said the FSI of 0.62 (now reduced to 0.59 as a result of the settlement) was "very customary, if not low". Mr. Romano was cautious about the FSI; he conceded it might be appropriate if properly "deployed".

Height as defined under the "new" zoning bylaw is one of the last matters to be determined from the many appeals filed in 2013<sup>2</sup>. The Ontario Association of Architects has retained Mr. Goldberg as its planner in that matter and his position before the Land

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<sup>1</sup> The physical character of the geographic neighbourhood includes both 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). 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.

<sup>2</sup> The Architects' appeal here is of a zoning by-law, which has been adopted by City Council. TLAB appeals are of a Committee of Adjustment decision granting or refusing a variance.

Tribunal is that the new by-law made a significant but unintended decrease in permitted height for flat roofs and is too restrictive for his client's members. Height was not contested by Mr. Romano.

It was however brought up by the neighbour to the west, Mr. Van Winters, who noted that most of the houses on his block were three stories. Mr. Goldberg replied that the new by-law limits a flat roof to 7.2 m, whereas a pitched roof can be 11 m high. In response to Mr. Van Winters, he said his clients chose deliberately to have a flat roof and with impacts, Mr. Goldberg felt were 'more innocuous' than a 11 m pitched roof.

## **OPA 320**

The present wording for s. 4.1.5 of the City's Official Plan was modified by Official Plan Amendment 320 in December 2015 but did not become effective until December 2018<sup>3</sup> This date has significance for the Committee of Adjustment decision for 69 Old Forest Hill Rd, just down the street from the subject property and therefore in the immediate context. Official Plan Amendment 320 brought about these changes to s. 4.1.5:

- the introduction of the word "prevailing" before "massing" in c);
- the creation of an immediate and broader context, whereas before there was only the "neighbourhood";
- the defining of "prevailing" by suggesting that it is the "most frequently occurring".<sup>4</sup>

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<sup>3</sup> The amendment came into force by Order of the Local Planning Tribunal by Member Wilkinson. ( PL16771, Dec. 7, 2018.)

<sup>4</sup> The previous wording only used "prevailing" with two characteristics. 4.1.5 . Development in established neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular

- a) patterns of streets, blocks, and lanes;
- b) size and configuration of lots;
- c) heights, massing scale and dwelling type of nearby residential properties;
- d) prevailing building types(s);
- e) setbacks of buildings from the street or streets;
- f) prevailing patterns of rear and side yard setbacks and landscaped open space;
- g) continuation of special landscape or built-form features that contribute to the unique physical character of the neighbourhood; and
- h) consideration of heritage buildings, structures and landscapes.



The Plan does permit a departure from the most frequently occurring characteristic if there is a mix of characteristics, but the minority characteristic must still exist “in substantial numbers” in the larger area, as well as having a “significant presence” on the block in which the subject property is located.<sup>5</sup> These changes must be applied from December 2018 forward, which includes the Frankforts’ application.

### Mr. Goldberg’s length evidence

Mr. Goldberg’s description of the neighbourhood was that it was “eclectic”.<sup>6</sup> He did not provide real life building length data or perform summary statistics. Nor did he study building lengths as a subset of massing characteristics.

His spreadsheet of decisions show 112 decisions, of which all but three were approvals. There were 27 decisions allowing for an increase in length, with an average variance of 25.7 m and 21 decisions allowing for an increase in depth, with an average of 27.4 m. Figure 4 summarizes five of Mr. Goldberg’s 112 decisions; they are the only ones that are in the immediate neighbourhood.

<b>Table 4. Recent COA decisions in the immediate neighbourhood</b>
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OPA introduced: “The physical character of the geographic neighbourhood includes both 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).

and “The prevailing building type and physical character of a geographic neighbourhood will be determined by the most frequently occurring form of development in that neighbourhood.”

<sup>5</sup> While prevailing will mean most frequently occurring for purposes of this policy, this Plan recognizes that some geographic neighbourhoods contain a mix of physical characters. In such cases, the direction to respect and reinforce the prevailing physical character will not preclude development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers within the geographic neighbourhood, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood and already have a significant presence on properties located in the immediate context or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood.

<sup>6</sup> Given the amount of time that the replacement dwelling dynamic has been happening and the high level of activity over this time, the new second generation of replacement dwellings in the neighbourhood creates an eclectic pattern of streetscape and property development patterns, reflected by the varied and custom architectural styles, including a mix of architectural vernaculars, roof styles and types, presentation to the street, massing, building depth and building size. The dwellings in this Study Area are 2 – 3 storeys, and large at generally 418 m<sup>2</sup> (4500 ft<sup>2</sup>) – 604 m<sup>2</sup> (6500 ft<sup>2</sup>) and larger.

		FSI	Building length
2001	502 Russell Hill	0.60	Not sought
2003	500 Russell Hill	0.78	Not sought
2010	238 Dunvegan	0.58	Not sought
2013	249 Dunvegan	0.85	Not sought
2018	69 Old Forest Hill Rd	0.79	37.01 m (Depth 35.96 m)

I find that the 27 and 21 decisions, which are culled from a universe of hundreds of Forest Hill properties, including those with and without Committee of Adjustment variances, are too few to form a physical characteristic.

### 69 Old Forest Hill Rd

Mr. Goldberg held out 69 Old Forest Hill Rd as an example of another property in the vicinity with a length variance. It is currently under construction. Mr. Romano shows it as having an 18.9 m depth but this was for the house now torn down. The Committee of Adjustment decision is dated November 7, 2018, about a month before OPA 320 came into force. To repeat, the Frankforts must comply with the more stringent methods of determining how their proposal respects and reinforces the physical character of the neighbourhood.

Like the subject, 69 Old Forest Hill Road has a stepped back rear, with a shorter second storey and a longer ground floor leading to a patio and privacy wall. Both “overhang” their neighbours. However, 69 Old Forest Hill Rd is an unusual site, being at a “crook” where Dunvegan turns northward and is renamed Old Forest Hill Road. Ms. Stewart elicited from Mr. Goldberg the admission that #69’s applicant had made some effort to align the rear walls with the neighbours. Even if I am wrong in these conclusions, it is but one example — not a “significant presence”. Nor has Mr. Goldberg established that the proposed building length is “materially consistent with the physical character of the geographic neighbourhood”.<sup>7</sup>

Turning to unacceptable adverse impact, I find that although the overhang for # 251 is less in absolute terms than for # 69, it is still not acceptable. Mr. Van Winters,

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<sup>7</sup> . . . will not preclude development whose physical characteristics are not the most frequently occurring but **do exist in substantial numbers** within the geographic neighbourhood, provided that the physical characteristics of the proposed development are **materially consistent** with the physical character of the geographic neighbourhood and already have a **significant presence** on properties located in the immediate context or [proximate context]. . .

owner of the affected property, estimated the excess length at 60% of his house's; this was not challenged, even though Mr. Van Winters probably did not exclude the 3.95 m basement length. Despite Mr. DeMelo's argument that the only impact will be to lightly used and highly screened parts of the Van Winters' lot, I find the impact is not minor.

### Mr. Romano's building length evidence.

Mr. Romano obtained "real life" building lengths from aerial photos and other sources. I illustrate his building lengths in Figure 5 ("Stewart Graphic") which conveniently shows the properties in his proximate and immediate neighbourhoods. This is a map created by Ms. Stewart before Mr. Romano's retainer (being part of her letter that was sent to the Committee of Adjustment) and I use it primarily to connect Mr. Romano's numbers to addresses and show everything in a picture.

**Figure 5. Stewart Graphic with Romano building lengths added**



According to Ms. Stewart's letter, the red numbers are building lengths, generated "from the City's database":

Although the dimensions provided are **approximate**, they illustrate that no dwelling in the immediate context approaches the proposed length for the subject dwelling. (Stewart letter, Sept 9, 2020)

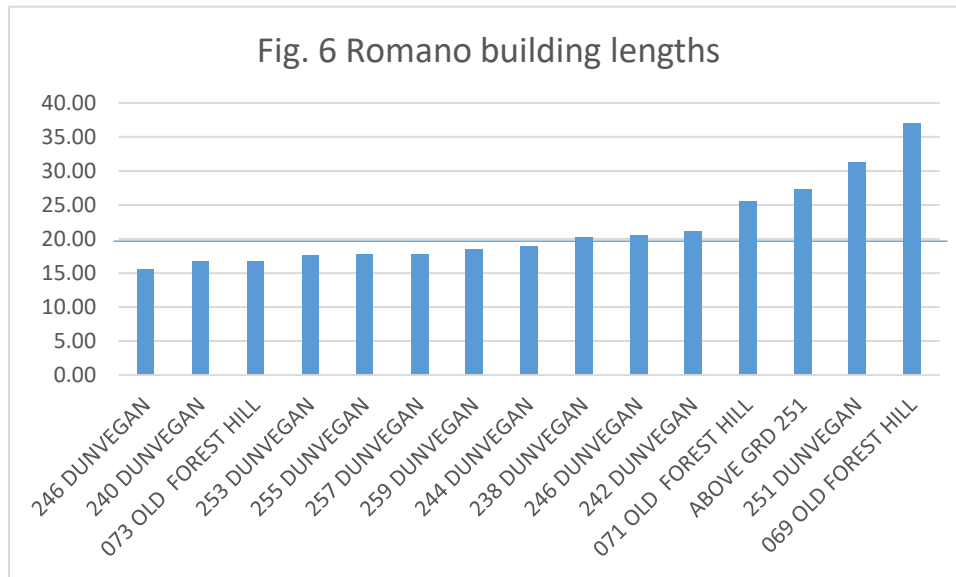
Since the graphic shows house shapes, I find that the rear walls along the Dunvegan, Russell Hill Road and Forest Hill blocks form a relatively straight line. This is contrary to Mr. Goldberg's assertion that there is an "**undulating**" pattern of rear yards.<sup>8</sup>, which I reject. For example, the three properties west of the subject property all have a two-part rear wall configuration that is roughly the same. The same is true for the easternmost four even numbered Dunvegan properties.

Mr. Romano created two building lengths tables: one for the immediate and one for the proximate neighbourhoods. I copied his numbers in black and repeated the street addresses in a heavy pencil line to make them more readable.

The discrepancies between red and black numbers are for the most part less than a metre. Where there is a greater discrepancy, for example 249 Russell Hill Road, this can be explained by a change in the zoning by-law in 2013, in which the owner of a corner lot could choose which of two abutting streets as the "fronting" street; i.e. Russell Hill Road or Dunvegan Road. The outline for this address indicates its east west building "length" is about 24 m; north to south this would be about 19 m. the Stewart graphic shows the first in red and Mr. Romano's number is written by me in black. Therefore, I find this discrepancy does not imply any error on Mr. Romano's part, such that I would have cause to reject his conclusions.

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<sup>8</sup> The new dwellings are larger, and commonly longer than the original vintage dwellings of the neighbourhood. Since the new replacement dwellings commonly co-exist adjacent to original vintage dwellings, there is commonly an **undulating or ununiform** rear building line pattern from property to property. Notwithstanding the longer dwellings, the rear yards remain generous due to the deeper lot depth in the neighbourhood. As such, rear yard amenity areas are large, well landscaped and due to the age of this neighbourhood, often containing mature trees. These rear yards commonly include outdoor swimming pools while some indoor swimming pools have also been constructed. (Goldberg Witness Statement)



Mr. Romano's analysis was empirical. In Figure 6, I sorted the 14 Dunvegan properties' building lengths. I also added 69 Old Forest Hill' newly permitted length of 37.01 m and a bar for 251's ground floor building length. 27.29 m – what one would see from the street. There is a light horizontal line at 20 m, which I find to be the prevailing upper limit of this physical characteristic.

The four bars on the right exceed the others. This illustrates that the character of the neighbourhood is one of 18 to 20 m building lengths, which the proposed building length does not respect and reinforce. Mr. Romano said in oral testimony that the rear yard condition and massing was out of character. I agree, based on his evidence:

The dwelling's massing extends seamlessly to contiguous wall and accessory components which accentuate and stand in stark contrast to proximate massing relationships (see attached air photos and tables).<sup>9</sup>

<sup>9</sup> What is the land use planning concern to me that the proposal is substantially **longer** than anything else that's within the immediate context. And there are elements, features that differ, that flow from that, such as how is the property occupied? **What's happening in the rear yard? What's happening in the front yard? And their impacts associated with the site development, that result from that overall condition that's being proposed.** (Romano oral testimony, August 17, 2021)

And it's my opinion that the proposed massing is out of character with the prevailing massing that's found within the immediate context. . . . **You don't see buildings being constructed deep into the lot like what's being proposed.**

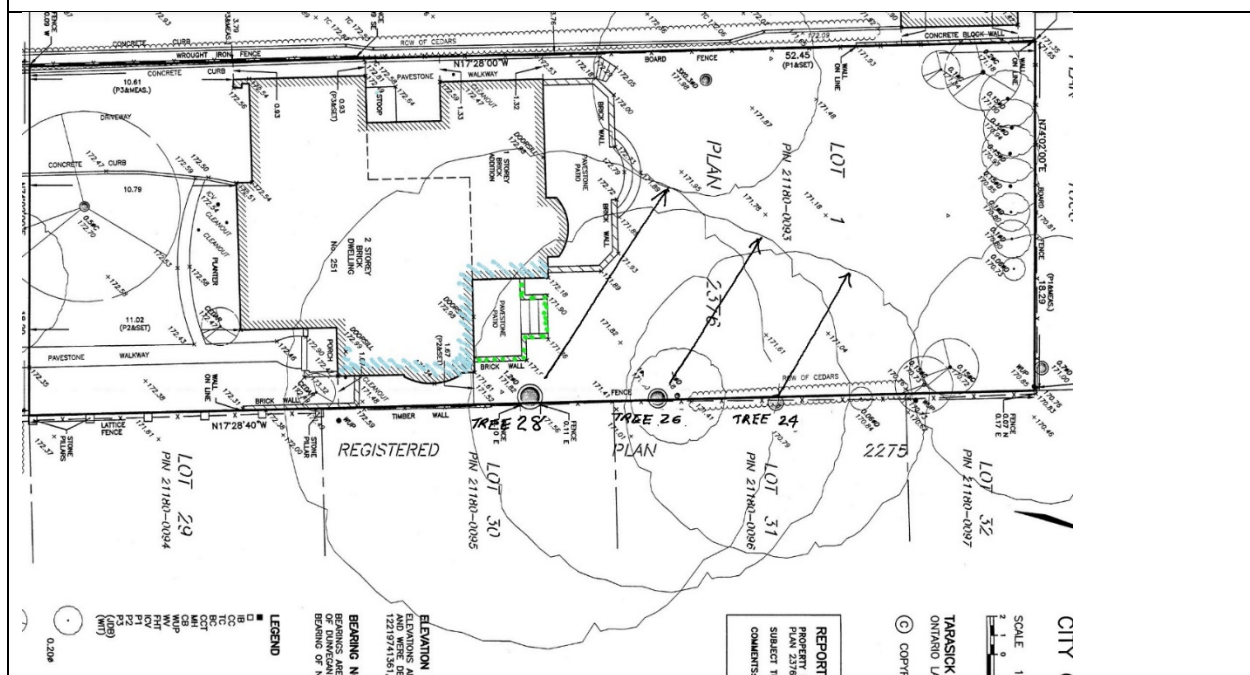
## Tree 28

I now turn the second major issue: the long term survival of Tree 28. This discussion requires a re-examination of the Frankforts' plans going back to what was before the Committee, then I quote Mr. Kunz's (opposing arborist's) evidence that Tree 28 will likely not survive in the longer term.

## The original application

The existing house is shown in the survey (Figure 7) below, rotated 90° (north is to the right). I added blue hatching to show the present basement walls and lime green dots for the rear porch. I have also added arrows showing the surveyor's depiction of the tree canopy for the three boundary trees. The rear yard is presently devoid of any construction save a rear planter attached to the house.

**Figure 7. Survey**



The Frankforts have submitted at least three revisions:

No. 1 the original application, with an underground parking ramp.

No. 2. A revised application in which the original basement near the tree would be retained and the new basement built behind it. This was the recommendation of arborist Bruce Bostock.

No. 3 The architect made some modifications to the grading of rear yard according to Mr. DeMelo, because I asked Mr. Goldberg about side to side grade differences . Because the rear yard slopes gently from the west to east (Van Winters to the Glickmans), the Frankforts need to build either a retaining wall on one lot line or the other to effect a flat terrace/ pool surface. They have chosen the latter; and this creates a 3 foot wall. Since this change was made after the first day of hearing. Mr. DeMelo convened a meeting of lawyers to apprise them of the changes<sup>10</sup>. Modification No. 3 was a result of the settlement in which the second floor was shortened by one metre.

With respect to Tree 28, the key change is between designs Nos. 1 and 2; No. 1 removed the basement, albeit very carefully; No. 2 retains the portions within Tree 28's tree protection zone and builds the new basement behind it. In all three designs, the ground and second floors will be cantilevered over the ground to come within 5.17 m of Tree 28, albeit without disturbing roots in the zone. Tree 28 has a 7.9 m radius protection zone; so, if the zone is considered a vertical cylinder, the above-basement floors will intrude about 2 m into this cylinder.

Based on these improved measures for protecting Tree 28's roots, including hand removal of the existing rear porch (lime green dots), Mr. Bostock wrote in November 2020:

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<sup>10</sup> Strictly speaking, amendments after the Committee decision may require fresh notice, which I would have been prepared to waive under s. 45(18.1.1) all were in a "downward" direction. No one raised this issue, and it is not necessary to address it, given the result. S. 45(18) (1) reads: 45(18) (1) On an appeal, the Tribunal may make a decision on an application which has been amended from the original application if, before issuing its order, written notice is given to the persons and public bodies who received notice of the original application under subsection (5) and to other persons and agencies prescribed under that subsection. Exception(18.1.1) The Tribunal is not required to give notice under subsection (18.1) if, in its opinion, the amendment to the original application is minor.



In our professional opinion, the modifications that have been made to the proposed dwelling are appropriate and **ensure the long-term survival of all the trees on the subject lot that are to be maintained.** . . .

Provided that all work to be done and mitigation measures to be taken have been taken in accordance with this report, it is our opinion that there will be **no negative impacts to the identified trees and that the long-term survival of all trees required to be retained will be protected and ensured.**

### Mr. Kunz's evidence

Mr. Kunz, the opposing arborist, was skeptical of the workability of the TPZ and doubted the long-term survival of Tree 28. I agree with his assessment.

[answering a question from Mr. Andres as to the prognosis even with the mitigation measures being proposed] The proponent . . . is completely filling his back yard with hardscaping. . . And in reviewing the mitigation measures I should note that ah we did not even prescribe the proper pruning of the roots . . . utilizing either pressure hydro vac or air spade. So that was an omission, I think, on everybody's part, But what's going to happen is when we fill this back yard with hardscaping and new house, there will be no room for this tree to regenerate new roots. So, if we don't properly prune them, then they will be damaged by machines, which is not preferred. . . . That will certainly contribute to the demise of that tree.

But further to that , if we only utilize minimum standards, despite the mitigation measures that we prescribe, what happens is, during construction, unless the arborist is there every day to ensure the prescribed measures are utilized perfectly, ah construction people take measures . . they temporarily remove hoarding whether it be horizontal or vertical, in order to get their job done and then they put it back. And I've seen this all the time through the years. People with machines have no regards for trees; they just want to get the job done. Machines are expensive, and powerful and they just use them and the trees just get abused.

I call that the "war zone", the tree is going to go through a war zone. And by the that will have no room to regenerate new roots even if the proper measures are followed.

On cross examination, he stated:

Use of the minimum preservation standards will get you the permit by the City but will it guarantee the long term longevity of a large tree, especially trees that don't have 100% vigor? No. We will expect a decline in trees.

### Official Plan provisions supporting tree canopy

Section 3.4.1 d states



3.4.1. To support strong communities, a competitive economy and a high quality of life, public and private city-building activities and changes to the built environment, including public works, will be environmentally friendly, based on: . . d) preserving and enhancing the forest by:

- i. providing **suitable growing environments for trees**;
- ii. **increasing tree canopy coverage and diversity**, especially of long-lived native and large shade trees; and
- iii. regulating the injury and destruction of trees;

Official Plan chapter 3.4 The Natural Environment has a two page preamble. The first paragraph reflects on the fact that the natural environment has no borders<sup>11</sup>. This may be at cross purposes with the regulatory scheme, which is premised on legal ownership; for example, whether a tree is on the public right of way or is a privately owned tree, and whether a tree is the proponent's or shared (boundary tree).

The preamble goes on to set out the value of trees both ecologically and in enhancing the attractiveness of neighbourhoods.<sup>12</sup> The words "competitive economy" hint at the fact that a leafy neighbourhood is one where people want to live, and where people want to live makes a neighbourhood strong and stable. Finally, the preamble recognizes that the desire of the proponent to maximize the development potential on private lands runs counter to tree-centric values.

Protecting Toronto's natural environment and urban forest should not be compromised by growth, insensitivity to the needs of the environment, or neglect. To this end,

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<sup>11</sup> Strong communities and a competitive economy need a healthy natural environment. Clean air, soil and water and abundant trees, parks and open spaces, underlie our health and well-being and attract people to work and invest in the City. Building the City while protecting and enhancing the natural environment is the aim of good stewardship. The natural environment is complex. It does not recognize boundaries and there are limits to the stresses resulting from human activity that it can absorb. To be good stewards of the natural environment we must acknowledge that it has no boundaries and we must respect its limits. (Official Plan, 3.4 opening paragraph)

<sup>12</sup> The urban forest is essential to the City's character. More than three million trees dominate our ravines, line our boulevards and beautify our parks. They provide shade and habitat, help clean the air, contribute to the green links between our streets, neighbourhoods, employment areas and parks, and support ecosystem diversity. City-building and development pressures, however, can create a difficult environment in which to sustain the urban forest canopy. We must not only protect the existing urban forest, but also enhance it, especially by planting native trees and trees that increase canopy coverage and diversity, or other non-invasive species where urban conditions may limit the survival of native species.

proposals for new development may need to be accompanied by a study assessing their impact on the natural environment

It is undisputed that this is a “long-lived native and large shade tree” in the language of 3.4. As to s. 4.1.5.(h), the respect and reinforce section, Mr. Goldberg conceded that the tree was a special landscape feature that should be continued. But the full conclusion advocated by Mr. Kunz requires in effect a finding that the City’s minimum tree protection measures are faulty in this case, which I am hesitant to do. Accordingly, while I accept Mr. Kunz’s evidence, and do find s. 3.4’s intent not to be maintained, I am sensitive to the City Council’s efforts to both promote urban forests and still allow homeowners a reasonable latitude, especially with respect to as of right building envelopes. In *11 Stanley*, I said:

[providing suitable growing environments for trees; and increasing tree canopy coverage and diversity] are [not] merely aspirational or meaningless but present another factor to be integrated with the other criteria of the Official Plan.<sup>13</sup>

Mr. Bostock (the Frankforts’ second arborist) said:

[In answer to Mr. Andre’s question of whether the policies of 3.4.1(d) were not maintained with a removed tree in the front]

Technically you can agree to that [i.e., that the policies are not maintained] but as an arborist I see all the time variations in increase or decrease in canopy and it’s the overall situation on different sites depending on different conditions that needs to be looked at, not the individual property – in my opinion – that’s just an arborist.

Mr. Goldberg relied on Mr. Bostock’s assurances for “growing environment for trees” and the City’s regulatory requirements for i and iii (this is a reference to subparagraphs in Official Plan 3.4.d). For ii, he relied on the City’s cash in lieu. For Tree 28, even Mr. Kunz said it would receive an injury permit. Therefore in this situation, there may be a conflict between (i) and (ii) on one hand, and (iii) on the other.

In my view, under 3.4, not every tree can or will be protected. Not every mitigation plan will meet the City’s Urban Forestry’s requirements. Not every tree is a “special landscape feature”. Where there is long term risk and the tree has a considerable canopy, the cash in lieu may not be a sufficient remedy.

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<sup>13</sup> Par 25] . . . There is no reason to doubt the correctness of the decision and, more importantly, it does not raise issues of general importance. *Deo v. Sheasby-Coleman*, 2021 ONSC 4150 Divisional Court File No.: 073/19 Date: 20210608, Favreau, J.

My task as I set out in *11 Stanley* is to integrate the various experts' opinions. I find that in this case the minimum tree protection measures present risk and that Tree 28 has special qualities that make that risk unacceptable, and therefore a development that subjects the tree to that risk is not minor.

Compaction is a leading cause of tree decline.<sup>14</sup> Mr. Bostock stated he would continue Urban Forest Initiative's tree protection measures<sup>15</sup> (this is the first arborist hired by the Frankforts). Those measures included "no material storage or construction access in the TPZ"<sup>16</sup>, plus consent of the shared owners. Dealing with consent, Ms. Abimbola (the City's lawyer) said that the Kriesers' consent was **not** required to process the injury permit and that in the event of issuance of a tree permit there was no appeal. The City's appeal process is only available to the Frankforts from a refusal to issue a permit and not to the Kriesers in the event a permit is issued. Dealing with the second issue of storage in the protection zone, the note on the Hicks' construction diagram suggests that the structural engineer and arborist will consult when work is to be undertaken inside the tree protection zone.<sup>17</sup>

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<sup>14</sup> **Compaction of the soil in the tree root zone is one of the leading causes of tree decline in Toronto's urban forest.** Soil compaction occurs primarily from vehicles and equipment moving across the root zones. Piling or storing materials or debris on top of the root system can also result in soil compaction. Soil compaction causes the pore spaces in the soil, which contains air and water necessary for root growth, to be reduced. **Without space available for oxygen and water, tree roots will suffocate and tree decline will follow.** With rutting, a form of intense compaction, roots are severed by the tires of equipment. Root destruction can also be caused by changes to the existing grade. Adding soil on top of tree roots can smother them by reducing the amount of oxygen and water they can receive. Only a few centimetres of added soil can have a detrimental impact on tree health. (Tree Protection Policy and Specifications for Construction Near Trees, July 2016)

<sup>15</sup> The recommended protection measures that were previously identified in the UFI Report are to be continued and enhanced as noted in this report in order to afford greater protection ....(Bostock Report, November 19, 2020)

<sup>16</sup> s. Given the location of the above trees on the property boundary, the property owner or their agent should receive confirmation of the adjacent property owners' consent to injure these shared trees. It is important that good arboricultural practices be undertaken during the entire course of construction. No material storage or construction access shall take place within tree protection zones (TPZs); (Urban Forests Initiative, Sept 3, 2020)

<sup>17</sup> The notes do not contain the notations from Urban Forests Initiative and that report will not likely be read by the workers. What is contained on the Hicks plan is: Note 1 The extent of the existing foundation wall shown to be retained & located within the TPZ for tree no. 28 will remain in place and protected during the demolition of the remainder of the existing house. The extent and logistics of demolition work will be reviewed and developed with services provided by a structural engineer with consultation and input from a certified arborist using the best

These somewhat conflicting specifications and conditions cause me concern. Possible disagreement between the structural engineer and arborist are glossed over. Paragraph 11 of the protocol agreed upon between the arborists states that the supervising arborist will visit thrice weekly without notice.<sup>18</sup> Mr. Kunz expressed doubt that if the visit uncovered deleterious activity, there was no practical mechanism to undo the harm.<sup>19</sup>

This is a two storey structure that is cantilevered into the tree protection zone. I find it is unrealistic not to have considerable heavy materials brought into this zone, for compaction to occur and subsequent “decline” as stated in footnote 14.

**Figure 8. Plan 2. Final location of basement and other foundation walls after construction**

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arboricultural practice intended to protect the tree.

Note 2 The extent of the new shoring located within and or adjacent to the for trees 28, 26, 24 & 20 will be reviewed and designed by a shoring engineer with consultation of a certified arborist, geotechnical engineer and structural engineer using the best arboricultural practices intended to protect the tree.

<sup>18</sup> The supervising arborist shall oversee all aspects of demolition of the existing dwelling and construction of the new dwelling that implicate or relate to tree protection matters, including: (a) implementing all tree protection measures; and 3 (b) visiting the Subject Property at least three times weekly during construction without notice to conduct inspections, and ensure compliance with the tree protection measures and Good Arboricultural Standards

<sup>19</sup> While standard mitigation measures are presented in the UFI report respecting construction within the minimum Tree Preservation Zones (TPZ's) of Tree 28, there is no mechanism presented for dealing with the likelihood of encountering structural roots. They mention a Certified Arborist must be present during all excavations and that excavations will be conducted in a root sensitive manner. Large structural roots and transport roots will likely be encountered for the excavation of the new house foundations. If these types of roots are encountered, what happens then when works are stopped? Will the design of the proposal house go back to the drawing board? It is our opinion that the extent of intrusion into the TPZ's of Tree 28 is excessive and that structural, transport and feeder roots will be encountered and severed or injured to such a degree that will adversely affect the health and longevity of this tree which could potentially destabilize the tree and eventually see the complete demise of the tree. (second Sept 9, 2020 report to George Krieser)

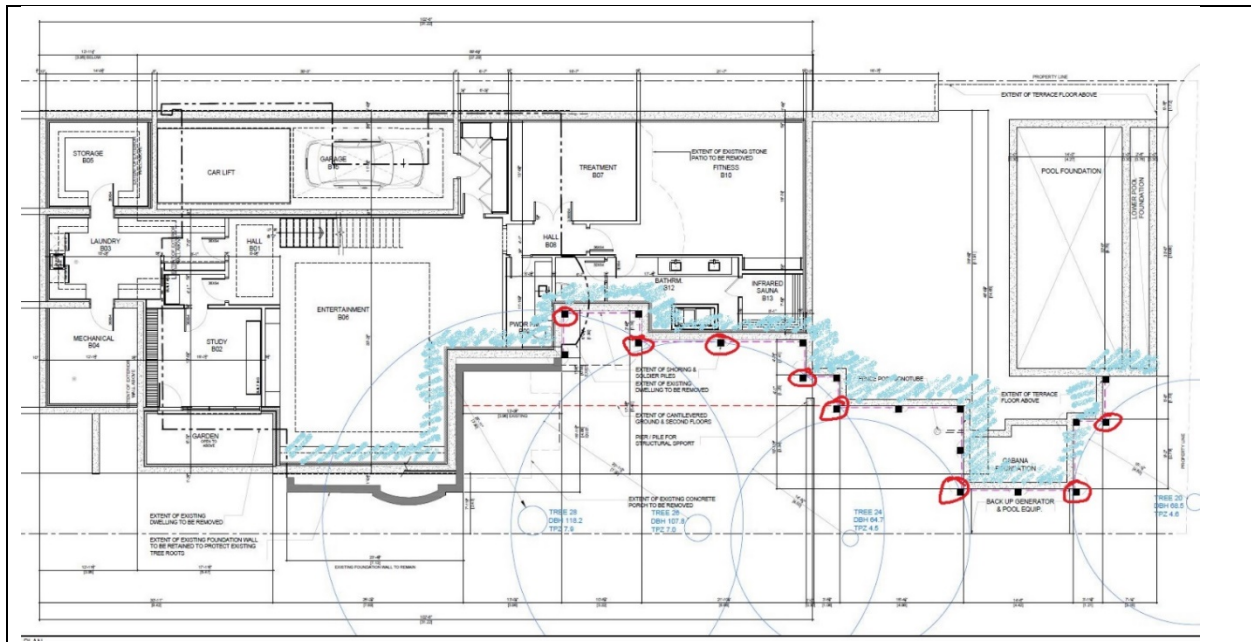


Figure 8 may be compared to the survey on page 14. The longer building length is linked with extensive underground construction that extends virtually to the rear lot line yet does not fall under the setback provisions for one reason or another<sup>20</sup>. There was no evidence from Mr. Goldberg on similar underground structures elsewhere in Forest Hill except for the Kriesers' underground swimming pool (2003). Red dots indicate corners of the basement walls that touch the circumference of a TPZ, and may in practice, require incursion into the TPZ because of the phenomenon of "overdig".<sup>21</sup>

## Conclusion

I am satisfied that the intent of two Official Plan policies are not maintained. For s. 4.1.5, "massing" in s. 41.5, (i.e., the variances for increased length and depth) I accept Mr. Romano's evidence and reject Mr. Goldberg's. For s. 3.4, I find that the development will not foster a suitable growing environment for trees and nor will it lead to an increased canopy, especially of the kinds of trees mentioned on the basis of Mr.

<sup>20</sup> Swimming pools need only have a 1.2 m setback. 10.5.60.20 Setbacks Despite regulation 10.5.60.20(2), in the Residential Zone category, the required minimum rear yard setback for an outdoor swimming pool or other ancillary structure used to hold water, . . . is as follows: (A) on a lot with a residential building other than an apartment building: . . . [through and corner lots] (iii) 1.2 metres in all other cases; . . .

<sup>21</sup> Ms. Stewart's estimate is that 60 cm of digging outside the intended final basement wall location is needed for space for placing forming walls, which Mr. DeMelo did not challenge.

Kunz's evidence. Although both sections are linked environmentally, contravening one is sufficient to find that the general intent and purpose of the Official Plan is not maintained. There is no evidence that the intent of the zoning bylaw is maintained by an overlong building. I have found that the impacts on the Van Winters and the Kriesers (via the risk to Tree 28) are not minor nor desirable for the appropriate use of the land. Having failed those statutory tests under the *Planning Act*, the building length variance cannot be given and since the variances must individually and cumulatively meet the statutory tests, the application fails.

## **DECISION AND ORDER**

The appeal is dismissed. The variances in Table 1 are not authorized.



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Ted Yao  
Panel Chair, Toronto Local Appeal Body