

INTERIM DECISION AND ORDER

Decision Issue Date Wednesday, January 05, 2022

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): AZITA AHSAN

Applicant(s): LORNE ROSE ARCHITECT INC

Property Address/Description: 335 LYTTON BOULEVARD

Committee of Adjustment File

Number(s): 21 123502 NNY 08 MV

TLAB Case File Number(s): 21 156158 S45 08 TLAB

Hearing dates: August 31, 2021, September 20, 2021, October 22, 2021

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY JUSTIN LEUNG

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Lorne Rose Architect Inc.	Applicant	
Azita Ahsan	Appellant	Meaghan McDermid
City of Toronto	Party	Uttra Gautam
Igor Sarenac	Party	Alyssa Clutterbunk
Charles Coupal	Party	
Associated Properties Corp	Party	
TJ Cieciora	Expert Witness	
Terry Mills	Expert Witness	

Hiba Hussain

Expert Witness

INTRODUCTION

This is an Appeal from a decision of the North York Panel of the Committee of Adjustment (COA) pertaining to a request to permit a series of eleven Variances for the subject property, 335 Lytton Boulevard

The Variances, if allowed by the Toronto Local Appeal Body (TLAB), would permit the construction of a new dwelling.

This property is located in the Lawrence Park South neighbourhood in the City of Toronto (City) which is situated north of Cortleigh Boulevard and bounded by Proudfoot Avenue the west and Mona Drive to the east. The property is located on Lytton Boulevard, south of Starthallan Boulevard and north of Cortleigh Boulevard.

At the beginning of the Hearing, I informed all Parties in attendance that I had performed a site visit of this subject property and the immediate neighbourhood and had reviewed all materials related to this Appeal but that it is the evidence to be heard and referenced that is of importance.

BACKGROUND

The requested Variances are outlined as follows:

1. Chapter 10.20.40.10.(1)(A), By-law No. 569-2013

The permitted maximum height of a building or structure is 10m.

The proposed height of the building or structure is 10.67m.

2. Chapter 10.20.40.10.(2)(B)(i), By-law No. 569-2013

The permitted maximum height of all side exterior main walls facing a side lot line is 7.5m.

The proposed height of the side exterior main walls facing the side lot lines is 7.76m.

3. Chapter 10.20.40.20.(1), By-law No. 569-2013

In the RD zone with a minimum required lot frontage of 18.0m or less, the permitted maximum building length for a detached house is 17.0m.

The proposed building length is 20.45m.

4. Chapter 10.20.40.30.(1), By-law No. 569-2013

The permitted maximum building depth for a detached house is 19.0m.

The proposed building depth is 20.45m.

5. Chapter 10.20.40.40.(1)(A), By-law No. 569-2013

The permitted maximum floor space index is 0.35 times the area of the lot.

The proposed floor space index is 0.712 times the area of the lot.

6. Chapter 10.20.40.70.(3)(D)(i), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the building is 0.92m to the east side lot line.

7. Chapter 10.20.40.70.(3)(D)(ii), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the building is 1.21m to the west side lot line.

8. Chapter 10.20.40.70.(3)(D)(iii), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the rear platform/deck is 1.24m to the east side lot line.

9. Chapter 10.20.40.70.(3)(D)(iv), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the rear canopy over the rear platform/deck is 1.24m to the east side lot line.

10. Chapter 10.5.40.60.(3)(A)(ii), By-law No. 569-2013

Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no wider than 2.0m.

The proposed stairs are 4.37m wide.

11. Section 4.2, By-law No. 438-86

The permitted maximum height of a building or structure is 10m.

The proposed height of the building or structure is 10.54m.

These Variances were heard and refused at the April 28, 2021 COA meeting. Subsequently, an Appeal was filed on May 17, 2021 by the property-owners and the TLAB scheduled a Hearing on August 31, 2021.

MATTERS IN ISSUE

The Appellant's legal representative and Expert Witness contend that the subject proposal is not a significant departure from the redevelopment and reinvestment seen in established neighbourhoods within which the subject property is located. It is further noted that this proposal is consistent with other houses which have been constructed in this neighbourhood and would be compatible for the local area context. The City and opposing Parties' Expert Witnesses contend that this proposal constitutes a form of overdevelopment and would act to adversely impact the neighbourhood characteristics. Issues around specific Planning policies and legislation, such as those mandated as part of Official Plan Amendment 320 (OPA 320), are approached with differing perspectives by the Expert Witnesses to this Appeal matter. The Tribunal will need to assess the evidentiary material provided to so as to determine whether this proposal constitutes good planning.

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').

Minor 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

Meaghan McDermid, legal representative for the Appellant Azita Ahsan, commenced by requesting that exhibits be entered to form part of the record. I acknowledged and accepted the following:

Exhibit 1: Document disclosure

Exhibit 2: Expert Witness Statement of TJ Ciecura

Exhibit 3: Responding Witness Statement of TJ Ciecura

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Ms. McDermid then called Mr. Ciecura which was without objection. I then indicated that I had reviewed Mr. Ciecura's curriculum vitae and qualified him to provide professional opinion evidence in the field of land use planning.

Mr. Ciecura proceeded with a photo study of the subject neighbourhood, which had also been provided as part of the disclosure documents to the Tribunal. His photo study assessed houses along Lytton Boulevard which, he described, as having a variety of established and in-fill type dwellings. Mr. Ciecura opined that some of the in-fill dwellings have habitable space on the third floor, which is not dis-similar to the subject proposal. He also used photographs of dwellings on Alexandra Wood and Cortleigh Boulevard to illustrate this.

He described his study area, as required by the Official Plan and amended by OPA 320, as having geographic boundaries of Glencairn Avenue to the North, Alexandra Wood to the West, Avenue Road to the East, and Hillhurst Boulevard to the South.

Mr. Ciecura's then assessed previously approved Variances for this subject neighbourhood and stated that the floor space index (FSI) Variance sought by the Applicant has regularly been sought in this area. As part of his analysis, he also assessed the mean, median and mode of these previously approved Variances.

Ms. McDermid asked Mr. Ciecura to define mode which he stated is the most frequently occurring. He further explained that planning is not strictly a quantitative exercise, and that qualitative methodology should also be utilized when assessing proposals.

He proceeded to explain that the Variance requests had been heard and refused by the Committee of Adjustment (COA). His client has now elected to file an Appeal to TLAB.

Ms. McDermid inquired as to how the west side yard setback of the proposal compares to that of the current site condition. Mr. Ciecura responded that it would continue to be a similar site condition.

Mr. Ciecura then referenced the City Planning staff report which had recommended a reduction in the FSI Variance request, and that the proposal be built in substantial conformity with the plans attached to the report. With regards to the conformity condition, he outlined that the drawings for the east elevation have now been slightly altered due to an adjustment to the door position. However, he indicated that this, in his opinion, was a minor alteration and the proposal is still substantively similar to what had been presented to the COA.

With regards to City Urban Forestry staff memorandum, he states that this is a standard-type memo which is issued by them and does not raise significant issues with this subject proposal.

The asphalt driveway, which is currently on the site, will be retained and incorporated with the proposed in-fill dwelling here.

Mr. Cieciora then proceeded to analyze relevant planning policies and legislation as it relates to the subject proposal. With regards to the *Provincial Policy Statement* (PPS), he opines that the policies herein provide direction on intensification within established urban areas. Mr. Cieciora argues that this proposal would allow for the efficient redevelopment on an existing lot of record.

With regards to the *Growth Plan for the Greater Golden Horseshoe (Growth Plan)*, Mr. Cieciora opines that the policy direction here is to efficiently use land within built up areas as opposed to expanding the urban boundary. He contends that this proposal would be consistent with these respective policies.

Mr. Cieciora then described the study areas of both Expert Witnesses Ms. Hussain, City Planner, and Mr. Mills, Planning consultant retained by opposing Parties. He states that there are slight differences between the study area he has proffered to those as provided by these other two Expert Witnesses.

He further critiqued Mr. Mills study area, which has a differing western boundary and contends that his western boundary study area is not similar to the boundaries of this area's Zone designation, as is delineated by Mr. Mills. He argues that Mr. Mills' proffered study area excludes several neighbourhood properties which he believes are necessary in conducting an assessment of this proposal, as it relates to OPA 320.

Mr. Cieciora then provided his analysis of the City's *Official Plan (OP)* policies. The OP has policies which describe established residential neighbourhoods as being 'stable but not static'. In this regard, he opines that this proposal will be complimentary and will not act to disrupt the neighbourhood characteristics. This proposal also recognizes that there will be a certain degree of reinvestment and redevelopment which will occur in established neighbourhoods.

In terms of policies which encourage preservation of existing trees on the property, he submits that no trees will be removed from the area of the existing housing footprint. Once the proposed house is built, they will look to provide additional tree plantings on site as well.

The front yard setback is being retained and the side yard setbacks proposed will be similar to other existing dwellings of the neighbourhood, thus complying with relevant OP policies.

Ms. McDermid asked Mr. Cieciora to define 'respect and reinforce'. Mr. Cieciora explained that it is to have a proposed development which has characteristics which already exist in the subject neighbourhood. The proposal can be similar to, but the OP notes that a proposed development does not have to be the same as the other dwellings of the local area context.

Mr. Cieciora then proceeded to assess the proposal as it relates to the Zoning By-law. With regards to the building height Variance, he explained that the Variance is partially required due to the grades that exist on the property. He further contends that there are other in-fill houses in this neighbourhood which also do not comply with Zoning provisions related to building height.

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In describing the building length Variance, Mr. Cieciora states that the proposed building would still meet several other performance standards, as per the Zoning By-law. He further argues that the majority of the building length is below grade resulting in a decreased visual impact at the street level.

In terms of the side yard setback Variance requests, he contends that the intent of the Zoning By-law contemplates for these types of setbacks. In addition, he is of the opinion that there will be adverse drainage issues as a result of such property setbacks being permitted.

Ms. McDermid asked Mr. Cieciora about the Expert Witness Statement of Mr. Mills, and portions of that document which comment that an additional Variance is needed as it relates to the rear bump out.

Mr. Cieciora responded that City Building staff did not identify that Variance as part of their Zoning review and believes the Zoning provision, as stated by Mr. Mills, is not applicable to this proposal.

I asked if a proposed in-fill dwelling did not require a Variance Application, would OPA 320 provisions still apply. Mr. Cieciora responded that if a proposal was Zoning compliant, then City Building staff would have approved the building permit, and OPA 320 would not have been assessed here. Furthermore, he opined that even if a review of the OP policies was to be undertaken, it would be done in a broad and subjective manner.

On Hearing Day 2, Ms. Chaytor proceeded with her cross-examination of Mr. Cieciora. She asked if the OP delineates that an in-fill type development must be assessed according to neighbourhood's prevailing building type. Mr. Cieciora acknowledged this. She inquired if the FSI Variance request would thus constitute the prevailing building type for this neighbourhood. He responded that, based on his research, that previously approved Variance requests have acted to inform his professional opinion in supporting this proposal. Ms. Chaytor inquired if his compiled data focused primarily on previously granted Variances. Mr. Cieciora indicated that is accurate, however that is because he is unable to obtain reliable data on existing, as of right dwellings in this neighbourhood.

Ms. Chaytor then asked how he interpreted the building dimensions of the existing dwellings of this local area context. Mr. Cieciora stated that due to insufficient data available from the City, his research focused principally on a site visit and visual analysis of the existing dwellings to determine certain features, such as building FSI. She then referred to Mr. Cieciora's Variance research table, as part of his Expert Witness Statement, and asked if he was using these previous Variance requests to justify the subject proposal. He responded that previously approved Variances now are part of building typology of this area and should be accounted for in such an analysis.

She then inquired if he is able to determine the median FSI as part of this data. Mr. Cieciora indicated that as he does not have data for the as of right dwellings of the neighbourhood that he would not be able to provide an accurate count.

Ms. Chaytor suggested that he cannot make an accurate determination on storm-water related issues here. Mr. Cieciura stated that he could make a determination if the side yard setback Variance request should be able to meet storm-water needs for the property.

She asked if Mr. Cieciura is not able to determine the prevailing FSI of this neighbourhood, as per OP policies. He indicated that is accurate. In terms of building height, she inquired if houses with a third floor are uncommon in this neighbourhood. He responded that there appears to be a variety of building types in this local area context, which he gathered through looking at City data and walking through the neighbourhood.

Ms. Chaytor asked if the cumulative impact of the proposal is important to consider. He responded that you need to assess the proposal as an 'end product' to determine its actual cumulative impact.

Ms. Guatam then cross-examined the witness. She asked if his study area extends west of Proudfoot Avenue. Mr. Cieciura stated that it did and that the area west of Proudfoot Avenue has a different Zone designation. She then asked if the area east of Proudfoot Avenue has more consistency, in terms of its Zone provisions. He indicated that he does not believe that is accurate and that the neighbourhood block west of Proudfoot Avenue, in his summation, is appropriate to be used with a study area.

She then asked how he would define compatibility. Mr. Cieciura responded that he believes a proposal's compatibility is assessed to determine if it can respect and reinforce the prevailing neighbourhood character. It doesn't necessarily need to be the same as the current housing type of that local area context.

Ms. Guatam referenced data on older Variance requests, pre-dating OPA 320, and asked if they have a lower FIS Variance in comparison to the subject proposal. Mr. Cieciura stated that this appears to be the case, however, contends that this older data being proffered cannot be obtained by members of the public.

Ms. Guatam indicated that FSI is not the only indicator of scale and massing for a dwelling. Mr. Cieciura responded this was accurate and other elements do need to be assessed when analyzing these types of proposals.

She asked if there are health and safety considerations for this proposal. Mr. Cieciura stated that he does not believe certain elements, such as side yard setback Variances, will act to negatively impact health and safety measures.

Ms. McDermid asked what the FSI requirement was in the previous 1986 Zoning By-law for this area. Mr. Cieciura stated it was 0.35 times.

I qualified Mr. Mills to provide professional opinion evidence in the field of land use planning. Ms. Chaytor then requested the following exhibits be entered into the record, for which I acknowledged and accepted as follows:

Exhibit 4: Expert Witness Statement of T. Mills

Exhibit 5: Responding Witness Statement of T. Mills

Mr. Mills presented his study area, as is necessary in accordance with the OP. He further opined that he also reviewed the rear yards of properties here as it would be relevant for his analysis of this proposal. Mr. Mills also conducted research on previous Variance requests within his study area. He indicated that there has been small amount of side yard setback Variance requests relating to in-fill type development proposals. The subject proposal, in his summation, is requesting the narrowest side yard setback Variances.

He further contends that an additional Variance is needed for the rear yard bump out. In terms of the four tests for Variance, as per the *Planning Act*, he does not believe this proposal would meet such requirements. In addition, he believes Variance requests 1 and 11 will be revised once Zoning By-law 569-2013 completes its Appeal Hearings at the Ontario Land Tribunal (OLT) and the By-law is then in full force and effect.

Mr. Mills continued his testimony on Hearing Day 3. He stated that he believes the FSI Variance request here is greater than other previous FSI Variances which the COA has permitted for this local area context and suggested it should be reduced to 0.65 times the area of the lot. The Variances are described as not meeting the four tests for Variance, as per the *Planning Act*, and as such should not be permitted by the TLAB.

With regards to the evidence as proffered by Mr. Cieciora, Mr. Mills disagrees that the massing of houses in this neighbourhood have been increasing over time.

Ms. McDermid then proceeded to cross-examine the witness and asked if lot coverage and building height is a means of controlling density. Mr. Mills responded they could be, but is not the exclusive methodology to look at for controlling density and massing.

Ms. McDermid inquired if FSI can be determined through visual inspection of a property. Mr. Mills stated that is correct. She asked if s. 4.1.5 of the OP establishes quantitative methodology to assess in-fill type development. Mr. Mills acknowledged this but further stated that it then acts to inform on the qualitative approach as well.

She asked if 185 Cortleigh Avenue and 359 Lytton Boulevard COA decisions had been missed as part of Mr. Mills research of previous COA decisions. Mr. Mills responded it appears so. Ms. McDermid states that she believes some of the conclusions, as reached by Mr. Mills, may need to be revised as a result.

Ms. McDermid asked if consistency is similar to compatibility. Mr. Mills indicated that he wanted to clarify that his testimony on this proposal was looking primarily at compatibility and not consistency.

She then inquired if 'general intent and purpose' is less stringent language than 'conforms to as is used in planning policies and legislation. Mr. Mills responded that he was unsure what her question was specifically inquiring about.

Referring to the plans, Ms. McDermid asked that if the terrace was further set back, would it then be Zoning complaint. Mr. Mills stated he believed the building depth Variance request would relate to the terrace.

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Ms. McDermid cites some errors in the data which is contained in Mr. Mills' Expert Witness Statement. Mr. Mills indicated that he does strive to be as accurate as possible, but errors do unfortunately occur.

At the conclusion of Hearing Day 3, I indicated that Ms. Hussain would provide her testimony at the fourth day of hearings. I stated that a case management meeting was not needed here due to the exceptional circumstances as Ms. Hussain had a sudden family emergency and had not been able to attend the hearing today.

Hearing Day 4 commenced with Ms. Hussain testimony I qualified her to provide professional opinion evidence in the field of land use planning. At Hearing Day 3, City Solicitor Ms. Guatam had indicated Ms. Hussain would be called at the next Hearing to provide her testimony to the tribunal.

She is a City Planner for the North York. Although she is not the author of the Planning staff report she was in attendance at this Hearing to support the City's position on this Appeal matter.

She described her study area as Proudfoot Avenue to the West, Briar Hill Avenue to the south, Avenue Road to the east and Strathallan Boulevard to the north, and she calls it the Lytton Park neighbourhood. This study area was devised in accordance to s. 4.1.5 of the OP. In this area, two storey detached dwellings constitute the majority of the building type. There are also minority of bungalows and three storey dwellings. Her testimony then outlined some houses of the study area to assess their building standards, such as FSI. Here, she contends that the proposal, especially in relation to the FSI Variance request, do not meet the four tests for Variance, as per the *Planning Act*.

With regards to s. 4.1.5 of the OP, and the 'development criteria' contained within it, Ms. Hussain states that proposal, while assessed in qualitative and quantitative terms, should be afforded more emphasis on utilizing quantitative assessment methodology. Further to this, in her review of previous Variances granted for this study area, the majority of FSI Variance requests have been below 0.65. She further explained that FSI is intending to regulate the massing of houses in neighbourhoods.

In terms of the Variance requests, while individually not a concern, the eleven Variances jointly are an issue in terms of its scale and massing. She further explained that FSI is used to regulate acceptable density for a neighbourhood. In addition, she argues that the lot here can accommodate a dwelling which has a more compatible built form for this neighbourhood.

Ms. McDermid then began cross-examining Ms. Hussain by inquiring about the staff report. Here, Ms. McDermid asked if the staff report recommendation was not to refuse the proposal, as it only raised issues with the FSI Variance request. Ms. Hussain responded that staff practice is to not use the term 'refusal' in reports and will look to provide alternatives to Applicants in terms of revising their proposal.

Ms. McDermid then referred to a recent OLT decision relating to Zoning By-law 569-2013. She asked if the OLT found the City's recommendation on changes to

building height had been accepted by that Tribunal. Ms. Hussain acknowledged this and further stated that, while this OLT decision approved increases to building height and main wall heights in the Zoning By-law, they have not been fully implemented by the OLT. As such, the current Variance requests for those items would still be necessary.

Ms. McDermid inquired if Ms. Hussain was recommending that the TLAB refuse this proposal in its entirety. She responded that is not what she was implying and the City would support the proposal, if the FSI Variance request was decreased.

Ms. McDermid then asked if 'meeting the general intent and purpose' was a less stringent test than 'conform', as these terms are used in Planning legislation and policies. She agreed 'conform' could be more stringent test but it is not relevant to the subject proposal as that test is not used here.

She then asked Ms. Hussain if removing the study and bathroom on the third floor would reduce the FSI to 0.65. Ms. Hussain responded that it is difficult for her to answer without revised plans reflecting this to review.

I asked Ms. Hussain about the term 'stable but not static' in the OP and she responded that change will occur in neighbourhoods, but it must be in keeping with the physical characters of that local area context.

Ms. McDermid then proceeding with closing statement to the TLAB. She presented case law to the Tribunal. In *Foster et al v. City of Toronto Committee of Adjustment*, she cites that 'need' is not a relevant issue when considering Variance proposals. In terms of the Clergy Principle, she contends that this Principle does not apply to Zoning By-law 569-2013 and that if the TLAB preferred, it should, at the minimum, approve the building height and main wall height Variances.

The building height is further argued by Ms. McDermid as not being as impactful when observed at the street level. In terms of the massing, Ms. McDermid contends that Ms. Hussain did not sufficiently explain what the issue with this is here.

With *Motisi et al v. Bernardi*, the OMB member states that Variances should not be assessed using a purely quantitative methodology.

Ms. Chaytor stated that, in her summation, Mr. Cieciora's testimony to the TLAB did not properly delineate what is the prevailing character for this neighbourhood. She further contends that the study area as proffered by Mr. Cieciora is erroneous. In terms of planning not being a purely quantitative exercise, she argues that you do need to use quantitative methodology, to a certain extent, to establish what constitutes a particular neighbourhood characteristic.

Ms. Gautam contends that the OLT decision for Zoning By-law 569-2013 is not in full force and effect and, as such, all Variance requests with this subject proposal continue to be necessary. She further states that Ms. Hussain's testimony should be assessed in its entirety and refutes Ms. McDermid's argument that Ms. Hussain provided inconsistent evidence. She supports Ms. Chaytor's assertions that Mr. Cieciora's study area was not devised properly. She then cited *Darling v. Toronto (City)*,

which was a consent (severance) proposal. Here, the OMB member indicates that proposals could potentially be precedent setting.

ANALYSIS, FINDINGS, REASONS

The Tribunal heard testimony from three Expert Witnesses with cross examination from lawyers representing the Appellant, City and opposing residents. On the fourth day of Hearings, the Appellant's lawyer Ms. McDermid indicated that the OLT had issued a decision, with respect to Zoning By-Law 569-2013. She further opined that this decision had implications for this Appeal matter, especially as it relates to the OLT accepting the City's recommendations on changes to Zoning provisions relating to main wall height and building height. Here, she indicated that the related Variance requests for main wall height and building height were now in compliance with the Zoning By-law. In response to this, City Solicitor Uttra Gautam stated that this was essentially an interim decision and that it had not been fully implemented by the City yet. As such, she contends that the current Variance requests before the TLAB continue to apply.

Within this dynamic, the Clergy Principle was raised by me and whether it was applicable for this OLT decision. Competing arguments were made by Ms. McDermid and Ms. Gautam on this issue. Ms. McDermid contends that, if the TLAB were to refuse the other Variance requests, the main wall height and building height Variances should be permitted. Ms. Gautam opined that the OLT decision relating to Zoning By-law 569-2013 is an interim decision and, as such, it is not in full force and effect yet. As such, Ms. McDermid's argument would not be appropriate here. Within this decision, Clergy Principle is further expounded upon by the two OLT members:

'As the reviewing court said in Clergy, the Tribunal has the discretion, if the circumstances of the case warrant the application of another principle, to do so. For instance, it may choose in its procedural discretion to consider and apply more recent policies and more modern standards that are consistent with a compelling public interest. More recent criteria were applied by the OMB in James Dick Construction Ltd.v. Caledon (Town), 2003 CarswellOnt 6221 (OMB) and other decisions. Here, since zoning standards must conform to the OP policies, and the latest policies emphasize compatibility ("respect and reinforce the existing physical character of each geographic neighbourhood"), the zoning standards proposed by the City are more acceptable than those of the Appellants."¹

What is being expressed here is that there is a certain level of discretion that can be applied by an adjudicator in determining how to interpret the Clergy Principle. I find that the OLT decision has been issued on an interim basis and until a final draft of these Zoning amendments is provided to the OLT for its review, a final decision has not yet been issued. As such, I don't find this OLT decision to be pertinent to this Appeal matter. Ms. McDermid stated that her client should not have to wait until a final decision is issued to obtain such approvals. However, the TLAB's mandate is to assess

¹ Colbourne D., and Burton, G. *Ontario Land Tribunal decision: Bahardoust v. Toronto (City)* October 2021, pp. 45-46

proposals to determine if they meet Planning policies and legislation. It is not organized to accelerate or 'fast-track' development proposals.

To reiterate, the subject proposal has been heard and refused by the COA. The property-owner/Applicant elected to Appeal the COA decision to the TLAB maintaining overall intent of that proposal with slight alteration. This is relevant as the City argues that the proposal should be revised, specifically relating to its FSI Variance request. The Appellant's lawyer did not indicate this was a recommendation they would pursue at this stage.

The Appellant retained Expert Witness, Mr. Cieciora, who provided comprehensive testimony on the proposal to the TLAB. He opined that the subject proposal should be permitted by the TLAB, as it would be an efficient use of land and would act to meet the needs of a larger family. While acknowledging the Planning staff report recommending a decrease in the FSI, he argues that the subject proposal constitutes good planning and can be 'absorbed' within this local area context.

Mr. Cieciora's testimony was also principally focused on the study area he had developed to assess this proposal as it relates to s. 4.1.5 of the City's OP. Further to this, he also conducted research on previous Variance requests within his study area as well. Mr. Cieciora has concluded that the subject proposal would be a compatible form of development as it is consistent with the development pattern which is occurring in this subject neighbourhood. Specially, with regards to the FSI Variance request, Mr. Cieciora stated that:

"14.19.1.11. Based on the review of recent minor variance application in the Geographic Neighbourhood. Redevelopments within the neighbourhood will generally exceed the permitted maximum FSI of 0.35 times the lot area. In particular, 247 Lytton Blvd was approved for 0.67x the lot area, 270 Lytton Blvd was approved for 0.69x the lot area, 316 Lytton Blvd was approved for 0.65x the lot area, and 365 Lytton Blvd was approved for 0.65x the lot area. There are many other examples where FSI variances have been approved in the neighbourhood which are similar to the proposed FSI. This indicates that comparable massing exists numerically within the Study Area."²

Here, and also discussed as part of his oral testimony, he finds that the proposed FSI Variance is similar to what has previously been approved for this neighbourhood by the COA. He further asserts that this proposed FSI is compatible for the redevelopment and regeneration occurring within this local area context.

Mr. Cieciora's testimony was then followed by those of Expert Witnesses Mr. Mills and Ms. Hussain. Both indicated that the study area, as proffered by Mr. Cieciora, to not be appropriate for this subject proposal. They indicated that certain areas in neighbourhood study area resulted in misleading data which, they argued, was used to bolster his arguments for the FSI Variance request. They contend the Tribunal should prefer their evidence to that-as advanced by Mr. Cieciora.

² Cieciora, T.J. *Witness Statement of T.J. Cieciora* July 2021, pp. 24

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Although Mr. Mills and Ms. Hussain stated concerns with the Appellant's proposal, they both undertook different approach on how the TLAB should handle this Appeal matter. Mr. Mills contends that the subject proposal should be refused in its entirety by the Tribunal. Ms. Hussain takes a differing position and states that if the Appellant was to revise their proposal, by reducing their FSI Variance to 0.65 (as had been described in the Planning staff report), that the City would be able to accept the proposal.

Although there are eleven Variance sought by the Applicant, the testimony during the four days of Hearings was focused on the FSI Variance and whether it meets the four statutory tests as per the *Planning Act*. I note that the TLAB must assess the proposal in its entirety to determine whether Variances, whether individually and cumulatively, satisfy the four tests would represent an appropriate form of development for this area.

During closing statements, Mr. Ciecura reiterated planning is not to be approached purely through quantitative assessment methods but must also use qualitative methods as well. This is a general principle within planning which was not disputed by any of the Parties here. What should be noted is that the City has made changes to their OP through OPA 320. These amendments have resulted in establishing requirement that quantitative methodology be used when assessing in-fill proposals. Within this context, there are actual established policies which justifies the use of such an approach. The 'Development Criteria' within the OP clearly articulates that an in-fill development proposal must be assessed to ensure it compatible with the neighbourhood character. As has been expressed in other TLAB decisions, this is usually analyzed by conducting research on previous Variances approved for the neighbourhood and a photographic study of building types within neighbourhood as well.

Within this dynamic, it is noted that there are eleven Variances that are being proffered by the Appellant to facilitate the construction of a proposed three storey dwelling. These Variance entail several performance standards such as building height, main wall height, building length, building depth, FSI and property setbacks-

In considering the testimony of the City Planner Ms. Hussain, I note that she opined that the Variance requests, individually are not of concern. However, the Variances as a cumulative proposal would not be appropriate for this local area context. With this in mind, she argues that if the Appellant were to reduce the FSI Variance to 0.65, the City would be able to accept all the Variance requests for this proposal.

With regards to this proposal as advanced by the City, it does not appear the Appellant has considered such a revision to their proposal and continues to argue that this proposal should be approved by the TLAB. Mr. Ciecura did opine that if the Applicant was to reduce the FSI to 0.65, that there would not be a discernable change to the visual impact of the proposed dwelling. He states that:

"15.9.8. The proposed third floor GFA is 36.88m² and accounts for 0.06 of the proposed FSI of 0.712. By eliminating the habitable space in the third floor, the FSI would be reduced to 0.65x the lot area, as recommended by staff. However,

this reduction would not change the overall massing and built form of the proposed dwelling as the third floor is located within the roof space of the proposed dwelling. The dwelling would look the same to anyone outside the house and its impacts would be the same. The only change that this reduction in FSI would create would be to use the space within the house less efficiently and to remove the study/office space, which as discussed above, is considered to be particularly desirable given the ongoing changes in live-work conditions and demands prior to and during the COVID-19 pandemic.”³

What Mr. Cieciora is stating is that an FSI of 0.712 is not a significant difference from 0.65. Here, he submits that the TLAB should accept the subject proposal as the scale and massing here will be similar to a dwelling with an FSI of 0.65. I note that there is a difference of 0.062 between both the FSIs which are proposed by the Appellant and City, respectively. However, it must be noted that there are ten other Variances being proffered for this proposed dwelling. As such, the FSI Variance cannot be assessed independently and the TLAB must consider all Variances before it and the overall impact of this proposal for this particular neighbourhood.

As had been previously discussed, Mr. Mills does not accept the City’s position on this Appeal matter and counters their recommendations by stating that:

“9. In Paragraph 78 of Hiba Hussain’s Witness Statement, Hiba provides an alternative to the recommendation in Paragraph 77. The alternative is that the Application be modified with respect to the floor space index to a maximum of 0.65 times the area of the lot, along with a condition that the development be substantially in accordance with the site plan and side elevation drawings submitted to the Committee of Adjustment. I do not support this alternative recommendation as it does not address the other relevant issues with the proposed development, such as building height and setbacks.”⁴

While I accept Mr. Mills comments, I noted that Ms. Hussain in her testimony, stated that the reduced FSI, coupled with the other Variances, would provide for a more compatible form of development for this neighbourhood. I find that the City Legal and Planning staff have taken a holistic approach to this proposal, and their recommendations would be consistent with relevant Planning policies and legislation.

The Appellant and City lawyers presented case law to the Tribunal, as part of their closing statements. With OMB decision of *Foster et al v. City of Toronto Committee of Adjustment*, the notion of ‘need’ was assessed by the adjudicator and found to be a primary matter of consideration by the Tribunal. I agree that Planning Tribunals are not structured to determine ‘need’ as they related to proposals. Tribunals are directed to assess proposals as it relates to planning policies and legislation. This principle was affirmed in the *Vincent v. DeGasperis* case decision issued by the Ontario Divisional Court.

³ Cieciora, T.J. *Witness Statement of TJ Cieciora* July 2021, pp. 33

⁴ Mills, T. *Responding Expert Witness Statement of Terry Mills* August, 2021, pp. 8

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With regards to the case law as submitted by the City, one of these was *Darling v. Toronto (City)*, which Ms. Gautam had explained during the Hearing as demonstrating that Tribunal decisions could be precedent setting. In recognizing this particular case law, I will note that the TLAB, in its customary practice, assesses each Appeal individually and on its own merits.

Ms. Gautam also cited my previous TLAB decision for 183 Cortleigh Avenue. In that decision, I requested that the FSI Variance sought be reduced by the Appellant in that matter. Ms. Gautam contended that a similar approach could be undertaken with the subject proposal.

Given the evidence heard, I find that the City, and the collaborative arguments of both the lawyer and planner, to be appropriate to be applied here. I find the eleven Variances sought, individually and collectively, do not meet the four tests as per the *Planning Act*. Furthermore, I find that cumulative impact of these Variances act to create a proposed dwelling which would not be consistent and compatible for this neighbourhood's character.

In reaching this determination, I recognize that City has indicated that they would be accepting of a proposal where the FSI was reduced to 0.65. As part of the evidentiary material which has been presented to the TLAB, this FSI would be within the range of FSIs which have previously been approved by the COA for this neighbourhood. In applying such changes to the proposal, this may be able to address several issues which have been raised during the Hearings. Furthermore, these changes may also ensure the proposal is structured to be more compatible for this local area context. To facilitate this, it would be prudent to issue an Interim Order so that the Appellant will have sufficient time to address the recommendations as have been set forth here.

To accomplish what had been stipulated in the Interim Order, a revised set of drawings need to be provided. As such, I find it appropriate to also issue an Interim Decision here so as to allow the Appellant sufficient time to provide revised materials which reflects this interim decision. Once the necessary materials are provided to the TLAB, I will review it and then make a determination if a final decision can then be issued. This determination will also include an analysis of the four tests for Variance, as per the *Planning Act*, to determine if the proposal meets these criteria or not.

The onus will be with the Appellant to review this Interim Order and to determine how they wish to proceed. If the conditions, as stipulated within this document are not met, then my analysis will then have to revert to the current proposal being proffered. Within this context, and has been outlined previously in this document, I would then have to reach a finding which would be not to find the four tests for Variance of the *Planning Act* being met and thus not approve the proposal. It should further be noted that if the Appellant did act to meet the conditions herein, the revised drawings submitted will need to be reviewed to determine if they are of an appropriate form. As such, it should not be inferred that the submission of new drawings would immediately necessitate the issuance of a Final Order approving the revised proposal.

INTERIM DECISION AND ORDER

1. The Appeal is allowed in part. The Decision of the Committee of Adjustment (COA) is set aside with the Variance request for FSI being reduced. The Variances as identified in Appendix 1 are approved. This approval is further subject to the following condition:
 - a) The Variances set out in Appendix 1 hereto are conditionally approved, subject to the Owner or Applicant:
 - i) The Owner or Applicant shall have a period of two (2) months from date of the issuance of this Interim Decision and Order to submit revised drawings reflecting this approval. Once such drawings are received, and reflect variances as described in Appendix 1, the TLAB may issue a final Decision and Order, with or without conditions. If this is not accomplished, then a final Decision and Order indicating refusal of these Variances will be issued.

If difficulties arise in the implementation of this decision, the TLAB may be spoken to.

X 

Justin Leung
Panel Chair, Toronto Local Appeal Body

Appendix 1

List of proposed variances

1. Chapter 10.20.40.10.(1)(A), By-law No. 569-2013

The permitted maximum height of a building or structure is 10m.

The proposed height of the building or structure is 10.67m.

2. Chapter 10.20.40.10.(2)(B)(i), By-law No. 569-2013

The permitted maximum height of all side exterior main walls facing a side lot line is 7.5m.

The proposed height of the side exterior main walls facing the side lot lines is 7.76m.

3. Chapter 10.20.40.20.(1), By-law No. 569-2013

In the RD zone with a minimum required lot frontage of 18.0m or less, the permitted maximum building length for a detached house is 17.0m.

The proposed building length is 20.45m.

4. Chapter 10.20.40.30.(1), By-law No. 569-2013

The permitted maximum building depth for a detached house is 19.0m.

The proposed building depth is 20.45m.

5. Chapter 10.20.40.40.(1)(A), By-law No. 569-2013

The permitted maximum floor space index is 0.35 times the area of the lot.

The proposed floor space index is 0.65 times the area of the lot.

6. Chapter 10.20.40.70.(3)(D)(i), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the building is 0.92m to the east side lot line.

7. Chapter 10.20.40.70.(3)(D)(ii), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the building is 1.21m to the west side lot line.

8. Chapter 10.20.40.70.(3)(D)(iii), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the rear platform/deck is 1.24m to the east side lot line.

9. Chapter 10.20.40.70.(3)(D)(iv), By-law No. 569-2013

The required minimum side yard setback is 1.5m where the required minimum lot frontage is 15.0m to less than 18.0m.

The proposed side yard setback of the rear canopy over the rear platform/deck is 1.24m to the east side lot line.

10. Chapter 10.5.40.60.(3)(A)(ii), By-law No. 569-2013

Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no wider than 2.0m.

The proposed stairs are 4.37m wide.

11. Section 4.2, By-law No. 438-86

The permitted maximum height of a building or structure is 10m.

The proposed height of the building or structure is 10.54m.