

# INTERIM DECISION AND ORDER

**Decision Issue Date** Monday, February 14, 2022

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): MOHAMMAD MAHMUDUL ISLAM, FATEH ALAMGIR

Applicant(s): ARC DESIGN GROUP

Property Address/Description:

Committee of Adjustment File 89-91 MCCOWAN RD

Number(s): 20 150768 ESC 20 CO, 20 179059 ESC 20 CO, 20 150776 ESC 20 MV, 20 150783 ESC 20 MV, 20 150787 ESC 20 MV

TLAB Case File Number(s): 20 225354 S53 20 TLAB, 20 225355 S45 20 TLAB, 20 225356 S45 20TLAB, 20 225357 S45 20 TLAB, 20 225358 S53 20 TLAB

**Hearing date:** July 8, 2021, September 10, 2021

**Deadline Date for Closing Submissions/Undertakings:** October 15, 2021

**DECISION DELIVERED BY S. GOPIKRISHNA**

## REGISTERED PARTIES AND PARTICIPANTS

Applicant	ARC DESIGN GROUP
Owner/Appellant	MOHAMMAD MAHMUDUL ISLAM
Appellant	FATEH ALAMGIR
Appellant's Legal Rep.	AMBER STEWART
Party	CITY OF TORONTO

Party's Legal Rep.	MARC HARDIEJOWSKI (CITY OF TORONTO)
Party	TANYA BAKSH
Party	GLENDA COWIESON
Participant	ALAN BURT

## **INTRODUCTION AND BACKGROUND**

Mahmudul Mohammed Islam is the owner of the properties at 89 McCowan Road, and 91 McCowan Road, located in Ward 20 (Scarborough- Southwest), of the City of Toronto . He applied to the Committee of Adjustment (COA) to create 3 lots, from the existing two lots at 89 and 91 McCowan Road, such that the third, new lot would face Martindale Road. He also planned to construct a new dwelling on the new lot facing Martindale Road, while adding an integral garage each, at the rear of the two existing houses facing McCowan Road.

The COA heard the Application on November 24, 2020, and refused the Application in its entirety. Mr. Islam appealed the decision of the COA to the Toronto Local Appeal Body (TLAB) on November 30, 2020, which then scheduled a Hearing on July 8, 2021. The City of Toronto, the Cliffcrest Scarborough Village Southwest Residents Association and Ms. Glenda Cowieson, one of the neighbours, elected for Party Status, while some of the other community members elected for Participant status.

## **MATTERS IN ISSUE**

The details of the consent to sever the existing lots at 89-91 McCowan, into three lots, with the new lot facing Martindale Road, as well as the requested variances to modify the existing dwellings by way of an integral garage at the rear of the houses, at 89 and 91 McCowan Road, as well as variances for the house to be built facing Martindale Road, are recited in Attachment A, which is attached to this Decision.

## **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').

### **Consent – S. 53**

TLAB must be satisfied that a plan of subdivision is not necessary for the orderly development of the municipality pursuant to s. 53(1) of the Act and that the application for consent to sever meets the criteria set out in s. 51(24) of the Act. These criteria require that " regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

- (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2 of the Planning Act;
- (b) whether the proposed subdivision is premature or in the public interest;
- (c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
- (d) the suitability of the land for the purposes for which it is to be subdivided;
  - (d.1) if any affordable housing units are being proposed, the suitability of the proposed units for affordable housing;
- (e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;
- (f) the dimensions and shapes of the proposed lots;
- (g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;
- (h) conservation of natural resources and flood control;
- (i) the adequacy of utilities and municipal services;
- (j) the adequacy of school sites;
- (k) the area of land, if any, within the proposed subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes;
- (l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and
- (m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41 (2)

of this Act or subsection 114 (2) of the City of Toronto Act, 2006. 1994, c. 23, s. 30; 2001, c. 32, s. 31 (2); 2006, c. 23, s. 22 (3, 4); 2016, c. 25, Sched. 4, s. 8 (2).

### **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**

At the Hearings held on July 8, 2021 and September 10, 2021, the Applicant was represented by Ms. Amber Stewart, a lawyer, and Mr. Jonathan Benczkowski, a planner. The City of Toronto, also a Party to this Proceeding, was represented by Mr. Marc Hardiejowski, a lawyer; the City, is noted herewith, did not call any Witnesses. The other Parties consisted of Ms. Tanya Baksh (who represented the Cliffcrest Scarborough Village Southwest Residents Association,) and Ms. Glenda Cowieson, who lives in the vicinity of the Site. By way of an editorial note, the addresses of the community members who elected for Party, or Participant status, are deliberately not listed, in the interests of privacy.

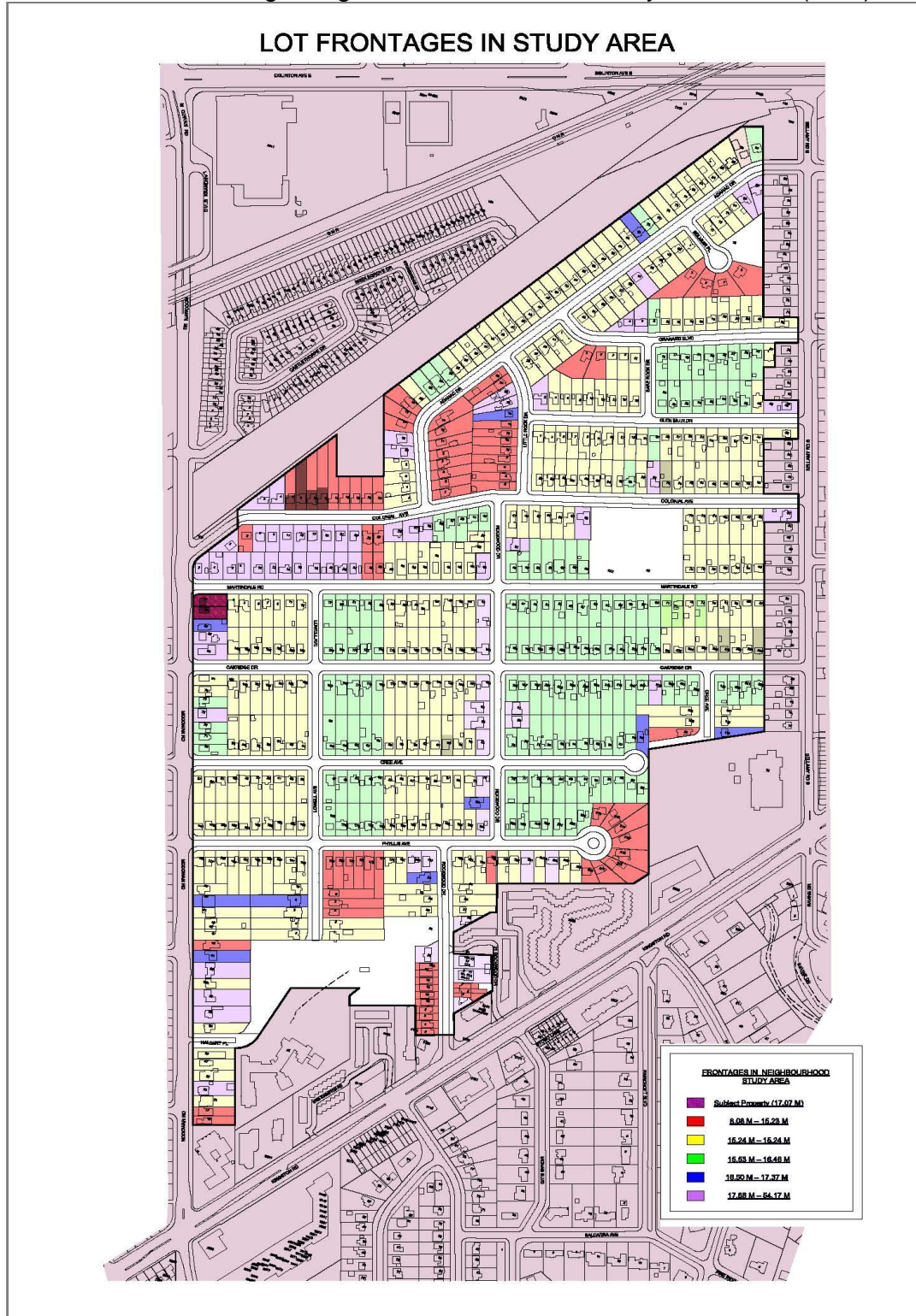
Mr. Benczkowski was affirmed, and recognized as an Expert Witness in the area of land use planning. His evidence consisted of the following:

The Study Area reviewed for this proposal is bounded by Adanac Road to the north, Phyllis Avenue to the south, Bellamy Road to the east, and McCowan Road to the west, as shown on the next page of this Decision (Page 5).

The properties in the study area all have the same Zoning By-law designation – RD Residential Detached, (f15.0; a557)( X 187) under Zoning By-law 569- 2013. Mr. Benczkowski stated that in accordance with the new Official Plan (i.e. what was formerly OPA 320), he had also reviewed a location more proximate to the Subject Property, referred to as the Immediate Context. He said that the study area is comprised of detached single-family dwellings, and that there is considerable diversity in the style of dwellings in terms of the built form. Original dwellings are often bungalows with driveways leading to parking areas in the rear yards, while newer replacement dwellings, which are scattered throughout the study area, are larger in both living space, as well as massing. Newer dwellings typically have an integral garage, and feature flat roof architectural styles, or have small, pitched mansard style roofs, symptomatic of a neighbourhood that is witnessing “a regeneration of the housing stock over the last 10 or so years”.

**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna**  
**TLAB Case File Number: 20 225354 S53 20 TLAB, 20 225355 S45 20 TLAB, 20**  
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Mr. Benczkowski then discussed the compatibility between the proposal, and the higher level Provincial Policies, beginning with the Provincial Policy Statement (PPS). He said



**DIAGRAM 1- STUDY AREA WITH LOT SIZES**

The Property is designated *Neighbourhoods* in the Official Plan, which permits

that the proposed minor variances are consistent with the policy direction in the PPS, which is to provide “policy direction on matters of provincial interest related to land use planning and development”, by virtue of their focus on intensification. He also discussed how this proposal is consistent with the applicable policies of the Growth Plan, “which promotes intensification, and the achievement of complete communities, with a mix of housing options to accommodate households of different sizes, at all stages of life”, again by virtue of its focus on intensification.

Mr. Benczkowski then discussed the relationship between the proposal, and the Official Plan. He said that the intent of the Official Plan is to ensure that new development does not propose changes to the neighbourhood that are out of keeping with the existing physical character of other developments within the area. Mr. Benczkowski stated that the Official Plan recognizes that neighbourhoods will experience physical change, and that they are not frozen in time. The proposal respects and reinforces the physical character of the neighbourhood, which includes a variety of architectural forms as well as several replacement dwellings that have become part of the fabric of the neighbourhood.

He referred to Built Form Policy 3.1.2, and explained how the variances fulfill these policies, on the basis of the test that there is an impact, such that it is not tantamount to unacceptable, adverse impact.

Lastly, he explained the compatibility between the proposal, and Policy 4.1.5 (Development of Neighbourhoods). He said that the proposal, if approved, would result in a new residential dwelling, which will front onto Martindale Road, whose impact “is no different from that of other properties, which already front onto Martindale Road”. He interpreted the absence of a request for minimum lot frontage in this proposal, to mean that the “test of prevailing size and configuration of lots was satisfied.”

Mr. Benczkowski asserted that the “prevailing characteristic in terms of heights, massing, scale and density is mixed”, before explaining how the proposal satisfied pertinent sub-sections of Policy 4.1.5:

*c) prevailing location, design and elevations relative to the grade of driveways and garages* – The proposed driveway features a positive slope to access an integral garage for the proposed dwelling on Martindale Road. The proposed location of the garages at 89 and 91 McCowan Road are in keeping with the prevailing location of other properties along McCowan Road.

*d) prevailing patterns of rear and side yard setbacks and landscaped openspace* – The proposed dwelling is built as per the required rear and side yard setbacks from the Zoning By-law. The retained two dwellings do not create any rear yard setback requirements from the proposed creation of the new lot. 91 McCowan Road requests a 1% reduction in the rear yard soft landscaping, thereby fulfilling the intent and purpose of the Official Plan.

Based on this evidence, Mr. Benczkowski concluded that the requested variances satisfied the test of maintaining the intent and purpose of the Official Plan.

The relationship between the proposal, and the intention and purpose of the Zoning By-Law was discussed next. The specific performance standards were discussed as follows:

*FSI* – The general intent and purpose of the density standard is to ensure buildings within that designated zone are all compatible in scale and massing. The request for an increase in FSI is not related to reduction in any setbacks or increased building length, but a function of the reduced lot area. Given that there is no change to the proposed scale and massing, as perceived from Martindale Road, the proposed FSI is consistent with intent and purpose of the By-Law.

*Eaves Encroachment* – Mr. Benczkowski stated that the general intent and purpose of the eaves' setback provision, is to ensure that the eaves do not encroach onto the property line. He said that the proposal satisfied this requirement because the variance helps maintain appropriate, and adequate separation.

*Maximum Driveway Width* – The general intent and purpose of the maximum driveway provision is to ensure that “ample greenspace is provided”. Given that the proposed driveways exists, there will be no change to the width of the driveway, or any changes to the greenspace, as a result of which the intent and purpose of this By-Law is upheld.

*Rear Yard Landscaping*- The general intent and purpose of the rear yard landscaping requirement is to ensure there is an adequate amount of soft landscaping to facilitate proper drainage of storm water. The proposal requests relief for 1% of the required landscaping, which is negligible, and not perceptible from the road, which means that the variance

*Lot Area* - The general intent and purpose of the lot area provision is to ensure that neighbourhoods maintain a lot pattern that is appropriate for the provision of a functional dwelling, and maintain lot characteristics that are contextually appropriate from the street and the neighbourhood. From a neighbourhood character perspective, lot frontages are more readily perceived from the street than lot area. All three proposed lots do not request relief for any built form variance that from the streetscape, are functional and appropriate given the proposed lot areas.

*Eaves Encroachment* - The general intent and purpose of the eaves' setback provision is to ensure that they do not encroach onto the property line, which demonstrates that there is adequate separation.

*Maximum Driveway Width* – The general intent and purpose of the maximum driveway provision is to ensure that ample greenspace is provided. The proposed driveway at 89 and 91 McCowan exist today, and no change is being proposed.

*Rear Yard Landscaping-* The general intent and purpose of the rear yard landscaping requirement is to ensure there is an adequate amount of soft landscaping to facilitate proper drainage of storm water. The proposal requests relief for 1%, which in my opinion maintain the general intent and purpose.

Based on this analysis, Mr. Benczkowski concluded that the proposal fulfilled the intention and purpose of the Zoning By-Law.

Mr. Benczkowski next addressed the question of how the proposal fulfils the test of minor. He said that given the “modest dwelling size”, any impacts resulting from shadowing will be minor in nature, and reflects the impacts already experienced in the neighbourhood. The proposed dwelling seeks approval for a two-storey dwelling with an integral garage, which according to Mr. Benczkowski is the built form for newly constructed dwellings in the neighbourhood. He asserted that the “proposal both numerically and qualitatively meets the test for minor”.

Lastly, Mr. Benczkowski described how the proposal met the test of appropriate development. He said that the proposal will result in the creation of three dwellings, such that they are compatible with what exists in the community, and create no adverse impacts. The proposal will allow for the development of a functional family home for the owners, which means that the house fulfills the test of appropriate development.

On the basis of this evidence, Mr. Benczkowski concluded that the variances satisfied that the variances satisfied the test of appropriate development.

Mr. Benczkowski next spoke to how the proposal satisfied relevant criteria under Section 51(24) of the Planning Act. He addressed

c) shapes and dimensions of the lots

f) compatibility between the proposal and the Official Plan

The proposal will result in the creation of three rectangular lots which have the same shape as the existing two rectangular lots. Mr. Benczkowski referred to the two tables presented below, and explained how the proposal fits the test regarding the dimensions.

#### **LOT FRONTAGE DISTRIBUTION**

<b>Lot Frontage</b>	<b>Total Numbers of Lots</b>	<b>Percentage of lot frontages in Study Area</b>
<b>8.08- 15.23</b>	<b>74</b>	<b>12.31%</b>
<b>15.24</b>	<b>302</b>	<b>50.52%</b>
<b>15.53- 16.46</b>	<b>145</b>	<b>24.13%</b>



<b>16.5- 17.37</b>	<b>12</b>	<b>2%</b>
<b>17.68- 19.89</b>	<b>50</b>	<b>8.32%</b>
<b>20.42- 54.17</b>	<b>18</b>	<b>3%</b>
<b>TOTAL</b>	<b>625</b>	<b>100%</b>

## **LOT AREA DISTRIBUTION**

<b>Lot Area Ranges</b>	<b>Total Number of Lots</b>	<b>Percentage of Lots in Study Area</b>
<b>265.89- 514.91</b>	<b>18</b>	<b>31.2%</b>
<b>527.22- 546.59</b>	<b>5</b>	<b>.87%</b>
<b>557.42- 696.22</b>	<b>53</b>	<b>9.19%</b>
<b>696.77</b>	<b>195</b>	<b>33.8 %</b>
<b>696.3- 748.48</b>	<b>149</b>	<b>25.82 %</b>
<b>750.09- 894.93</b>	<b>105</b>	<b>18.2 %</b>
<b>904.08- 1776.77</b>	<b>52</b>	<b>9%</b>
<b>TOTAL</b>	<b>577</b>	<b>100%</b>

Mr. Benczkowski's evidence focused on the visibility of the frontage of a lot- he stated that "the lot- frontage is the most discernable feature of a lot from the street". On the basis of the statistical tables above, this is then established as the prevailing type. The frontage of 15.24 metres corresponds to the areas of 696.77 sq. metres, as well as the category of lots with frontages of 696.3- 748.48 square metres, which account for a total of 58% of the lots in the area. He added that the lots with large areas, exemplified by the ones in excess of 904 sq.m. lie mainly along the exterior of the neighbourhood, and not on the interior. These large lots on the exterior of the neighbourhood are the lots which are ideal for severances.

Through an examination of corner lots in the community, Mr. Benczkowski also demonstrated how the community demonstrated "a pattern of lots, such that a shallower

lot, facing a different street, co-exists with two or more lots facing the perpendicular street". The examples provided were:

- 55 McCowan, a shallow lot facing McCowan Road, whose side yard is adjacent to the three houses at the southeast corner of Phyllis Avenue, and McCowan Rd., namely 145, 145 and 149 Phyllis Avenue. 10 Lowell Avenue, whose side-yard borders three houses at the south west intersection of Phyllis and Lowell Avenues, namely 159, 161 and 163 Phyllis Ave.
- 50 Rockwood Drive, which is wedged between the backsides of 192 and 194 Phyllis Avenue to the South, and 71 and 73 Cree Avenue on the North
- 60 and 62 Rockwood, whose side yards are adjacent to the backyards of 70 and 72 Cree Avenue. On the south, and 191 and 193 Oakridge on the North, on the stretch of Rockwood Avenue between Cree Ave., and Oakridge Ave.
- 102 Cree Drive, whose north side yard, backs onto the back yard of 217- 225 Oakridge Avenue.
- 92 Rockwood Drive whose north side yard borders 41 and 43 Colonial Ave. Its neighbour 90 Rockwood Avenue, has a similar relationship with the backyards of 44 and 46 Martindale Road.
- 33 Granard Boulevard, whose side yard is adjacent to 70 and 68 Bellamy- the formation of 33 Granard Blvd. is the result of severing the rear parts of 68 and 70 Bellamy Road.

By way of an editorial note, I refer to the aforementioned theory of the creation of smaller lots, and their co-existence of small lots and bigger lots in alternating fashion, as the "**2/3 theory**" on a go forward basis, in view of the fact that 2 lots are being combined before being divided into three lots.

On the basis of this evidence, Mr. Benczkowski concluded that the proposal satisfies the test of lots and sizes.

By way of an editorial comment, the evidence regarding the Official Plan is not repeated here since it was discussed during the test respecting how the proposal satisfies the intent, and purpose of the Official Plan.

Mr. Hardiejowski's cross examination focused on the applications of Policies 4.1.6 and 4.1.7 of the Official Plan, which discuss developments on a major street. Mr. Benczkowski's contention was that on the basis of his conversations with City of Toronto staff, the aforementioned Policies provide guidance about how to proceed, even if the third lot, and the house to be constructed on it, did not face the major street in question. Mr. Hardiejowski disagreed with this interpretation, and said that in his opinion, the aforementioned policies did not apply if the development in question, faced the flanking street, as was the case here. However, both agreed that the Policy was still under review. Mr. Hardiejowski's next set of questions focused on the prevailing type of lot sizes on Martindale Road, followed by how the proposed development facing Martindale Road, did not respect the prevailing type. Mr. Benczkowski disagreed with Mr. Hardiejowski's perspective, by opining that the proposed development was consistent with what was found in the "immediate context, which consisted of the portion of Martindale Road, between McCowan Road, and Rockwood Drive". Mr. Hardiejowski

asked if there was a substantial difference between the interior, and the exterior portions of his General Neighbourhood to justify the identification of an “Immediate Context”. to which Mr. Benczkowski disagreed, and maintained that there was a significant difference between the interior, and the exterior of the General Neighbourhood. Lastly, Mr. Benczkowski agreed with Mr. Hardiejowski that 42 Glenmuir was the only example of variances being required to construct a house on a lot resulting from a severance, as opposed to other examples, where houses constructed on new lots created through a consent to sever, without variances.

Ms. Baksh asked Mr. Benczkowski to clarify how the requested lot area respected the “prevailing” lot area, when it was significantly smaller than what the Zoning By-law permitted. Mr. Benczkowski focused on the proposal’s not seeking a variance for the frontage, which “is more perceptible from the road”, and that the frontage, consistent with what already exists on the street, helps the proposal to respect the character of what exists in the community. He also emphasized that the proposal’s not requiring variances with respect to side yard setbacks, meant that the dwelling to be built on the lot “was situated such that it did not result in any adverse impacts on the neighbours, and consequently respects what exists in the community”. Ms. Baksh then questioned Mr. Benczkowski’s classification of McCowan as a “major arterial road”, as opposed to a minor arterial road, to which Ms. Benczkowski confirmed that McCowan is a major arterial road, as per the Official Plan, “though transportation sees this differently”. Mr. Benczkowski conceded that the severance which he had discussed at various stages in this Hearing, was at 42 Glenmuir, and apologized for referring to it as “28 Grenard Road” by mistake.

Ms. Cowieson asked Mr. Benczkowski if the proposed dwelling facing Martindale Road would have any windows facing her house. Mr. Benczkowski explained that there were no windows on the second floor, and only one window in the mud room, ( next to the garage) , sunk into the ground, which have no impact on her property. Ms. Cowieson asked about the impact of the shadows that could be potentially cast by the new house on her property, and pointed out that no shadow studies had been submitted.

Mr. Benczkowski explained that the City did not require the submission of a shadow-study for buildings less than six floors, and reiterated his earlier answer that the house was appropriated on the lot, such that no shadow impacts were expected. With respect to a question about the height of deck, and the impact it would have on the neighbours, Mr. Benczkowski explained how the slope of the ground “was positive from the street to the back of the property”. He said that the slope meant that no more than 2-3 risers were required to access the “deck” from the ground.

The first Witness to speak in opposition to the Appeal was Ms. Tanya Baksh, on behalf of the local Neighbourhood Association. Ms. Baksh described how she had been living in this area since 2005, and how she and her husband had renovated their house, such that no variances were required from the “generous Zoning By-Laws”. She also spoke to how they purchased the bungalow across from their current home, “because she and her husband planned to retire in this community”, and wondered what the impact would

be if a house, such as the one contemplated in the proposal, would be allowed next to the bungalow.

Ms. Baksh said that while she was in support of development and improvements in the neighbourhood, “an increasing amount of developments being proposed in our neighbourhood, are well beyond the By-Laws”. She spoke t about the work of the local Neighbourhood Association, ( i.e. the Cliffcrest Scarborough Village Southwest Residents Association), and her work with the Planning and Development Committee, which was working to “together to preserve the unique nature of our neighbourhoods”.

Ms. Baksh said that the proposed severance of 2 lots into 3 lots, and building a 3<sup>rd</sup> new house at 1 Martindale, “is not keeping with the character of our neighbourhood”. She said that the proposal would create “lot areas much smaller than properties in our area” and significantly interfere with the neighbouring bungalow by “towering over their home, infringing on their privacy, decrease their level of sunlight, tremendously alter the fabric of the neighbourhood”. She thanked the applicants for eliminating many of the variances from before, but asked questions about the precedent set by allowing three lots, which were considerably smaller than what was allowed in the community. She asked if the approval of these three dwellings, would result in the building of “future oversized homes on undersized lots by proposed oversized home on undersized lot with minimal backyard”.

When cross-examined by Ms. Stewart, Ms. Baksh agreed that 33 Grenard Road (which was the result of a consent to sever the property) “fit the community” by not causing any adverse impact. Through the use of pictures from Toronto Maps and Google, Ms. Stewart traced the evolution of 33 Grenard, from the time when it was a part of the backyard of the houses at 68, and 70 Bellamy to the present, where there is a two storey house, on a lot facing Grenard Street- the pictures taken more than 10 years ago showed nothing but shrubs and plants, while the latest picture, as stated earlier in this paragraph, shows a two storeyed house facing Grenard. Ms. Stewart analogized this evolution to what could be expected of the third house to be built at the Site, facing Martindale Road. A similar explanation was also offered in the case of 42 Glenmuir Street, where a smaller lot was created facing Glenmuir Street, though Ms. Baksh opined that the houses at 68 and 70 Bellamy Rd ( the Lots which were severed to create 33 Grenard) , “looked crowded”, and did not have the feel of “spacious lots”, which characterized this neighbourhood.

In response to concerns about the interspersing of large lots with small lots, Ms. Stewart demonstrated the example of houses at the intersections of Rockwood Avenue with Colonial Avenue, and Martindale Road, and drew attention to “the lack of a jarring visual impact” between these houses- Ms. Baksh agreed with Ms. Stewart’s conclusion, but insisted that “these lots had been there from before, and were not the result of consents to sever lots”. She also disagreed with the impact created by some of the severed lots in the interior of the community, because “these properties have been built till the lot line, which is not the character of the community.”







#### **DIAGRAM 4- A PICTORIAL DEPICTION OF THE LOCAL RESIDENTS' ASSOCIATION'S CONCERNS ABOUT THE FUTURE OF MARTINDALE**

Ms. Cowieson began by speaking to how hard her family had worked to “to gut, insulate and drywall the basement, followed by the installation of new flooring, updating the kitchen with new cabinets, and energy star applicants, before repainting” their present house. She said that the proposed dwelling facing Martindale Road would have a negative impact on “her space, negatively impact privacy, and sunlight, in addition to “tremendously alter the fabric of the neighbourhood”. Through the means of photographs of various rooms in her house, Ms. Cowieson demonstrated how there was adequate sunlight in the rooms of her house, such that it was not necessary to use “any lamps or lights, when the sun is up”, before expressing concerns that the access to sunlight would be” limited, as a result of the new house”.

In her cross-examination, Ms. Stewart demonstrated how the 3.3 metre separation between the side wall of Ms. Cowieson’s house, and the dwelling to be built facing Martindale, “would be double what is required by the By-Law.” Ms. Stewart also compared this 3.3. m separation, to the 3.9 metre separation between 31 Grenard and its neighbour at 33 Grenard, to help visualize what the impact of the proposal would be on its neighbour. When Ms. Stewart asked Ms. Cowieson if it would be helpful to erect a privacy screen on the east side of the deck of the dwelling to be constructed, to address the latter’s concerns about privacy, “murmuring and voices carrying over”, the latter said that she did not have any preference.

I thanked the Parties and set September 30, 2020, as the deadline to receive the updated set of conditions.

## **ANALYSIS, FINDINGS, REASONS**

I note that one of the key tests in the determination of whether the lots can be severed, and whether the dwellings to be constructed are appropriate, is the test respecting the Official Plan. One of the key concepts in the Official Plan preferred by the Applicants, and the City (formerly referred to as OPA 320) is the concept of “prevailing”, which is defined as the “most frequently occurring”, and lists different variables, which can be used as the basis to establish the “prevailing” type- in other words, a counting exercise is not merely crucial, but a *sine qua non* to make supportable findings with respect to the “prevailing type”.

Consequently, it is important to have access to reliable, and trustworthy data; analyses, irrespective of their sophistication and methodology, relying on incomplete, or faulty data, will result in faulty results.

With the above observations in mind, I note that the Applicants themselves stated that there were concerns with the data as provided by the City, with specific reference to the areas of the lot sizes- it emerged that the data supplied by the City calculated the area of each lot by multiplying the length and the breadth, irrespective of the shape of the lot. These calculations do not distinguish between a right angle triangle ( where the area is  $0.5 * \text{length} * \text{breadth}$ ), or more complex lots with pie shapes, whose areas require a more sophisticated approach, than the cookie-cutter methodology used in the preparation of the data. In response to questions from myself about the Applicants’ making efforts made to “refine” the data, I was advised that no efforts had been made, to preserve what I understood to be the “integrity” of the data, notwithstanding the aforementioned issues. While I know that the Applicants are not responsible for the errors identified earlier in this paragraph, I believe that the data set could have been refined through the use of appropriate formulae to accurately calculate the areas of the lots.

I disagree with the Applicants that refining the obtained data through use of the correct formulae disturbs the “integrity” of the data, because I interpret the “integrity of the data” to be inclusive of “accuracy” or “reliability” to make supportable findings. In other words, the “integrity” of the dataset before me could not have been “disturbed”, because it lacks “integrity” in the first place. I find that had the Applicants used the correct formulae to update the Lot Areas, they would have been endowing the data-set with “integrity”, as opposed to disturbing it.

There is a nexus between the Applicants’ providing the Tribunal, and other Parties involved in a given Hearing, with accurate information, and the principle of the burden of proof resting with the Applicants. Being asked to provide accurate statistical information does not constitute a “bake me a pie in the sky” scenario, because there exist statistical methodologies to refine data whose accuracy is in question- in this case, the use of appropriate multiplication formulae would have been sufficient.

In addition to the above concern, whose impact I find to be significant, but difficult to calibrate, it is important to state the following issues with the statistical distributions

supplied by the applicants, with respect to the Lot Areas, and the Lot Frontages, (which appear on Pages 8 and 9 of this Decision):

- There are 615 data points in the Lot Frontage data set, but only 577 data points in the Lot Area data set, with no explanation for an appreciable 7 % decrease in numbers of data points as we go to the Lot Areas from the Lot Frontage.
- The Applicants categorized the frontage data into 6 categories, but 7 categories for the lot areas- it is not evident about which lot frontage category maps into which lot area category, an issue of crucial importance given their methodology of identifying the prevailing type of lot frontage, and then extrapolating this conclusion onto lot areas, to demonstrate that the proposal respects the prevailing lot area. I refer to this issue as the “asymmetric categorization issue” for the purposes of discussion later in this Section

When the three issues (i.e. inaccurate information about lot areas, a 7% reduction in data points, and asymmetric categorization of lot frontages and areas) are juxtaposed on each other, I am confronted by the perfect storm of statistical confusion, a definite impediment to any determination of the “prevailing” type. While I am cognizant of the option of my finding that a supportable decision cannot be made with respect to the tests under Sections 45.1, and 51(24), due to the aforementioned issues with the data, I have decided to explore a different route, where the best is made of the circumstances before me.

It is necessary to see what impact (if any) has the reliance on inaccurate data had on the ability of other Parties, to present their respective positions.

The City, as stated earlier, did not present any evidence – its cross examination concentrated on Policies 4.1.6 and 4.1.7 of the new OP ( i.e. the former OPA 320), though both Parties agreed that both “policies are being reviewed”, on the basis of which I find that the Policies to be informative, but not determinative. As such, Policies 4.1.6 and 4.1.7 are not premised on the identification of the “prevailing” type of any of the variables identified in Policy 4.1.5 of the OP. In other words, the City’s position is not compromised by the data issues discussed earlier in this Section.

The position of Party Cowieson, largely concentrated on the impact of the proposal on their property- their concerns correspond to the tests of minor, and appropriate development, without reference to the OP. Consequently, her questions or concerns are not impacted by the accuracy of the statistical information before the panel.

The concerns of the local Residents’ Association, expressed through the words of its spokesperson, Ms. Baksh, concentrated on the “creation of sub-standard lots, and how some of the houses, were built all the way to the lot-line”, as result of being situated in smaller lots than before- in other words, their focus is the construction of large houses on small lots. Neither component of this issue, large houses or small lots, is related to inaccurate data. The other concern expressed by Ms. Baksh was the potential impact of this development on the future development of this neighbourhood, if approved- I



understood this concern to mean a rapid explosion of sub-standard lots. The possible proliferation of sub-standard lots in the future is a long-term, ongoing concern, which is independent of the lack of reliable data, because the latter is a short term concern, whose impact is hopefully limited to this Decision.

I find that the three Parties in Opposition to this proposal did not rely significantly on the statistical data whose reliability is in question; consequently, their perspectives are not prejudiced in any way if I identified a methodology to restrict the impact of the erroneous portions of the data, with specific reference to Lot Areas. The lack of prejudice to other Parties' positions provides me with a limited flexibility to proceed with the analysis of the proposal.

I herewith will discuss the compatibility between the proposal, and Section 51(24), beginning with the test respecting the shapes, and dimensions of lots. The shapes of the lots to be formed are rectangular, like the shapes of the vast majority of the lots in the area, which means that they fulfill the "shapes" component in Section 51(24)(f)- *shapes and dimensions of the lots*.

With respect to the "dimensions" component of the test, I note that the Applicants brought forward an interesting theory which demonstrated that

- lots with frontages of 15.24 sq.m. are the prevailing type with respect to lot frontages,
- when seen from the public realm, the frontage is the most perceptible attribute of a property. They then attempted to extrapolate this observation into a conclusion regarding lot areas.

The challenge before me is how to analyze their theory, because of the issues with the reliability of their data, as well as the asymmetric categorization issue, as stated earlier.

I agree with the Applicants' conclusion that frontages of 15.24 metres are the prevailing type, because they constitute 48.3% ( 302 lots out of 625 lots) of the lot frontages ( and not 50.2% as claimed by the Applicants). I find that the proposed lot frontages are comparable to the single largest numerical category of lot frontages, and consequently fulfill the test of "dimension" (singular), because the lot frontage is one of two dimensions that is used to calculate the Lot Area. Given that further analysis regarding Lot Areas is not possible, for reasons stated and reiterated in this Section, I give the Applicants the benefit of doubt, and find that the test of dimensions has been fulfilled, because there we have verifiable information regarding at least one of the two dimensions (length and area).

I reiterate that the Applicants should make every effort to present accurate and reliable data to the Tribunal, on a go forward basis. The methodology utilized here, namely of giving the benefit of doubt to the Applicant, may be used if and only if:

- a) It can be demonstrated that the Applicants made every effort to obtain, and refine the data submitted to the Tribunal for decision making purposes

- b) Reliance on the data whose accuracy is in question, does not prejudice the positions of other Parties.

The evidence demonstrated how the proposal satisfies the test of compatibility with the Official Plan, under Section 51(24)(c) of the Planning Act. There was evidence about the gradual evolution of the community, which means that Policy 2.3.1 of the OP is fulfilled. The Applicants spent significant effort to address concerns about the impact of the built form, and demonstrated convincingly that there would be no privacy, nor shadow impacts, resulting from the dwelling to be built on the lot facing Martindale Road, if the proposal were approved. The suggested conditions, discussed later in this Section, specifically refer to the installation of a privacy screen, and hedges along the lot line separating the new lot from that of the immediate neighbour, to allay concerns regarding murmurs, and privacy.

With respect to Section 4.1.5 of the OP, I find that the test of “prevailing” has been fulfilled for two reasons:

- The proposed dwelling are single family dwellings, which constitute the overwhelming majority of the houses in the Neighbourhood.
- With respect to the variance respecting lot areas, I rely on my earlier finding respecting Section 51(24)(f), where I found that the evidence demonstrated that the proposed frontages respected the “prevailing” type.

I therefore find that the proposal satisfies the test of compatibility with the Official Policy. The consequence of this finding is that the proposal automatically meets the lower threshold (compared to the test of compatibility with the OP) of satisfying the intent and purpose of the Official Plan, as stated under Section 45.1 of the OP. As a result, the test respecting the OP does not have to be separately analyzed in the context of Section 45.1 of the OP.

As a result of the analysis presented above, I find that the proposal satisfies the relevant tests under Section 51(24).

We now come to the issue of the compatibility between the proposal, and the tests of Zoning, Minor, and Public Interest under Section 45.1 of the Planning Act. I note that the test of satisfying the intent, and purpose of the OP is satisfied because the evidence was adequate to meet the higher threshold of being compatible with the OP, as stated under 51(24) of the Planning Act.

With respect to the test which examines the compatibility between the proposal, and the Zoning By-Law, I find that the request for an increase in the FSI is not related to reduction in any of the setbacks, or increased building length, which means that the dwelling to be built, and the other two buildings to be modified, are compatible in terms of scale, and massing with the neighbouring houses. The eaves to be installed are such that they satisfy the performance standard of not encroaching onto the property line. The variances respecting the rear yard landscaping are such that they ensures an adequate amount of soft landscaping to facilitate proper drainage of storm water, thereby fulfilling the performance standard. While I recognize that the Opposition raised

a concern about “houses being built all the way to the lot line”, the photographs shown at the Hearing did not demonstrate this concern. Consequently, I find that the proposal satisfies the intent and purpose of the Zoning By-law, because it ensures that the proposed development does not cause unacceptable adverse impacts on the existing neighbourhood.

The proposal is now examined through the lens of the test of minor. This test focuses on the impact of the proposal on the neighbourhood, with specific reference to the immediate neighbours- the threshold for intervention by the TLAB is the possibility of an unacceptable adverse impact by the proposal on its neighbours. My understanding of the issues put forward by Party Cowieson is that while their property has a side yard that borders the backyards of the houses at 89 and 91 McCowan Road, the development of a new lot, and a dwelling on the same, will result in their having to experience a “side-yard, by side-yard” relationship with the new dwelling, facing Martindale Road. This experiential change, while new, does not rise to the level of unacceptable adverse impact. The stated concerns about the deprivation of sunlight was addressed through the Applicants’ establishing that there would be a 3.3 metre separation between their house, and the new dwelling to be developed, and the visual, photographic comparisons to a 3.9 metre gap between the houses at 33 Granard Avenue (which was birthed out of a similar consent to sever), and its neighbour at 31 Granard Avenue. As noted earlier, the Applicants were also amenable to a condition regarding the planting of hedges along the fence, and privacy screens on the east side of the rear deck, to address concerns raised by Party Cowieson. As far as the existing houses facing McCowan Rd. are concerned, the impact of the houses on each other, as well as their individual, and collective impact on the street, has already been experienced, and has not resulted in any complaints, or concerns. On the basis of this analysis, I find that the proposal satisfies the test of minor.

In terms of the test of appropriate development, the proposal will bring about the development of a single family house with an integral garage facing Martindale Road- single family dwellings with integral garages are not new to this area, nor are the lots resulting from the severance of other lots. As a result, I find that the proposal satisfies the test of appropriate development.

As a result of the above analysis, I find that the proposal satisfies the four tests under Section 45(1), as well as the relevant subsections of Section 51(24). Consequently, the Appeal is allowed, and the decision of the Committee of Adjustment dated November 24, 2020, is set aside.

Before I discuss the conditions to be imposed on the approval, it is important to answer the very pertinent question asked by Ms. Baksh- namely, what would the long term impact of approving this application ; would it specifically result in a wholesale replacement of the existing bungalow type houses, by a completely new type of house, with multiple levels of living space, built on smaller lots, to boot?

Notwithstanding the cautionary quote from Yogi Berra, the baseball player “*It’s tough to make predictions, especially about the future*”, it is important to realize that every development has to be considered on its own merits, which means that previous COA

decisions, even in the vicinity of the Site, have to be considered carefully, and applied judiciously to the proposal in question. It is counterintuitive to claim that each development has to be taken up on a “case by case” basis, and then justify the development on the basis of “what is good for the goose is good for the gander”. It is important to note Policy 4.1.5 involves a counting exercise, and necessitates access to accurate numerical information. Lastly, there has to be a serious consideration of public interest related matters in planning matters; the Parties are best positioned to identify the public interest in any given planning proposal.

I note that these observations have not been relied upon to make findings in this case, and may be constituted to be *obiter dicta*, whose intention is to seed thoughts, that will hopefully provide food for future consideration and contemplation.

It is now relevant to discuss the conditions to be imposed on the approval of the consent to sever, as stated below- I note that the conditions stated below are consistent with the recommendations of Practice Direction 1 of the TLAB, which were updated on January 25, 2022, which give Parties up to **two years** ( as opposed to one year earlier) from the date the decision is released, to comply with the Orders.

(1) Confirmation of payment of outstanding taxes to the satisfaction of the Revenue Services Division, in the form of a statement of tax account current to within 30 days of an applicant's request to the Deputy Secretary-Treasurer of the Committee of Adjustment to issue the Certificate of Official as outlined in Condition 6.

(2) Municipal numbers for the subject lots, blocks, parts, or otherwise indicated on the applicable registered reference plan of survey shall be assigned to the satisfaction of the Supervisor, Surveys, Engineering Support Services, Engineering and Construction Services.

(3) One electronic copy of the registered reference plan of survey integrated to NAD 83 CSRS (3 degree Modified Transverse Mercator projection), delineating by separate Parts the lands and their respective areas, shall be filed with, and to the satisfaction of, the Manager, Land and Property Surveys, Engineering Support Services, Engineering and Construction Services.

(4) One electronic copy of the registered reference plan of survey satisfying the requirements of the Manager, Land and Property Surveys, Engineering Support Services, Engineering and Construction Services shall be filed with the Deputy Secretary-Treasurer of the Committee of Adjustment.

(5) Prepare and submit a digital draft of the Certificate of Official, Form 2 or 4, O. Reg. 197/96, referencing either subsection 50(3) or (5) of the Planning Act if applicable as it pertains to the conveyed land and/or consent transaction to the satisfaction of the Deputy Secretary-Treasurer of the Committee of Adjustment.

(6) Once all of the other conditions have been satisfied, the applicant shall request, in writing, that the Deputy Secretary-Treasurer of the Committee of Adjustment issue the Certificate of Official.

(7) Within TWO YEARS of the date of the giving of this notice of decision, the applicant shall comply with the above-noted conditions.

I also note that the Applicants have also requested for a different Condition not recited above, which discusses the widening of Highways that abut the land- While I don't foresee any issues with the inclusion of this condition, I have to wait till the Applicants resubmit the conditions by way of a Word Document, so that the updated conditions may be recited together as part of the Final Order- this issue is discussed in more detail after the recitation of the conditions.

The conditions to be imposed on the variances, including the construction of a new dwelling on the 3 lots resulting from the severance, relate to a standard condition, which requires buildings to be built in substantial accordance with the submitted Plans and Elevations. With respect to the new dwelling, I sincerely appreciate the Applicant's sensitivity towards the privacy concerns expressed by the neighbour, as manifested in their willing to construct a privacy screen on the east side of the deck, as well as maintain the existing hedge which separates the two lots. The suggested conditions, with respect to each the houses, as suggested by the Applicant are as follows:

**1. 89 McCowan Road (Retained Lot Part 1)**

The proposed rear garage shall be constructed substantially in accordance with the following plans and drawings, prepared by Arc Design Group:

a) 89 McCowan Avenue: Siting/Grading Plan SP (April 7, 2021), Front Elevation A10 (February 21, 2020), Left/Right Side Elevation A11 (February 21, 2020), Rear Elevation A12 (February 21, 2020).

**2. 91 McCowan Road (Retained Lot Part 4)**

**List of Variances**

1. The proposed rear garage shall be constructed substantially in accordance with the following plans and drawings, prepared by Arc Design Group:

a) 91 McCowan Avenue: Siting/Grading Plan SP (April 7, 2021), Garage Front Elevation A10

**3. 89 – 91 McCowan Road Rd. (Parts 2 & 3) (February 21, 2020), Garage Rear and Side Elevation A11 (February 21, 2020).**

The proposed dwelling shall be constructed substantially in accordance with the following plans and drawings, prepared by Arc Design Group:

a) Parts 2 and 3: Siting/Grading Plan SP (April 7, 2021), Front Elevation A5 (April 7, 2021), Right Side Elevation A6 (April 7, 2021), Left Side Elevation A7 (April 7, 2021), Rear Elevation A8 (April 7, 2021).

4. The owner shall install a 1.8 m high opaque privacy screen on the east side of the rear ground floor deck.

5. The existing hedges located on the east property line, as illustrated on the approved Site Plan, shall be preserved.

I find that the conditions stated above are reasonable, and may be imposed on the variances part of the Appeal.

I have decided to issue an Interim Order at this stage, which states that the proposal has been approved in principle. To obtain the formal Final Decision and Order, the Applicants are asked to resubmit:

- The recitation of the severance, variances and suggested conditions by way of a **Word Document** ( my emphasis) as opposed to a PDF document, so that the conditions can be cut and pasted, and edits made where necessary ( e.g. the new Two Year time frame to complete the process, as opposed to the One Year Frame earlier). This document is referred to as **Attachment A**
- The drawings may be submitted separately as **Attachment B**.

I specifically draw the attention of the Applicants to the issues faced when the recitation and the drawings are submitted together, as a single PDF document- it is difficult to edit and update the written part of the document, because any attempt to edit the combined submission may result in a distortion of the diagrams component of the submission.

This technical issues necessitates the submission of Attachments A, and B, as defined above, before the Final Decision, and Order can be released. The Applicants are given time till the end of the day on February 28,2022, to submit these documents.

## **INTERIM DECISION AND ORDER**

1. The Appeal respecting 89 and 91 McCowan Rd. is allowed in Principle, and the decisions of the Committee of Adjustment, respecting the properties at 89/91 McCowan Rd., dated November 20, 2020 are set aside.
2. To obtain the Final Decision and Order, the Applicants need to submit two documents, referred to as Attachments A and B, where:
  - a) **Attachment A** The recitation of the severance, variances and suggested conditions by way of a **Word Document** , as opposed to a PDF document, This document is referred to as **Attachment A**.
  - b) **Attachment B:** All relevant drawings may be submitted separately as **Attachment B**.

The deadline for submitting the aforementioned Attachments is **February 28, 2022**. The Final Decision and Order will list the details of the severance, variances and conditions imposed on the severance and approved variances.

So orders the Toronto Local Appeal Body

X



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S. Gopikrishna  
Panel Chair, Toronto Local Appeal Body