Toronto Local Appeal Body

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INTERIM DECISION AND ORDER

Decision Issue Date Tuesday, October 05, 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): WILLIAM OLDMAN
Applicant(s): JIM PFEFFER

Property Address/Description: 428 LAKE FRONT
Committee of Adjustment File Number(s): 18 257345 STE 32 MV

TLAB Case File Number(s): 20 186993 S45 19 TLAB

Hearing date: **Thursday, May 13, 2021**
Tuesday, May 18, 2021
Wednesday, May 19, 2021
Tuesday, June 22, 2021
Thursday, June 24, 2021

DECISION DELIVERED BY ANA BASSIOS

APPEARANCES

Name	Role	Representative
Jim Pfeffer	Applicant	
William Oldman	Owner/Appellant	John Alati
Willian Guest and Eleanor Guest	Party	Dennis Wood/Angela Fang
Mandi Kimsa	Party	Dennis Wood/Angela Fang
Kevin Kimsa	Party	Dennis Wood/Angela Fang
Brent Crawford	Party	
David McKay	Expert Witness	

Michael Spaziani	Expert Witness
Jim Pfeffer	Expert Witness
Mike Pettigrew	Expert Witness
Michael Hannay	Expert Witness
John Larsson	Participant
Paul Mcintyre	Participant
Cindy Macmillan	Participant
Gillian Stewart	Participant
David Bruce	Participant
Birthe Joergensen	Participant
Don Norris	Participant
Rob Neish	Participant
Erin Mitchell	Participant
Michael Macmillan	Participant
Ilana Kotin	Participant
Chris Gaffney	Participant
Nelson Coombs	Participant
Caron To	Participant
David Bryson	Participant
Joe Bogdan	Participant
Tom Mason	Participant
Jeffrey Levitt	Participant
Eva Kralits	Participant
Holly Allen	Participant

INTRODUCTION

This is an Appeal of the Toronto and East York panel of the City of Toronto (City) Committee of Adjustment's (COA) refusal of an application for variances at 428 Lake Front (subject property).

The purpose of the application is to construct a four-storey detached house, with a below-grade three car garage having access via a car elevator, a swimming pool and terrace on the south side of the second floor, and a basement walkout on the south side.

The Appellant describes the structure as a 2.5 storey detached dwelling with walkout basement and garage.

The subject property is located adjacent to Balmy Beach between Silver Birch Ave and Nursewood Rd in the Beach neighbourhood. There is no direct frontage on a public street and the subject property is only accessible via a right-of-way over the property located at 2 Munro Park (also known as 430 Lake Front).

The property is designated *Neighbourhoods* in the City Official Plan (OP) and is zoned RD (f10.5;d0.6)(x 1257) under Toronto By-law 569-2013 and R1 Z0.6 under the former City of Toronto Zoning By-law 438-86.

I advised those present on the first day of the Hearing that I had attended at the site and the surrounding area and had reviewed the pre-filed materials in preparation for the hearing of their in-person evidence.

The hearing of this matter took place over five days and evidence was heard from five Expert Witnesses. I wish to thank the Participants for their coordination and selection of two spokespersons to speak on behalf of the larger group of twenty (20) residents who elected Participant status in the proceedings.

At the outset of the first day of the Hearing, an urgent Motion was heard requesting the substitution of Mr. Michael Hannay as an Expert Witness for the owner, replacing Mr. James Ziegler. With the consent of the Parties, the Motion was allowed.

Supplementary evidence from both the Appellant and the Opposing Parties was admitted through the course of the Hearing.

BACKGROUND

The application before the TLAB has been revised from that which was before the COA. The Appellant, therefore, is requesting approval of the following variances:

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

1. **Chapter 5.10.30.1.(2), By-law 569-2013**

   A building or structure may not be erected, or used, on any lot that does not abut a street.
   The detached house is proposed to replace an existing house on a lot that does not abut a street.

2. **Chapter 5.10.40.70.(6), By-law 569-2013**

   On lands under the jurisdiction of the Toronto and Region Conservation Authority pursuant to the Conservation Authorities Act, R.S.O 1990 c. C.27, as amended, other than in the Open Space Zone category, if the Toronto and Region Conservation Authority determines that a shoreline hazard limit or a stable top-of-bank crosses a lot, a building or structure on that lot must be set back a minimum of 10 metres from that shoreline hazard limit or stable top-of-bank.
   The proposed swimming pool and deck on the ground is setback 0m from the shoreline hazard limit or stable top-of-bank, the house including the basement is setback 10m.

3. **Chapter 5.10.30.1.(1)(A), By-law 569-2013**

   No land may be used and no building or structure many be erected or used on the land unless the land abuts an existing street, or is connected to an existing street by a street or streets, constructed to a minimum base curb and base asphalt or concrete.
   The detached house is proposed to replace an existing house on a lot that does not abut a street.

4. **Chapter 10.5.80.40.(3), By-law 569-2013**

   Vehicle access to a parking space on a lot must be provided from a street or lane.
   Access to the parking space is not from a street or lane, it is from an existing Right-of-Way.

5. **Chapter 10.5.100.1.(2)(B), By-law 569-2013**

   The maximum permitted driveway width is 6.00 m.
   The driveway width is proposed to be 7.28 m.

6. **Chapter 10.20.40.10.(1)(A), By-law 569-2013**

   The maximum permitted building height is 12.00 m.

The detached house is proposed to have a height of 14.06 m, measured from the stablished grade at 78.63 m.

7. Chapter 10.20.40.10.(2)(B)(ii), By-law 569-2013

The maximum permitted height of all side exterior main walls facing a side lot line is 9.50 m.
The proposed height of the side exterior main walls facing a side lot line is 10.58 m, on the north elevation, 13.47 m on the south, west and east elevations, measured from established grade at 78.63 m.

8. Chapter 10.20.40.10.(6), By-law 569-2013

The permitted maximum height of the main pedestrian entrance above established grade is 1.2 metres.
The proposed height of the main pedestrian entrance above established grade is 2.44 metres.

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

The maximum permitted floor space index of a detached house is 0.60 times the area of the lot (479.62 m2).
The proposed floor space index is 1.08 times the area of the lot: 864.67 m2. (Includes a portion of the storey below ground because it is closer to the to established grade)

10. Chapter 10.20.40.50.(1), By-law 569-2013

A)The permitted maximum number of platforms at or above the second storey located on the side wall of a detached house is 1.
The proposed number of platforms located on the side wall (south) is 2.

B) The permitted maximum area of each platform at or above the second storey of a detached house is 4.0 square metres.
The proposed area of the platform at or above the second storey is 59 square metres (second floor) (this floor has been identified as the 2nd floor because the basement has been identified as the first floor).

11. Chapter 10.20.40.70.(3)(B), By-law 569-2013

The minimum required side yard setback is 0.90 m.
The proposed side yard setback is 0.50 m from the north side lot line (taken to the wall of the garage and basement wall). The proposed side yard setback is 0.30 m from the west lot line.

12. Chapter 10.20.30.20.(1)(A), By-law 569-2013

The required minimum lot frontage is 10.5 m.
The existing lot does not have a frontage on a municipal street.

1. Section 4(2)(a), By-law 438-86

The maximum permitted building height is 12.00 m.
The detached house proposed to have a height of 13.98 m, measured from the established grade at 78.63 m.

MATTERS IN ISSUE

The subject property is a beachside property. Direct access to, and view of, the beach and lake are a high-value feature of all the houses which are located on the first line of properties beside the public beach. The siting of the proposal and the projection of the south face of the building, facing the beach, has therefore been particularly at issue, with extensive evidence having been led on visual impact and views to and from the proposed dwelling and the neighbouring properties.

The subject property does not abut a street and therefore variances are required before any development proposal can be authorized. The Owner/Appellant takes the position that variances 1, 3, 4, 5 and 12, above, are “technical” variances, as this is an existing lot of record. (A detached dwelling and double garage are currently located on the property). The Opposing Parties contend that there is no as-of-right entitlement to build on this property and identify variances 1, 2, 3 and 12 as “gatekeeper variances” which should be granted conditionally, i.e., only on the basis of a satisfactory proposal that has been shaped to meet the objective of good planning and the four tests.

As the property does not have a conventional frontage onto a public street, a front lot line/frontage/front is not identified, and therefore every lot line has been treated as a side lot line in the Zoning Notice. Some zoning parameters (height, front yard setback, rear yard setback, and building length and building depth) are defined in relation to the front lot line, and as the front lot line is not available for reference, a difficulty is created in the application of these definitionally dependent parameters. The Opposing Parties have argued that a number of regulations that would normally apply have not been referenced, and that in the context of the four tests and the OP, it is not appropriate to ignore these zoning standards that would normally apply to a property in this neighbourhood.

Further adding to the complexity of this matter is the configuration of lots in this part of the neighbourhood, which have developed organically over time in a semi-grid road

pattern that is truncated at the beach, with a number of properties relying on right of way accesses over neighbouring properties. The zoning by-law is generally premised on the conventional standard expectation that the lot, any dwelling, and adjacent dwellings, will be oriented towards a public street. In this case, however, the high-value public ream is the beach, not a street by which vehicular and public pedestrian access would be gained. It is this duality of the south yard, both private amenity and public exposure, that gives rise to the dispute as to the "front" of the property, and therefore how regulations in the By-law which reference the front lot line and frontage ought to be applied, if at all.

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

Extensive evidence was received over the five days of the Hearing. A detailed summary is presented here, for the purpose of providing some context for the following section of this Decision. All of the evidence and testimony in this matter has been carefully reviewed and the omission of any point of evidence in this summary should not be interpreted to mean that it was not fully considered, but rather that the recitation of it is not material to the threads of reasoning that will be outlined in the *Analysis, Findings and Reasonings* section below.

Three Expert Witnesses provided evidence on behalf of the Applicant in support of the application for variances. Mr. Pfeffer was qualified as an expert in Architecture and

Urban Design. Mr. Hannay, for the purposes of this Hearing, was qualified as an expert in visual imaging and rendering and Mr. Pettigrew was qualified as an expert in land use planning. Parties Kimsa and Guest were represented by the same counsel and called two expert witnesses. Mr. McKay was qualified as an expert in land use planning and Mr. Spaziani was qualified as an expert in architecture and urban design. Party Crawford was not represented by counsel and did not call any witnesses.

THE PROPOSAL

The Applicant has described the proposal as a 2.5 storey detached dwelling with walkout basement and garage. Mr. Spaziani advised that the City has consistently described the proposal as a four-storey structure with the basement level considered as the first of four floors.

Figure 1:Proposed House, Computer Simulation. Ziegler EX 4, Tab 7

Figure 2: View 1, Reference View. Ziegler EX 4, Tab 7

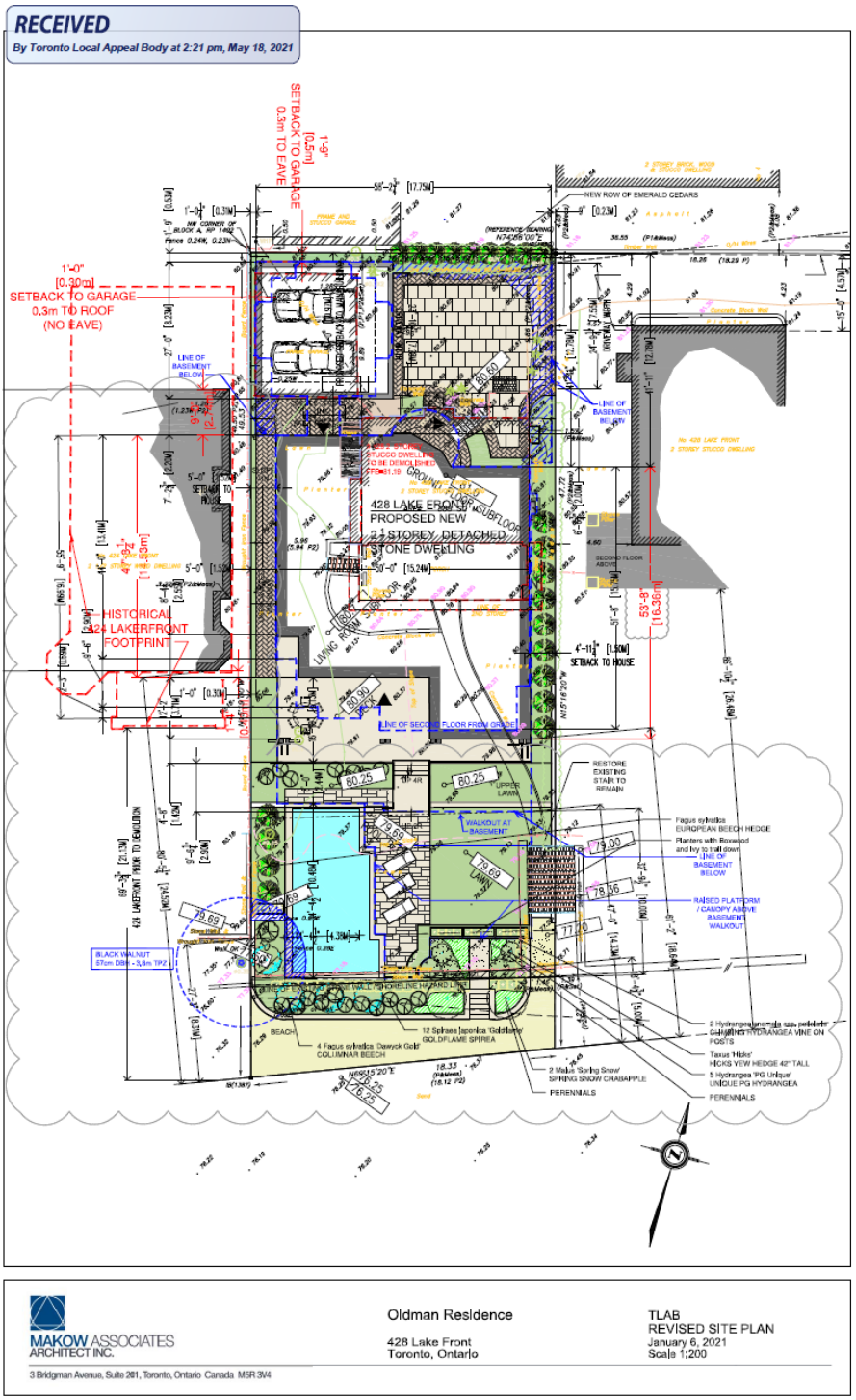

Figure 3: Updated Site Plan. EX 11

It was Mr. Pfeffer's opinion that the Queen Anne style of the house matches the existing context and that the exterior design, in form, scale, proportion, pattern and materials harmonize with the character, scale and appearance of the surrounding neighbourhood. He contended that the form and massing of the proposed house are similar and complementary to the adjacent home at 424 Lake Front and asserted that the proposed house, which is on an 18.29m wide lot, will not stand out as being significantly larger than 424 Lake Front, which is on a lot he estimated is 14.33m wide.

Mr. Pettigrew described the design of the amenity area as consisting of a covered porch adjacent to the house, a wooden deck, a pool, and a platform that provides a flat surface adjacent to the pool that makes the amenity area more usable. He advised that the platform "is because of the drop in the topography of the property towards the beach". Below the platform is a walk-out to the beach from the basement/ first level.

Mr. Pfeffer described the existing site condition as a sloping lawn down to the beach and asserted that in most recent development of properties in this section of the beach, this slope has typically been replaced with levelled landscaping accomplished through terracing and retaining walls, along with development of the waterfront yard with private recreational use. He asserted in his Witness Statement that flattening of a yard with retaining walls or landscape works is common throughout the City, generally as of right and not subject to planning restraints. He advised, nonetheless, that the intention in this regard is to level the waterfront yard to match the yard of the adjacent home to the west at 424 Lake Front (the Kimsa house). In his opinion, the retaining wall, raised platforms and plantings continue the established pattern of development on this area of the beach and fit harmoniously alongside the two adjacent dwellings.

Mr. Pfeffer asserted that the house was designed to maximize the open area of the lot on the Beach side. He noted that the proposed two car garage is in the location of the existing garage and that it is "pushed as far as is reasonably possible" into the northwest corner of the property. He advised that there is a "small space" to enable a car to turn around rather than having to back up along a narrow right of way to the public street (Munro Park Ave).

Mr. Pfeffer acknowledged that a portion of the proposed house is below ground. He advised the TLAB of his experience presenting proposals with basement extensions to the COA and commented that variances resulting from those portions of the building below the surface of the lot have "always been considered to be of no impact". He advised that the Zoning By-law excludes portions of the building below the surface of the lot from setback rules. He acknowledged that variances generated by portions of the building below the surface of the lot area typically involve length, depth and lot coverage. In reference to a TLAB decision on 51 Elmwood, he acknowledged that the proposal on the subject property is different in that the basement wall would be visible.

He contended, however, that the proposed south face of the basement level of the proposal would be visible in the same way that the retaining wall of 424 Lake Front is visible.

In his Witness Statement, Mr. Pfeffer referenced the ground floor (City identified as second level) wall of the house, which he stated is below the 17m length which is typically permitted for houses in Toronto. Mr. Pettigrew's evidence was that the proposed building length "along the ground floor" would be less than the 17m permitted by the By-law. He did not address the belowground portion of the building and did not address the matter of building depth specifically

In Mr. Pfeffer's opinion, although the south face of the proposed house is further south than the existing house on the subject property, and further south than the face at 430 Lake Front (and the two adjacent houses), "it does not do so in an unreasonable way". In his opinion the proposed length is "entirely ordinary", and the proposed house is sited as far north on the lot as is "reasonable".

Figure 4: South Elevation (Beachside) EX11

Mr. Pfeffer referenced the walkout from the basement level, which he asserted is a common feature in homes where the topography accommodates. He noted that there is also a pair of French doors and flanking windows exiting the basement of the proposed

house at the level of the beach. In Mr. Pfeffer's opinion, it is common that houses have terraces over basements and that terracing to create private amenity space (above) is common. He further asserted that green roofs on top of basements are "essentially yard". In Mr. Pfeffer's opinion, the house is consistent with the established physical character of the nearby context, while noting that the 16 beachside properties between Silver Birch Ave and Nursewood Road are "eclectic in their overall character".

Mr. Spaziani's evidence was that what a person would see from the beach is a perched swimming pool on a deck, and the extra height from the bottom of the structure to the top, which is approximately 16m vertical height, is the height of a five storey apartment building. With the dominant forward component being the first level, it is his opinion that the public reading of the structure from the beach will be a large departure from what one would expect, largely through the absence of the dominant landscape foreground that is in his opinion the prevailing characteristic in the lake front context.

Height

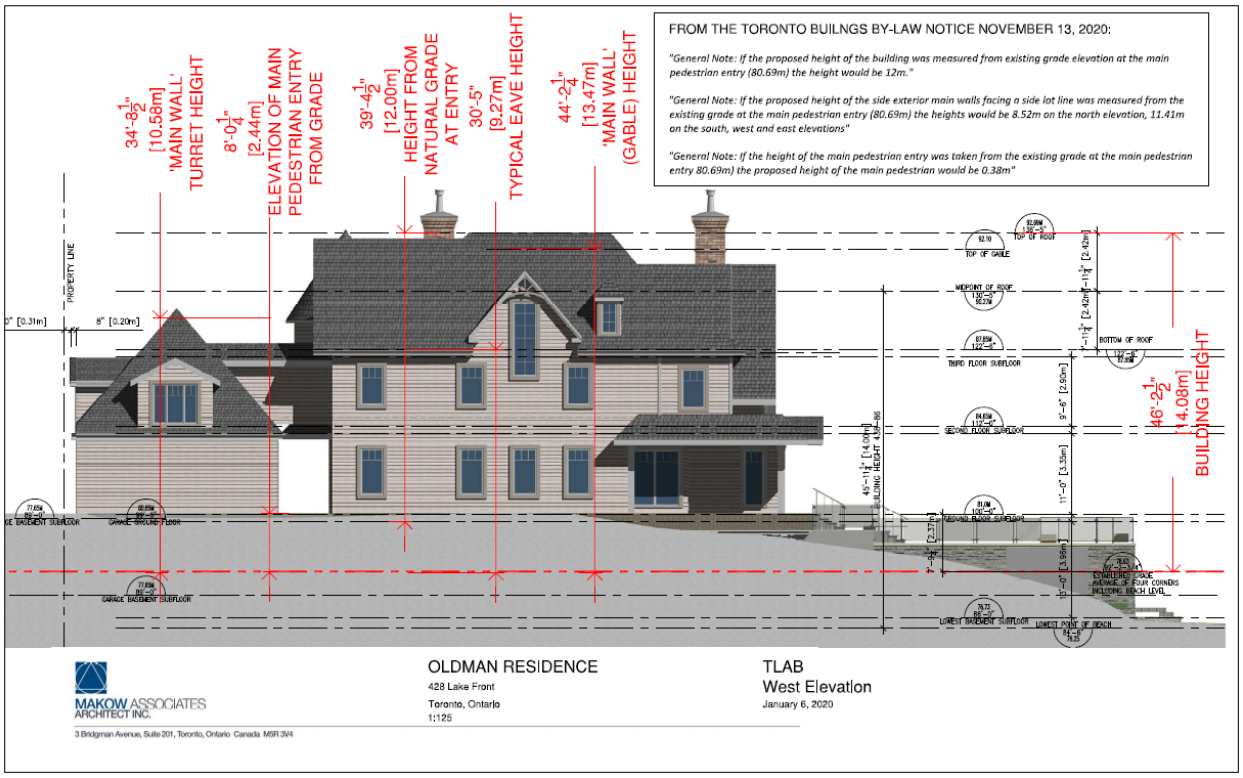

Figure 5: West Elevation. EX 11

Mr. Pfeffer described how height is usually measured under the By-law provisions, from the elevation established at the front yard setback line. He referenced the Zoning Notice and explained the "workaround" employed by the Zoning Examiner. The established grade in this case has been calculated on the basis of an averaging of the elevation at the four corners of the lot. Figure 5 depicts, on the west elevation of the proposal, the established grade as calculated by the Zoning Examiner. It also notes that if the proposed height was measured from the existing grade elevation at the existing pedestrian entry, the height would be 12m. The By-law permits a height of 12m.

Views

Mr. Hannay is a Professional Planner, but in this Hearing he was qualified for his expertise in visual impact assessment.

Mr. Hannay described the methodology and technique employed to develop accurate photocomposites of views, accurate composite computer simulations of the proposal and other elements and visual impacts. Mr. Hannay's evidence and Mr. Ziegler's Expert Witness Statement (Exhibit 4) were very helpful resources in the depiction of context and the illustration of issues and points of argument throughout the Hearing.

Figure 6: View 3, Existing Site. EX 4

Figure 7: View 3, Proposed House, Computer Simulation. EX 4

Mr. Hannay provided an analysis of viewsheds from both adjacent houses at 424 Lake Front and 2 Munro Park Ave. While qualifying his analysis in recognition that he did not have access to the properties, he advised that it is a good approximation of what would be seen from those two properties. He described how the views of the beach/ water in each case are obstructed by existing elements such as fences and existing vegetation.

Under cross-examination Mr. Hannay was questioned as to the "opacity" of the vegetation and the visibility in winter when the trees are not in leaf. Mr. Hannay acknowledged that what had been depicted in the viewshed diagrams was the "worst case scenario" in which the views from those properties are obscured to the greatest degree by the existing vegetation.

In Mr. Hannay's opinion, the proposal does not have any significant visual impact and the potential impact on views from the adjacent properties are "quite minimal" and should not be considered as having any significant impact.

THE FIRST TEST: GENERAL INTENT AND PURPOSE OF THE OP

As a result of the unique characteristics of the subject property, evidence was heard regarding the unique regulatory context of this application.

Regulatory Context – OP Policy 4.1.8

Mr. McKay's evidence was that because the subject property does not front onto a public street, this has implications for the variances required, both because variances are required to build *any* structure on the subject property, and also because the absence of a defined front yard has created a gap in terms of regulations that would normally be applied in an RD zone.

Mr. McKay referenced OP Policy 4.1.8 as grounds to address the Zoning By-law provisions which would normally apply to a property in the RD zone, which have not been applied to this application.

> *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 Mr. Spaziani's understanding, the interpretation of the Zoning Examiner rendered the important regulations regarding length and depth and the location of the main walls along a street inapplicable. It was Mr. Spaziani's evidence that from an urban design perspective these are essential regulations which establish relationships between properties and street facing conditions intended to achieve compatible relationships.

In Mr. McKay's opinion, a reasonable alternative approach, consistent with the intent and purpose of the OP and the Zoning By-law, would be to address the proposed

building as if the lot fronted on a street and was subject to the usual regulations which would apply to any other dwelling in the neighbourhood.

OP Policy 3.1.2.5 and Policy 3.1.2.9:

Mr. McKay asserted that the proposal does not comply with OP Policy 3.1.2.5 and Policy 3.1.2.9:

3.1.2.5 Development will be located and massed to fit within the existing and planned context, define and frame the edges of the public realm with good street proportion, fit with the character, and ensure access to direct sunlight and daylight on the public realm by:

a) *providing streetwall heights and setbacks that fit harmoniously with the existing and/or planned context; and*

b) *stepping back building mass and reducing building footprints above the streetwall height.*

3.1.2.9 The design of new building facades visible from the public realm will consider the scale, proportion, materiality and rhythm of the façade to:

a) ensure fit with adjacent building facades…

Mr. Pettigrew did not address the above policies of the OP directly, but instead addressed the issues of context, public realm, character, and building mass in his other evidence.

Neighbourhood and Immediate Contexts – OP Policy 4.1.5

Mr. Pettigrew described the subject property's location and surrounding context. He described the area as being an eclectic one. He described the change in the area as one that has generally gone from a more cottage-like setting to a more urban context with larger houses and south facing amenities that include terraced patios and large balconies. He advised that the topography is generally southward sloping and drops more sharply towards the beach. The degree of slope varies east and west of the subject site. Under cross examination, Mr. Pettigrew advised that he considered the properties immediately east of Silver Birch Ave to be at relatively level grade and that the ground rise begins at 412 Lake Front and continues eastward.

In Mr. Pfeffer's Responding Witness Statement, he included the below map from City of Toronto mapping that shows topography via contours spaced at 0.5m intervals. (The closer the contour lines, the steeper the slope).

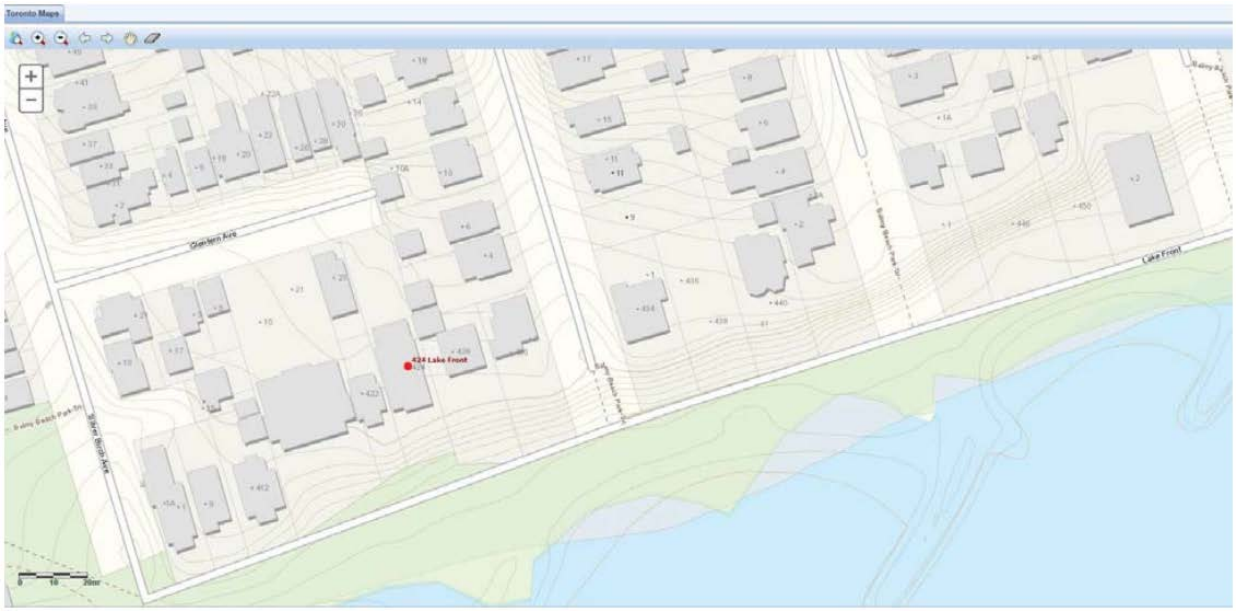

Figure 8: Topography/ Slope, City of Toronto Mapping. Pfeffer. EX 4, Tab 5

Mr. McKay and Mr. Pettigrew identified the broader, Lake Front and Immediate Contexts upon which they based their analyses.

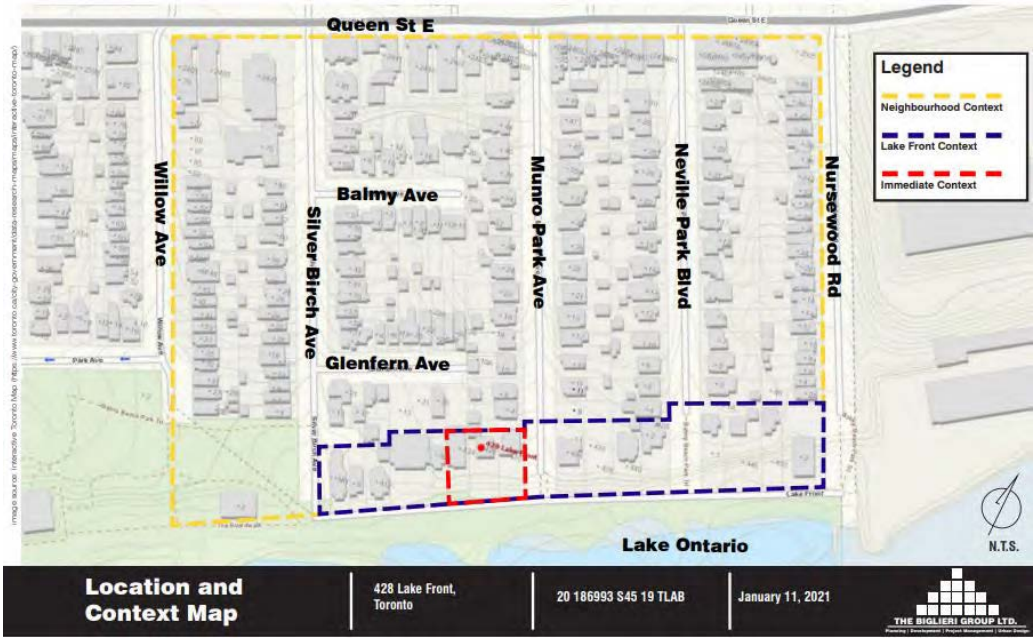

*Figure 9: Location and Context Map, **Pettigrew**, EX 1 Tab 101*

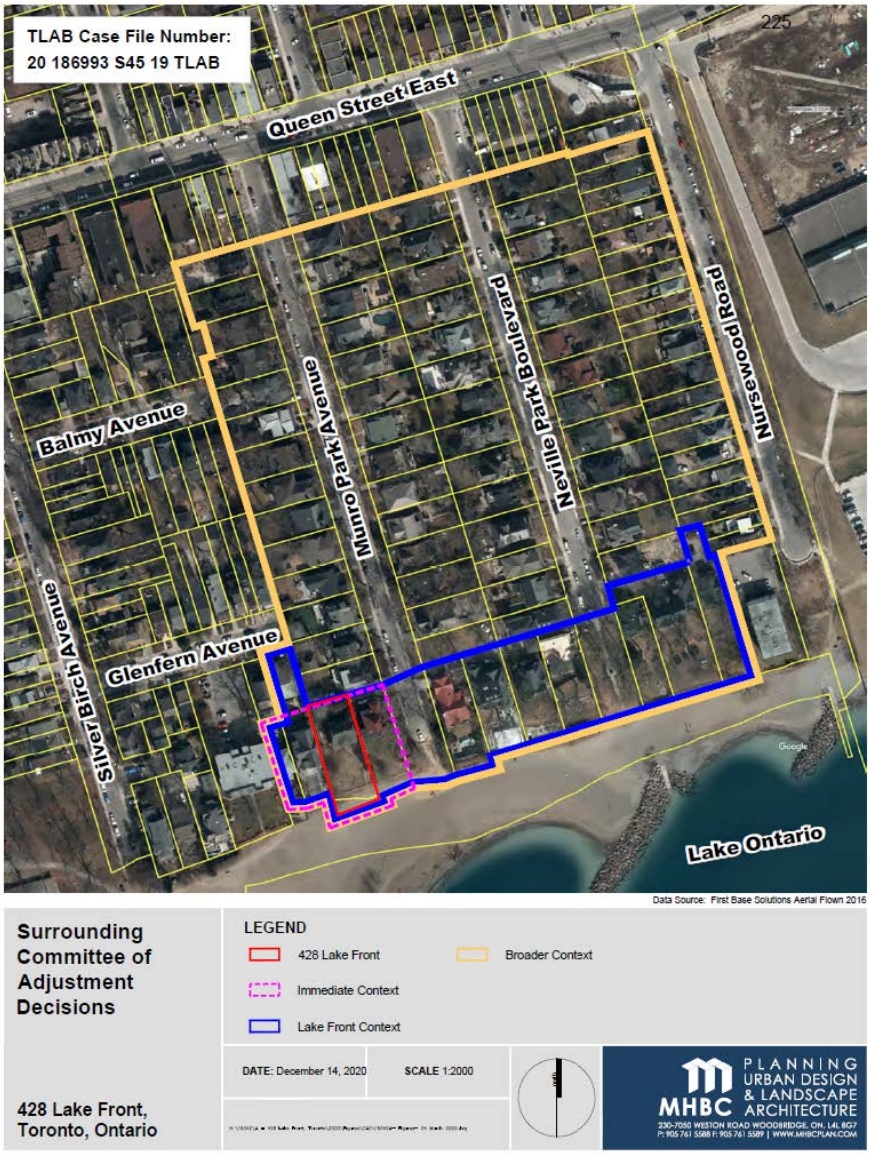

Figure 10: Context Map. ***McKay****, EX 13, Tab 12*

Mr. McKay discussed the complexity of defining a broader context as well as an immediate context as directed by the OP. He advised that this is an atypical location, and layout, so the definition of the immediate context of the blocks facing a street can not be directly applied in this case. Nonetheless, both Mr. McKay and Mr. Pettigrew defined an immediate context and a Lake Front context and both Experts focused on the analysis of these areas instead of the broader context which has different and more uniform characteristics. Mr. McKay identified 422, 424, 428 Lake Front and 2 Munro

Park Ave as the immediate context for the purposes of analysis. Mr. Pettigrew identified only the two adjacent properties and the subject property as the immediate context.

Mr. Pettigrew included in his Lake Front Context the three properties to the east of Silver Birch Ave. Mr. McKay contended that these three properties – 1 Silver Birch, 9 Silver Birch and 412 Lake Front - are of a different nature, are not on the height of land/ bluff and the houses have setbacks closer to the southern property lines.

Photo 101-B-10 - View from Beach of 1 Silver Birch to 420 Lake Front

Physical Character – OP Policy 4.1.5

The purpose of OP Policy 4.1.5 is to ensure that development in established *Neighbourhoods* will respect and reinforce the existing physical character of each geographic neighbourhood.

> *OP Policy 4.1.5 (Extract)*
> *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. The determination of material consistency for the purposes of this policy will be limited to consideration of the physical characteristics listed in this policy…*

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. Some Neighbourhoods will have more than one prevailing building type or physical character…

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.

Mr. Pettigrew asserted that the area along Lake Front has undergone significant change in the past two decades. He pointed at 424 Lake Front as the initiator of much of this change. He advised that at least 50% of the single detached properties along the Lake Front have been replaced or renovated in the last 15 years and that a new prevailing character has evolved in the Lake Front Context exhibiting significant alteration of the built form, as well as alterations to the landscape areas adjacent to the beach. Mr. Pettigrew's evidence was that the variances individually and cumulatively and the proposal as a whole are consistent with the OP Policies.

Mr. Spaziani noted that the four levels, the dimensions and the wall height patterns would be seen and experienced from the four public access paths and from the beach area. In his opinion, the unique pattern of public experience adds particular importance to the consideration of material consistency with the physical character of the context. He attested that the beachfront is the common public realm that results in these lots on the beach being seen as "fronting" on this space "as an urban design reality".

Mr. Spaziani supported the definition of the Immediate context as identified by Mr. McKay, which included 422 Lake Front, which Mr. Pettigrew had not included in his definition of the immediate context. In his opinion, the treatment and south yard condition of 422 Lake Front supports the prevailing characteristic which should be considered in this immediate context. It shows the kinds of landscape treatments that exist in 3 out of 4 of the houses. Mr. Spaziani conceded that 424 Lake Front (the Kimsa property) is a departure from the immediate context and is a non-prevailing condition.

He noted that the Kimsa house has a swimming pool with retaining walls that have modified the existing grade to introduce a non-prevailing condition, however it has no basement walkout; it is a structured terrace on ground (terra firma). Mr. Spaziani characterizes the prevailing character as houses perched on "table land" above a landscaped area prominent in the foreground, some with terracing and gardening, descending down to the beach. He considered the slope as a prevailing characteristic in the Lake Front context and concluded that there is always a descending to the south lot line. He noted that while the Kimsa house is something of a departure from this prevailing character, it is less impactful than the proposal in that it has no basement walkout, and its structured terrace is located on ground ("terra firma").

Mr. Pettigrew's opinion was that the proposal for 428 is a continuation of the gradual change that has occurred in this area and reflects a new prevailing character that has emerged in the Lake Front Context over time. In Mr. Pettigrew's opinion, the prevailing condition of the Lake Front context consists mainly of private, rear yard amenity areas, and landscaping that has altered or adapted the topography to provide large, flat areas for patios and terraces.

Mr. McKay advised that the proposed intrusion into the landscaped open space on the south side of the subject property (230 sq. m (2,475 sq. ft)., representing the basement extension beyond the main house, the pool and raised platform beyond the basement) is not materially consistent with the prevailing physical character of this area as seen through the deployment of buildings on the top of the height of land / bluff. He further asserted that while there are pools below the height of land / bluff, they are at or slightly above the grade, not full structures which are 3.32 m (10.89 feet) above the grade along the beach.

Development Criteria OP Policy 4.1.5

A portion of OP Policy 4.1.5 sets out criteria for evaluation of whether a proposal respects and reinforces the existing physical character of a neighbourhood (I've bolded the criteria Mr. McKay considered of importance).

> *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.

Mr. McKay advised that criteria c), f), g) and h) of Policy 4.1.5 are relevant to the assessment of the proposal.

- *Prevailing massing, scale, density (c)*

Mr. McKay advised that in his opinion the most important test of the proposal in the OP policy context is the massing, scale, and density. Mr. McKay's opinion evidence was that density refers to how much can be built; massing is the envelope in which to place the building; and scale is how the building relates to another (adjacent) buildings.

With regard to massing and scale, Mr. Pettigrew asserted that the home is consistent with the replacement homes recently approved with FSI greater than 0.6 times.

o Density

Mr. McKay acknowledged that the statistical comparison between different FSI's and identification of the prevailing density is challenging because of both the By-law technicalities of what floor areas are counted as GFA in each set of plans and as well as the general unavailability of accurate GFA statistics. He described how, in his opinion, the FSI regulation in the By-law is a somewhat less than ideal tool as it can be "manipulated" by the characteristics of lots. For comparability between structures, Mr. McKay is of the opinion that GFA provides a better means of comparison. Mr. Pettigrew's opinion was that there was no basis for the use of GFA as an alternate statistic than what is employed in the By-law. Mr. Pettigrew and Mr. McKay both provided extensive analysis of FSI statistics in the context areas to support their evidence that the proposed FSI is in range for the Lake Front Context.

o Massing

The TLAB heard opinion evidence from Mr. Pfeffer that the form and massing of the proposed house are similar and complementary to the adjacent home at 424 Lake Front. He asserted that the articulation of the beachfront façade breaks up the mass of the house and provides a visually interesting façade. In his opinion, the design allows

for differences in lot size and configuration and was prepared to reflect the established pattern of development. This includes the 2 ½ storey massing and Queen Anne style of the home itself, placing the new garage in the location of the existing garage, adjacent to the garages of the neighbouring homes, locating the home as far back from the beach as practicable to maintain a generous waterfront yard, leveling the waterfront yard in a manner similar to the adjacent 424 Lake Front, and the provision of amenity space in the rear yard.

In his responding Witness Statement, Mr. Pfeffer asserted that creating a walkout basement and flat yard is a completely reasonable thing to want to accomplish with a design for such a lot, as indicated by the prevalence, in his opinion, of similar walk out basements in the Lake Front context. Mr. Pfeffer's evidence was that "The fact that a portion of this this flat area has, in this case, a basement under it has no impact or relevance".

Mr. McKay used images from Mr. Spaziani's Expert Witness Statement to describe how, his opinion, the massing that would result from the proposal would create a building that is imposing and overwhelming and that juts forward towards the beach. In Mr. McKay's opinion, the building's massing does not fit within the prevailing character of the Immediate Context. Mr. McKay asserted that the extension of a structure over a walkout is a unique proposition and does not exist anywhere else in the Lake Front context and in Mr. McKay's opinion, this dimension of the design is "not even close to a prevailing condition".

In his evidence, Mr. Spaziani highlighted for the TLAB the area of the first level (basement) that projects beyond the second level. He noted that this is a substantial area of structure (156.4m2 excluding the pool tank) that, in his opinion, reads as a solid structure of significant area. In his opinion, one could consider this "a one-storey bungalow that sits in front of a three-storey house".

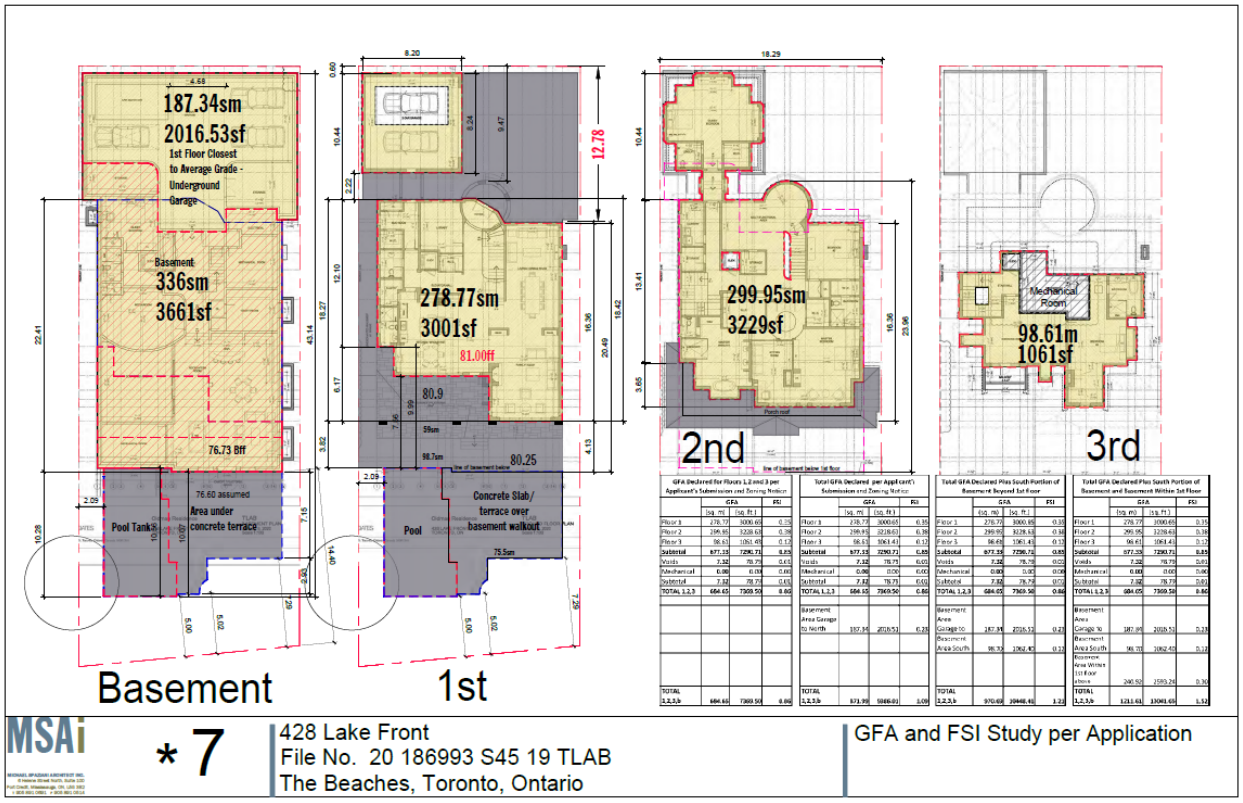

Figure 11: GFA and FSI Study, EX 7, Tab 6, Diagram 7

o Scale

In his testimony, Mr. Pfeffer maintained the proposed building is in scale. He advised that while the building is bigger, this is because it is on a wider lot. He asserted that the proposal is in proportion to the other houses in the area.

Mr. McKay's opinion evidence was that the scale of the building is overwhelming in relation to the adjacent properties, and that the massing is emphasized when brought forward towards the beach. In his opinion, it reads as a four storey building from the beach and it is not appropriate in terms of massing or scale.

- *Prevailing setbacks (f & g)*

While it is the south and north setbacks that were primarily at issue in this matter, Mr. Pettigrew noted that the only setback variances requested are for the north and west side yard setbacks. He advised that these relate to the garage, which replaces the existing garage on the property and is located where the existing garage is.

In his evidence, Mr. Pettigrew illustrated the siting of the buildings in the Lake Front Context and opined that most of the homes are generally in line; that there is a "prevailing setback", with the significant exception of the first three properties east of Silver Birch. Under cross examination, Mr. Pettigrew qualified his evidence to detail that there are a number of prevailing setbacks/ characters reflecting groupings of 3 or 4 houses along the Lake Front.

It was Mr. McKay's evidence that all of the buildings along the Lake Ontario shoreline are built at the top of the bluff with landscaped open space to the south leading down the bluff to the beach edge, with the exceptions of 438 Lake Front and 440 Lake Front (per the recent settlement). It was Mr. McKay's evidence that OP Policy references "prevailing" as the criterion. As the definition of prevailing in this context is that which occurs most frequently, "intrusions" into the south yard in his opinion do not respect and reinforce the prevailing patterns of rear and side yard setbacks and landscaped open space.

Mr. McKay applied the expectations for a rear yard setback to the north property line and similarly concluded that the setbacks consequent on the basement extension beyond the house and the new garage do not respect and reinforce the existing physical character of the rear yard setbacks. In his opinion, a setback of approximately 7.5m would do so.

- *Southern Setback*

Mr. McKay advised that it was his expert opinion that to be able to consider the policies of the OP it is appropriate to treat the subject property as if it had identified front and rear lot lines. Because he considered the beach as the "public realm" edge of the property, he treated the subject property's "front" lot line as that abutting the public realm – the beach – and the rear lot line as the north edge of the property. The designation of the south lot line as the front of the property was vigorously rejected by the Applicant's legal counsel, Mr. Pfeffer, and Mr. Pettigrew. Mr. Pettigrew advised that in his opinion the south sides of the Lake Front properties are not front yards, they are rear yard private amenity areas adjacent to public open space. Mr. Pettigrew submitted that for the subject property, "we should neither be concerned with what is front or rear, nor that all four lot lines are side yards; but rather consider the proposal within its unique and existing context".

Mr. Pfeffer disagreed with the principle of establishing the south lot line as the front lot line. In his opinion, it is inappropriate to "twist" an interpretation of the By-law which makes the beach stand in for the street. He noted that the majority of the 16 properties facing the beach in the Lake Front Context Have frontage on municipal roads and therefore there would be no consistency in the treatment of the south lot line as the front

of these properties. As the rear lot lines and the depth of the properties are not consistent, in his opinion "an interpretation of the Zoning By-law which restricts the allowable length of a house on this 159'-6" deep lot to less than 17m (length) is not reasonable" or in keeping with the intent of the By-law. He emphasized that as he processed the application with the City, the City had not adopted this approach of treating the south lot line as the front of the property.

- *continuation of special landscape or built-form features (h)*

In his testimony, Mr. Pettigrew provided his professional opinion that the landscape on the south side of these properties is not consistent, and it is not a unique or special feature, it is simply topography and changing grade. He noted that there are other examples of pools, alterations of slope and grade all the way from Silver Birch to Nursewood Aves.

In Mr. McKay's opinion, the special landscape, comprised of the prevailing patterns of landscaped open space, which is unique to the Lake Ontario frontage within this area of the City of Toronto, constitutes an important part of the prevailing physical character.

THE SECOND TEST: GENERAL INTENT AND PURPOSE OF THE ZONING BY-LAW

"Gatekeeper Variances"

Mr. Pettigrew advised that Variances 1, 3, 4, 5, and 12 are all existing conditions and are required to permit any form of development on the lot, which is an existing lot of record. For that reason, it was his opinion that these "technical" variances are appropriate and meet the intent of the Zoning By-law.

In Mr. McKay's opinion, as a new development on the property cannot occur without Variances 1, 3 and 12 (which he termed "gatekeeper" variances) that arise from the lack of a street frontage, it is appropriate to evaluate the proposal and decide these variances on the standard of normally applied regulations, including those regulations that would normally apply but have not been cited in the Zoning Notice.

The Applicant's position remained that issues relating to length, depth, front yard etc. have all been considered in designing the home, whether they are variances or not and that regardless, the proposal is maintains the intent of the Zoning By-law.

Missing Regulations

Mr. Pfeffer asserted that the variances required to construct the proposed dwelling are technical in nature and that they result from the unusual circumstances of the subject

property and are either “entirely unremarkable” in scale for the neighbourhood, or explained by the lot configuration. He advised that, notwithstanding the absence of a “front” or “rear” lot line, due consideration was given to the appropriate setback of the proposed house from all lot lines and that he was confident that the design meets the intent of the By-law. In relation to the absence of a building “length” or “depth” measured in a way defined by the By-law, he advised that the physical extension of the house on the subject property was given due consideration in the development of the design and that he was confident that the extension of the house on the subject property meets the intent of the By-law.

Mr. McKay advised that the intent and purpose of OP Policy 4.1.8 is to mandate zoning standards to achieve compatibility in the neighbourhood. In Mr. McKay’s opinion, since no new building can be constructed without variances in regard to the three regulations requiring frontage and access to a street, and further that the granting of these variances would have the consequence of not requiring the application of regulations which are established in relation to a front lot line - depth, length, front lot line setbacks, etc., the question must be asked whether it is the intent of the Zoning By-law that these regulations should not apply to the construction of a new dwelling in the RD zone. In Mr. McKay’s opinion, the clear answer is that there is no intent in the By-law to waive these requirements and that the variance(s) to permit a dwelling to be constructed free of these usual regulatory restraints should not be granted.

Mr. McKay noted the importance of the unapplied regulations of the By-law - front yard setback, building length, building depth, other yard setbacks and height (which has been applied in a modified form) – as they establish the three dimensional footprint within which the requested GFA can be accommodated. He advised that the reason for his focus on the establishment of the front yard is because for any lot in the City it is the first step; all other regulations relate to that starting point. Mr. McKay advised that fundamentally it does not make sense to him as a land use planner that because a lot does not have frontage on a public street, one could build to 0.9m within any lot line.

Mr. Levitt, a Participant in these proceedings, agreed with Mr. McKay. In Mr. Levitt’s opinion, it cannot reasonably be argued that the general intent and purpose of the Zoning By-law will be maintained when many of its key standards are rendered inapplicable **not** due to the application of any principles of good planning, but **rather** as a consequence of an inadvertent gap in the By-law.

In his Expert Witness Statement, Mr. McKay stated that it would not be reasonable to take an approach which would preclude a redevelopment in principle, and that a reasonable alternative approach, consistent with the intent and purpose of the OP and the Zoning By-law, would be to address the proposed building as if the lot fronted on a street and was subject to the usual regulations which would apply to any other dwelling

in the neighbourhood. Mr. McKay opined that if the variances for frontage/access to a street are to be considered, a condition should be applied that would require the construction of a building in accordance with plans approved by the TLAB after considering the proposed building in the context of the usual By-law regulatory framework.

Acknowledging that they are not required variances, Mr. Spaziani analyzed the proposed dwelling in the context of By-law regulations including building length and minimum front yard setback averaging as in his opinion, these regulations represent standards of good urban design and compatibility (per OP Policy 4.1.8).

Mr. Pettigrew responded to Mr. McKay's opinion that the "gatekeeper" variances must be tied to the By-law provisions for building length, depth, and front yard setback or these "missing" provisions would not be addressed. It was Mr. Pettigrew's evidence that Policy 4.1.8 as well as the Zoning Notice do in fact deal with "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", albeit according to the criteria of a lot without street frontage. While the lot is not subject to some of the zoning criteria of the adjacent properties, this, he asserted, does not mean that the proposal disregarded appropriate setbacks, heights, and other zoning provisions for a typical single detached dwelling. Mr. Pettigrew asserted Mr. Pfeffer's evidence provided the methodology behind the design of the proposed dwelling and that it is important to note that "the length, height, and proposed setbacks between the existing homes is in keeping with the intent of the RD zone for single detached homes".

Counsel for the Applicant, argued that much of the evidence, which was entered on behalf of Parties Kimsa and Guest does not speak to the variances actually being sought, but "introduces false, misleading and inappropriate metrics". It was the Applicant's position that the Hearing must focus on the actual variances requested.

In Mr. McKay's opinion, "the identification of a built form envelope which is guided by planning/urban design policies/principles, in the absence of binding by-law regulations, can achieve a dwelling and related landscape treatment which respects and reinforces, and will be materially consistent with, the existing physical character of the relevant neighbourhood contexts." The key principles he identified to achieve this outcome are as follows:

1. The application of an average front yard setback, established from the south property line, in order to establish an appropriate built form relationship between the proposal and the neighbouring properties

2. That a prevailing existing physical characteristic that is to be respected and reinforced is the significant soft landscape condition which represents a special landscape which is unique to the Lake Front Context.

3. That the density, as a measure of FSI and gross floor area, within the Lake Front Context should be respected and reinforced. Reference to measures of FSI and gross floor area in the Broader Context are not helpful given the differences in lot size and topography between the two contexts.

4. That the building length, both above and below ground, should be controlled to that set forth in the By-law (17 m) to respect and reinforce the existing physical character of the Lake Front Context, avoid incompatibility issues and not establish unnecessary precedents.

- *Front Yard Setback Averaging*

Using the illustration reproduced in Fig 12 below, (Lake Front Context Plus 3c) Mr. Spaziani demonstrated the stepping south walls of the houses beachside. He acknowledged that the regulation in the Zoning By-law regarding front yard setback averaging refers to houses fronting on to the same street, while that is not the condition here. Nonetheless, in his opinion, this is a good urban design principle for alignment of neighbouring structures which is valuable and useful in this situation to achieve a predictable and less impactful massing relationship to the public realm.

Following Mr. Spaziani's evidence that the public realm is the beach, Mr. McKay asserted that the south lot line serves as the front lot line in this matter and that is the starting point he used in analysing the proposed building with regard to massing and scale. By-law provision 10.5.40.70(1)B would in usual circumstances dictate that the front yard setback for the subject property would be set at an average of the front yard setbacks of the two adjacent buildings. Mr. McKay noted that this principle of averaging front yard setbacks had been employed in the appeal decision for 438 and 440 Lake Front.

> "10.5.40.70 Setbacks
> (1) Front Yard Setback – Averaging
> In the Residential Zone category, if a lot is:
> …
> (B) between two abutting lots in the Residential Zone category, each with a building fronting on the same street and those buildings are both, in whole or in part, 15.0 metres or less from the subject lot, the required minimum front yard

> setback is the average of the front yard setbacks of those buildings on the abutting lots."

In response to my question regarding the planning grounds and principles for introducing this setback averaging approach to analysis of the proposal, Mr. McKay advised that in his opinion the concept is entrenched in planning theory and history as a mechanism to foster compatible land uses. In his opinion, it is a way of mandating that the built form respects what is adjacent. He advised that it is his opinion that the intent of the averaging provision in the Zoning By-law is to create a consistent street wall, but also to create a general statement of open space, whether it is a front yard or rear yard, so that the built form of a structure respects and does not impose on the public realm.

Mr. Pettigrew reiterated that the only variances that are required for setbacks are to the garage (Variances 11), and in his opinion the proposed setbacks are appropriate for the surrounding area and meet the intent of the Zoning By-law to control the massing and impact of proposed buildings on the adjacent lands. While stipulating that the setback to the south property line does not require a variance, Mr. Pettigrew advised that in his opinion, the setback is nonetheless consistent with the front line of the other houses.

In Mr. Pettigrew's opinion, it is unfair to apply a front yard condition to the subject property when there are no actual front yards, streets, driveways or parking on the south side and the adjacent two properties have not addressed the south yards of their properties as front yards. In his opinion, the intent and purpose of the front yard setback averaging principle in the By-law is to address consistency in streetscape and does not refer to properties' views or privacy. He opined that the Opposing Parties were using a "valid urban design policy" for achieving a different "ulterior" concern, which in his opinion is not appropriately applied

Mr. Pettigrew referred to the plan (figure 9 below) submitted by counsel for Kimsa and Guest which illustrated setback distances and challenged the notion that the setback averaging principle has been, or ought to be, consistently applied even though it has been noted in appeal decisions of the OMB and TLAB. He noted that, because an average front yard setback is not a "static metric" this is another reason that the approach should not be applied. As an illustration, he referenced how the recent settlement on 440 Lake Front would change the setback that would apply to 438 Lake Front under the averaging principle. In his opinion as soon as another house is redeveloped, the previous setback is no longer appropriate on the adjacent properties.

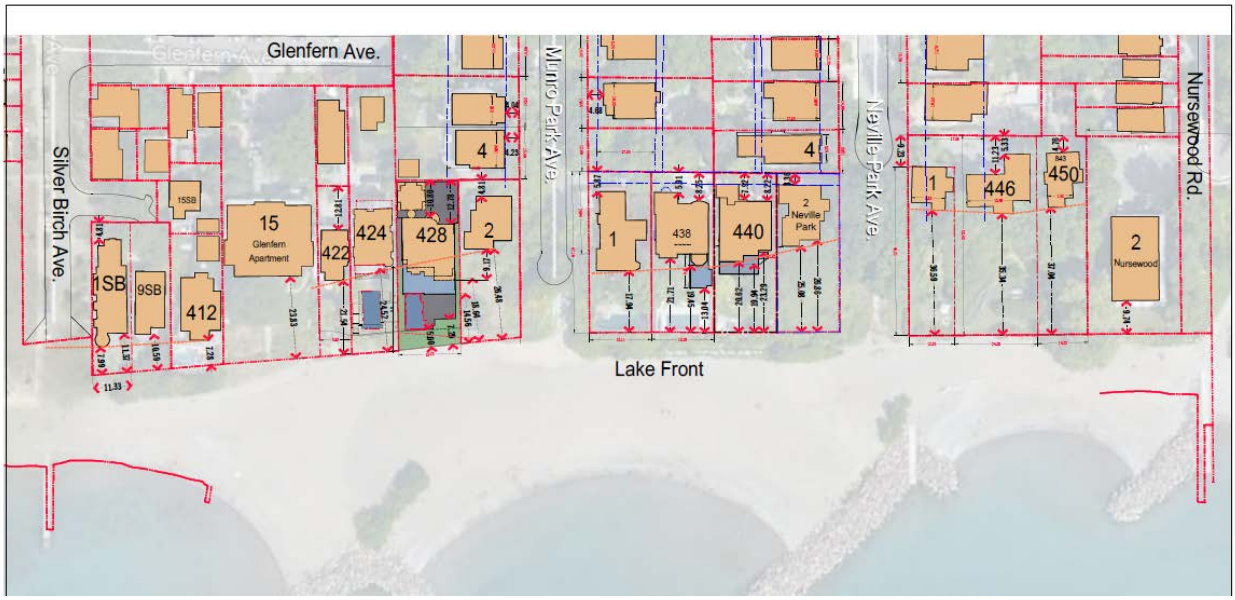

Figure 12 MSAi 3c, Lake Front Context Plus: EX 7, Tab 10

Mr. Pettigrew illustrated how the main front wall of the proposed building lines up with the front wall of 422 Lake Front (immediately west of 428 Lake Front and the most southerly façade between Munro Park and the apartment building at 15 Glenfern Ave). In his opinion, the siting of the proposed building and the setback to the south is "consistent with the intent of the Zoning By-law and that it maintains the prevailing character and built form of the homes in this area, not only in the immediate context, but further afield in the Lake Front context."

- *"Planned Context"*

In his evidence and testimony, Mr. Pfeffer described how the property at 2 Munro Park Ave could be redeveloped "as-of-right". He referred to 2 Munro Park as an "outlier" "by virtue of it being an older building which has not yet been subject to the redevelopment which many of the properties along the Lake Front have been". It was his evidence that 2 Munro Park, by virtue of the fact that it fronts onto Munro Park, has as-of-right zoning which allows for construction much closer to the southerly property line than the existing home on the lot, and indeed much closer than is proposed for 428 Lake Front. Counsel for the Applicant asserted that this potential development represents the "planned context" which should be referenced if any front yard setback averaging were to take place for his client's property. Counsel for Mr. Guest conveyed that Mr. Guest has no intention of redeveloping the property.

After the evidence of all the Opposing Parties and the Participants had been heard, additional material was submitted by the Applicant in the form of reply evidence, but which was contested as a revised plan that was couched in the cloth of a reply. The

additional material was allowed (Exhibit 20) and Mr. Pfeffer presented what transpired to be a revised site plan that set back the main portion of the building by 51cm in response to average setback that might result from the theoretical planned context/ potential redevelopment on 2 Munro Park Ave. (It also depicted additional planting and marginally adjusted landscaping to screen the "cave" under the elevated platform).

- *Building length*

Mr. Spaziani attested that the connected length of the proposed building is over 43.0m, far exceeding the By-law standard of 17m.

Regarding the By-law provision controlling building length, Mr. McKay described the building length in four components: 1) the length of the main building; (2) the additional length of the building at the basement level which extends south of the face of the main building; (3) the additional length of the building created by the pool structure and raised platform that extends beyond the extended basement; and (4) the extended basement beyond the main mall to the north property line. (Figure 5 provides an elevation where these components can be seen).

Mr. McKay assessed the building length as over 29m above grade (see figure 10) since in his opinion the garage and living space above is functionally connected to the main house. Further adding the portion of the extended basement which projects beyond the main house and is above grade, as defined, and above ground, and the raised platform and pool structure, Mr. McKay totalled the building length as experienced by the neighbours at over 43m which in his opinion is a truly massive structure. In his opinion, the By-law building length maximum is 17m and its intent is to control this kind of extended length; to preclude the creation of a very large building that overwhelms the surroundings and creates impact. In this circumstance, he asserted that the proposal would result in a very large building that would overwhelm the much smaller building at 2 Munro Park Ave and would result in adverse impacts on both abutting neighbours. He asserted that the Applicant has provided no justification for this building length and in Mr. McKay's opinion the intent and purpose of the By-law with regards to the regulation of building length has not been met, which is in turn the intent and purpose of OP Policy 4.1.8.

Mr. Pfeffer's evidence was that the regulations regarding setback do not apply to underground / below grade components of a building and that even though he acknowledged that the By-law provision in the By-law does refer to "above and below ground", it was his evidence that land use planning tribunals have previously ruled that is no impact from belowground portions of buildings. In concert with Mr. Pfeffer, Mr. Pettigrew's evidence was that the length of the building along the ground floor is proposed at 14.53m along the west elevation and 16.36m along the east elevation. He

asserted that this is consistent with the existing house at 424 Lake Front abutting the Property to the west which has an approximate length of 16.89m along the shared lot line with 428 Lake Front and the east of 2 Munro Park Avenue/430 Lake Front has a length of approximately 15.78m (including the covered porch and habitable area above it). In Mr. Pettigrew's opinion, an RD zone permits the maximum length of a dwelling to be 17m and it therefore is his opinion that the proposed building length is consistent with the adjoining properties.

Requested Variances

Mr. McKay advised that he had no objections in principle to the requested variances for:

- Variance 4 (parking access) on the basis that the Applicant has right of way access to Munro Park Ave;
- Variance 5 (driveway width)
- Variances 6, 7, and 8 to By-law 569-2013 and Variance 1 to By-law 438-86 (height) provided that the permissions only pertain to that portion of the house on the height of land / bluff; and
- Variance 10 (platform above a second storey) relative to the 4m2 platform on the top floor of the house, the second level platform remains at issue.

The contested variances are:

- Variances 1, 3 and 12 (lot does not abut a street, no frontage)
- Variance 2 (TRCA shoreline hazard setback)
- Variance 9 (FSI)
- Variance 10 (platform at second level, area)
- Variance 11 (side yard setbacks, north and west)

- *Variances 1, 3 and 12 (lot does not abut a street, no frontage)*

As outlined above, the opposing Parties object to the granting of these variances unless all the standards in the By-law (and the four tests) are met. The Applicant asserts that this is an existing lot of record, and it is not the intent of the OP or the Zoning By-laws to prevent development on an existing lot of record.

- *Variance 2 (Variance 2 (TRCA shoreline hazard setback)*

Mr. Pfeffer referred to the comments of the TRCA with regard to Variance 2, which requests the waiving of a 10m setback from the shoreline hazard limit. He advised that

a permit will be required from the TRCA prior to any development taking place and the letter from the TRCA (included as Tab 29 in the Appellant's Disclosure Document Exhibit 1) states that the TRCA has no objection to the granting of the variances on the understanding that a 10m setback for all habitable spaces will be maintained from the shoreline hazard.

Mr. Pettigrew advised that that platform, being a "structure", is also implicated in Variance 2. He advised that the habitable area of the basement area is now proposed outside of the 10m setback from the TRCA shoreline hazard. Mr. Pettigrew's evidence was that the "City had no concerns with the requested variance" and that the TRCA is satisfied with this condition and have no concerns with the variance.

Mr. McKay acknowledged that the matter has been addressed to the TRCA's satisfaction. He advised, however, that the TRCA has not commented or concerned themselves with the larger issue of building massing as it relates to other requirements of the By-law.

- *Variance 9 (FSI)*

Mr. Pettigrew provided opinion evidence regarding Variance 9 (FSI). He opined that "the OP and Zoning By-law use FSI to control density through massing and scale relative to the lot area". He advised that the area belowground that has been included in the FSI total is related to the underground parking garage and is unseen. He noted that the Zoning Notice excluded the area that falls within the shoreline hazard area from the calculation of FSI. It was his opinion that the FSI above grade of 0.76 (calculated over the entire area of the lot and excluding the underground component) is appropriate for the neighbourhood and meets the intent of the Zoning By-law. In his opinion, this is supported by the Committee Decision of December 12, 2018, for 1 Silver Birch Avenue which provided a condition to limit the above grade FSI of that application to 0.88 which had an overall FSI of 1.29.

It was Mr. McKay's opinion that whether looked at in terms of GFA or FSI, the proposed house would be the largest house in the Immediate Context. In his opinion, this situation is exacerbated by the extension of the basement beyond the front wall of the house (which floor area is not included in the calculation of GFA or FSI), all of which together constitutes an overdevelopment of the lands.

- *Variance 10 (platform at second level, area)*

Mr. Pettigrew identified on the revised Site Plan (figure 3) the platform area that requires a variance (Variance 10 B) as the City has identified this level as the second floor. He advised that the area of the platform is located "primarily at grade on the top of the slope with only a portion required to overhang the basement walk-out". In his opinion,

this is a covered porch similar to that on the Kimsa property at 424 Lake Front and he noted that there is no overlook from the proposed porch to the Kimsa property. In his opinion, the variance to permit more than one platform above the first floor is a technicality due to the way established grade has been defined. It is his opinion that it is an appropriate platform location and setback and meets the intent of the Zoning Bylaw.

In Mr. McKay's opinion, the proposed substantial increase in platform size on the south side of the building, which he described as extending substantially over the entirety of the (front) yard, while at grade with the main house, and eliminates all landscaped area to the south of the main walls of the proposed building. In his opinion, the variance for this platform would not maintain the general intent and purpose of the By-law.

In his Responding Witness Statement, Mr. McKay noted that the visualizations of the Applicant depict a series of landscape plantings in front of and on top of the extended platform (above the walkout basement) which he asserts are an attempt to visually mitigate the introduction of an artificial, man-made platform element into the special landscape character that exists in the Lake Front Context. In his opinion, rather than try to hide this inappropriate platform, the platform should be replaced with an at-grade landscaping treatment.

Conclusion

It was Mr. Pettigrew's opinion that the requested variances maintain the general intent and purpose of both By-laws.

It was Mr. McKay's opinion that the proposal as presented and specifically Variances 1, 2, 3, 9, 10, 11 and 12 do not meet the intent and purpose of the Zoning By-law. Further, in his opinion, these variances when combined with the variances to allow a building on the lot despite not fronting on a public street, undermine the intent and purpose of the zoning by-law as it results in normal depth, length, rear yard setback, and front yard setback (averaging) regulations not applying to the proposal which allow a building which is too long and too big (overpowering 2 Munro Park Avenue) and out of character with the neighbourhood (in any of the Contexts).

In his opinion, these variances would permit a building which is not compatible with its neighbours or the existing physical character of the neighbourhood, generally which by-law regulations are intended to achieve, as expressed in *Policy 4.1.8*.

THE THIRD TEST: DESIRABLE FOR THE APPROPRIATE DEVELOPMENT OR USE OF THE LAND

In Mr. Pettigrew's opinion, the application represents a desirable and appropriate use for the property. It was his professional opinion that the proposed use and variances are consistent and compatible with the context of the existing surrounding neighbourhood.

In Mr. McKay's opinion the proposal is not in the public interest. He referenced Mr. Pettigrew's submission that the development would restore a derelict house and commented that would be true of any redevelopment in the City. In his opinion, it is not in the public interest to create a building that is overwhelming to its surroundings and out of character with the properties along the Lake Front. He advised that in his opinion, the proposal does not meet the test of appropriate development of the land.

THE FOURTH TEST: MINOR IN NATURE

In Mr. Pettigrew's opinion, the variances affected by the calculation resulting in an established grade below ground results in significantly skewed numbers or mischaracterised floor levels. In his opinion, the variances relating to grade/ height are minor in nature as they would not be required if the grade were established at the main entrance (north elevation) of the house. It was his evidence that the variances relating to setbacks from the garage are minor as they are replacing an existing detached garage (one storey) and are adjacent to portions of the surrounding properties that area also used for garages and parking. Similarly, it was his evidence that variances required for the platform and pool area on the south side of the property are minor as they create an appropriate amenity area adjacent to the beach and are consistent with the prevailing amenity areas and landscape treatments of the replacement homes along the Lake Front. With regard to the FSI variance, it was his evidence that the FSI is appropriate for the surrounding area and meets the intent of the OP and Zoning By-law. He concluded that the variances to allow development on the lot reflect existing conditions and are therefore minor in nature.

Mr. Pettigrew concluded that the proposed home to replace the existing detached home and detached garage would not create any undue adverse impacts on the surrounding neighbourhood and is an appropriate form of development for the Property. For this reason, it was his opinion that the variances are minor.

Mr. McKay advised that the test for "Minor" addresses whether there will be adverse impact from the proposal. In his opinion, there will be impacts on the adjacent neighbours that will not be minor. He asserted that privacy on 2 Munro Park Ave will be

affected and the wall condition on the east side of the proposed building would create overlook and privacy issues.

Responding to the Applicant's evidence that there is no right to a view in this case, Mr. McKay asserted that this situation is not a matter of a view over a back yard; people buy these properties primarily for the views of the beach and the lake. In his opinion it is the loss of the view that is an adverse impact that is unique to this circumstance.

In summary, it was Mr. McKay's opinion that the proposal does not maintain the intent and purpose of the OP, does not maintain the intent and purpose of the By-law, is not desirable for the appropriate development of the land and is not Minor. He qualified his opinion by asserting that he would support development on the subject property, but that it is a question of **how** it happens and the current proposal as it stands is not supportable.

PARTY CRAWFORD

Mr. Crawford was not represented by legal counsel and did not call any witnesses. He currently lives on Neville Park Ave and advised that he grew up at the top of Neville Park Ave. He is a real estate agent and opined that the real reason anyone buys a home on this stretch is for the panorama. In his opinion, the views are what people pay for; two blocks north a two-storey house costs much less. Mr. Crawford expressed concern about the "relentless pressure to get closer to the water, to get a better view than the neighbour". In his opinion, allowing the proposal for the subject property to be built would "seal the deal of the race to the water". In his Witness Statement, he opined that "every new build is trying to get closer and closer to the south lot line blocking people's views and eliminating more and more of the natural bluff".

Mr. Crawford commented that he thought a house that was not on a street would have *more* controls rather than fewer.

PARTICIPANT LOWE

Mr. Lowe owns and lives in the home at the bottom of Neville Park Ave. In his opinion, the proposal is out of scale and mass. He advised that he believed that development can be balanced with the character of the neighbourhood. In his opinion, the situation on the lake front is not sustainable as each one shuffles further forward (to the beach). He is of the opinion that this application would create an undesirable precedent.

PARTICIPANT LEVITT

Mr. Levitt is a long-standing resident in the broader neighbourhood and walks the beach in front of the subject property regularly. He is a retired lawyer who was employed in the Legal Services Branch of the Ministry of Municipal Affairs and Housing for many years and is knowledgeable about municipal by-laws. He was not, nor did he request to be, qualified to give land use planning evidence.

In his opinion, the proposal does not meet the four tests set down by s. 45(1) of the *Planning Act* for reasons which echoed the submissions of the Opposing Parties. He submitted that it cannot reasonably be argued that the general intent and purpose of the Zoning By-law will be maintained when many of its key standards are rendered inapplicable **not** due to the application of any principles of good planning, but **rather** as a consequence of an inadvertent gap in the By-law.

In Mr. Levitt's opinion, the City's eastern beaches are used and enjoyed by residents of the entire City and beach visitors would experience this proposal "up close and personal". He therefore asserted that there is a public interest that is unique to this site.

ANALYSIS, FINDINGS, REASONS

The Zoning By-laws and some of the most important OP policies that govern the adjudication of variances are premised on the conventional expectation that a lot will have frontage on a street. From that starting point, OP polices such as Policy 4.1.5 that is operative in determining "fit", and zoning By-law regulations such as front yard setback maximums are established. In this matter, because there is no frontage defined, interpretation of the intent behind the actual policies and regulations is more at issue and more complex.

UNDERPINNING PRINCIPLES OF BOTH THE OP AND THE ZONING BY-LAW

Front yard/ front lot line/ frontage

In simple terms, Parties Kimsa and Guest have argued as follows: that the OP and the Zoning By-law intend for a front lot line to be established and for regulations that are defined in relation to a front lot line, - such as front yard maximum setback, building length, height etc. – to be applied to all development in the RD zone. Therefore, they argue, the south side of the property, the only side which abuts the public realm, should be considered the front for the purposes of applying the OP policies and the Zoning By-law regulations. The challenge to this interpretation is that the south side of the property, while it is the only public edge to the property, is not where the main

pedestrian entrance and vehicular access is located and the south yard is proposed to be used for amenity space usually associated with a backyard environment, including elements such as a pool and a deck.

On this difference between the Parties, I do not find that the south side of the property can be considered to be fully a front yard as envisioned by the premise of the OP and the Zoning By-law, primarily because vehicular access and the main pedestrian access are not located here, and the yard is intended to function with many elements of what would traditionally be found in a backyard. Nonetheless, the south side of the property does abut a very important element of the public realm, the proposed dwelling is clearly oriented and designed to address the beach and the lake (as all of the properties abutting the beach do), and is exposed to a highly used public beach. I concur with the evidence of Parties Kimsa and Guest that the general intent and purpose of the front and rear setback provisions in the By-law are to achieve a general alignment of the front and rear faces of nearby houses. Whether the south yard is conceived of as the front or rear yard, I find the intent and purpose of the OP and the By-law in this regard are the same; that the building faces should generally be aligned.

The Applicant has not conceded that the south lot line is anything other than a side lot line, as interpreted by the Zoning Examiner. The Applicant's experts however described the south yard's amenity area and noted all of the typical backyard characteristics and I note that the proposed structure is proposed to be built almost to the lot line on all the other sides. For these reasons, I find that for the purposes of analyzing the application, consistent with the intent of the OP and the Zoning By-law, the setback on the south lot line should be assessed in the context of expectations for front yard and/or rear yard setbacks, not side yard setbacks,

Regulatory Context – OP Policy 4.1.8

OP Policy 4.1.8 links the principles and policies of the OP to the Zoning By-law by mandating that numerical site standards (such as building setbacks from lot lines) be contained to ensure that new development will be compatible with the physical character of established neighbourhoods. In this matter, the Zoning Examiner's interpretation that all lot lines are side lot lines has excluded certain of the normally applicable requirements of the By-law from the Zoning Notice.

Zoning Standards

First, a brief discussion regarding the purpose of a Zoning By-law, which is to serve as an articulation of community development standards within the policy context provided by the OP. Development in the City of Toronto which proposes to go beyond the By-law maximums and minimums is generally required to obtain authorization for variances from the COA or, on appeal, from the TLAB. In most instances where a zoning notice is

not waived by the applicant, a Zoning Examiner, employed in the Buildings Department, will review the specifics of the development proposal against the provisions of the Zoning By-law and identify each instance in which a proposal exceeds the parameters specified in the By-law.

The task of the Zoning Examiner is to review the literal letter of the By-law and identify the variances which are required prior to the issuance of a building permit. It is not the duty of the Toronto Building Department to contemplate the intent of the By-law nor to consider the proposal in the context of the OP. As a matter passes into the jurisdiction of the COA and the TLAB, evaluation of the proposal broadens from the Zoning Examiner's consideration of applicable law under the Building Code to a broader land use planning consideration under the four tests mandated by s.45(1) of the *Planning Act.* The language employed in the four tests reflects this broadening of consideration but is particularly pertinent in the statement that the variances must maintain the *general intent and purpose* of the Zoning By-laws.

In this matter, the zoning notice has not identified that variances are required for front and rear yard setbacks, building length and building depth. Uniquely, these requirements of the By-law are not absent from the list of required variances because the dimensions of the proposal comply with the expectations set in the By-law, which would be the usual reason. Rather, this comes about because calculation of these particular dimensions is premised on a defined "front" of the lot which in this case has not been identified. It seems as if the basis for the decision to omit the regulations regarding front and rear yard setbacks, building length and building depth has been made on the basis that if the requirements are not "calculable" in the method described by the By-law, they do not apply.

It is pertinent to note that in the case of the height requirement, a similar definitional challenge occurs. The calculation of height depends on "established grade". The By-law defines established grade on the following basis:

> 800.50(240) Established Grade
>
> > means the average elevation of the ground measured at the two points where the projection of the required minimum front yard setback line is 0.01 metres past each side lot line.

In this instance, however, the Zoning Examiner has employed what the Applicant's Expert Witness, Mr. Pfeffer, referred to as a "workaround" in calculating established grade, by averaging the grade of the four corners of the lot instead of relying on an identified front yard setback.

Counsel for the Applicant had argued that much of the evidence which was entered on behalf of Parties Kimsa and Guest does not speak to the variances actually being sought, but "introduces false, misleading and inappropriate metrics". It was the Applicant's position that the Hearing must focus on the actual variances requested.

The Zoning By-law contains a set of Principal Building Requirements which include maximum heights, building length, building depth, minimum front yard setbacks, minimum rear yard setbacks and side yard setbacks, which combine to describe a three-dimensional space commonly known as the "building envelope". That some of these standards are not applied in this case means that the dimensions of the building, as well as its location on the site, are unconstrained by a requirement for variances in these respects.

The unique conundrum of this matter is that the zoning notice, with a view to the issuance of a building permit, has determined that certain provisions of the By-law cannot be calculated by the method stipulated in the By-law, whereas the intent and purpose of the By-law is that these provisions are to be applied to properties within the capture of the By-law. In this matter, I do not accept that a deficiency in the property, namely that it does not abut a public street, should liberate the development from normal and otherwise applicable provisions intended by the By-law. If anything, access to the property via a right-of-way creates a greater sensitivity, on the part of the neighbours, to the intensity of a development than would normally be the case. The lot is characterized by two exceptional features – that it is a prime and extremely desirable waterfront lot, and that it takes access via a right of way over a neighbouring property. It is otherwise a conventionally shaped lot with few buildability challenges and does not warrant unique latitude under the By-law to achieve desirable development.

The intent of the OP and the purpose of the By-law is that development be regulated with respect to building length, building depth, front yard and rear yard setbacks. The Appellant has cited case law and has argued that issues must be related to actual variances at hand, "rather than issues raised that are peripheral to the subject variances". (The case law will be examined in a later section of this decision).

For the reasons above, in this particular matter, I find that the provisions for front and rear setbacks and building length and building depth are germane to the second test of s. 45(1): that the general intent and purpose of the Zoning By-laws be maintained.

PPS AND GROWTH PLAN

The proposal's consistency with the PPS and conformity with the GP were not contested.

THE FIRST TEST: GENERAL INTENT AND PURPOSE OF THE OP

OP POLICY 4.1.5

Neighbourhood and Immediate Contexts

Both land use planning experts acknowledged that the character of the lake front properties are significantly different than that of the broader neighbourhood, as defined by the OP. Both have identified an Immediate Context and a Lake Front Context (not to be confused with the street name). I agree that for the purposes of describing a "neighbourhood" character, the properties abutting the beach generally between Balmy Beach Park (Silver Birch Ave) and the RC Harris Water Treatment Plant (Nursewood Rd) constitute an appropriate reference context for analysis. Mr. McKay excluded the properties immediately to the east of Silver Birch Ave on the basis that they are different because they are not on the height of land/ bluff and the houses have setbacks closer to the southern property lines.

I prefer the Lake Front delineation as identified by Mr. Pettigrew for two main reasons. Firstly, The OP identifies the considerations for delineating a geographic neighbourhood, including zoning, prevailing dwelling type and scale, lot size and configuration, street pattern, pedestrian connectivity and natural and human-made dividing features. The differences exhibited by these three properties are not grounds to exclude them from the Lake Front Context. Specifically, I do not agree that the rise in land that begins to the east of 412 Lake Front Ave is a dividing feature.

Secondly, two primary issues of contention in this matter have been prevailing setbacks on the south side of the lots and the prevailing character of the south yards' landscapes. Using these features to exclude three properties from the context and using the same features to subsequently describe prevailing character would seem to be somewhat tautological.

Mr. McKay identified 422 Lake Front Ave, 424 Lake Front Ave, 428 Lake Front Ave and 2 Munro Park Ave as the Immediate Context. Mr. Pettigrew did not include 422 Lake Front in his Immediate Context[1]. Of the two delineations, I prefer the Immediate Context as identified by Mr. McKay, that being the properties located between the apartment building at 15 Glenfern Ave and Munro Park Ave. (See Figure 12). I see no grounds for the exclusion of 422 Lake Front Ave from the Immediate Context.

[1] I note that the text of Mr. Pettigrew's Expert Witness Statement included 4 Munro Park Ave, to the north of the subject property, in the Immediate Context. His Context Map, however, did not include this address, the photograph collection illustrating the Immediate Context (EX 1, Tab 101, Tab A) did not include 4 Munro Park, and in his oral testimony he also did not refer to this address.

I do, however, note Mr. Pettigrew's exclusion of 422 Lake Front Ave in the Immediate Context when considering his later evidence in relation to prevailing setbacks.

Physical Character

I prefer the evidence of Mr. McKay and Mr. Spaziani regarding the prevailing character of the Lake Front Context. The slope manifested on almost all of the properties in the Lake Front Context has been referenced as a defining feature by Mr. Pettigrew, as well as Mr. Spaziani and Mr. McKay. Mr. Pettigrew acknowledged that the three properties immediately to the east of Silver Birch Ave, are located on relatively level grade and that the ground rises to the east of these three properties. As a very general description, the properties in the Lake Front Context, with the exception of the three properties immediately to the east of Silver Birch, have a flat(ish) area of land where the houses are generally located, and a steeper bottom half, sloping down to the beach. See Figure 8. This flat area above the slope has been variously referred to as the "bluff" (it does not technically qualify as a bluff (EX 15)), or "height of land, or "table land".

I concur with Mr. Spaziani and Mr. McKay's description of the prevailing physical character of the Lake Front Context: that of houses perched on "table land" above a landscaped area prominent in the foreground, some with terracing, and gardening, descending down to the beach. Mr. Pettigrew's testimony was that the character of the area has evolved from a more cottage-like setting to a more urban context with larger houses and south facing amenities and that there is a new prevailing condition of mainly private rear yard amenity areas and landscaping that has altered or adapted the topography to provide large flat areas for patios and terraces.

Mr. Pettigrew referred to the proposal as a "continuation" of the gradual change that has occurred in this area. OP Policy 4.1.5 requires that development respect and reinforce the **existing** physical character of a neighbourhood. The existing patios and terraces are generally levelled earth, not patios created out of a roof to a built structure below, as in the proposal. It was Mr. Pfeffer's evidence that the flattening of a yard with retaining walls or landscape works is common throughout the City, generally as of right and not subject to planning restraints. The same is not true of the raised platform and basement walkout under it that Mr. Pfeffer equates to the established pattern of development. The proposed deck/ terrace area located above the basement and extending to a supported platform with a walkout below is an order of magnitude beyond the levelling and terracing of ground that has emerged as an evolution of the south yard landscape condition. Mr. Pfeffer asserted that the fact that a portion of this flat area has, in this case, a (proposed) basement (and a walkout) under it has no impact or relevance. I do not agree. Terraced hard and soft landscaping to create level areas stepping down a slope does not constitute an equivalency with the bottom level of a four-tiered substantial structure, as visible on the south side. Mr. Pfeffer asserted one may terrace

a landscape without variances, but one may not build a substantial structure with a green roof and call it terracing.

I find that the prevailing character of the Lake Front Context south yards remains more reflective of the natural condition of the beach and that the proposal does not respect and reinforce the existing character in this dimension.

Policy 4.1.5 stipulates that where there is a mix of physical characteristics, the prevailing physical characteristics will not preclude development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers and have a significant presence within the immediate context. While this exception in the policies exists, in Mr. McKay's opinion this exception is not met in this case as the proposed development features do not have a significant presence in the Immediate or Lake Front Contexts. While there are two examples of basement walkouts in the group of "table land and slope" properties, they are not close to the scale that is contemplated by the proposal, and I do not consider them characteristic of the prevailing Lake Front Context physical character.

The walkout on 412 Lake Front Ave is also not characteristic of the prevailing physical character as it does not have the height of land, slope condition and prominence of the subject property and proposal. As such, I do not find that the proposal's physical characteristics of the basement and walkout under a raised and extended platform have a significant presence within the Lake Front or Immediate Context. (OP Policy 4.1.5).

I concur with the evidence of Parties Kimsa and Guest that the prevailing physical character of the Immediate Context reflects that of the Lake Front Context as described above. 424 Lake Front Ave is a non-prevailing condition having significantly excavated the slope, but the other three properties in the Immediate Context, 422 Lake Front Ave, 2 Munro Ave and the existing condition of the subject property, are consistent with the prevailing physical character as described above.

Counsel for the Appellant in his closing submission described the evidence of Mr. McKay and Mr. Spaziani as "hypocritical" in examining what their own client has built next door at 424 Lake Front. I recognize this perspective, but the prior actions of one of the Opposing Parties to this Hearing, even if they are to a degree contradictory to the objections being raised regarding the proposal, are not a deciding factor in the determination of the prevailing character in the Lake Front Context, or the Immediate Context.

Development Criteria

OP Policy 4.1.5 c) Prevailing massing, scale, density

- Density

Mr. Pettigrew asserted that scale and massing is determined by FSI. While related, these terms describe three different relationships: 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. In the By-law, FSI is the numerical ratio of what the OP refers to as "density".

Mr. McKay preferred to use GFA as a method of describing density and for his evidence regarding the prevailing density. I do not accept that total GFA serves the purpose of describing density. GFA is an indicator of size. What the OP refers to is density, i.e.. a ratio of GFA to lot size, in this case. The intent of the OP Policy, and the FSI provision in the By-law, is to accommodate the scaling up or down of GFA in proportion to lot size.

Mr. Pettigrew presented the FSI of the proposal as 0.76 by deducting the part of the basement that was included by the Zoning Examiner, and by including the full area of the lot in the calculation[2]. He therefore adjusted both the total GFA and the total lot area to argue what he considers to be a reasonable reflection of density.

Mr. McKay acknowledged that in employing Mr. Pettigrew's method, the total aboveground FSI would be the fourth largest FSI in the Lake Front Context, after 1 Silver Birch (which is at grade), 412 Lake Front Ave and the recent settlement at 440 Lake Front Ave. He identified, though, that if the total basement area was included in the calculation, the FSI of the proposal in total is 1.35, and would be the largest in the Lake Front Context by an appreciable margin[3].

I conclude from the evidence of the two Experts, that the basement component of this proposal is the most at issue. While the general intent of the Zoning By-law has been to exclude the basement component from FSI calculations, for the purposes of considering density in the policy context of the OP, I prefer Mr. McKay's approach for the following reasons:

- The total basement area is substantial, larger than the total floor area of many two-storey plus finished basement detached houses in Toronto.
- The OMB decision excluding the floor area of basements in the By-law calculations of FSI relied on the expectation that depth provisions in the By-law

[2] Garage area is closer to grade and therefore included in GFA
The part of lot below identified Shoreline Hazard Limit was excluded from FSI calculation
[3] The next largest, by his calculation, would be 1 Silver Birch at 1.29 FSI.

would be applied and that the floor area of a basement is generally not visible (to the public). See page 55.

- The south face of the structure at the basement (first) level would be viewed from the public beach.
- The basement area is unconstrained by the need for variances for building length and depth, as would normally be the case.
- The side walls of the basement component of the structure extend substantially beyond the upper three levels, and are manifest above ground to both the Guest property and that of the Kimsas, as are the pool tank and supports for the concrete platform that covers the walkout.[4]

Following the evidence of Mr. McKay, I find that the density of the proposal does not respect and reinforce the physical character of the Lake Front Context.

o Massing

The evidence of all the Opposing Parties, and the Participants, focused on the first level of the proposed dwelling, particularly the basement extension and the concrete platform extending to the Shoreline Hazard Limit. I concur with the evidence of Mr. Spaziani that the extension of basement and deck / pool structure introduces a building mass that is oversized and unattractive when perceived from the beachfront, contrary to the established and prevailing character of the Lake Front Context, which he describes as a landscape dominant foreground viewed from the beachfront.

Mr. Pfeffer's response to Mr. Spaziani's evidence above was that Mr. Spaziani's opinion is not supported as some of the houses (1 Silver Birch, 9 Silver Birch and 412 Lake Front) have the house at the beach, the majority of the properties have stepped and terraced landscaping and the properties east of Neville Park have significantly different topography to the subject lot. Setting aside the reality that the addresses Mr. Pfeffer refers to also have significantly different topography to the subject lot, I find this response inadequate in addressing the specific issue of the actual built form massing of the extension of the basement and deck/pool structure and the prevalence of this specific form and massing in the context.

Mr. Pettigrew's evidence regarding massing depends on an analysis of density/ FSI. While related, this evidence is not sufficient to describe prevailing massing. I do not concur that FSI numbers serve as a representation of massing, which may be different according to the design, even though the FSI be constant. Mr. Pfeffer describes the massing of the proposal in terms of the stepped massing where the west side is recessed from the primary east gable and breaks up the mass of the house to provide a

[4] See Figures 4, 5 and 11

visually interesting façade. He refers to the "2 ½ storey massing" and the Queen Anne style. As has been noted by the City and the Opposing Parties, the structure is a four level structure, visible on the south side at all levels.

The evidence of Mr. Ziegler and Mr. Hannay, while extremely helpful in presenting accurate computer simulations and depictions of views, did not provide an opinion on massing that addressed the requirements of OP Policy 4.1.5 c). Analysis in Mr. Ziegler's Expert Witness Statement incorporated the proposed landscaping almost as part of the built form, suggesting that the proposed landscaping would provide "visual transition from the beach area to the proposed development" and did not otherwise assist in understanding this element of the proposal's built form.

The Applicant's evidence has relied heavily on depiction of planting and landscaping to screen or mitigate several of the proposal's components, most especially the area on the platform/ green roof and in front of the basement walkout area. Under cross-examination, Mr. Spaziani bluntly responded that this was an attempt to use hanging vines to mask bad urban design. While trees and vegetation add a great deal to the attractiveness and sustainability of development, vegetation cannot be relied upon as a screen for building mass. Plants are living things and their survival cannot be guaranteed. Alteration of landscaping in most respects is unregulated subsequent to construction and cannot be relied upon as a permanent feature or as a mitigation of the massing of a built structure into the future.

For the reasons above, I find that the massing of the proposal does not respect and reinforce the physical character of the Lake Front Context.

- Scale

The Experts' Opinions regarding the size of the proposal in relation to the other dwellings (the scale relationship) in the Lake Front Context parallel those of their opinions on density. The Appellant's evidence is that the aboveground size is in scale with the other renovated houses in the context. The Opposing Parties argue that the total size of the structure, including the basement, is out of scale with the other houses in the Lake Front Context. In the Immediate Context, the relationship between the aboveground component of the proposed dwelling and the aboveground component of the adjacent Kimsa house at 424 Lake Front is not markedly out of scale. The scale relationship between the adjacent Guest house at 2 Munro Park is one of a significant difference in scale, even if only the aboveground portion of the structure is considered. The proposal is similarly out of scale with the house at 422 Lake Front Ave.

With respect to OP Policy 4.1.5 c) that development will respect and reinforce the physical character, including c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties, I find that the proposed dwelling in respect of

massing, scale and density, is an overdevelopment of the site and does not respect and reinforce the physical character of the Lake Front Context.

OP Policy 4.1.5 f) and g) Prevailing setbacks of buildings from the street or streets; prevailing patterns of rear and side yard setbacks and landscaped open space;

Under cross examination, Mr. Pettigrew qualified his previous evidence regarding a prevailing south yard setback to detail that there are a number of prevailing setbacks/ characters reflecting groupings of 3 or 4 houses along the Lake Front. Figure 12 shows that the dwellings are for the most part located at the north of the properties on the "table land" above the sloped portion of the land, as described in the section on prevailing physical character.

I have found previously that the south yard setback should be assessed in the context of expectations for front yard and/or rear yard setbacks, not side yard setbacks. I accept Mr. Pfeffer's evidence that that the Zoning By-law specifically excludes portions of the building below the surface of the lot from setback rules. Mr. Pettigrew illustrated how the main front wall of the proposed building lines up with the front wall of 422 Lake Front (immediately west of 424 Lake Front and the most southerly façade between Munro Park and the apartment building at 15 Glenfern Ave).

I find that the prevailing south yard setback in the Lake Front Context can only be generally described as responsive to the general topography and loosely aligned in sections divided by the north south streets and the apartment at 15 Glenfern Ave. See Figure 12. I find that within the grouping of four houses that constitute the Immediate Context, a specific prevailing south yard setback cannot be identified as each house shows a different setback. Therefore, under these conditions, I do not find that, at a policy level, the proposal fails to meet the criteria of OP Policy 4.1.5 f) and 4.1.5 g) with respect to the south yard setback.

On the north yard setback, Mr. McKay's advice was that the basement extension beyond the house and the new garage do not respect and reinforce the existing physical character of the rear yard setbacks. In this respect, I prefer the evidence of the Applicant which illustrated similar features such as main entrances and parking areas on adjacent properties. The variance to the west side yard is required for the new garage which is intended to replace the existing garage in generally the same location.

I do not find that with respect to the north and west yard setbacks the proposal fails to meet the criteria of OP Policy 4.1.5 f) and 4.1.5 g),

OP Policy 4.1.5 h) Continuation of special landscape or built-form features that contribute to the unique physical character of the geographic neighbourhood

Mr. Pettigrew provided his professional opinion that the landscape on the south side of these properties is not consistent, and is not a unique or special feature, it is simply topography and changing grade. In Mr. McKay's opinion, the special landscape, comprised of the prevailing patterns of landscaped open space, which is unique to the Lake Ontario frontage within this area of the City of Toronto constitutes an important part of the prevailing physical character and that in this respect, the proposal does not respect and reinforce the Policy 4.1.5 h).

I have previously found that the prevailing physical character of the Lake Front Context is that of houses perched on "table land" above a landscaped area prominent in the foreground, some with terracing, and gardening, descending down to the beach. I concur with Mr. McKay that the sloped area immediately above the beach is a defining feature that has contributed to the unique physical character of the Lake Front Context. Adjacency to the beach and the shoreline are undoubtably a unique feature of these properties, but the transition from the beach onto private residential property has meant that the natural state has been altered by construction of hard and soft landscaping and amenities such as pools, gazebos and terracing.

Thus, while I concur that the physical character of the Lake Front Context exhibits a prevailing pattern of landscaping on the bottom steeper section of the south yards, I do not find that this area constitutes a special landscape in and of itself.

I find that the proposed dwelling in respect of massing, scale and density, is an overdevelopment of the site and does not respect and reinforce the physical character of the Lake Front Context and the Immediate Context (OP Policy 4.1.5 c)). I therefore find that the proposal, as currently designed, does not maintain the general intent and purpose of the OP.

It is accepted jurisprudence of the Ontario Land Tribunal (formerly the Local Planning Appeal Tribunal (LPAT) and before that the Ontario Municipal Board) and the TLAB case law that, an application for variances must meet all four tests of s.45(1) to be approved. In some cases, variances may be approved as standalones, as approvals which are not dependent on the design and features of a proposal. It is for this reason that TLAB decisions address both individual and cumulative impacts of requested variances for any proposal. In this matter, I have found that the proposal as an integrated whole does not meet the general intent and purpose of the OP (with respect to density massing and scale) and therefore the individual variances that are occasioned by the design of the proposal are not supported untethered from specific plans and elevations (which in this case are not realizable because of the above finding).

THE SECOND TEST: GENERAL INTENT AND PURPOSE OF THE ZONING BY-LAW

"Gatekeeper Variances"

Mr. Pettigrew advised that Variances 1, 3, 4, 5, and 12 are all existing conditions and are required to permit any form of development on the lot, which is an existing lot of record. For that reason, it was his opinion that these "technical" variances are appropriate and meet the intent of the Zoning By-law.

In Mr. McKay's opinion, as a new development on the property cannot occur without Variances 1, 3 and 12 (which he termed "gatekeeper" variances) that arise from the lack of a street frontage, it is appropriate to evaluate the proposal and decide these variances on the standard of normally applied regulations, including those regulations that would normally apply but have not been cited in the Zoning Notice. In other words, he opined that the TLAB should not grant the variances in regard to "front on" and "gain access directly to" a public street (Variances 1 and 3) unless the standards in the By-law (and the four tests) are met. It was Mr. McKay's evidence that there is no as-of-right development entitlement on the subject property at all, that even to obtain 0.6 FSI, the "gatekeeper" variances must be obtained.

The term "technical variance" is one that is perhaps too often used before the TLAB. It is taken to mean a variance that is required because of some technical deficiency in the property rather than one that is triggered by the design of the proposal. It should not be taken for granted that the TLAB will choose to remedy what is described as a technical deficiency by means of an unconditional granting of the requested variance.

The duty of the TLAB is to adjudicate every variance in light of the four tests outlined in s. 45(1) of the *Planning Act* remains. I find that in this matter, the very first variance in itself is a caution that basic conditions for development are not met. Therefore, a decision regarding the granting of Variances 1, 3 and 12 must be made cognizant of this and therefore dependent on the overall appropriateness of the proposal and whether the application as a whole meets the four tests of s.45(1) of the *Planning Act.*

Missing Regulations

I have previously found that in this particular matter the provisions for front and rear setbacks and building length and building depth are germane to the second test of s. 45(1): that the general intent and purpose of the Zoning By-laws be maintained.

Mr. Pettigrew responded to Mr. McKay's opinion that the "gatekeeper" variances must be tied to the By-law provisions for building length, depth, and front yard setback or

these “missing” provisions would not be addressed. It was Mr. Pettigrew’s evidence while the lot is not subject to some of the zoning criteria of the adjacent properties, this, he asserted, did not mean that the proposal disregards appropriate setbacks, heights, and other zoning provisions for a typical single detached dwelling.

Mr. Pettigrew asserted Mr. Pfeffer’s evidence provided the methodology behind the design of the proposed dwelling and that it is important to note that “the length, height, and proposed setbacks between the existing homes is in keeping with the intent of the RD zone for single detached homes”.

On the basis of this evidence from Mr. Pettigrew and Mr. Pfeffer, the proposal will be reviewed accordingly in respect of building length, building depth and setbacks.

- Front and Rear yard Setbacks

Because there is no frontage, all of the lot lines are deemed to be side lot lines by the Zoning Examiner and are therefore considered subject to a 0.9m side lot setback requirement. For a lot that *does* front on to a street, Regulation 10.5.40.70(1)B in the By-law sets the requirement for a front yard setback as the average of the front yard setbacks of those buildings on the abutting lots.

> “10.5.40.70 Setbacks
> (1) Front Yard Setback – Averaging
>
> In the Residential Zone category, if a lot is:
>
> (A) beside one lot in the Residential Zone category, and that abutting lot has a building fronting on the same street and that building is, in whole or in part, 15.0 metres or less from the subject lot, the required minimum front yard setback is the front yard setback of that building on the abutting lot; and
>
> (B) between two abutting lots in the Residential Zone category, each with a building fronting on the same street and those buildings are both, in whole or in part, 15.0 metres or less from the subject lot, the required minimum front yard setback is the average of the front yard setbacks of those buildings on the abutting lots.”

If the above provision does not apply, the required minimum front yard setback in the RD zone is 6.0m.

The minimum rear yard setback in the RD zone is the greater of 7.5m or 25% of the lot depth. In either condition, the conventional setback requirements for front yards and rear yards are expected to be substantially greater than that for side yards.

It is the evidence of the Parties Kimsa and Guest that the intent of the front and rear yard provisions in the By-law are to ensure that the front and rear of the houses generally align with each other, implementing OP Policy 3.1.2 and OP Policies 4.1.5(f) and 4.1.5(g).

With regard to the matter of front and rear yard setbacks, I concur with the evidence of Parties Kimsa and Guest that the general intent and purpose of the front and rear setback provisions in the By-law are to achieve a general alignment of the front and rear projections of adjacent houses.

Mr. McKay's evidence was that the application of the front yard average setback approach is a key principle for achieving the design of a dwelling that would be compatible with the existing physical character. That is to say that the mechanism for achieving the general alignment of the houses abutting the public realm, particularly in the Immediate Context, should be the use of the averaging principle that underpins Regulation 10.5.40.70(B).

In response to my question regarding the planning grounds and principles for introducing this setback averaging approach to analysis of the proposal, Mr. McKay advised that in his opinion the concept is entrenched in planning theory and history as a mechanism to foster compatible land uses. In his opinion, it is a way of mandating that the built form respects what is adjacent. He opined that the intent of the averaging provision in the Zoning By-law is to create a consistent street wall, and also to create a general statement of open space, whether it is a front yard or rear yard, so that the built form of a structure respects and does not impose on the public realm.

The Applicant takes the position that since the south yard does not front on to a street, that this provision of the By-law is not appropriately applied. In Mr. Pettigrew's opinion, the intent and purpose of the front yard setback averaging principle in the By-law is to address consistency in streetscape and does not refer to properties' views or privacy. He opined that the Opposing Parties were using a "valid urban design policy" for achieving a different "ulterior" concern, which in his opinion is not appropriately applied.

Mr. Pettigrew illustrated how the main front wall of the proposed building lines up with the front wall of 422 Lake Front (immediately west of 428 Lake Front and the most southerly façade between Munro Park and the apartment building at 15 Glenfern Ave). In his opinion, the siting of the proposed building and the setback to the south is "consistent with the intent of the Zoning By-law and that it maintains the prevailing character and built form of the homes in this area, not only in the Immediate Context, but further afield in the Lake Front context." (I note in this regard that 422 Lake Front Ave was not included in Mr. Pettigrew's delineation of the Immediate Context).

I accept Mr. McKay's advice that the intent and purpose of the front yard setback averaging principle is to create a consistent street wall and to create a general statement of open space. I do not concur with the evidence of the Applicant that the inconsistency of the beach depth complicates any idea of averaging. The principle of consistency, and the framing of the view from the public realm, relies on the relationship between the front faces of the existing buildings, not to the depth of the beach. In this matter, a consistent building edge to the public realm of the beach stands as substitute for the street wall feature and the general statement of open space, which is the corollary to the edge principle, becomes more important given the natural condition of the beach and the prevailing physical character.

I do not agree with Mr. Pettigrew's evidence that the setback to the south is consistent with the intent of the Zoning By-law in the Immediate Context and in the Lake Front Context. Firstly, Mr. Pettigrew had not included 422 Lake Front Ave in his definition of the Immediate Context and disputed Mr. McKay's inclusion thereof. The south setback line of the proposal is forward of both the adjacent properties that Mr. Pettigrew included in his Immediate Context. Secondly, the principle of averaging propels a tendency towards a mean, or a general alignment of the building faces between the furthest forward and the furthest back. Absent this averaging principle, the tendency would be for each subsequent proposal to "creep forward to the beach" as in the concern expressed by the Participants. It is this tendency to shorten the setback distance on front yards that Regulation 10.5.40.70(B) obstructs, and I find that while not fully and immediately translatable to the circumstances of this proposal, it is however a helpful model and reflects the general intention and purpose of the By-law with regard to setbacks from the public realm.

I acknowledge the concern that Mr. Pettigrew articulated that the defining of a setback in relationship to other elements results in a setback that can change over time. From a land use planning point of view, a definite south yard setback that could be consistently applied to the south yard of the Lake Front Context properties might be considered a preferable approach. Mr. Pettigrew's approach to determining an appropriate setback, however, would likewise not represent a definite and consistent south yard setback and would not instil greater predictability and consistency than the application of the setback averaging principle.

I note that that this principle of averaging front yard setbacks was employed in the appeal decisions for 438 Lake Front Ave and 440 Lake Front Ave.

I find that there is merit in consistency of application of this principle in the Lake Front Context in light of the important visual relationship to the public beach and because of the unusual configurations of frontages in the Lake Front Context. For the reasons

stated above, I therefore find that the south yard setback of the proposal does not maintain the intent and purpose of the Zoning By-law.

- "Planned Context"

In the context of the discussion on the south yard setback, counsel for the Applicant introduced the concept of "planned context" which the OP references in some policies and preambles.

In his evidence and testimony, Mr. Pfeffer described how the property at 2 Munro Park Ave could be redeveloped "as-of-right". He referred to 2 Munro Park as an "outlier" "by virtue of it being an older building which has not yet been subject to the redevelopment which many of the properties along the Lake Front have been. It was his evidence that 2 Munro Park, by virtue of the fact that it fronts onto Munro Park, has as-of-right zoning which allows for construction much closer to the southerly property line than the existing home on the lot, and indeed much closer than is proposed for 428 Lake Front.

In the final hours of the Hearing, a revised site plan was submitted into evidence which set back the main wall of the proposed dwelling by 51cm to comply with a setback calculated on the basis of an average between the existing building setback at 424 Lake Front Ave and the projected as-of-right setback imputed for 2 Munro Park Ave.

Counsel for the Applicant asserted that this potential development represents the "planned context" which should be referenced if any front yard setback averaging were to take place for his client's property. Counsel for Mr. Guest conveyed that Mr. Guest has no intention of redeveloping the property.

I do not agree that this is an appropriate application of the concept of "planned context". OP Policy 4.1.5 which addresses development criteria in *Neighbourhoods* does not reference planned context; its overarching intent is that physical changes to established *Neighbourhoods* must be sensitive and gradual and "fit" the existing physical character. The Zoning By-law confers as-of-right development potential, and the Applicant is able to realize that potential on their own property without challenge, but it is not open to an applicant under the umbrella of "planned context" to anticipate the realization of that potential on a neighbouring property to benefit their own proposal.

It is very clear that the provisions of the By-law with regard to setbacks identify a consistent setback distance or define the required setback in relation to the **existing** buildings. Mr. and Mrs. Guest's home from all outside appearances is a charming and comfortable dwelling and they have stated they have no intent to redevelop the property. Even should the Guests, or subsequent owners, choose to do so, there is no inevitability that any future redevelopment would result in a south yard setback as modelled by Mr. Pfeffer.

- Building Length and Building Depth

The lots in the Lake Front context, including the subject property, are rectangular lots oriented in a north-south direction, regardless of the side from which vehicular access is gained. (See Figure 12). The Appellant identifies the width of the property as 18.29m and its length as between 53m and 47.72m.

Although all four lot lines have been deemed to be side lot lines for the purposes of the zoning notice, the essential dispute between the Parties is whether either the north or south sides of the lot can be described as the "front". The east and west lot lines have not been disputed as side lot lines. While the By-law provisions regarding Building Length and Building Depth have not been applied in this regard on the basis that a front lot line/ front yard setback has not been identified, (discussed above), the measurement of building length does not, in an actual sense, depend on the question of which lot line is considered the front. (Even from the perspective of common practice, the longest dimension of a lot or a building is generally described as the "length", and the shorter perpendicular dimension as the "width", much as the Appellant has described the lot).

Either way, the resulting measurement for building length is the same, and does not change on the basis of which of the two lot lines is identified as the front.

The regulations that define building length and building depth are as follows:

> 105) Building Length
> means the horizontal distance between the portion of the front main wall of a building on a lot closest to the front lot line, and the portion of the rear main wall of the building closest to the rear lot line, measured along the lot centreline. If the main walls are not intersected by the lot centreline, the measurement is from the point on the lot centreline where a line drawn perpendicular to the lot centreline connects with the main wall.
>
> 10.5.40.20 Building Length
> (1) Portion of Building to which Building Length Applies
> In the Residential Zone category, building length regulations apply to all main walls of a building above and belowground, excluding the footings for the building.
>
> 10.20.40.20 Building Length
> (1) Maximum Building Length if Required Lot Frontage is in Specified Range
> In the RD zone with a required minimum lot frontage of 18.0 metres or less, the permitted maximum building length for a detached house is 17.0 metres
>
> (455) Main Wall

means any exterior wall of a building or structure, including all structural members essential to the support of a roof over a fully or partly enclosed area.

Building depth is measured from an identified front yard setback, which is in question in this matter.

(100) Building Depth

means the horizontal distance between the front yard setback required on a lot and the portion of the building's rear main wall furthest from the required front yard setback, measured along a line that is perpendicular to the front yard setback line.

10.5.40.30 Building Depth
(1) Portion of Building to which Building Depth Applies
In the Residential Zone category, building depth regulations apply to all main walls of a building above and belowground, excluding the footings for the building.

10.20.40.30 Building Depth
(1) Maximum Building Depth if Required Lot Frontage is in Specified Range
In the RD zone with a required minimum lot frontage of 18.0 metres or less, the rear main wall of a detached house, not including a one storey extension that complies with regulation 10.20.40.20(2), may be no more than 19.0 metres from the required front yard setback.

In general terms, the building length regulation deals with the actual length of the building between the main walls. Building depth relates to the location of the building, whatever its actual length, and limits how far back on the lot the back wall of a structure may be located.

I note that the provisions for both building length and building depth apply to the belowground portions of buildings.

- Setbacks vs building length and depth

It was the testimony of Mr. Pfeffer that the Zoning By-law excludes portions of the building below the surface of the lot from setback rules. The same is not true for the provision regarding building length, nor building depth. The immediate consequence, therefore, of the non-application of the building length and building depth provisions is to liberate the development from restraint on the belowground portion of the building structure.

In his evidence, Mr. Pfeffer referred to his experience as a witness at the Ontario Municipal Board (OMB) hearings on By-law 569-2013, which is Toronto's Harmonized By-law and the primary By-law in force on the subject property. He also referred to his work on the Ontario Association of Architects Task Force on this By-law. Under cross-examination by Mr. Wood, Mr. Pfeffer was referred to the OMB Decision by Member Conti issued on March 01, 2018 (Exhibit 8) regarding the new Harmonized By-law, particularly to the paragraphs dealing with length and depth.

Mr. Pfeffer conceded that the By-law does control below grade basements and that the measurement of length includes what is below ground. He maintained, however, that parts of the building below ground are "not generally considered to have impact".

Paragraph 141 of the same OMB decision (Exhibit 8) casts further light on the issues of building length and depth and provides insight into the intent of the Zoning By-law.

> From OMB Decision March 1, 2018 re Toronto Harmonized By-law (Exhibit 8):
> [141] After considering the evidence the Board does not agree with the City and SARG that the part of the provision that may include 50% of basement area in the GFA calculation is necessary and the Board is concerned that it is not a reasonable interpretation of the policy direction in the Official Plan. If the concern is that lots sloping toward the rear would encourage deeper buildings, the building depth and length provisions of the By-law should provide control over this matter. If the concern is that property owners will change grades at the rear of lots to create walk-outs, the Board understands that the City has the authority to control grading in conjunction with the building permit process. If the concern is massing, the floor area of a basement with a walkout is generally not visible from the street and does not affect the massing along the street.

The OMB concluded that other means of controlling the floor area and massing of a basement component in a dwelling are not necessary because the provisions for length and depth can be relied upon to provide control regarding deeper buildings. Further, the concern regarding massing impact that the floor area of a basement could present to the street, (I extrapolate this to include the public realm generally) is discounted on the basis that a walkout is generally not visible (to the public realm) and would therefore not affect the massing in a way that impacts beyond the subject property.

Given the unique prominence of the beachside face of this property, I find that the visibility of the walkout from the basement to the beach in this case can not be dismissed as a consideration. The non-application of the depth and length provisions of the By-law releases the primary constraint which was relied upon in the OMB in its decision to omit the inclusion of basement area in the GFA calculation as a means to control massing.

The submitted materials of the Appellant include case authorities to support the contention that there is no impact from a proposed underground/basement component beyond what is permitted as-of-right. In the authorities cited, the belowground variance has been authorized on the premise that it was not visible from the ground or street level. I am of the opinion that the same cannot be said in this matter, where the visibility of the basement south wall, containing French doors and flanking windows, has been an issue that has been the subject of extensive testimony through the Hearing. Reference to *Figures 4 and 5* above show the south elevation of the building and the proposal profile from a west elevation demonstrating the extent of the basement structure belowground, aboveground and at the established grade.

Mr. Pettigrew affirmed in his Expert Witness Statement the same measurements and conclusion as Mr. Pfeffer – that the length of the building along the ground floor is 14.53m along the west elevation and 16.36m along the east elevation. He also noted that the maximum permitted length in the RD zone is 17m and therefore it was his opinion that the proposed building length is consistent with the adjoining properties. Mr. Pfeffer's and Mr. Pettigrew's opinions are therefore premised only on the aboveground portion of the building.

Mr. Spaziani's evidence was that the connected (basement level) length of the proposed structure, including the raised platform, is over 43.0m (141 ft), far exceeding the By-law standard of 17m. See figure 11.

Mr. Pettigrew's evidence was that the length, height, and proposed setbacks between the existing homes is in keeping with the intent of the RD zone for single detached homes, but I do not find support for this contention with regard to building length in the evidence of the Applicant beyond the assertion that there is no impact from the proposed building length, with which contention I do not agree.

Mr. McKay asserted that the Applicant has provided no justification for this building length and in Mr. McKay's opinion the intent and purpose of the By-law with regards to the regulation of building length has not been met, which is in turn the intent and purpose of OP Policy 4.1.8. I prefer the evidence of Mr. McKay in this regard and in concert with my findings regarding the general intent and purpose of the OP with regard to the massing, scale and density of the proposal (OP Policy 4.1.5 c)), I find that the building length of the proposed dwelling does not maintain the general intent and purpose of the Zoning By-law. For the same reasons, I find that the building depth does not maintain the general intent and purpose of the Zoning By-law.

- *Requested Variances*

Mr. McKay advised that he had no objections in principle to the requested variances for:

- Variance 4 (parking access) on the basis that the Applicant has right of way access to Munro Park Ave;
- Variance 5 (driveway width)
- Variances 6, 7, and 8 to By-law 569-2013 and Variance 1 to By-law 438-86 (height) provided that the permissions only pertain to that portion of the house on the height of land / bluff; and
- Variance 10 (platform above a second storey) relative to the 4m2 platform on the top floor of the house, the second level platform remains at issue.

The contested variances are:

- Variances 1, 3 and 12 (lot does not abut a street, no frontage)
- Variance 2 (TRCA shoreline hazard setback)
- Variance 9 (FSI)
- Variance 10 (platform at second level, area)
- Variance 11 (side yard setbacks, north and west)

- *Variances 1, 3 and 12 (lot does not abut a street, no frontage)*

As outlined above, the opposing parties object to the granting of these variances unless all the standards in the By-law (and the four tests) are met. The Applicant asserts that this is an existing lot of record and that it is not the intent of the OP or the Zoning By-laws to prevent development on an existing lot of record.

I have previously found that a decision regarding the granting of Variances 1, 3 and 12 must be made cognizant of the caution that a structure may not be erected on a lot that does not abut a street and that therefore granting of these variances is subject to the overall appropriateness of the proposal and whether the application as a whole otherwise meets all four tests of s.45(1) of the Planning Act.

- Variance 2 (Variance 2 (TRCA shoreline hazard setback)

Mr. Pfeffer referred to the comments of the TRCA with regard to Variance 2, which requests the waiving of a 10m setback from the shoreline hazard limit. He advised that a permit will be required from the TRCA prior to any development taking place and the letter from the TRCA (included as Tab 29 in the Appellant's Disclosure Document Exhibit 1) states that the TRCA has no objection to the granting of the variances on the understanding that a 10m setback for all habitable spaces will be maintained from the shoreline hazard.

Mr. McKay acknowledged that the matter has been addressed to the TRCA's satisfaction. He advised, however, that the TRCA has not commented or concerned

themselves with the larger issue of building massing as it relates to other requirements of the By-law.

I find that the intent and purpose of the Zoning By-law with regard to the shoreline hazard setback is to protect for the environmental impact concerns that are the mandate of the TRCA. I find therefore that this variance request could be supportable under the condition expressed by the TRCA that for all habitable spaces a 10m setback will be maintained from the shoreline hazard.

- *Variance 9 (FSI)0.6 FSI permitted, 1.08 requested*

It was Mr. Pettigrew's opinion that an FSI above grade of 0.76 (calculated over the entire area of the lot and excluding the underground component) is appropriate for the neighbourhood and meets the intent of the Zoning By-law. In his opinion, this is supported by the Committee Decision of December 12, 2018, for 1 Silver Birch Avenue which provided a condition to limit the above grade FSI of that application to 0.88 which had an overall FSI of 1.29.

I have previously found that the proposed dwelling in respect of massing, scale and density, is an overdevelopment of the site and does not respect and reinforce the physical character of the Lake Front Context and the Immediate Context (OP Policy 4.1.5 c)). While the By-law does not require that basement areas be included in the FSI number, this exclusion is premised on the expectation that the regulations for building length and building depth will work in concert with the FSI provision to regulate over-development of the lot. In this matter, under the unique circumstances of the Zoning Notice, the regulations for building length and depth have not been engaged.

In my opinion, the basis for exclusion of the underground component of buildings in calculation of FSI per the Zoning By-law has not been met in this application: building length and depth variances have not been required to regulate the belowground component of the building, as expected in the Zoning By-law; the very substantial size of the belowground component contributes greatly to the overall density of the site and; the exposure of the basement level to the public realm on the south side is not an expected condition in the By-law. In concert with my previous findings regarding massing, scale and density, and for the reasons stated, l find that the requested variance of 1.08 FSI, further exacerbated by the substantial belowground component which has not been included in the FSI calculation, does not meet the general intent and purpose of the By-law.

In this regard, I prefer the evidence of Mr. McKay, that the proposal constitutes an overdevelopment of the subject property and the requested FSI variance does not maintain the general intent and purpose of the Zoning By-law.

- *Variance 10 (platform at second level, area)4m^2 permitted, 59m^2 requested*

Parties Kimsa and Guest are opposed to the extended area of the second floor platform. The variance for the number of platforms was not opposed.

Mr. Pettigrew identified the area of the platform that is the subject of this variance as "located primarily at grade on the top of the slope with only a portion required to overhang the basement walk-out". See figure 3. In his opinion, this is a covered porch similar to that on the Kimsa property at 424 Lake Front and he noted that there is no overlook from the proposed porch to the Kimsa property. In his Response to Mr. McKay's Expert Witness Statement, Mr. Pettigrew clarified that this variance request applies only to the area of the covered porch adjacent to the home that extends less than 5 feet from the south wall of the house. I comment that it would have been helpful to the TLAB if the area of the platform that is subject to this variance had been depicted on the site plan or in another diagram.

Mr. Pettigrew's evidence is that this variance is a "technicality" due to the established grade and that the platform is on the ground floor, not the first floor, and should be treated as such. I find that the request for a variance to allow the area of this proposed platform considered individually does not offend the general intent and purpose of the By-law, but it is nonetheless inherently tied to the design of the proposal and as such a variance in this regard will not be granted separately as a standalone approval.

- *Variance 11 (side yard setbacks, north and west)*

With regard to Variance 11, which relates to setbacks to the north and west lot lines, I prefer the evidence of the Applicant which illustrated similar features such as main entrances and parking areas on adjacent properties. The variance to the west side yard is required for the new garage which is intended to replace the existing garage in generally the same location. I find that these variances to the north and west lot line setbacks to maintain the general intent and purpose of the Zoning By-law. For the same reasons as stated above, this variance will not be granted as a standalone approval.

CONCLUSION

I find that variances 2, 10 and 11 individually meet the general intent and purpose of the By-law, but that they are intrinsically tied to the design of the proposal. Since I have found that the variances cumulatively do not maintain the general intent and purpose of the OP and of the Zoning By-law, Variances 2, 10 and 11 will not be authorized as stand-alone Variances absent an approvable design that meets the four tests of s. 45(1).

THE THIRD TEST: DESIRABLE FOR THE APPROPRIATE DEVELOPMENT OR USE OF THE LAND

In Mr. Pettigrew's opinion, the application represents a desirable and appropriate use for the property. It was his professional opinion that the proposed use and variances are consistent and compatible with the context of the existing surrounding neighbourhood.

In Mr. McKay's opinion the proposal is not in the public interest. He referenced Mr. Pettigrew's submission that the development would restore a derelict house and commented that would be true of any redevelopment in the City. In his opinion, it is not in the public interest to create a building that is overwhelming to its surroundings and out of character with the properties along the Lake Front. He advised that in his opinion, the proposal does not meet the test of appropriate development of the land.

In this regard, I prefer the evidence of Mr. McKay and for the reasons stated above I find that the proposal does is not desirable for the appropriate development of the land.

THE FOURTH TEST: MINOR IN NATURE

Extensive evidence was submitted regarding views, viewsheds, obstruction of views from the adjacent properties and the impact of the massing and scale of the proposal on the views from the adjacent properties. The Applicant asserted that there is no right to a view in this case. Mr. McKay's response was that this situation is not a matter of a view over a back yard; people buy these properties primarily for the views of the beach and the lake. In his opinion it is the loss of the view that is an adverse impact that is unique to this circumstance.

I concur with the Applicant's evidence that the adjacent neighbours have no entitlement to an unobstructed view over the subject property. The adverse impact that I have found from the massing, scale and density of the proposal is in its visibility and impact when viewed from on the public realm of the beach, not from the adjacent properties.

ADDITIONAL COMMENTS AND OBSERVATIONS

I take no inference from the non-participation of the City in this Appeal or at this Hearing.

Through the Hearing, Parties expended time and effort in criticizing the tone of evidence offered and the standing of opposing Experts. I did not find this approach helpful; all of

the Experts were qualified to give opinion evidence in their fields, and I have given their evidence weight on its content, not its tone or ascribed motivation.

Similarly, the motivations, conduct or bone fides of each of the Parties were at times questioned by the other Parties. I do not find these instances helpful to the adjudication of this matter. The application has been adjudicated on its land use planning and design merits and in the context of the four tests.

AUTHORITIES

Counsel for the Applicant has submitted a substantial list of authorities to support key arguments. Only some of the authorities, as necessary, will be reviewed below.

- Compatibility

The Applicant cited *Motisi vs Bernardi*[5], *Scarborough (City)*[6] and *Theodore*[7] and asserted the principle that compatibility does not require that it be the same as, or even similar to, but must exist in **harmony** with the existing development. In *Motisi vs Bernardi* the Board found that the variance did not produce an unacceptable adverse impact on the neighbours, and as such was considered minor. The principle of compatibility and the judgement of undue adverse impact are foundational to the final test of s. 45(1): "Minor". In the City of Toronto, however, the OP gives clarity to how that "harmony" can be established, and it is, in this matter, via the OP Policy 4.1.5 criteria. It would not be sufficient for the Applicant to argue only that there is no adverse impact, the proposal must also meet the tests of maintaining the general intents and purposes of the OP and the Zoning By-law and be desirable for the development of the land. All four of the tests have been adjudicated in this Interim Decision.

- Relate to Actual Variances

The Applicant relied upon *Galbraith*[8] and *Re Tanna*[9] as authorities to support the principle that the TLAB only consider the variances requested, not other issues that are "peripheral" to the subject variances. This is a principle which the TLAB steadfastly upholds. The TLAB will not deliberate, for example, on an objection to the height of a building when only a parking variance is required. The unique circumstances of this property, however, have given rise to one of the only instances where the overall intent of the Zoning By-law, I have found, is wider than the actual variances requested or

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[5] *Motisi v. Bernardi, 1987 CarswellOnt 3719 (OMB)*
[6] *Scarborough (City) Official Plan Amendment no. 1001, re, 1998 CarswellOnt 5601 (OMB)*
[7] *Theodore, Re, 2018 CarswellOnt 8692 (TLAB)*
[8] *Galbraith, Re,* 2018 CarswellOnt 1564 (TLAB.)
[9] *Tanna, Re,* 2018 CarswellOnt 8685 (TLAB)

mandated through the Zoning Notice. I have provided extensive reasoning in this Interim Decision to support my finding.

- *Character Analysis and As-of-Right*

Levine[10] and *Rubinoff*[11] were cited. In both these cases, the benchmark as-of-right permissions pertained to the subject property. In this Appeal before me, the Applicant is seeking to draw reference from his *neighbour's* as-of-right Zoning By-law permissions, to which he himself is not entitled. Further, the as-of-right entitlements of 2 Munro Park Ave, respecting the south yard, are not generally or pervasively available to the other properties and are not appropriately considered a feature of the physical character of the Context.

- *Lack of Impact Where Not Visible*

Counsel states that if certain variances are not visible at street level, it is difficult to argue that they will create adverse impacts on neighbours. In *Re Goldberg*[12]*,* the applicant sought to convert the unexcavated area beneath their rear deck into a small basement room. The TLAB accepted the evidence that the variance sought had no impact by virtue of it being underground, where it is not visible from the ground or street level. With regards to the scale of the proposal, there is a **substantial** difference between a small basement room and a 500m^2 (+5,000 sq ft) basement as proposed herein. While the proposal might not be visible from street level (there is no associated street) it is visible to the public beach which is arguably more sensitive than the typical residential street to the impact of the south face of the basement which comprises a large raised built platform and substantial walkout with French doors and windows.

In *Bahardoust vs Toronto*[13] *(City)*, the OMB concluded that it is more appropriate to not include underground structures as part of a building when calculating the minimum required setback and to rely on site specific zoning By-law amendments to implement the particulars of any one development depending on site conditions. I am in agreement with the OMB's conclusion in this regard and have accordingly evaluated the specific site conditions of the subject property and the proposal.

- *"Stare Decisis" – the TLAB is not bound by its prior decisions*

Counsel raised this principle in reference to the decision re 440 Lake Front Ave which was released while the Hearing of this Appeal was in progress. Counsel for the Applicant asserted that these are two different contexts. The proposal is located in the group of four houses that constitutes the Immediate Context adjacent to that of 440 Lake Front Ave, but these properties are both within the Lake Front Context that the

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[10] *Levine Re,* 2009 CarswellOnt 3817 (OMB)
[11] *Rubinoff, Re*, 2018 CarswellOnt 2047 (TLAB)
[12] *Goldberg Group, Re,* 2018 CarswellOnt 19175 (TLAB)
[13] *Bahardoust v Toronto (City),* 2017 CarswellOnt 11119 (OMB)

Experts identified. There are strong parallels on the primary issue of south yard setback and the averaging principle, and the context is more similar than any of the other authorities cited by the Applicant. I find that the reasoning employed in the decision on 440 Lake Front Ave and also in a previous decision regarding 438 Lake Front Ave to be instructive.

CONCLUSION

I have found that the proposal does not maintain the general intent and purpose of the OP and that cumulatively, the variances do not maintain the intent and purpose of the Zoning By-law and that the proposal is not desirable for the appropriate development of the land. For the same reasons, I find that the proposal is not minor in nature.

I have found that the proposed development on the subject property does not meet the four legislative tests of s. 45(1) of the *Planning Act.* I recognize, however, that the Applicant had relied on the Zoning Notice for identification of the required variances, which I have found does not fully cover the intent of the By-law. In recognition of the Applicant's reliance on the Zoning Notice and in the interest of fairness in these unique circumstances, and relying on the consensus of the opposing Parties that development on the subject property is supportable contingent on appropriate revisions, I am of the opinion that the Applicant should be offered the opportunity to revise the submitted plans to address the standards that I have determined are applicable to the development, consistent with my findings in this interim decision.

There is precedent, in unusual circumstances, for a land use planning tribunal to allow an Applicant the opportunity to revise the submitted plans. For reference, the LPAT Decision re 2915 Bloor St West Limited Partnership v. Toronto (City)[14] can be viewed.

The Applicant, if willing, is invited to revise the plans in consultation with the other Parties to this matter to facilitate a proposal that would be consistent with my findings in this Interim Decision.

Amended Application – S. 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 S. 45 (5) of the *Planning Act* and to other persons and agencies prescribed under that subsection.

[14] Bloor Street West Limited Partnership v Toronto (City), 2019 CanLII 42152 (ONLPAT)

The Tribunal is not required to give notice under S. 45 (18.1.1) if, in its opinion, the amendment to the original application is minor.

In this case, any revisions that would be undertaken to address the matters outlined in this Interim Decision would not, in my opinion, be considered minor. Therefore, revisions to the plans as submitted to the TLAB will require recirculation and a new Notice to satisfy notice requirements under Section 45 (18.1) of the *Planning Act.*

I also strongly recommend that the Parties initiate a dialogue with the hope of reaching a settlement prior to any future sitting in this matter.

INTERIM DECISION

Should the Applicant be willing, the TLAB is prepared to consider a revised development proposal with input, and preferably consent, of the Parties. To that end, in light of the evidence and the findings in this Decision, the following matters should be addressed. These directions are not definitive and minor deviations may occur that the Parties agree are reasonable.

1. A revised proposal shall not include any additional variances, or any expansion of requested variances.

2. Within three months of the date of this Interim Decision, the Applicant is permitted to submit a revised proposal to the Parties and the TLAB in general compliance with the findings of this Interim Decision and with the following criteria:
   a) A south yard setback that maintains the averaging principle of By-law Regulation 10.5.40.70 (B), referencing the existing buildings and south yard setbacks at 424 Lake Front and 2 Munro Park Ave;
   b) A building length that reflects prevailing building lengths, including belowground structure, in the Immediate Context, and not to exceed the verified building length of 422 Lake Front Ave or 424 Lake Front Ave, whichever is the greater;
   c) A building depth that reflects prevailing building depths, including belowground structure, in the Immediate Context, and the main wall on the south side to be located no further south than the location of the main wall on the south side of 422 Lake Front Ave or 424 Lake Front Ave, whichever is the furthest south.

3. *Notice* of revised plans shall be given as per S. 45 (5) of the *Planning Act.* The Applicant shall circulate the amended plans and give Notice to those who received notice of the original application and file with the TLAB an affidavit that this has been served on all Parties and Participants. Those who receive this Notice shall, not later than 30 days after the day that the Notice was given, notify the TLAB of their

intention to elect Party or Participant status and appear before the Tribunal. Those who have been recognized as a Party or Participant to this Appeal shall not be required to re-elect status.

4. Upon receipt of revised plans, a *Notice of Hearing* will be issued setting dates for submission of Notice of intention to be a Party or Participant, Disclosure, Expert Witness Statements, Witness Statements and for Responses and Replies.

5. If no revised application is received within three months of the date that this Interim Decision is issued, or in the event that the Applicant advises the TLAB that a revised application will not be submitted, a final Decision and Order will be issued on this matter without further *Notice* or Hearing.

ORDER

1. Relief from Rule 17.4 of the TLAB's Rules of Practice and Procedure to allow an urgent Motion to substitute Mr. Michael Hannay as an Expert Witness for the Owner, replacing Mr. James Ziegler, is granted.

2. The requested relief requested in the Motion dated May 4, 2021 is granted.

3. The Applicant shall submit revised plans within three months of the date of this Interim Decision, according to this Interim Decision, or in the alternate advise the TLAB of their intention to forego the opportunity to revise the application.

4. The Applicant shall provide *Notice* of any revised plans as per S. 45 (18.1) and in accordance with S. 45 (5) of the *Planning Act* and provide the TLAB with an affidavit confirming such.

5. TLAB staff are directed to issue a Notice of Hearing upon receipt of a revised application.

The Tribunal may be spoken to if issues arise from this Interim Decision and Order.

X 

Ana Bassios
Panel Chair, Toronto Local Appeal Body