

# DECISION AND ORDER

**Decision Issue Date**      Tuesday, March 22, 2022

PROCEEDING COMMENCED UNDER section 45(12), subsection 45(1) and subsection 45(2)(a)(i) of the Planning Act

Appellant(s): Anne Yan

Applicant: Richard Wengle Architect Inc

Property Address/Description: 205 Heath St

Committee of Adjustment Case File Number: 20 189507 STE 12 MV (A0783/20TEY)

TLAB Case File Number: 21 130097 S45 12 TLAB

**Hearing Dates:**      Dec 7, 17, 2021, Jan 12, 25, Feb 22, 2022

**DECISION DELIVERED BY:** T. Yao

## REGISTERED PARTIES AND PARTICIPANTS

Applicant	Richard Wengle Architect Inc
Appellant/ Party/ Owner	Anne Yan
Appellant's Legal Rep	Matthew Lakatos-Hayward
Planner	Jane McFarlane
Arborist	Sebastian Bravo
Participant	Lee Weston
Party	Audrey Loeb
Ms. Loeb's Legal Rep	Robert Brown
Planner	Terry Mills
Participant	Daniel Wengle
Participant	Noreen Taylor

## INTRODUCTION

Anne Yan wishes to demolish a house at 205 Heath St West and build a new one. If redeveloped, her house would become a new, architecturally designed dwelling in a prime residential district. Ms. Yan's project originally required 13 variances. On March 3, 2021, the Committee of Adjustment refused her application. She appealed and so this matter came to the TLAB. In September 2021, she gave notice of amended

plans in which some variances were reduced or eliminated. She now seeks the seven variances set out in Table 1 below:

<b>Table 1. Variances sought for 205 Heath St W</b>			
Variances from By-law 569-2013			
		Required	Proposed
1	Rear deck height	1. Be at the same level as access floor. 2. May extend 2.5 m at any height above ground. 3. Portion beyond 2.5 m must be no higher than 1.2 m above the ground	A portion 6.26 m from rear main is 1.6 m above the ground (Requirement 3; reduced from 6.57 m)
2	Height	11 m	11.91 m (reduced from 12.27 m)
3	Front door sill	1.2 m above established grade	1.73 m
4	Building length	17 m	23.8 m (reduced from 24.54 m)
5	Building depth	19 m	23.8 m (reduced from 24.32 m)
6	Floor Space Index	0.35 times the lot area	0.80 (reduced from 0.87 times the lot area)
Variances from By-law 438-86 <sup>1</sup>			
7	Height	11 m	11.97 m (reduced from 12.33 m)

<b>Table 2. Variance requests new eliminated</b>			
1	Rear deck; east sideyard setback	1.5 m	1.37 m
2	Main wall heights	8.5 m	8.58 m (front) and 11.72 m (rear)

<sup>1</sup> By-law 438-86 is the former City of Toronto Zoning By-law. The current by-law 569-2013 is still under appeal, and since plan examiners test the application under both the new and former by-law this creates an additional variance request because the rules on height differ under the two by-laws.

3	Side yard setback	1.5 m	Now 1.62 m (was 1.22 m from east side lot line)
4	Front porch encroachment	1. May encroach 2.5 m so long as condition #2. Is met; Condition 2. May not encroach into side yard setback of 1.5 m	Now 1.58 m from west side lot line (was 1.44 m from side lot line)
5	Rear yard setback for cabana	2 m	0.66 m

### **Applicant's recent changes**

Table 1 shows all the variances except front door sill height have been reduced since the Committee of Adjustment decision. Section 45(18.1.1) of the Planning Act allows me to find that a change in plans need not be recirculated if I find the change is a minor one. The relevant case law<sup>2</sup> suggests that if the change is downward, it will be considered minor. If the variances had been granted, I would have made this order.

### **Right to develop**

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

### **MATTERS IN ISSUE**

The Provincial Policy Statement and the Greater Golden Horseshoe Growth Plan must be considered, but they contain a high level of generality. I find they do not have an application to the physical dimensions of a single lot development in a settlement area; i.e., within urban boundaries and serviced by municipal systems.

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

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<sup>2</sup> *Bickham v. Hamilton (City)*, 2016 CanLII 72356 (ON LPAT) "The Board found that the second variance of the side yard would, escalate, rather than diminish, the potential impact of the sunroom addition, an outcome clearly at odds with the intent and purpose of s. 45(18.1.1) . [...] *Serpa v Toronto (City)*, 2017 CanLII 74744 (ON LPAT) "This revision to the variances, pursuant to s. 45(18.1.1) of the Act was allowed because it involved a reduction of the requested variances. . ." *Dong v. Toronto (City)*, 2016 CanLII 8496 (ON LPAT) The Board finds that as the application as modified, represents a betterment in the relief being sought, pursuant to s. 45(18.1.1) of the Planning Act , ("Act ") no further notice is required. [...] The Board explained that not only is this common practice, but it is also something that is permitted by the Act (s. 45(18.1.1) ).[...]

- 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.

## **EVIDENCE**

The planning witnesses were Ms. McFarlane, Ms. Yan's planner, and Mr. Mills, Ms. Loeb's planner, both of whom I qualified as able to give opinion evidence in planning matters. I also qualified Mr. Bravo, the owners' arborist, as able to give opinion evidence in the field of arboriculture.

The principal opposition to Ms. Yan comes from Ms. Loeb, the rear yard neighbour. She retained Mr. Mills as her planner as well as Mr. Brown, her legal representative. Other neighbours, who were concerned about the density, were Ms. Taylor, who lives across the street and Mr. Weston of Parkwood Ave, around the corner from Ms. Yan. These persons did not retain planners or lawyers. The next-door neighbour, at 201 Heath St, and the City of Toronto did not participate in this hearing.

I attended at the subject property, not for purposes of gathering evidence, but for context to properly appreciate the evidence given at the hearing.

## **ANALYSIS, FINDINGS, REASONS**

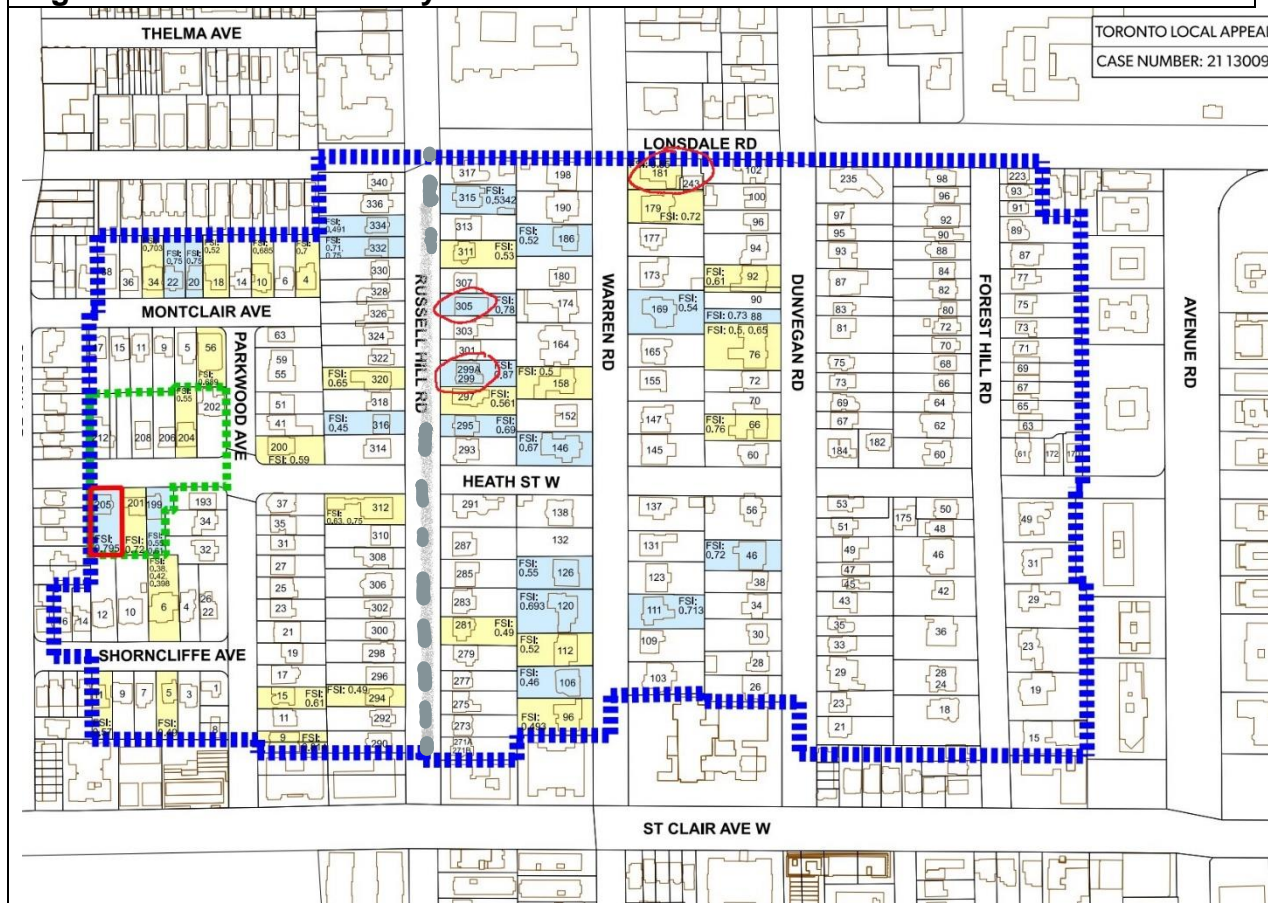
S. 4.1.5 of the Official Plan of the City of Toronto requires that the development to "respect and reinforce the existing physical character in the neighbourhood"<sup>3</sup>. In this test, the "prevailing heights" and "prevailing density" of nearby residential properties are specifically mentioned. Ms. McFarlane said the proposed house is about a metre lower than the next door house at 201 Heath St, an important comparable, and so I find that the height "fits in" with the character of the neighbourhood. However, density is a less straightforward matter.

Ms. McFarlane, Ms. Yan's planner, set out the boundaries for her "geographic neighbourhood". It is roughly north of St Clair, from Spadina to Avenue Road. Frontages on both of those streets are excluded. Her study area is shown in Figure 3 and contains about 228 properties. I accept this as the target neighbourhood to ascertain the existing physical character for the purpose of s. 4.1.5.

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<sup>3</sup> Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular... (c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;

Figures 3. McFarlane Study area

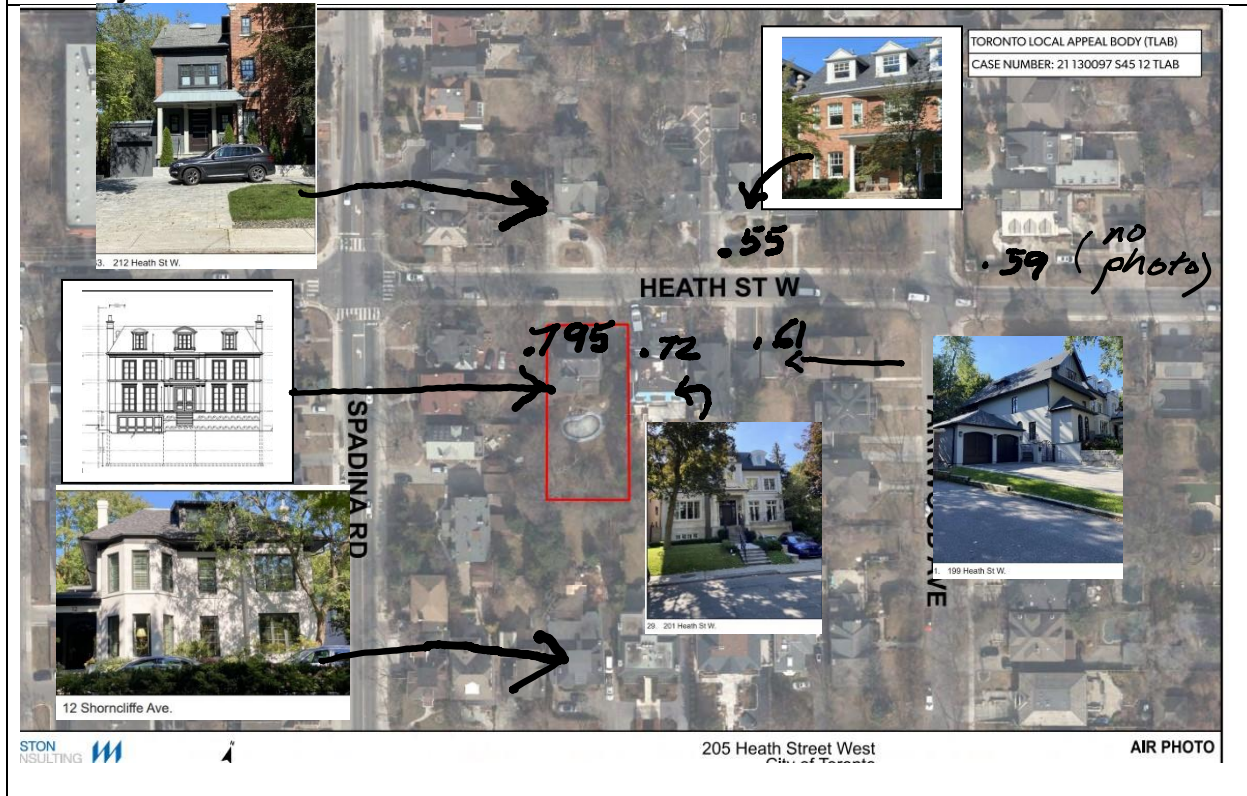


Mr. Mills' study area is a subset of Ms. McFarlane's — essentially the western half, with his boundary running down the centre of Russell Hill Road. This contains about 84 properties, although there are other minor differences. As a result, he only needed to analyze the data Ms. McFarlane already gathered, instead of creating and analyzing a different set of Property data.

The reason for exclusion of the eastern half, Mr. Mills said, is because it was formed from a different plan of subdivision, with larger lots. I find this is true; for example, that there are 24 properties on the west side of Russell Hill Rd (in his study are) and 16 for the similar two blocks on the west side of Warren Rd (outside). I have circled the three most dense properties as found by Ms. McFarlane; they all are in the excluded part. However, I used both study areas in coming to a decision. Both gave useful information.

### The photographs

**Figure 4 Aerial of immediate study area with photos of nearby properties with density increases**



The immediate study area is largely common to both planners; Figure 4 shows four of the eight houses. Ms. Yan's proposed front elevation is also included, together with 12 Shorncliffe, Ms. Loeb's house. In footnote 5, I quote Ms. McFarlane's answer to Mr. Brown's question about "immediate context"; Ms. McFarlane's answer referred to the larger neighbourhood, so I assume she sees no difference between the two neighbourhoods.

Photographs and her walking tour formed the basis of Ms. McFarlane's "qualitative" analysis of neighbourhood character. She noted a great deal of reinvestment in the lower Forest Hill area, with newer homes retaining the "same look and feel" of the older homes, particularly in terms of architectural style.<sup>4</sup>

<sup>4</sup> Both the new and older dwellings are of a very large size, two and three stories in height. There's no um significant departure in this neighbourhood from original dwellings being for example one story bungalows and a lot of the newer contemporary homes being three stories. This is a neighborhood of very large houses to begin with. However, in terms of the difference .... it's really just some variation in terms of the architectural style, although a lot of the more contemporary houses use a lot of the materials that are um, I wouldn't say historic but are represented in this neighbourhood. I mean it's a Forest Hill neighbourhood; like the stone and the brick.

Her core “quantitative” conclusion<sup>5</sup> is that there are 54 “over density” decisions, and in her view, combined with her “qualitative” judgement, led her to support the variances.

### **Goad’s Atlas and subsequent conclusions**

Mr. Mill’s began his analysis from a historical perspective (Figure 5).

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You can just see in terms of the windows, some of the use of the materials and colours is more modern than the landscaped yards. However, there is a respect that a lot of the newer houses have for the traditional character in this neighbourhood by incorporating these traditional architectural materials into it.

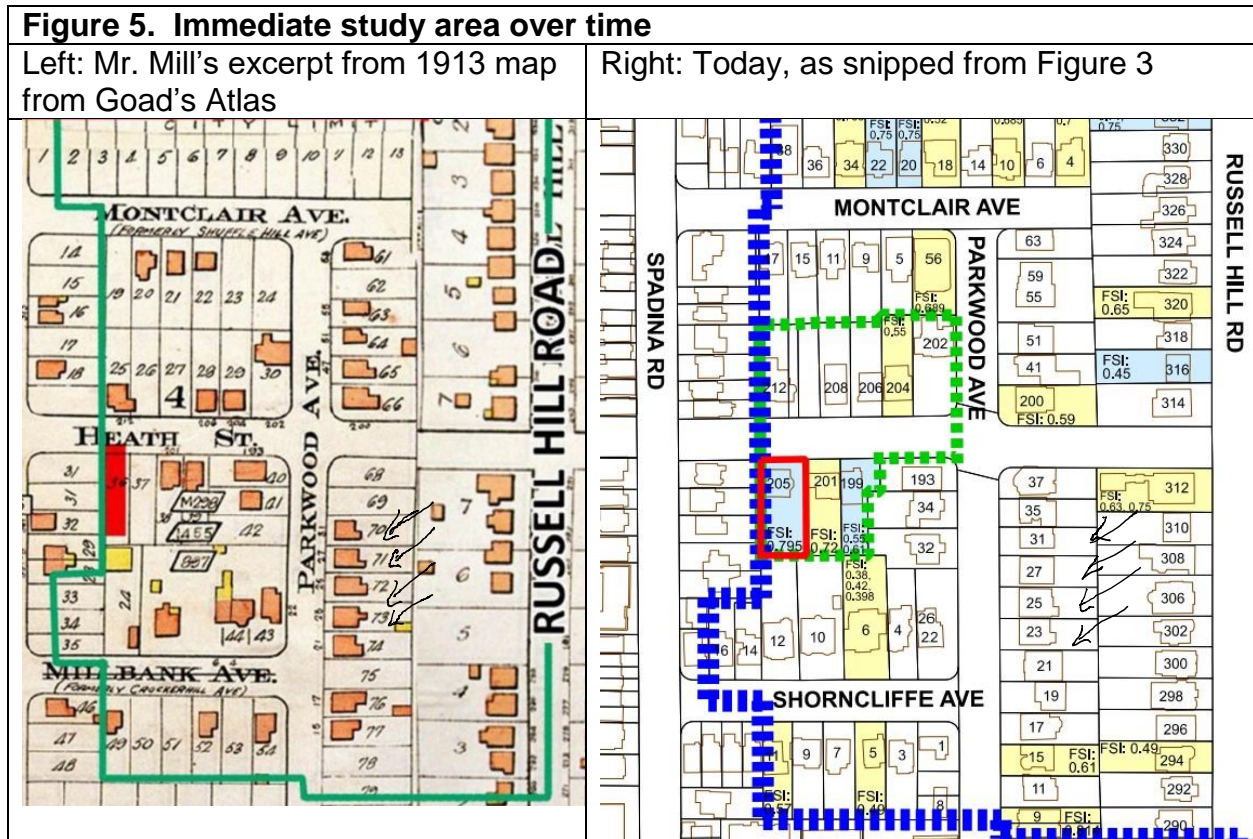
The next section of my evidence is going to turn to the quantitative measure. . . It’s not just about the numbers, when you are evaluating a neighbourhood, it’s very much about the feel and the experience and the character . . . and this has been one . . . from the onset of gradual investment, there’s been at least a couple of decades or reinvestment, in the dwellings, improving them, new dwellings, extensions, additions, very common for rear additions to a lot of dwellings, families love that family room, that’s behind the kitchens, to pop up and out. It is my opinion that the proposed variances and resulting development is consistent with the prevailing height, massing, scale and density[. . . [the photographs show] large two and three storey dwellings sitting on lots with manicured yards, with elevated front entrances, with these traditional architectural features, with facades of brick and stone, which I know don’t speak very much to height, massing and scale, but it does contribute to the scale of dwellings within this neighbourhood. Another measure I used, which contributes to my evaluation, is numeric, quantitative numbers, and that’s pulled through previous applications in this neighbourhood. Now I’m going to move us to [my map of all density applications on individual lots in the larger neighbourhood]. It’s also nice to see on the map in terms of where these properties are located, which have sought and seek approval for density variances above what the by-law stipulates.

<sup>5</sup> Mr. Brown: Variance number, 6, of course we’re now dealing with an issue of significant concern in the neighbourhood. . . . Your client is asking for what, in this new proposal?

Ms. McFarlane: We’re asking for 0.80 , that is to accommodate a slight rounding up, from 0.798, I believe.

Mr. Brown: So, now another question would be what is the prevailing FSI in the immediate neighbourhood?

Ms. McFarlane: So, the neighbourhood, the geographic neighbourhood that I’ve selected contains many variances that exceed the 0.35 FSI; or many dwellings that exceed the 0.35 FSI value. Um it’s not correct to just count the number and say is it above 50% or below 50% when forming an opinion on what “prevailing” is. It’s also not appropriate to take an average of all the approvals, because we don’t have data on some of the dwellings. So, as part of forming an opinion on what prevailing density is, you use qualitative information from a site visit as well as quantitative which proves that there are about 54 dwellings that. . . sorry 54 decisions . . . about 50 dwellings in the neighbourhood that have approvals which exceed the 0.35 density requirement.



The 1913 map shows #s 205 (Ms. Yan's house) and 208 Heath St (Ms. Taylor's) had yet to be built. The rough shapes of #212 (lot 25, circular driveway with car in front), 202 and 193 (the corner properties) are similar to the present day map. I also looked at other properties on the east side of Parkwood, I find there is enough similarity in shapes to conclude that, despite Ms. McFarlane's assertion of continuous regeneration, there are some properties whose building outlines have not changed significantly in over a hundred years.

Ms. McFarlane's map (Figure 3, page 5 and above Figure 5) colours the properties with Committee of Adjustment density increases.<sup>6</sup> I note many lots have no colour, including for example the ones for which I drew arrows.

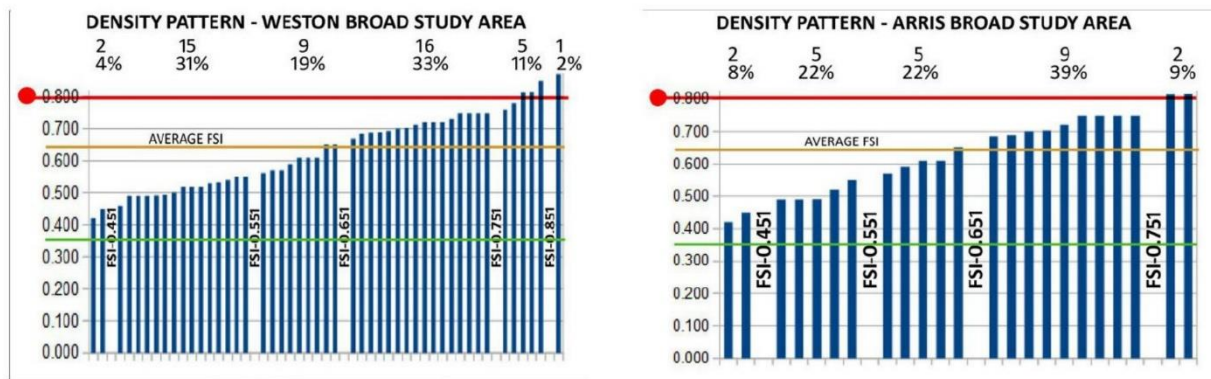
The immediate neighbourhood consists of eight houses, five on the north side and three on the south side. Since there have been four Committee of Adjustment approvals for these eight houses, Ms. McFarlane suggested that "at least half" have

<sup>6</sup> The different colours refer to by-laws 569-2013 and 438-86. I have ignored the difference between colours.

over-density limit approvals and therefore such densities form part of the character of the immediate neighbourhood context.<sup>7</sup>

Ms. McFarlane is clearly aware of the difference between “approvals” and “dwellings”. The “four approvals” may be of interest to a decision maker who is concentrating on the behaviour of the Committee of Adjustment. I am more interested in how many houses are built that have a density over 0.35.

**Figure 6 Mills chart of Mills and McFarlane broader neighbourhoods**



Number 199 Heath had two approvals: one with a 2014 file number, for 0.61, and for 0.55 the next year. Two approvals where the sought-for density goes down is unusual, and obviously the owner's motives can only be speculated at. Whatever the reason, they could only build one house. That one house formed part of the character; the two decisions did not create two houses. I have treated this a single approval for the higher (earlier) variance of 0.61 and thus there are three dwellings out of eight that received a density increase in the relevant time period and three is not “prevailing”.

<sup>7</sup> ... In addition to the large number of properties which are coloured and give you an indication that they, ah, that the dwellings ... on the property exceed, ... 0.35, we can look at um well three of the additional six properties in the immediate context have sought density for density, in particular number 201 at ... 0.72 FSI, ... in addition. ... [number] 199 received two variances [0.55 and 0.61], and then across the street at number 204, a variance was sought and approved at 0.55 FSI. So, four approvals for three properties. ... plus the application obviously for the subject property, which is more than half of the properties that constitute the immediate context. So, with respect to density in the immediate context, I'd say it's one of densities that, ... the prevailing densities exceed the zoning by-law versus comply with it, in the immediate context. And that would be my similar opinion in terms of the broader context, that there are many properties, as you can see highlighted, which exceed zoning, the density provisions in both applicable zoning bylaws.

Mr. Mills did not produce his own spread sheet but reworked Ms. McFarlane's numbers. In Figure 6<sup>8</sup> he sorted and grouped his data (left, 23 properties), and hers (48 unique addresses). Either chart shows the proposed density of 0.80 (heavy horizontal line) is at the extreme end of density decisions. I now "drill down" to look at the McFarlane addresses that received density increases over 0.70.

**Figure 7 Highest densities in McFarlane neighbourhood**

1	299 Russell Hill Rd	2021	0.87
2	181 Warren Ave	2012	0.85
3	9 Parkwood Ave (North Lot Part 1 & 2)	2012	0.815
4	9 Parkwood Ave (South lot Pt 3&4)	2012	0.814
5	305 Russell Hill Rd	2013	0.78
6	70 Dunvegan)	2013	0.76
7	20 Montclair Ave	2016	0.75
8	22 Montclair Ave (Part 1)	2020	0.75
9	312 Russell Hill Rd (2.0)	2010	0.75
10	332 Russell Hill Rd	2019	0.75
11	88 Dunvegan Rd	2018	0.73
12	201 Heath St W	2010	0.72
13	179 Warren Ave	2007	0.72
14	46 Dunvegan Rd	2013	0.72
15	111 Warren Rd	2018	0.713
16	332 Russell Hill Rd	2018	0.71
17	34 Montclair Ave	2012	0.703
18	4 Montclair Ave	2009	0.7

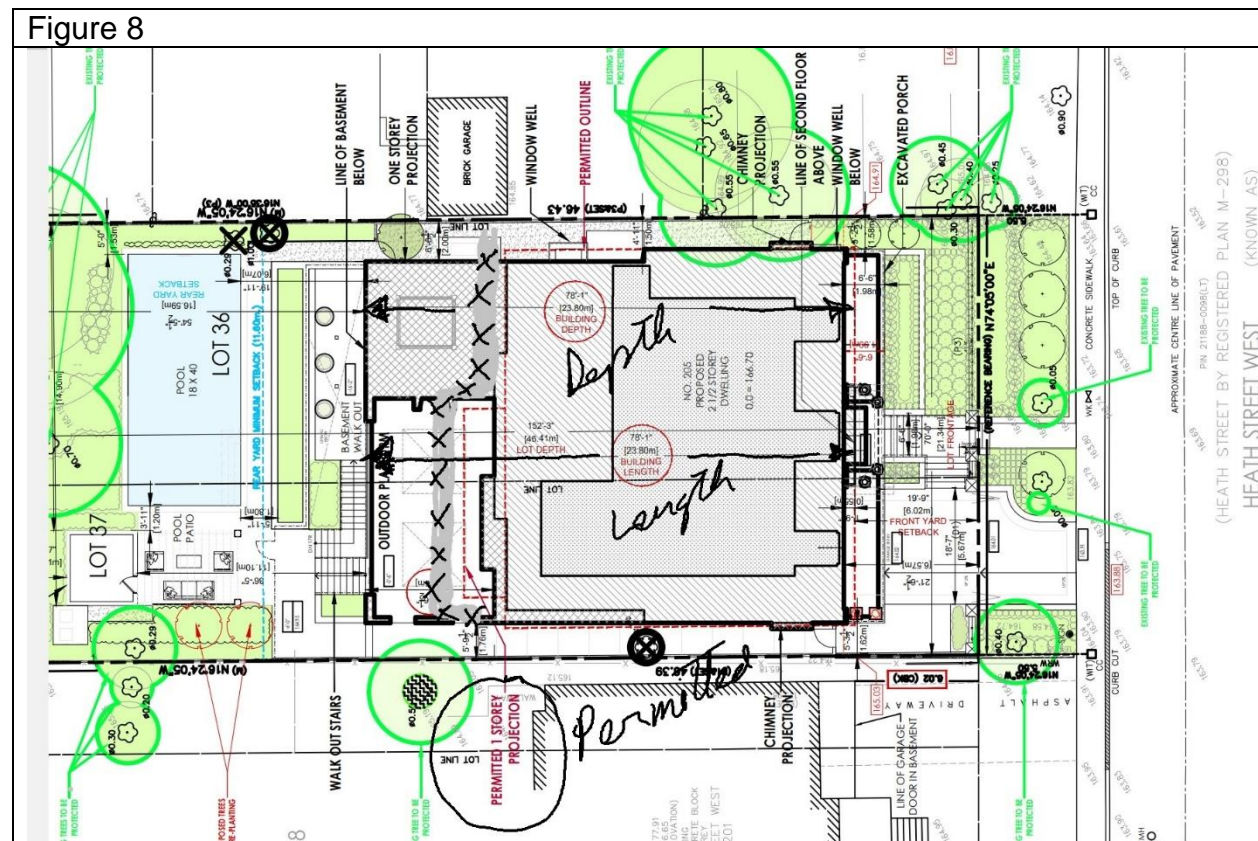
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<sup>8</sup> Mr. Mills calls Ms. McFarlane's data set "Weston", after her firm's name. His data on the right is labelled "Arris", his firm name.

Figure 7 shows two highest are 299 Russell Hill Rd and 181 Warren Road, with number 5 being 305 Russell Hill Rd, all three are circled in Figure 3. Numbers 3 and 4 are for 9 Parkwood. This is a 2012 severance of a lot one property away from a midrise apartment at 2.00 x lot area on St Clair. The South Forest Hill residential study area is 0.35 x lot area. I do not feel this severance is a reasonable comparable. Thus, the Yan proposal would be the 3<sup>rd</sup> highest density out of 200 or so properties, a good number of which retain their original outline.

I find that a density of 0.80 does not fit in to either neighbourhood. The neighbours took a public policy viewpoint, that is that the proposal does not maintain the intent of the Official Plan, which is for gradual, sensitive change. They accept that there will be some development on this lot, but not at such a high density. While there is no evidence for 0.80 there may be some evidence that a density in the low 70's or high 60's is more respectful, but of course I cannot bind any subsequent decision maker.

## Length and Depth



In Figure 8 I snipped the September site plan which shows the two 23.8 m length and depth variances. Ms. McFarlane said that the excess was caused by a rear one storey family room on one side of the rear part of the building. Mr. Mills said that the architect

had drawn in a “permitted 1 storey projection”; a succinct representation of a permitted exception to Regulation 10.20.40.20 Building Length.<sup>9</sup> Since both the permitted length and the one storey exception as illustrated by the architect occur in the same clause, it is impossible not to conclude that this is the zoning intent. (The permitted exception shape is drawn in with x’s). Ms. Yan’s one storey family room ignores this Regulation and I find that this is not minor nor desirable for the appropriate development of the lot.

## **DECISION AND ORDER**

The variances are not authorized.



**X**

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Ted Yao  
Panel Chair, Toronto Local Appeal Body

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<sup>9</sup> 10.20.40.20 Building Length

(1) maximum building length if required lot frontage is in specified range in the RD zone with a required minimum lot frontage of 18.0 metres or less, the permitted maximum building length for a detached house is 17.0 metres.

(2) one storey extension to building length if required lot frontage is in specified range in the RD zone, despite Regulation 10.20.40.20(1), on a lot with a required minimum lot frontage of more than 12.0 metres to 18.0 metres, a detached house may extend beyond the permitted maximum building length by a maximum of 2.0 metres, if the extended part:

- (a) has a maximum height of 5.0 metres and one storey;
- (b) is no wider than 50% of the width of the building at its widest point; and
- (c) is at least 3.0 metres from each side lot line