

INTERIM DECISION

Decision Issue Date Monday, September 13, 2021

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

Appellant(s): JOHN PATRICK O'BRIEN

Applicant(s): BELINDA JONES ARCHITECT

Property Address/Description: 4 KENNEDY AVENUE

Committee of Adjustment File
Number(s): 20 206713 STE 04 MV

TLAB Case File Number(s): 21 156889 S45 04 TLAB

Hearing date: September 1, 2021

DECISION DELIVERED BY : Ted Yao

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Jodi Jean Lock-O'Brien	Owner/Party	Alan Heisey, Q.C.
John Patrick O'Brien	Appellant/Owner	
Alex Hardy	Expert Witness	
Jennifer Gagné	Expert Witness	
Allison Naughty	Party	
Ji-Young Youn	Party	

INTRODUCTION

With the help of a friend, John O'Brien, one of two owners of 4 Kennedy Ave, built two sheds and a hot tub pad in his back yard. He did this without a building permit because he was replacing two worn out sheds and mistakenly thought that replacing an existing structure did not need a permit. Without him realizing it, the site presented engineering, zoning and tree regulation issues. Shed 1 is located at the rear lot line beside the hot tub pad (please see word "Shed" in site plan page 3). Shed 2 is a small,

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enclosed space beneath the stairs to hold garbage receptacles. Mr. O'Brien now wishes to legalize these structures and to do, needs the variances set out in Table 1.

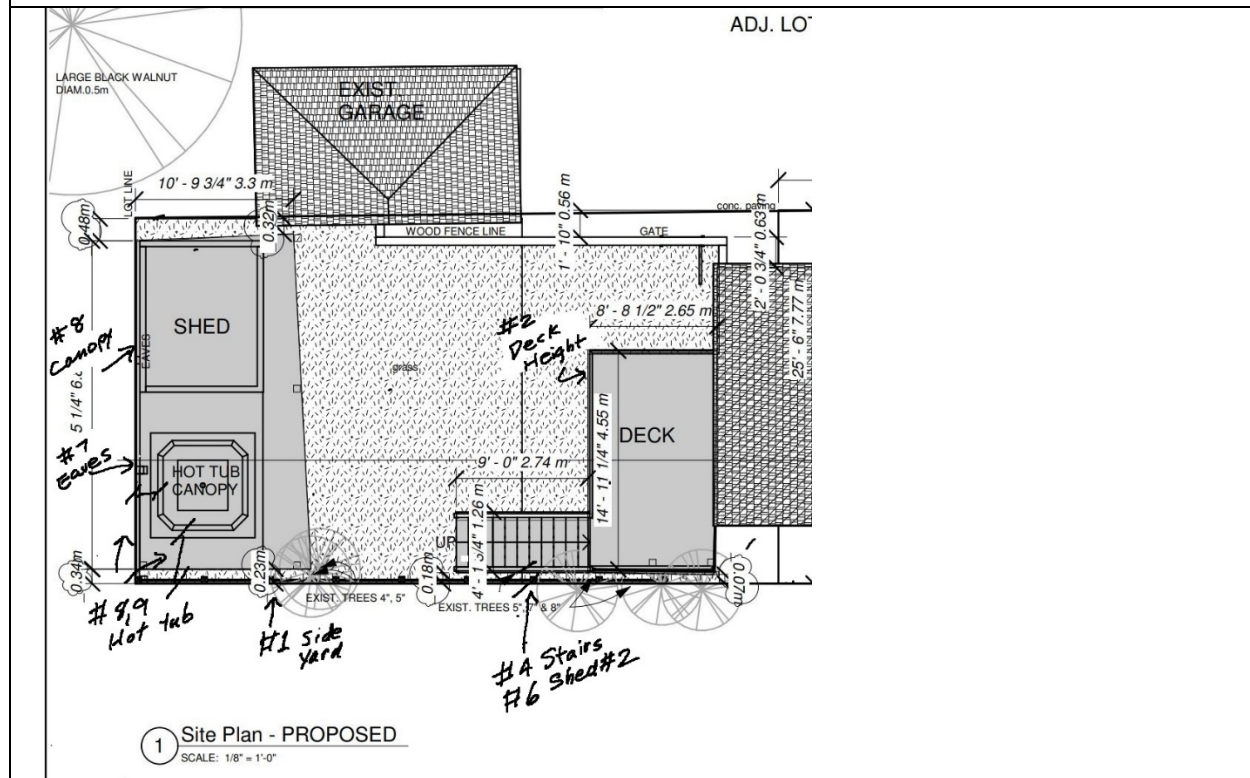
Table1. Variances sought for 4 Kennedy			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	South side yard setback	0.45 m	0.21 m
2	Deck height	1.2 m	2.6 m
3	Average grade is assumed to be 107.6 ESL ¹		
4	Exterior stairs setback to south lot line	0.6 m	0.23 m
5	Rear yard setback to ancillary building	0.3 m	0.1 m
6	Side yard setback for Shed 2 (this is a different requirement than Var #1)	0.45 m	0.30 m; canopy is 0 m from rear lot line
7	Eaves of ancillary building	Can encroach max. 0.3 m and be no closer than 0.15 m from lot line	Encroach 0.3 m from rear lot line and are zero m from west side lot line
8	Rearyard setback for hot tub	1.2 m	0.32 m
9	Sideward setback for hot tub	1.2 m	0.98 m
10	Lot coverage by ancillary structures	5%	12%
11	Min. no. of parking spaces	1	0

Please see Figure 2 (next page), which is a pictorial depiction of the plan examiner's list of required variances. Note that four of the variances relate to the south side, which adjoins an apartment building and no one appeared from that property to express an opinion. Also, variances 2, 4 and 6 are at a distance from the rear yards and Mr. Heisey (Mr. O'Brien's lawyer) asked me to approve these without waiting, since they were not objected to. I prefer not to deal with this application in piecemeal fashion.

¹ I follow the plan examiner's scheme. The line #3 appears to be simply an explanatory note, although it is given its own number. "ESL" means elevation above sea level.

In any event, absence of objection is not the test for approval and I must still consider the variances comprehensively on their merits.

Figure 2. Pictorial representation of plan examiner's variances



I understand there was a stop work order causing work to cease, and Mr. O'Brien applied to the Committee of Adjustment on April 28, 2021. It refused; Mr. O'Brien appealed, and so this matter comes before the TLAB.

MATTERS IN ISSUE

The Provincial Policy Statement and the Greater Golden Horseshoe Growth Plan must be considered, but they contain a high level of generality. For example, the Provincial Policy Statement discourages lot creation on prime agricultural land and prefers municipal water and sewage over private systems and so on. I do not find these policies offer guidance for what is essentially a home construction project, albeit one that has importance for the owners and their immediate neighbours.

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

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

- be minor.

Onus as to “right” to develop

The obligation is on the proponent (Mr. O’Brien) to demonstrate to the decision-maker at the TLAB that the tests are met on the balance of probabilities; there is no right to a variance.

EVIDENCE

I heard from Alex Hardy, Mr. O’Brien’s planner, whom I qualified as able to give opinion evidence in the area of land use planning. Tree evidence was given by Jennifer Gagné, Mr. O’Brien’s arborist, whom I qualified as able to give opinion evidence in arboriculture. Mr. O’Brien testified on behalf of himself and his wife. Ms. Naughty and Ms. Youn (Runnymede St. neighbours) testified in opposition.

Member’s Site visit

As required by my conditions of employment I visited the site for the sole purpose of better assessing the evidence given at the hearing.

ANALYSIS, FINDINGS, REASONS

The neighbours and their positions

Number 4 Kennedy is the second-last house on the west side of Kennedy. At the end is 2 Kennedy Avenue, a three storey apartment complex that wraps around Kennedy, Morningside and Runnymede, the street that backs onto Kennedy. The end Runnymede house is occupied by Ms. Youn; her neighbour to the north is Ms. Naughty. The Youn and Naughty lots are thus to the rear of Mr. O’Brien, with Ms. Youn being directly behind. Ms. Naughty is behind Mr. Parrott, Mr. O’Brien’s neighbour on Kennedy Ave, who has written a letter supportive of Mr. O’Brien.

Ms. Naughty and Ms. Youn both wish to preserve a walnut tree which is located on the property line between Ms. Naughty and Mr. Parrott (i.e. it is a true boundary tree between those neighbours). For both opponents, the concern is financial as well as environmental.; if the tree becomes diseased, they may be faced with costs of removal of limbs or the entire tree. Ms. Youn has a second concern about the stability of the retaining wall between the Youn and O’Brien properties.



In the photo (left), Mr. Parrott's property is to the right; Ms. Youn is directly behind, and the black walnut tree is centre right. Shed 1 is the unfinished space near the walnut tree. The steps covering Shed 2 may be glimpsed at the left.

The planning evidence

Mr. Hardy presented painstaking and convincing evidence that in both the immediate context and geographic context (the comparison

areas mandated by the Official Plan for determining the character of the neighbourhood) that proposed setbacks respect and reinforce the physical character of the neighbourhood. I have accepted his neighbourhood boundaries: west to east from Windemere to Kennedy; and north to south from Bloor to Morningside. He determined that there are numerous ancillary buildings and decks at a distance of 0.3 m or less to a side or rear lot line. Below is one of Mr. Hardy's maps showing the location of rear yard uncovered platforms (i.e., decks); about half are as close to the lot line as Mr. O'Brien proposes.

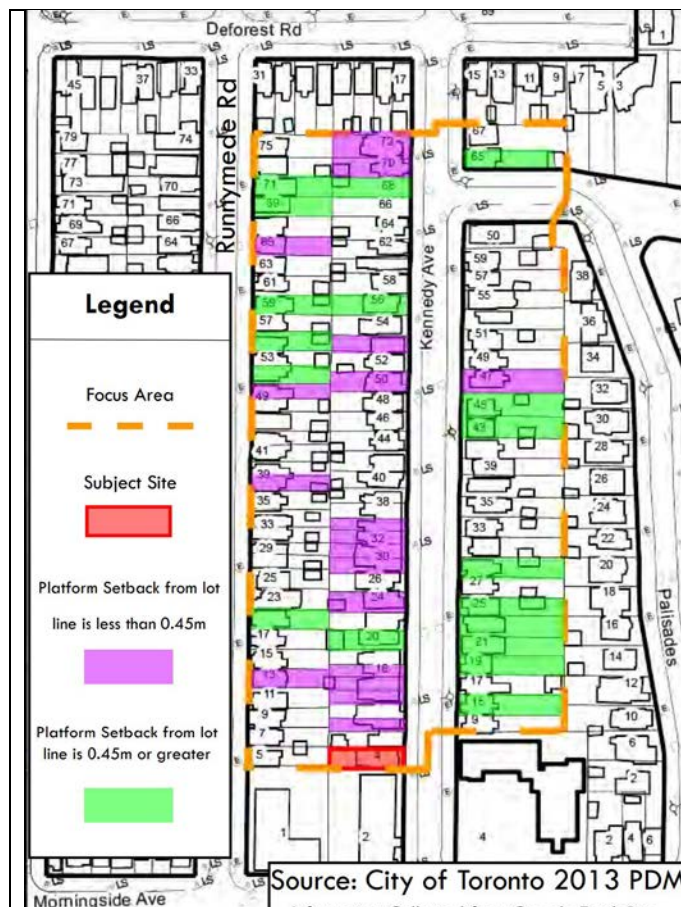


Figure 4: Closeness of uncovered platforms to side or rear yards in immediate neighbourhood

The only variance that was somewhat out of character is the coverage for which Mr. O'Brien seeks 12% (5% permitted). This is because the hot tub pad is covered with a roof; it would not be counted for coverage purposes if it was uncovered. Mr. O'Brien wishes to have a roof because, as he said, some of the walnuts can be quite large and when they fall, "they sting". This is a reasonable reason for a cover for the hot tub pad and I am prepared to find that this variance meets the test of "respecting and reinforcing" the character of the neighbourhood. I am also prepared to find that it is minor and desirable for the use of the land.

Although Mr. Hardy did an immense amount of work, (including checking aerial photographs for 757 lots in the larger neighbourhood), the focus of this hearing is not on physical character, but on the walnut tree.

Policies and by-laws concerning trees

The City's Official Plan has three policies concerning trees²: "providing for a suitable environment", "increasing canopy" and "regulating injury of trees". I find the third to be the most relevant, meaning that all development will follow the procedures mandated under the City's Tree by-law, (Municipal Code 813³) .

Mr. O'Brien retained Ms. Gagné, an arborist. From her evidence and my specialized knowledge gained as a TLAB decisionmaker⁴, I find the City's normal regulatory procedure is to require that an applicant for a building permit submit an application for a tree injury permit where there is a tree near the proposed construction. This tree may be on the applicant's land or a neighbour's, as in this case. The Tree By-law sets out various grounds on which Urban Forestry may refuse a permit, and seven are listed, including section 17C, "[the] tree [under consideration is] healthy". A permit may be granted notwithstanding section 17C, if:

² 3.4 To support strong communities, a competitive economy and a high quality of life, public and private city-building activities and changes to the built environment, including public works, will be environmentally friendly, based on: ...

- d) preserving and enhancing the urban forest by:
 - i. providing suitable growing environments for trees;
 - ii. increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees; and
 - iii. regulating the injury and destruction of trees;

³https://www.toronto.ca/legdocs/municode/1184_813.pdf

⁴ Notice of facts and opinions

16. A tribunal may, in making its decision in any proceeding,

- (a) take notice of facts that may be judicially noticed; and
- (b) take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge. (s. 16 *Statutory Powers Procedure Act*)

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- The development is as of right (subsection (10));
- The injury is minor and there is a tree protection plan approved by Urban Forestry (subsection 11); or
- the Committee of Adjustment or the TLAB have approved the variances, that is, similar to the as-of-right position but where the *Planning Act* tests have been satisfied for a minor variance (subsection (5) of the Tree Bylaw).

Figure 4. Gagné photo of walnut (Tree 1) with my rough sketch of context, not to scale)

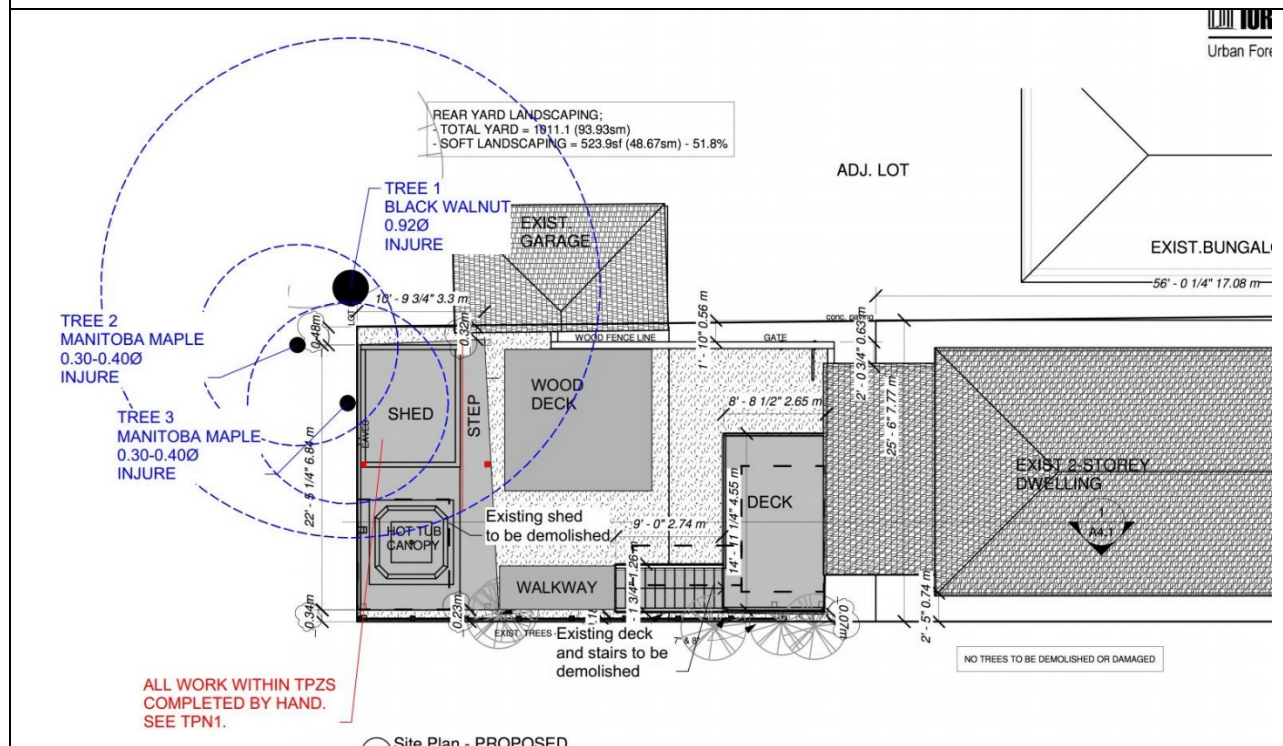


In this case, neither Ms. Naughty nor Ms. Youn's concerns are "traditional" planning concerns. Ms. Youn is concerned that the weight of the proposed hot tub etc., will cause the retaining wall to collapse onto her property and Ms. Naughty does not want the tree to die, causing her the expense of removal. Both are valid impacts and can be considered under the heading of whether the variances are minor in impact.

Dealing with Ms. Youn's concern, I explained in the hearing that I thought that maintenance and responsibility for the retaining wall was a shared responsibility between the O'Brien and Youn families. When and if a building permit is applied for, the City Buildings Department will use its judgement as to whether a geotechnical report is required. I hasten to add that I don't purport to be recommending any course of action the Buildings Department may take; it is the one with the knowledge and expertise. Accordingly, assuming that construction will be supervised under the Building Code Act and assuming due diligence by both families, I find the impact from concerns about the slope stability to be minor and I do not deny approval on that basis.

Ms. Gagné's conclusions

Figure 5. Site Plan with Gagné Tree Protection Zone (largest circle)



Ms. Gagné was retained shortly before this hearing and did not observe any of the construction. The usual course for an injury permit is to retain the arborist prior to construction. The arborist will then make a list of all affected trees, describe protective measures necessary during construction with attendance diffing the digging sometimes and set out a remediation plan. Here Ms. Gagné can only set out the protective measures she would have imposed, had she been retained prior to the construction. These consisted of cutting the roots cleanly and using hand digging for the two Sonotubes. According to her report, she accepts that Mr. O'Brien did both.

She noted:

- The tree is healthy;
- She listed it as in "fair" condition because it is flared as a result of the retaining wall beside it.
- The tree is 92 cm in diameter and would thus have required a 6 m Tree Protection Zone ("TPZ"), according to standard City of Toronto practice
- Hoarding would have been required to be placed around this zone and possibly boards on the ground if heavy machinery had been used.
- She was informed by Mr. O'Brien that he cut all roots with pruning scissors and she noted:

5. According to the owner, a minimal number of roots less than or equal to 2.5cm were encountered and cleanly pruned, likely from the adjacent vine or cedars that were previously present.

In her opinion it is unlikely that the walnut tree's roots would be damaged or further damaged "because of the grade change".

This grade change is shown Ms. Gagné's photo (left Figure 4). My rough context sketch shows the 1.5 m high retaining wall to the right of Tree 1 (walnut). Ms. Gagné explained that the retaining wall was constructed 15 years ago, prior to the present ownership by the O'Briens. When the wall was placed near the tree, it is likely that feeder roots underneath were killed and have not regenerated, as they would have had to ascend through 1.5 m of soil to reach surface air and water (this is what she meant by "grade change"). Accordingly, it was her conclusion that Mr. O'Brien's construction has likely not further harmed the walnut tree.

Ms. Gagné recommended remediation consisting of 70 l of water per week and mulch laid down to a depth of 2 to 3 inches. Both Ms. Youn and Ms. Naughty said they are currently watering the tree voluntarily. I do not see the point in attempting to legalize this arrangement by a condition to be registered on title. It is in everyone's best interest that the tree be cared for and that the O'Briens and their neighbours make their own voluntary arrangements as to watering and mulch.

Ms. Youn and Ms. Naughty questioned Ms. Gagné's objectivity. I find that her evidence was clear, forthright and not biased in Mr. O'Brien's favour. I have accepted her testimony.

For complete transparency I think it would be desirable to know if Urban Forestry concurs with Ms. Gagné. I cannot make Urban Forestry process the injury permit outside its normal timelines, which would normally take place after this decision is finalized. I would ask Ms. Gagné or Urban Forestry to report to me by October 11, 2021 as to its opinion, if any. If Urban Forestry is unable to comment at that time, I will proceed to finalize the Order, subject to the standard urban forestry condition⁵.


X

Ted Yao
Panel Chair, Toronto Local Appeal Body

⁵ I note that the O'Briens have already applied for an injury permit and paid the \$2300 fee.