

DECISION and ORDER

Decision Issue Date Thursday, February 17, 2022

PROCEEDING COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act

Appellant: Cheryl Tredgett

Applicants: Michael Grisch, Ian Roberson

Property Address/Description: 20 WOODLAND PARK RD

Committee of Adjustment Case File Number: 20 217523 ESC 20 MV

TLAB Case File Number: 21 163972 S45 20 TLAB

Hearing Dates: Nov 30, Dec 3, 2021, Jan 6, 18, 20, and Feb 7, 2022

DECISION DELIVERED BY Ted Yao

REGISTERED PARTIES AND PARTICIPANTS

Vanessa Burdon, Todd Burdon	Owner/Party	Tara Piurko
T. J. Cieciura	Expert Witness	
Cheryl Tredgett, Dennis Rushforth	Appellants	Alan Heisey
Michael Manett	Expert Witness	
Michael Sean Gaudet, Catherine Gaudet	Parties	
City of Toronto	Party	Gabriela Dedelli, Marc Hardiejowski
Peter Rinas, Daniela Nolano	Participants	
Patrick Smith, Laura Smith	Participants	

Jackie Mazur, Jeff Gastman

Participants

David Beal

Participant

Background

The Burdons wish to tear down the bungalow at 20 Woodland Park Rd and build a new residence. To do so they request seven variances. The Committee of Adjustment granted the variances on May 12, 2021 and Ms. Tredgett, the Burdons' next-door neighbour, appealed to the TLAB.

The Burdons have a young family and grandparents live nearby. Todd Burdon describes Woodland Park Road as a "nice little pocket for young professionals".

Table 1. Variances sought for 20 Woodland Park Rd			
From Zoning By-law 569-2013			
		Required/Permitted	Proposed
1	Floor Space Index	0.60 times the area of the lot	0.7145 times the area of the lot (reduced from 0.73)
2	Coverage	33% of the lot area	38.41% of the lot area (reduced from 39.07%)
3	Building Height	9 m	10.03 m
4	Height of front main walls	7.0 m for no less than 60% of the total width of front main wall	69 % of the front and 74% of the rear main wall exceeds 7.0 m
5	Roof eaves	no closer than .3 m from side lot line	Closer to south side lot than permitted; namely 0.26 m
6	Width of parking space	3.2 m	3.1 m
From Scarborough Zoning By-law 8786¹			
7	Building Height	9 m	10.03 m

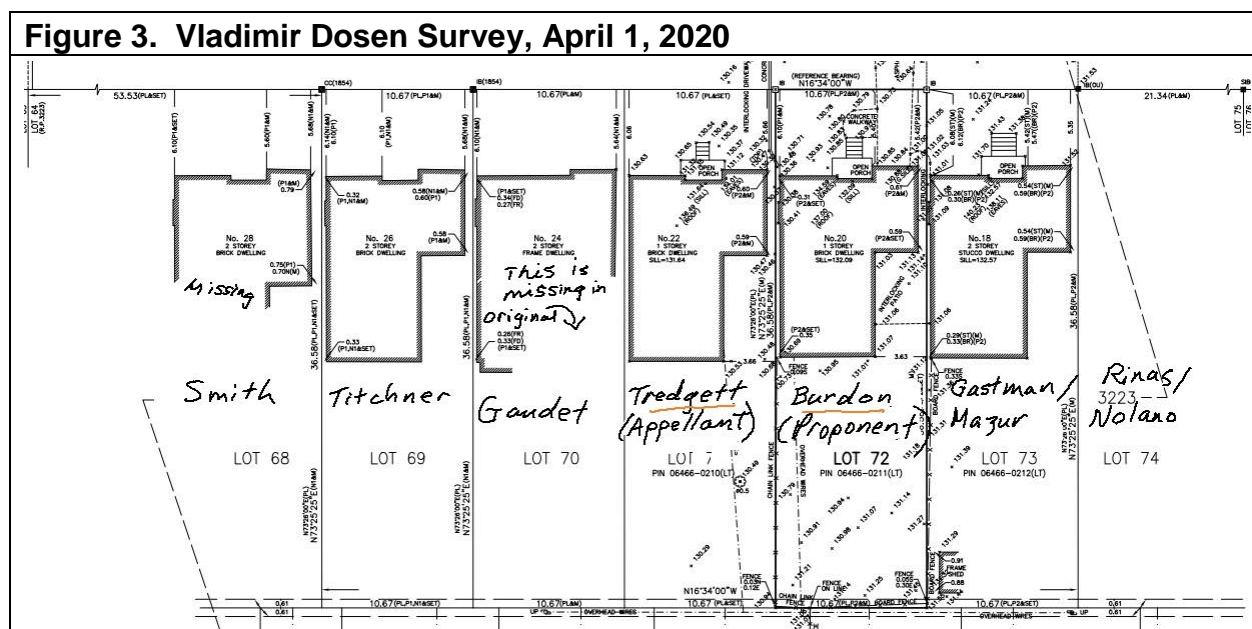
¹ Because there are still appeals outstanding against 569-2013, the Buildings Department reviews zoning compliance against the previous zoning By-law 8786 as well. In this case it appears to result in a duplicate variance request for building height.

Table 2. One variance has been eliminated ²			
		Required/Permitted	Proposed
	Building length	17 m	Now 16.99 m. Originally 17.42 m was sought

Onus as to “right” to develop

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

EVIDENCE



I heard from planners TJ Cieciora (testifying for the Burdons) and Michael Manett (testifying for Ms. Tredgett and Mr. Rushforth). I qualified both as able to give opinion evidence in the area of land use planning. The Burdons were represented by Tara Piuorko; Ms. Tredgett and Mr. Rushforth by Alan Heisey. I also heard from each

² As a result there is no length variance requested. Because this arose after the Committee of Adjustment there is a special procedure for dispensing with further notice, which I would have done if the result had been in favour of the Burdons.

household in the above plan of survey (except Mr. Titchner). The opposing neighbours were testifying on their own behalf, without assistance by Mr. Heisey. When I say neighbours I generally mean those persons except for those represented by Mr. Heisey, who spoke for Ms. Tredgett and Mr. Rushforth.

Ms. Dedelli, the City of Toronto lawyer, cross examined Mr. Cieciura and made submissions. but did not bring a witness from City Planning.

I now set out some of the background to this hearing. The matter was originally assigned to Chair Lombardi, who conducted a mediation (October 19, 2021) and heard two days of evidence on November 30 and Dec 3, 2021. He heard the entirety of Mr. Cieciura's evidence in chief and cross examination by Ms. Dedelli. The second day ended with Mr. Heisey being part way through his cross examination. Chair Lombardi then advised that he was required to recuse himself and assigned the matter to me. As part of stepping away, he requested that I should deal with Vice Chair Bassios if I needed internal direction. On January 14, 2022, I held a status hearing and decided that, in lieu of starting from scratch, I would listen to the TLAB tapes of Days 1 and 2, so that the parties would not have to duplicate previous efforts.

Part of my obligation to the Burdons, who were the most inconvenienced by the change in hearing officer, was for me to listen to what I considered some of the more important pieces of Mr. Cieciura's testimony, and transcribe some of it for the parties, to demonstrate my grasp of their evidence and assist this transition of hearing officers. The hearing continued for three more days, five days in all. As one of my commitments to the parties, I assured them that I would release the decision within 14 business days of the end of the hearing and have done so. In view of the negative decision for the Burdons, this may allow them to recalibrate their plans and still begin construction this year.

Member's Site visit

I visited the site for the sole purpose of better assessing the evidence given at the hearing.

MATTERS IN ISSUE

The parties agree that as far as the Provincial Policy Statement and the Greater Golden Horseshoe Growth Plan are concerned, the *Planning Act* requirements are met. I agree; this is about the location and shape of the rear wall of a single dwelling and

whether it meets the massing and density tests under the Official Plan. The high level Province-wide issues in the documents are not engaged.

There is also agreement that 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.

In my view, the main Official Plan policy to be considered in this case is s. 4.1.5 of the Official Plan of the City of Toronto. It requires new development to “fit in” physically with the character of the neighbourhood.

ANALYSIS, FINDINGS, REASONS

This is a very focused hearing with a single issue, namely the extent and shape of the rear wall of the Burdons’ house. The Burdons say they do “fit in” as the main objection of the neighbours is answered by their decision to shorten the building. Ms. Tredgett, the Burdons say, could build a 17 m (the zoning maximum) long house tomorrow, thereby erasing any disparity between their respective house lengths. Mr. Manett (the Tredgett/Rushforth planner) concluded that the deployment of the massing, that is, the arrangement of the sculpted form of the house is “out of character” for this neighbourhood. This difference of positions is the main issue for me to decide.

The development of neighbourhood character

Woodland Park is a north-south street, with Kingston Road at the south and Ferncroft Drive at the north. Despite this, Ferncroft also forms the parallel north-south street to the rear of the Woodland Park.

The **wider** neighbourhood is contained by Fallingbrook on the west, to Woodland Park on the east, all north of Kingston Road. The **immediate** neighbourhood consists of Woodland Park Road itself. There is no dispute between the parties about this and I agree. The wider neighbourhood contains 415 properties; the immediate neighbourhood contains 52 or 53 properties depending on whether to count a corner property. The parties also agree that there is no difference in character between the immediate and wider neighbourhoods. This is important because the neighbours’ evidence includes observations about the rear yards on Ferncroft Ave, but they did not

go farther and extrapolate their views on the character of the neighbourhood beyond their own subarea, and Ferncroft despite intersecting, is not in the “immediate neighbourhood”.

The survey on page 3 was commissioned by Mr. Burdon on April 1, 2020 to supply accurate measurements about the location of his house (20 Woodland Park). Surveyor Dosen also includes benchmarks from previous surveyors, (Baird and Mucklestone December 23, 1947 and H.C Sewell May 23, 1947). These references are helpful for a historical perspective.

The original Plan of Subdivision 3223 had at least 90 lots, and lots here had a frontage of 10.67 m or 35 feet. #14 Woodland Park and #16 Woodland Park were depicted as a “double lot”; i.e., 21.34 m or 70 feet; it became the lots now owned by the Wards and Rinas/Nolano families. # 16 (Rinas /Nolano). Thus, there is uniformity as to frontage for this section of Woodland Park Rd.

The 1947 surveyors also demarcated the existing buildings, basically a one storey box with an attached garage to the left. Over time, some of these bungalows received additions to make larger dwellings. The roots remain; for example, #6 looks like the original, #8 has living space above the garage, as does #12; #s10, 14, 16 and 18 are two-storey. The subject property (#20, the Burdons, heavy arrow) and appellants’ #22 (Tredgett/Rushforth), both retain the original design. The next properties, #s 24 and on, are two-storey. I find, based on Mr. Gastman’s evidence that I will detail later, that the earlier additions were simple “bump-ups” in which the original box -plus garage footprint was retained. Later additions were full two storey replacements, altering the historical design to a greater or lesser degree.

Figure 4. Current (circa Sept 2021) streetscape

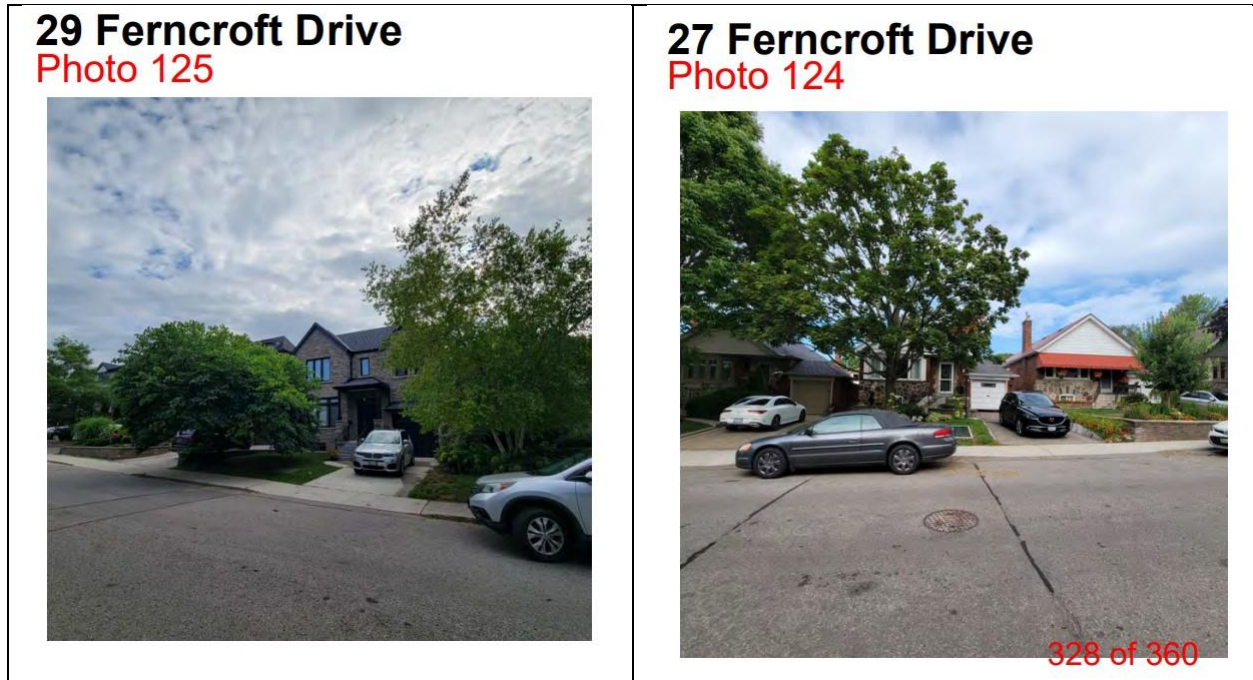




The opponents' thesis is that their rear yards share an "open space" ambiance, which they say will be unduly impacted by the bulk and massing created by the overhang of the new Burdon house.

David Beal (#25 Ferncroft) also objected on the same grounds. I include below photos of #s 29, and 27 Ferncroft, which are the ones north of him (photos oriented the same way as a viewer looking east). Number 29 shows a two storey; number 27 quite likely an original house much like the Tredgett/Rushforth house. Number 19 Ferncroft, three houses south of Mr. Beal's house, shows a building under construction. From the street, Ferncroft shows great similarity with Woodland Park; newer houses exist next to bungalows; there is episodic construction activity as well.

Figure 5
Two houses on Ferncroft



I conclude that the original “cookie cutter” houseform and footprint are part of the “DNA” of the neighbourhood character. The neighbourhood has had gradual change, also part of the character.

Jeffrey Gastman, the other next door neighbour, makes a second complaint that is somewhat different from the others. He said that the original homes had a “notch” behind the original garages (aerial photo, left, Figure 6). He bought his house in 2004; already renovated by the “bump-up”, which preserved this notch. The existing Burdon bungalow’s notch allows light for his dining room window, which will be greatly diminished. The proposed house will be at the permitted 0.45 m side yard setback.³ The most recent addition, that of Titchner 3, at 26 Woodland, has a small suggestion of a notch on the side toward 24 Woodland (Please see circle in Figure 6, right).

Similar to the building length discussion, Mr. Cieciora took the position that if no side yard variance was sought, Mr. Gastman’s objection was of little import, the building envelope had already been set. As in that discussion, this omits the effect of the FSI variance as part of the Official Plan test.

Figure 6. left Gastman aerial with “notches”; right Manett aerial, showing Titchner under construction

³ There is also a small eave variance on the Gastman side.



Smith “rear wall line”

Figure 7 is an important piece of evidence, consisting of two aerial photos, the top from Patrick and Laura Smith, (#28 Woodland Park) and the bottom from Mr. Cieciora. Mr. Smith has drawn on his map what he considers a consistent rear wall line, more or less respected by neighbours who have built additions. The Gastman and Ward bump-ups are entirely forward of this line.

The Smiths illustrate the Burdons’ footprint (at that time proposed to be 17.42 m long) in a dark colour and the patio in a lighter colour. To see the shortened length, the reader has to subtract 1.43 m, slightly more than half the depth of the patio.⁴

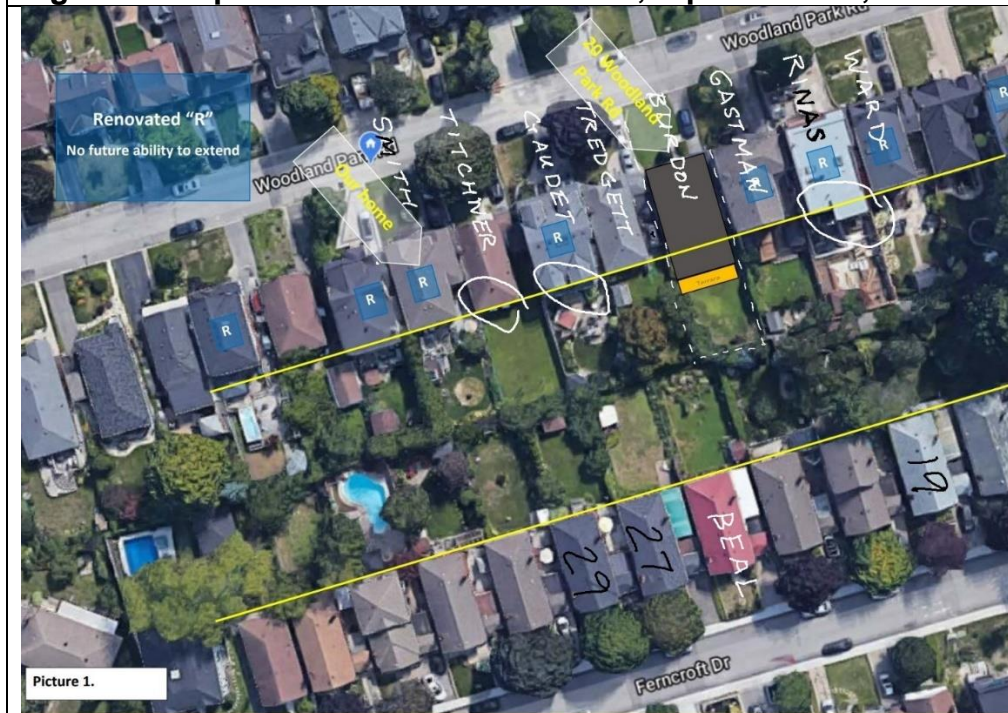
The lower map is Mr. Cieciora’s “Attachment 9”, filed September 20, 2021, and is similar in that the Burdon building length is 17.42 m instead of the current shorter length. The above exercise has to be repeated for Mr. Cieciora’s map. He also shows the other side of Woodland, where there is more variation among rear walls. There are three coloured lines:

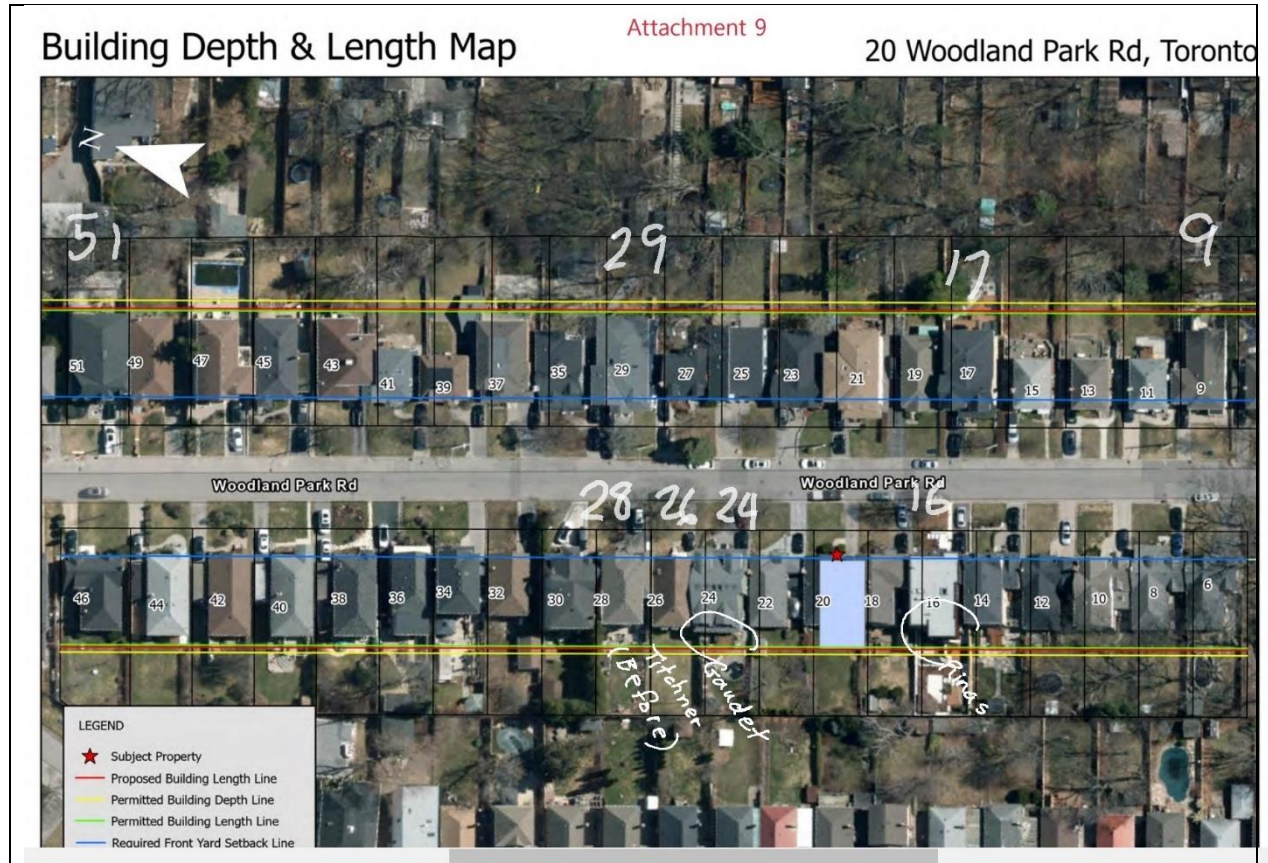
4 . At the Committee of Adjustment, the Burdons sought a building length of 17.42; now reduced to 16.99 metres (17 m permitted). The rear terrace (lighter square) was 3.05 m deep; now it is 1.73 (about 56% of the former depth). The rear patio has now also been shortened and a foundation wall underneath the patio deleted, but this does not have any effect on the zoning measurement or length nor the sought-for variances.

Red	new Burdon wall
Green	17.00 m required max building length line, and
Yellow	19.00 m required max building depth line

Since 16.99 m is practically the same as 17.00 m, the red and green lines should coincide, and I accept that Mr. Cieciura has drawn them side by side because the lines have some thickness. The distance between the red/green line and yellow line would be two metres if the front yard setback and front yard coincided. In this case, it is 1.81 m, since the Burdons have chosen to build somewhat back of the front yard setback line.

Figure 7. Depictions of Burdon rear wall; top Mr. Smith; bottom Mr. Cieciura





The proposed new rear wall

Figure 8. Current site plan



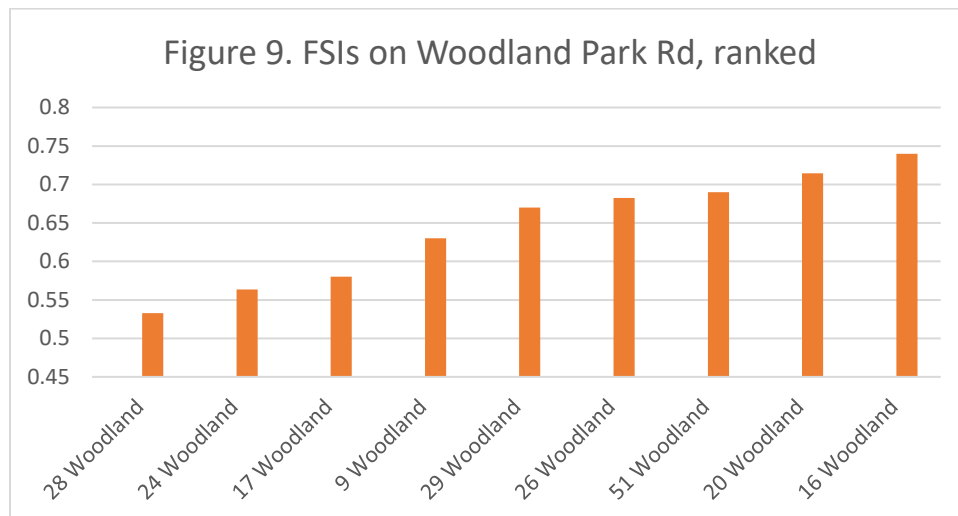
The best estimate of the extent of the overhang (heavy double arrow) is given by Mr. Gastman, who says his current house is 12.88 m long and the 17.42 m would have created an overhang of 4.57 m or 15 ft. Corrected to 16.99 m, this gives an overhang of 3.14 m or 10.3 feet. I am not sure whether this takes into account fact that the Burdons have built somewhat back of the front yard setback line. Mr. Beal also estimated the original overhang at 15 feet. I return to this issue in the “rear walls” section.

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This is the Birchcliff community under the old Scarborough zoning. It uses a formula⁵ to calculate maximum gross floor areas (GFAs). For purposes of this discussion, the 10 properties in the Smith map have a maximum Gross Floor Area of 204 m², which translates to an FSI of 0.523 for a lot the size of the Burdons' (390.3 m²), who seek 0.7145.

There are nine Woodland Park FSI exceedances, including Burdons'. In seven out of those nine, the Committee of Adjustment decision has **specified the FSI as a decimal number** to two places, e.g., #24 Woodland Park is 0.56.⁶ In two of those the Committee has only specified the **proposed floor area**: 9 Woodland Park at 211.5 m² and #28 Woodland Park at 208 m². For these two, the lot area is not given and can only be estimated. The most favorable FSIs to the Burdons, (i.e., highest) are the ones I have used in Figure 9, namely 0.63 for #9 and 0.53 for #28.

FSIs for these nine properties are shown in Figure 9.



⁵ (1462) Exception RD 1462 The lands, or portion thereof as noted below, are subject to the following Site Specific Provisions, Prevailing By-laws and Prevailing Sections. Site Specific Provisions: (A) The maximum floor space index for a lot with a dwelling unit in a permitted building type is: (i) the lesser of 0.6 times the lot area or 204 square metres, if the lot area is less than 408 square metres; (ii) the lesser of 0.5 times the lot area or 279 square metres, if the lot area is 408 square metres to 697 square metres; and (iii) 0.4 times the lot area if the lot area is more than 697 square metres.

⁶ For #26 Woodland Park (Titchner 3), the committee stated the proposed floor area is 266.43 but we can calculate the lot area from the coverage variance (namely 390.3, same as the Burdons' lot area). I consider this one of the seven for which we have a stated decimal FSI.

Number 20 Woodland Park would be the second highest FSI of nine decisions and the second highest of 53 properties in the immediate neighbourhood. Since the two neighbourhoods have the same character, this puts the Burdons' FSI variance in the top 4 % of properties of the immediate area (i.e. 53 addresses sample size) and in the top 22% if only the 9 Woodland Park properties are considered.

Since the variances must cumulatively meet the four tests, I also have to consider the combined effect of other variances, namely height. Only the Burdons and Rinas/Nolano sought height variances; the Burdons sought 10.03 m, #16 (Rinas/Nolano), 8.4 m. The standard is 9 m; however, there is a lower limit for a flat-roofed dwelling, which is the standard applicable to the Rinas/Nolano roof.

Mr. Cieciura countered this position with the suggestion that we don't know about previously granted high FSIs and illegally built structures. He had no evidence for this speculative claim. He could have for example pointed to one of his 187 photos. I accept Mr. Manett's plausible estimation that those properties, like the Tredgett/Rushforth house, are in the .20 to .50 FSI range.

The question before me is: does the proposal respect and reinforce the prevailing **"heights, massing, scale, density"** of nearby residential properties. The only ones with larger massing are #s 16, (Rinas/Nolano), #26 (Titchner 3), #24 (McCarthy, now the Gaudets). On the Smith map, these project past the common rear wall line.

Rear walls

Mr. Cieciura's map shows that only the Burdon house will touch the 17 m length line, although #s 29 and 51, both on the other side of the street, are close. I considered the evidence I heard from owners of even numbered Woodland Park homes below.

The Smiths' house, #28, is the leftmost footprint in the Vladimir Dosen Survey (page 3). When the Smiths moved into it in 2002, it was still a bungalow. Patrick Smith says they "largely maintained" the former footprint but needed a small FSI variance which they obtained in 2010. This is the lowest FSI (at 0.53), and #28's rear wall does not project over the line.

Next door between the Smiths and the Gaudets is #26, Titchener "3". Larry Titchener did not appear at the hearing, but his application was described by Ms. Gaudet. She explained that at her request, the Committee deferred his application, forcing a compromise, at "6 to 8" feet" rear projection. She considers this should be the

“high water mark” of any new rear wall.⁷ I find Ms. Gaudet’s estimate is corroborated by the Manett aerial, right photo of Figure 6, (page 8). Its FSI is 0.682, slightly less than #51 Woodland Park, an earlier Titchner development (FSI of 0.69)

Continuing south, next is the Gaudet house, #24. The Gaudets are successors in title to Ronald McCarthy, who obtained his FSI variance in 2006. Ms. Gaudet says the previous owner spent \$50,000 to landscape their rear yard and, “It is their oasis.” Their current rear wall projection (seen more clearly in the Cieciura map) is “two feet” and consists of the whole two storey rear wall. Their FSI is 0.56.

Next are the Tredgett/Rushforth and Burdon bungalows, but I find bungalows form part of the existing physical character this neighbourhood. Mr. Manett counted 25 two-stories and 28 bungalows and are at the lowest end of his estimated FSIs, at 0.20.

Next to Burdon is #18 Gastman/Mazur, whose rear wall aligns with the Smith line, as does #14 (Ward). Since it never got an FSI variance, it must be below 0.60.

Next is #16 Rinas/Nolano, whose FSI is the highest on the street at 0.74, compared to the Burdons’ FSI of 0.7145.

The Rinas/Nolano “dream home” had an 8.5 foot full two storey rear “outcropping” plus a second floor projection that adds a further 5 feet⁸ to a rear portion of 8.5 feet, which I will come back to later in more detail.

⁷ 2. We have a hot tub which we were able to freely enjoy and which felt private given that our home was flanked on both sides by bungalows. However, soon after we moved in, we were told that the home immediately to the north of us was going to be topped up. The developer sought to extend the home at least 10 feet beyond the footprint of the existing bungalow. We are not opposed to development, but the encroachment on the greenspace and more importantly, on our privacy when we use our hot tub, was a concern. Many neighbours were also opposed to the scope of the proposal at #26 Woodland (see attached Photo #2) and the matter was deferred at the Committee of Adjustments (“COA”). The developer, who also lives on this street, reduced the scale of his build **to 6' beyond the footprint on the main floor with an 8' cantilevered extension on the second floor**. This seemed like a reasonable encroachment on privacy and into the greenspace and the new plans were unopposed at the second COA hearing. It is my opinion that this should be the high water mark for encroachment into the green space. Photos 3 and 4 show how private our yard was before while Photos 5 and 6 demonstrate that even this reasonable size home still looms over our home and impedes on our privacy.

⁸ We are proud to live in this beautiful community and decided to tear down our existing bungalow and build our own custom 2 story dream home, which we have recently completed. 1a.) When my Wife and I decided to build, we were most sensitive to our immediate neighbors to the north and south in respect to their continued future back yard privacies and enjoyment. We obtained 11 surrounding neighbor’s signatures before submitting all our variances to

So, to sum up we have from north to south:

#26, rear wall is “6 feet” beyond the footprint on the main floor [i.e., Smith line] with an 8 foot cantilevered extension on the second floor rear wall, most of this would be over the line but we don’t know about the where the front wall is;

#24, rear wall “two feet” over the line;

#16, rear wall very slightly over the line; cantilevered enclosed balcony (5 ft) completely over the line for a portion of the rear wall’s width.

How does the proposed rear wall compare to these? The Cieciura map shows an overhang equal to Rinas/Nolano balcony (5 ft, as stated by Mr. Rinas); from which must be subtracted the 1.43 m (4.7 ft). This suggests the location of the two rear walls are pretty close, but I find the new Burdon rear wall is still farther back than Rinas/Nolano’s enclosed balcony. The Rinas/Nolano design is nonetheless more sensitive, as it is “notched” and the projection is second floor only. The architect has placed it farther away from the northern neighbour (Gastman/Mazur), as Mr. Rinas testified, to avoid shadowing on the Gastman/Mazur side. The Burdons’ design will not display the same sensitivity to the Tredgett/Rushforth house. Again, the tests do not imply, in my view that each succeeding design can merely ratchet up the previous greatest number.

However, the fact is that their FSI is greater than the Burdons’. Mr. Heisey made the legal argument that the variance was obtained before December 2018, the coming into force of OPA 320, and the post-320 regime is stricter. OPA added the word “prevailing” to modify those characteristics that have to be respected: *prevailing heights*, *prevailing density* of nearby residential properties. I agree with Mr. Heisey but can distinguish #16 on other grounds.

committee of adjustment. Nobody objected. 1b.) We considered all neighbor’s rear building outcroppings along the west side of Woodland Park Road. We kept the character and integrity of our open spaces sight line views intact that we all enjoy. We instructed our Architect to keep this in mind when designing our contemporary home. Therefore, we tiered our two-story rear outcropping into two sections. We added a **3.5 foot full 2-storey outcropping** to the northern portion past our immediate neighbor’s rear building to ensure minimal morning shading. On our southern rear outcropping section, we added a **5-foot full 2- story outcropping** past our southern neighbor’s rear wall. See photos 1 and 2. 1c.) Above our 5-foot two story addition to the south we added a cantilevered 2nd floor balcony which spans 17 feet in width and **5 feet in depth**. This is a feature of our ‘Architect’s contemporary design’, and it allows light to our immediate neighbor to the north throughout the day since it is further away from their property line and the adjacent neighbors still have an open space feeling. See photos 3 and 4. (Rinas Witness Statement)

The Rinas/Nolano design has mitigated the impact of the enclosed balcony and higher density. The evidence of Mr. Rinas is that his family opted for a **three storey design**, in effect a side split with two stories above the old garage, the garage being left intact. His design “recaptures” the floor area of the garage into living space, which accounts for the high FSI. He also said that the ceiling in his office over the garage is “low”, and so, I infer that compromises were made that were not made in the Burdons’ design, which is a full two storey rear addition plus a height variance.

To sum up, I accept Mr. Smith’s rear wall line as being part of neighbourhood character and existing massing that new development must respect and reinforce. If no variances were sought, then the Official Plan test would not come into the picture; the Burdons could build as they wish, providing other relevant setbacks were observed. But variances **are** sought and my conclusion that this causes their rear wall to overstep the Smith line in a non-sensitive way. I turn to height.

Height

The Burdons seek a height of 10.03 m, which is the second highest height variance for the larger neighbourhood. The highest is for #187 Fallingbrook (photo right), and it clearly is higher than the two storey neighbour to the right. The fact that we have to go three blocks away to find a comparable underscores the out of character nature of their request.

187 Fallingbrook Road Photo 116



324 of 360

Figure 11: Height variances granted by the COA for the 415 properties larger area		
		Height in m
187	Fallingbrook	10.17
20	Woodland Park	10.03
167	Fallingbrook	9.75
61	Briar Dale	9.65
67	Queensbury	9.5
43	Briar Dale	9.45
173	Fallingbrook	9.42
47	Briar Dale	9.4

22	Hunt Club	9.31
44	Hunt Club	9.31

Of Mr. Cieciura's 76 decisions, only 23 sought height variances. The top ten height variances, including the Burdons', are in Table 11, above. I find that this variance is not minor and does not respect and reinforce the prevailing pattern of heights in the neighbourhood. In other words, the proposed height does not "fit in".

OP 4.1.5

My task now is to apply the facts to s. 4.1.5 of the Official Plan. The application does not seek depth or length variances, but does seek a combination of density and height. Both numbers are at the ends of the spectrum of Committee of Adjustment decisions. Secondly, these variances would result in a wall beyond the Smith line.

Section 4.1.5 of the Official Plan states:

5. Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular: . . .
- c) prevailing **heights, massing, scale, density** . . . of nearby residential properties; . . .
 - g) prevailing patterns of rear and side yard setbacks and landscaped open space;

This section goes on to state:

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.

In ascertaining whether the development respects and reinforces "heights massing scale and density" and patterns of rear setbacks and landscaped open space", I have to address the following questions:

- Should a quantitative or qualitative approach be used?
- Is "landscaped open space" part of neighbourhood character?
- What does "prevailing" mean, in this context?
- Does the decision maker need to rely on OPA 320 apply to explain the Rinas/Nolano density of 0.74?

Quantitative v qualitative?

First, I think it disingenuous to rely on a predominately “qualitative” approach when the sought-for density is expressed in four decimal places, and as Mr. Heisey observed, both height and density are numbers. But Mr. Cieciura’s argument is a little different:

The proposal will still result in a compatible built form which is a two-storey single detached dwelling. This is a **common built form** in the neighbourhood and will fit harmoniously into immediate context and the overall broader context of this neighbourhood. (par 23.1, Cieciura Witness Statement)

The words “commonly built form” are the kind of broad-brush approach that is reliant on past approvals, that was criticized by Justice Wilson in *621 King*.⁹ The argument also relies on the word “compatible” which appears in s. 4.1.8 of the Official Plan, “Zoning by-laws will contain standards to ensure compatibility”.¹⁰ This is a misreading of the section. The word “compatibility” occurs as one of the purposes of a zoning by-law; it does not say that if a development meets most of the standards, it is deemed to be compatible in all respects.

I find that these arguments do not succeed.

Landscaped open space

Clearly the respect test applies to prevailing heights and densities. The parties disagreed about subclause g) “landscaped open space”. the residents said the rear yards were the sort of pattern g) refers to. Mr. Cieciura denied the applicability of g); “These are typical back yards; there’s nothing special”. I disagree with Mr. Cieciura.

“Open Space” is a zone in the zoning by-law, which allows natural areas, schools, marinas and golf courses. This is not the meaning here. “Landscaped” is also in the zoning by-law and means shrubs, grass or even dirt and walkways; it merely excludes driveways.¹¹ Therefore, these words have their natural English language meaning and the residents’ interpretation was bolstered by many pictures of their

⁹ *621 King Developments Ltd., Re*, 2011 ONSC 3007, 2011 CarswellOnt 5374

¹⁰ 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.

¹¹ Landscaping means an area used for trees, plants, decorative stonework, retaining walls, walkways, or other landscape or architectural elements. Driveways and areas for loading, parking or storing of vehicles are not landscaping. (Bylaw 569-2013)

gardens, which I find constitute “landscaped open space”. Both rear yard setbacks and landscaped open space are preceded by the word “patterns”, which I find means that you look at more than one.

Moreover, I disagree with Mr. Cieciora’s argument that people are unable to observe a “metric” like FSI.¹² “Most people can quickly observe, even on a first visit to a friend’s rear yard, whether there is any pattern to rear additions. I think most people who buy a house will at least take a peek into the back yard and look at the “pattern” and observe whether recent additions are in their view modest or large. This is especially so for this neighbourhood, which I have described as having a lot of similarity in house forms.

I find the pattern of landscaped open spaces of the Woodland Park Rd back yards is part of the neighbourhood character.

“Prevailing”

The word “prevailing” is defined as “the most frequently occurring number”.¹³ It modifies “heights”, “massing”, “scale”, “density” and “patterns”. “Height” is self-explanatory. “Density” means Floor Space Index, in context with the words “massing” and “scale”, and I have just explained it is what you see when go out the rear door and look down the neighbours’ rear walls.

Looking at houses with integrated garages in the Davisville Village neighbourhood, TLAB Member Gopikrishna found that 3 of 29 houses on Carey Rd and 9 out of 73 in the broader neighbourhood, had integral garages and on that basis rejected the proposal.¹⁴ Similarly, TLAB Member Bassios rejected the *Evangelista* proposal, in part because there were only 3 densities in the top range out of 46 decisions¹⁵ They were accepting the most frequently occurring number definition and by inference the **applicability of OPA 320**.

¹²Most people can say that looks like a 6,000 square foot house that looks like a 5,000 square foot house. But nobody that I've ever asked has been able to say. Well, my house is a point 35, unless they've been through recent development approval and have drawings and calculations on their house. I personally wouldn't **even know [for] my house what the FSI is.**

¹³ 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.

¹⁴ Shakeri, Re, 2020 CarswellOnt 19644, This is noted as 26 *Carey Rd* on the TLAB website.

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

Mr. Heisey's submission that the adoption of OPA is enough to put the Rinas density in a special category, strikes me as unnecessary on his part. I have explained that the second floor is only part of the back wall and is related to internal layout. In addition, because Mr. Rinas obtained signatures in support, there was no opposition at the Committee of Adjustment and hence no evidence of impact for the Committee members.

Mr. Cieciura's position was that it was sufficient to find that a proposed variance need only fall within a "**range** of approvals".¹⁶ Ms. Dedelli and Mr. Heisey's position, that I accept, is that all properties must be considered, not just the subset that obtained approvals.

Ms. Piurko submitted this cannot be true; or no variances would be granted. I was given the decision of TLAB Member Bassios, who called such a comparison "skewed", although "possibly useful" in *Re: Evangelista*.¹⁷ In that case the proponent's planner said:

¹⁶ Mr. Cieciura testifying on November 30, 2021 at 4:27:

Now we're drilling down into the intent of the policies, so I'm going to spend a little bit of time on this one. . . . [Official Plan policy 4.1.5] c), the prevailing height, scale, density and dwelling type of nearby residential properties. So that's, that's an important policy requirement and when you talk about prevailing heights, massing, scale, density, and dwelling type, . . . It's not a numerical exercise purely -- there is a -- an acknowledgment, or we all acknowledge, I acknowledge that, you look at the numbers of the existing residential area, being the heights, density and-- and any performance standards for which we can actually find data. And that will help inform what is prevailing in the neighborhood. However, in my opinion, it's more of a quantitative [sic., he meant qualitative] analysis, because we cannot tell what the height is of every house. Well, there is no such metric. We cannot tell what the massing in terms of coverage, floor space um is, of every house. We have to look at it more qualitatively. Um, even the density, looking at what's been recently approved, and if those recent approvals are fitting in and forming part of the character of the neighborhood, we can use that as an indicator of what's in the neighbourhood. However, I took you through the neighbourhood photo study, and you [i.e., Chair Lombardi, at that time] are familiar with the neighborhood and looking at the proposal, **it is within the range of approvals that have been granted**. It is within the range of what exists, by nature of those approvals being granted.

And it will fit in when you look at how the zoning bylaw regulates the deployment of FSI, the deployment of GFA and where that is to be located on the lot. This proposal respects all of those performance standards. And, particularly now with the revision to be a compliant building length, it even more closely reflects what the by-law calls for, in terms of where the house is located, and where the massing is located on the lot.

¹⁷(Member Bassios speaking): 63 I have considered the data contained in Tab 24 of Exhibit 3 (Document Disclosure of Appellant). This data documents approvals for variances granted by the COA, or on appeal. It is therefore likely to over-represent the larger houses in the

In his opinion, this policy recognizes that new development built to the permissions in the By-law may be different than existing development, but those differences can exist in a compatible manner. He stated that the physical form of the proposed development is in compliance with the zoning envelope.

The identical argument is made here, In coming to this conclusion, Member Bassios devised bands of density numbers, on her own, and observed that the grouping containing the sought number 1.19 FSI, did not have the largest number of Committee decisions. She thus avoided making sweeping black or white pronouncements about the exact meaning of “prevailing”, and I follow her approach; it is sufficient to observe that height and density here are at the extreme end of the spectrum.

We now move on to look at the application of whether the general intent of the Official Plan and zoning are maintained.

Conclusion: Official Plan and zoning conformity

Decision makers have used three interpretive tools:

plain meaning (“Words mean what they say”, a comment made by Member Gopikrishna in *Re Shakeri*);
avoidance of contradiction; and
the purpose of the legislation.¹⁸

neighbourhood as it does not capture those redevelopments that have proceeded without FSI variances, i.e., are within the maximum allowed by the By-law. Even a sample thus skewed towards the upper end of the actual on-the-ground prevailing density can be a useful snapshot of densities that have been approved in the neighbourhood. (*Re Evangelista*, 2021 CarswellOnt 15038) My note: Ida Evangelista was the applicant and agent for the owner. The case is filed in the TLAB website as 193 Winnett.

¹⁸ [19] “Correctly interpreted” asks for an exercise of statutory interpretation. First, we have to look at the plain meaning of the legislation. Does the plain meaning require fresh authorization for a subsequent proceeding involving the same subject matter? Alternatively, do we find as a fact that the second proceeding did not involve the same subject matter and thus required fresh authorization, based on the plain meaning of the applicable subrule?

[20] Second, if the plain meaning creates some contradiction or ambiguity, we should attempt to interpret the legislation in a way that avoids the contradiction (“avoidance of absurdity” approach). Third, we should ensure that the meaning carries out the purpose of the legislation (the “purposive” approach). Modern statutory interpretation requires that all three approaches be used together and that the three are not treated as mutually exclusive watertight compartments *Law Society Of Upper Canada V. Roy Francis Dmello*, 2013 ONLSHP 100 (CANLII)

The plain meaning of “frequently occurring” describing non numbers like “massing” and “patterns” needs more interpretation. The “avoidance of contradiction” tool is not a factor because the main contradiction, namely granting legal status to something the law specifically prohibits, is built into the scheme of authorization of variances. However, the third tool is important because the Official Plan contains clear language as to s. 4.1.5’s purpose. It is to promote stability, by making new development fit in, as well as many other goals. It also says new development should not be disruptive.

The historical narrative started with the Smith’s decision in 2010 to add to their bungalow, and neighbours followed their example. (“Some physical change will occur over time as enhancements, additions and infill housing occurs on individual sites”.¹⁹) However, until as recently as 2020, including three applications by the professional developer Mr. Titchner, no applications have been for a combination of height and FSI, and no single FSI greater than 0.69 was applied for, except for the Rinas/Nolano proposal, which I have distinguished. In the case of #26 Woodland Park(Titchner 3), a compromise under the threat of a protracted dispute created a second storey overstepping. I find these other additions conformed with s. 4.1.5 of the Official Plan, but the proposal here does not.

The reason is because gradual change was not followed. In overstepping the line by more than a modest amount, the proposal is destabilizing in that it creates a new paradigm. This was also the case in *Shakeri*, where houses with integral garages were proposed after enactment of the Davisville Village by-law to prohibit same, and in *Evangelista*, where attic space was converted to living space, contrary to the building permit. My rejections in *30 Westridge Rd* and *57 Ninth St*²⁰ were also new paradigms; variance decisions that followed close in time to a previous similar decision.

Turning to the intent of the zoning by-law, the reasoning behind the formula (wherein GFAs were held down to a maximum 204 m² until the lot size reached 408 m²) has to do with the original bungalow design. This formula allows properties from 340 m² to 408 m² to benefit from an extra layer of scrutiny, by artificially setting the lower ceiling. Larger lots, that could accommodate more gross floor area, did not have to be constrained by this lower GFA ceiling.

I think Scarborough Council showed wisdom with this formula; they were managing the transformation from bungalows to two storey structures, a change that

¹⁹ OP s. 2.3.1 “Healthy Neighbourhoods”

²⁰ *Arcica Inc, Re*, 2018 CarswellOnt 18357 (TLAB) is on the TLAB website as *30 Westridge Road*. *Romano, Re*, 2020 CarswellOnt 18169 (TLAB) is *57 Ninth Street*.

continues to this day. The Smith rear wall line respected and reinforced the original neighbourhood's character, while still permitting gradual, sensitive change.

I find that the height and density variances proposed do not respect this character and thus do not meet the intent of the Official Plan and zoning by-law as required by the *Planning Act*. Therefore, these variance requests must fail.

Decision and Order

The variances are not authorized. The Committee of Adjustment decision is set aside.



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Ted Yao
Panel Chair, Toronto Local Appeal Body