

# INTERIM DECISION

**Decision Issue Date**      Monday, April 04, 2022

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

Appellant(s): SOHO GRAND CONDOMINIUMS INC.

Applicant(s): MARTIN CHENIER

Property Address/Description: 354 WELLINGTON STREET WEST

Committee of Adjustment File

Number(s): 20 186885 STE 10 MV (A0800/20TEY)

**TLAB Case File Number(s): 21 215729 S45 10 TLAB**

**Hearing date: Monday, January 24, 2022**

**Deadline Date for Closing Submissions/Undertakings:**

**DECISION DELIVERED BY TLAB Vice Chair A. Bassios**

## REGISTERED PARTIES AND PARTICIPANT

Appellant	Soho Grand Condominiums Inc.
Appellant's Legal Rep.	Matthew Helfand
Appellant's Legal Rep.	Jane Pepino
Applicant	Martin Chenier
Party	TSCC 1555
Party	TSCC 1628
Party's Legal Rep.	Joel Farber

Participant	Luciana Budur
Participant	Liviu Budur
Participant	Amrit Singh
Participant	Leanna Lui
Participant	Richard Roventa
Participant	Karen Burrows
Participant	Dan Ifrim
Participant	Hiu Ying Chan
Participant	Kevin Matte
Participant	Katya Filippetti
Participant	Corey Dales
Expert Witness	Martin Rendl
Expert Witness	David Ashbourne
Expert Witness	Steve Krossey

## **INTRODUCTION**

This is an Appeal of the Toronto and East York panel of the City of Toronto (City) Committee of Adjustment's (COA) refusal of an application for variances for the property known as 354 Wellington St West (subject property). The purpose of the application is to alter the existing 7½-storey residential building by expanding the eighth storey and constructing a three-storey addition above.

The subject property is located in Downtown Toronto in the Entertainment District. It is designated *Regeneration Areas* in the City Official Plan (OP) and zoned Commercial Residential Employment (CRE (x1)) under Zoning By-law 569-2013, and Reinvestment Area (RA) under the former City of Toronto Zoning By-law 438-86, which continues to apply in some respects.

In attendance at the Hearing were:

- Jane Pepino, and Matthew Helfand, legal counsel for the Applicant/Appellant, and Expert Witness Martin Rendl (Land Use Planning);
- Joel Faber, legal counsel for the Appellants, and David Ashbourne, Expert Witness (Land Use Planning).

- Participants Leanna Lui, Richard Roventa, Kevin Matte, Dan Ifrim and Corey Dales.

I advised those present at the Hearing that, in accordance with Council direction, I had visited the site and the surrounding area and reviewed the pre-filed materials in preparation for the hearing of their evidence.

## **BACKGROUND**

### **REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:**

#### **1. Chapter 200.5.10.1.(1) By-law 569-2013**

The minimum required number of additional parking space(s) is 30 spaces (26 Residents spaces and 4 Visitors spaces).

In this case, zero additional parking spaces will be provided.

#### **2. Chapter 200.15.10.(1)(A) By-law 569-2013**

A minimum of one accessible parking space is required to be provided for the additional dwelling units.

In this case, zero additional accessible parking spaces will be provided.

#### **3. Chapter 50.10.40.10.(1) By-law 569-2013**

The maximum permitted height of a building or structure on a lot is the numerical value, in m, following the letters "HT" shown on the Height Overlay Map: In this case 12.0 m and 18.0 m.

In this case, the building addition height will be 42.0 m measured to the highest point.

#### **4. Chapter 50.10.40.30.(1) By-law 569-2013**

No portion of a building may be set back more than 50.0 m from a lot line that abuts a street.

In this case, the building addition will be set back 83.65 m from a lot line that abuts a street (Wellington Street West).

#### **5. Chapter 50.10.40.70.(1) By-law 569-2013**

The minimum required building setback from a side lot line or rear lot line is 7.5 m.

In this case, the rear lot line setback will be 0.55 m.

#### **6. Chapter 50.10.40.70.(3) By-law 569-2013**

Where a lot abuts a lane, the minimum required building setback from a side lot line or rear lot line that abuts the lane is 7.5 m measured from the original centreline of the lane.

In this case, the building will be set back 2.9 m from the original centreline of the lane abutting the rear lot line.

**7. Chapter 50.10.40.70.(5)(A) By-law 569-2013**

The minimum required building setback from a lot line that abuts a street is 3.0 m for the portion of the building or structure which exceeds a height of 20.0 m. In this case, the building will be setback 0.0 m from a lot line that abuts a street.

**8. Chapter 50.10.40.80.(2) By-law 569-2013**

In the CRE zone bound by Queen Street West to the north, Simcoe Street to the east, Front Street West to the south, and Bathurst Street to the west, if a building has windows facing each other, the minimum required above ground distance between the windows is 15.0 m.

In this case, the building addition will have exterior facing walls that are separated by a distance of 8.7 m at Levels 9, 10 and 11, to an existing portion of Phase 1 with windows.

**9. Chapter 50.10.40.80.(3) By-law 569-2013**

In the CRE zone bounded by Queen Street West to the north, Simcoe Street to the east, Front Street West to the south, and Bathurst Street to the west, if a building has windows, the minimum required above ground distance between the windows and another main wall without windows or a lot line that does not abut a street or park is 7.5 m.

In this case, the distance between the rear main wall with windows and the rear lot line will be 0.55 m.

**10. Section 12(2)246(C) By-law 438-86**

The by-law requires a building to be located within 50 m of the street.

In this case, the building addition will be located 83.65 m from the Wellington Street West frontage.

**11. Section 12(2)246(E) By-law 438-86**

A minimum of 29 additional parking spaces are required to be provided for the additional 49 dwelling units (26 Residents spaces and 3 Visitors spaces).

In this case, zero additional parking spaces will be provided.

**12. Section 7(3) Part II 1(II) By-law 438-86**

Exterior walls that face each other shall be separated by a distance of at least 11 m.

In this case, the building addition will have exterior facing walls separated by a distance of 8.7 m at Levels 9, 10 and 11, to an existing portion of Phase 1.

**13. Section 4(2)(A) By-law 438-86**

The proposed building addition occurs within areas having height limits of 12.0 m and 18.0 m

In this case, the building addition height will be 42.0 m.

#### **14. Section 7(3) Part II 8(i) By-law 438-86**

No person shall erect or use a building or structure on a lot in King-Spadina in which a window of a dwelling unit (other than a window of a kitchen or bathroom), live-work unit or a window of a dwelling room in the building is closer than 15 m to a window of another dwelling unit (other than a window of a kitchen or bathroom) or a window of a dwelling room on the same lot.

In this case, a portion of the building addition with dwelling unit windows will be located 8.7 m to the window of a dwelling unit within Phase 1 (south portion of building).

### **MATTERS IN ISSUE**

The opposing Parties TSCC 1555 and TSCC 1628, which are condominium boards of the first phases of development on this site, contested only the two variances which relate to separation distance between the existing Phase 1 and the proposed addition.

The Participants in this matter, some of whom are directors of the Party condominium boards, raised myriad additional concerns with the proposed development.

### **JURISDICTION**

#### **Provincial Policy – S. 3**

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2020 Provincial Policy Statement ('PPS') and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area ('Growth Plan').

#### **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**

A summary of evidence is presented here for the purpose of providing some context for the following sections of this Decision. All of the evidence and testimony in this matter has been carefully reviewed and the omission of any point of evidence in this summary should not be interpreted to mean that it was not fully considered, but rather that the

recitation of it is not material to the threads of reasoning that will be outlined in the *Analysis, Findings, Reasons* section below.

Mr. Rendl provided land use planning evidence for the Applicant and Mr. Ashbourne for the opposing Parties.

Mr. Ashbourne offered no objection to Mr. Rendl's evidence regarding the subject property and context. Mr. Ashbourne provided his opinion on only two of the variances, Variances 8 and 14 above (relating to separation distances). He advised that he was satisfied that all the other requested variances meet the four tests and did not opine or comment on them.

Rendl

Mr. Rendl's description of the proposed development included the diagram below, which provides a useful depiction of the building components on the site.

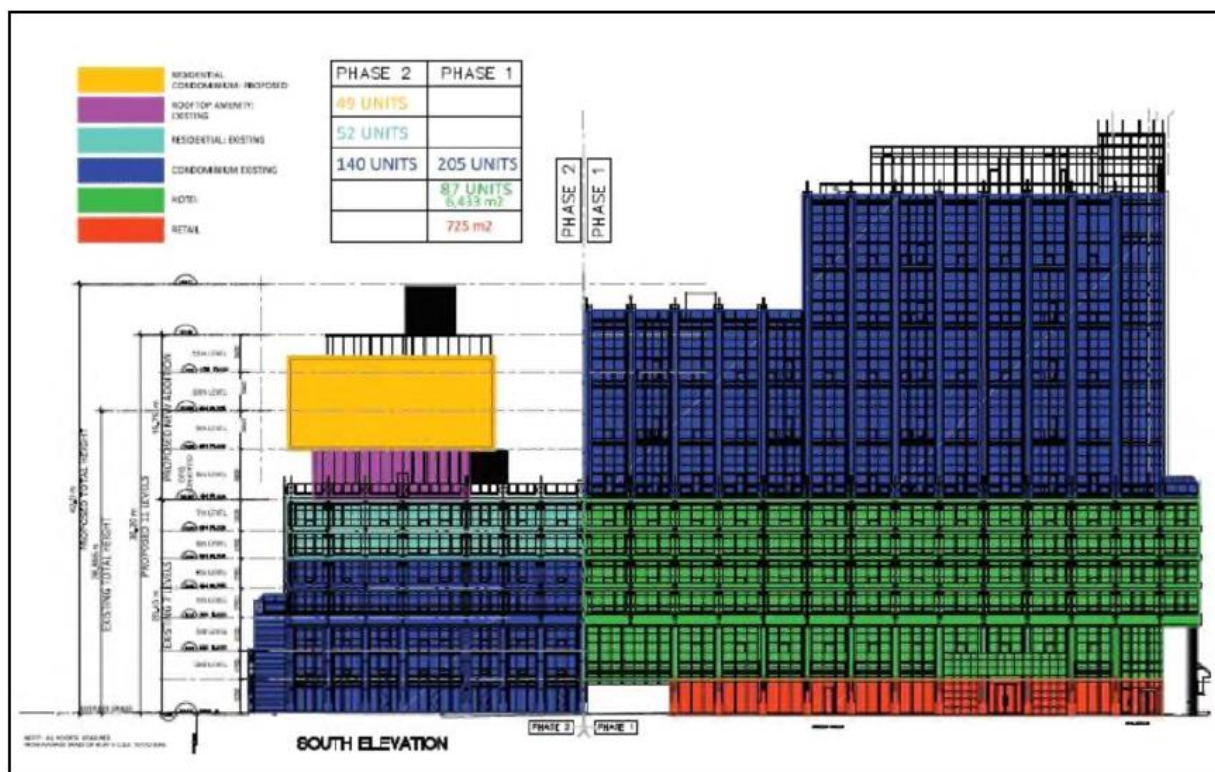


Figure 1: phasing, uses, units and condominium corporations

Mr. Rendl described the context of the proposal as follows:

- The first phases of development of this property were constructed in the nineteen nineties.
- Phase 1 (318 Wellington Street West) is the 16 storey Soho Metropolitan Hotel and Residences which has retail uses on the ground floor, the Soho hotel on

floors 2, 3 and 4, and 205 residential condominiums on floors 5 to 16, (TSCC 1555).

- Phase 2 (350 Wellington Street West) is the 6 storey plus mechanical penthouse component and is composed of 140 Residential condominium units from the ground floor to the fourth floor (TSCC 1628), 52 long term stay units on floors 5 and 6 and a mechanical penthouse and outdoor amenity area on the existing roof level above.
- The area surrounding the site consists of a mix of high-rise and mid-rise residential, office and hotel buildings.
- Immediately to the north of the site is the 41 storey Bisha Hotel and Residences.
- West of the site is Clarence Square, a public park.
- Immediately north of Clarence Square, are 12 row houses that are listed on the City's inventory of heritage properties.

Mr. Rendl described the proposal as follows:

- The proposal is for an addition on top of the existing "phase 2" building at 350 Wellington St W.
- Conversion and expansion of the current mechanical penthouse level and addition of 8 long term stay units and indoor amenity space at this level (seventh floor).
- Addition of 41 long term stay units on the next two residential floors above, plus a mechanical penthouse and rooftop amenity space at the top of the proposal.

### Ashbourne

In his evidence, Mr. Ashbourne highlighted Official Plan section 3.1.3 regarding tall buildings.

He referenced the Built Form policies of Chapter Three of the Plan, in particular OP Policy 3.1.2.3 relating to separation distances:

OP Policy 3.1.2.3 "Development will protect privacy within adjacent buildings by providing setbacks and separation distances from neighbouring properties and adjacent building walls containing windows".

Mr. Ashbourne noted the City of Toronto Tall Buildings Guidelines which apply to buildings "with a height that is greater than the width of the adjacent street right-of-way, or the wider of two streets if located at an intersection". The height of the proposed addition would be taller than the width of the Wellington St W.

He noted principles provided by the Tall Building Guidelines with regard to appropriate separation distances between buildings.

### Participant Roventa

In Mr. Roventa's opinion this proposal is not minor; it is a substantial development and, uniquely, it is a proposal to build multiple condominium storeys over a separate (occupied) condominium entity. He wanted the TLAB to understand that this is an interconnected complex, and that adding three storeys is a major undertaking that would have a real impact on multiple connected buildings, businesses and homes.

Mr. Roventa described the parking study and the shadow study as "flawed".

In his statement, Mr. Roventa carefully described the impact that would be caused by each of the requested variances to the existing residents and to the downtown area surrounding the proposal.

He raised further concerns regarding impacts on views, obscuring of the views from the 13<sup>th</sup> floor terrace, legality of the development in light of agreements between multiple entities occupying the site, bicycle parking, waste storage, requirements of the building code, noise and vibration during construction.

### Participant Dales

In Mr. Dales' opinion, the application has been presented as a request for minor variances, but it fails to convey "the extreme complex nature of this building".

He provided a criticism of the parking study, its methodology and its conclusions.

In addition to reiterating many of the same concerns as Mr. Roventa, with supplemental detail and photographs, Mr. Dales expressed his concern regarding the invasion of privacy that he foresees from the angled windows, the floor to ceiling glass on the exterior facing the existing phase 1 building and the "increasing number of eyes on our home" from the long term stay (hotel) units that are proposed.

### Participant Matte

Mr. Matte identified four grounds for his assertion that the requested variances fail to maintain the general intent and purpose of the Official Plan and the City's Zoning By-laws, namely:

1. Failing to "enhance liveability" by preserving the privacy, view and access to light of adjacent buildings.
2. Failing to ensure the needs of people with disabilities and seniors are met.
3. Failing to ensure "good transition in scale" between the proposed building addition and Clarence Park.
4. Failing to increase "opportunities for surveillance" over Clarence Park.



## **ANALYSIS, FINDINGS, REASONS**

### Separation Distance: Variances 8 and 14

The evidence of the opposing Parties rested exclusively upon the two variances which relate to the required minimum separation distance between the proposed addition and the closest elements of the existing Phase 1 building.

The harmonized City of Toronto Zoning By-law 569-2013 remains under appeal in some respects and in such instances, variances to the previous By-law are also mandated, resulting in a variance request for each By-law reflecting the same condition.

- Official Plan Policies – Separation Distance

Both expert witnesses provided a detailed overview of relevant policies. Mr. Rendl acknowledged that the proposal qualified under the Official Plan's definition of a tall building, but advised that in his opinion the Guidelines are really aimed at buildings like the (taller) Bisha tower located immediately behind the subject property.

Mr. Ashbourne focused specifically on the policies relating to tall buildings in Section 3.1.3 of the Official Plan and on the Tall Building Guidelines.

The policies of all of the Part 1 Official Plan, the Downtown Plan, the King-Spadina Secondary Plan, the King-Spadina Urban Design Guidelines and the City of Toronto Tall Building Guidelines all contain policies that reinforce the same intent and purpose for separation distances as a measure to, generally:

- maintain adequate privacy for “sensitive adjacencies” (neighbouring buildings),
- preserve adequate access to sunlight and natural light,
- maximize access to sunlight and sky view for surrounding streets, parks, open space and neighbouring properties,
- minimize negative impacts on the public realm and neighbouring properties such as adverse shadowing, pedestrian-level wind, blockage of sky view and loss of privacy for residents.

In Mr. Rendl's opinion, the 8.7m separation between the east wall of the proposed addition and the west wall of the Phase 1 building maintains appropriate privacy, sunlight penetration and sky views for the residential units.

Mr. Ashbourne's opinion was that the proposed 8.7m separation distance will significantly impact the ability to achieve a reasonable level of privacy for existing and future residents of both the addition and existing adjacent building. In his opinion, the proposal will also have an adverse impact on the access to sunlight for west facing units in the existing adjacent building.

Units within the required 15m separation distance

The Participants in this matter understandably cite impacts of the proposal on all of the existing buildings and units on the property. However, Mr. Rendl advised that the areas of the existing Phase 1 building which are within the 15m minimum separation distance from the addition are limited to two two-storey units, Suite 924 and 925, and one floor of the units above them.

There are three units in the proposed addition which are within the minimum separation distance of 15m from the existing Phase 1 edge.

In the Figures below, showing the south elevation and a plan of the eighth floor (referencing the eighth floor of the addition), I have marked the locations where the separation variances are triggered. (The ninth floor plan shows the same condition as the eighth floor plan).

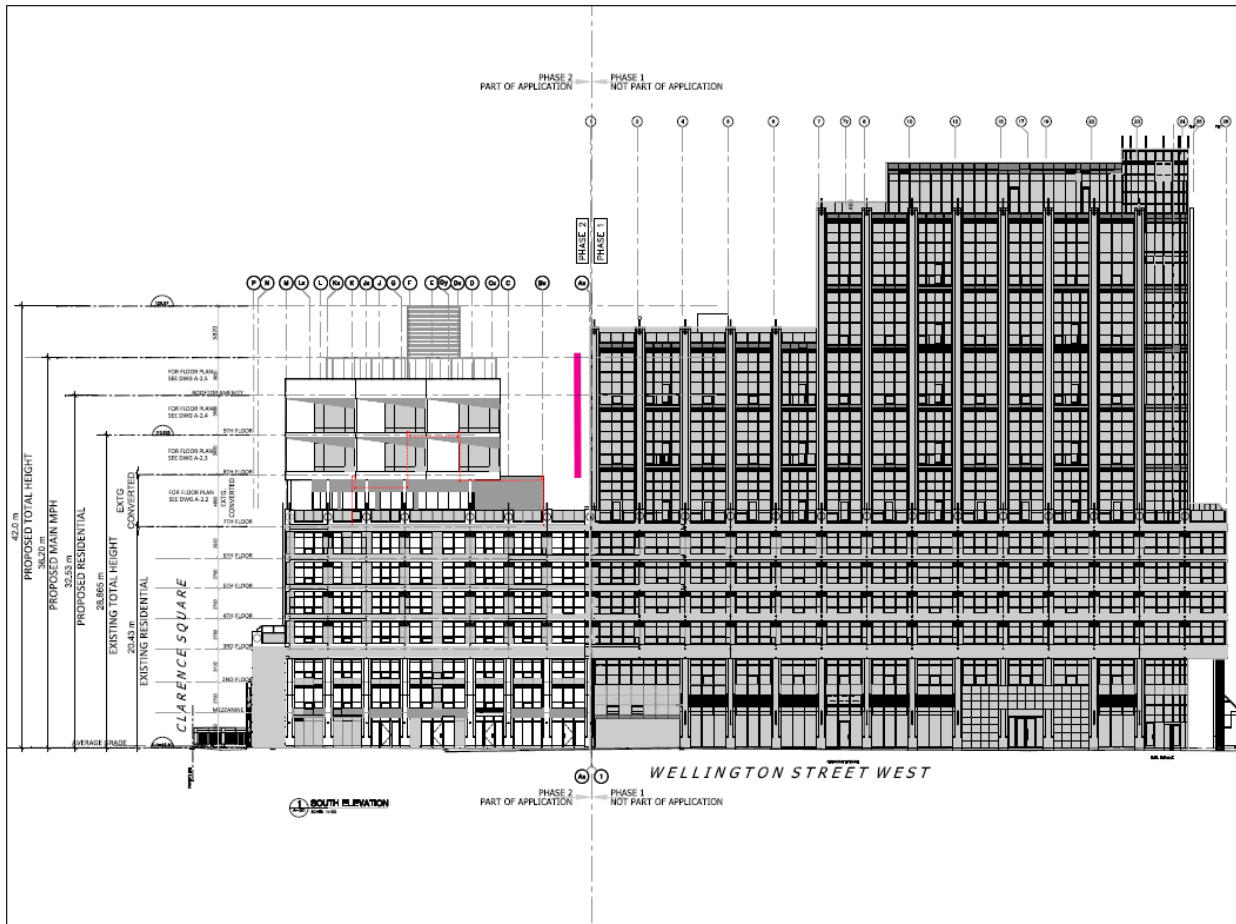


Figure 2: South Elevation, Exhibit 3

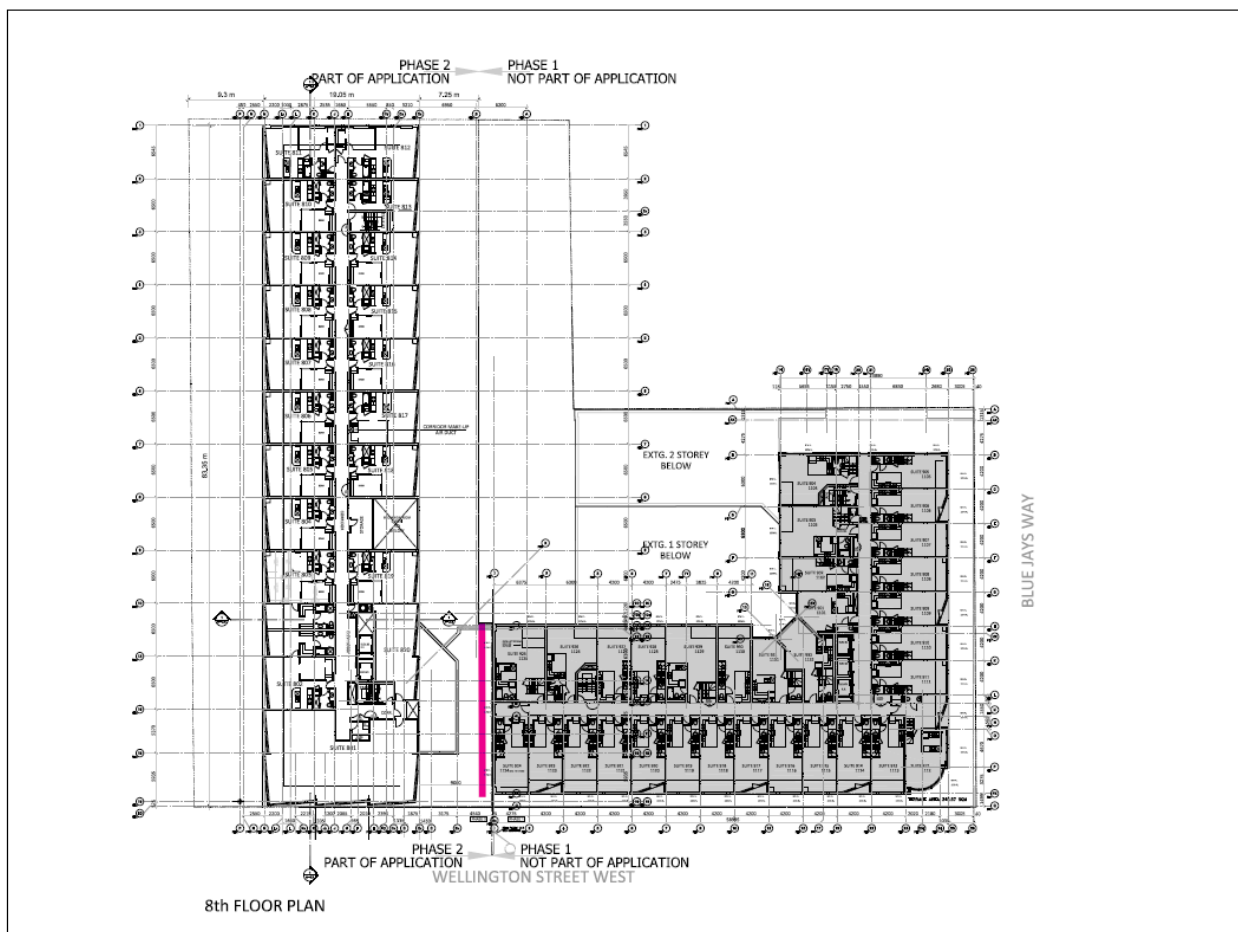


Figure 3: Eighth floor plan EX 3. marked.

### General intent and purpose of the Official Plan and Zoning By-law: Separation Distance

I have been provided a thorough description of the policy context which mandates separation distances as a means to achieve the planning goals of maintaining privacy and access to light for adjacent buildings and to protect the public realm from negative impacts such as shadowing.

Mr. Rendl says that the separation distance is adequate to achieve the aims of the Official Plan and the Zoning By-law and Mr. Ashbourne says that it is not. Neither of these opinions is substantiated in a way that illuminates for me how a separation distance of 8.7m achieves or fails the general intent and purpose of the Official Plan and the Zoning By-laws with respect to privacy and access to light.

Mr. Ashbourne was asked whether it was his opinion that anything less than the 15m set in the By-law would compromise adequate privacy. He confirmed that in this circumstance, that was his opinion. The question was put to him: how much would be enough? This is a variation of the same question that I must adjudicate: is a separation distance of 8.7m adequate to achieve the intent and purpose of the Official Plan and Zoning By-law?

I have not been provided any back-up information or reasoning from Mr. Rendl as to why, or how, 8.7m suffices to meet the goals. I have no evidence from either of the experts as to how privacy and access to light are incrementally affected as the separation distance is decreased from the prescribed 15m to 8.7m, in this case, and when or how that reduction passes from providing adequate privacy to not.

Mr. Rendl noted at least one example in proximity to the property where a separation distance less than 15m has been approved. The separation distance in that case, I was advised, was 13m. No other examples of reduced separation distances in the neighbourhood were identified.

Having heard two opposing opinions from two experts on the issue of separation distance between the towers, I find no explanatory foundation for either of the opinions. I respect the opinions of both of the experts and recognize their respective credentials and experience, but opinion is not enough without supportive analysis and explanation.

I do not find that the opposing Parties have provided evidence to lead me to the conclusion that the proposed separation distance will fail to provide adequate privacy and light to the affected condominium units in the existing Phase 1 building. By the same token, though, I do not find that the Applicant has provided sufficient basis for determining that the proposed separation distance satisfies the general intent and purpose of the Official Plan and the Zoning By-law.

The burden remains on the Applicant to satisfy the TLAB that the first two tests of s. 45(1) of the *Planning Act* have been met and I find that this obligation has not been discharged with respect to the requested variance to minimum separation distance in this matter.

My finding that the requested variances to the required minimum separation distance do not meet the first two tests does not precipitate the denial of the application as a whole. As the section of the proposed addition which requires the variance is relatively small, an adaptation of the design to accommodate the required separation distance is feasible should the other requested variances be supported, and if the Applicant so chooses.

#### Remaining Variances

Mr. Ashbourne provided evidence and opinion on only the two variances discussed above, relating to the separation distance between the proposed addition and the existing Phase 1 tower. His testimony was that he was satisfied that all the other variances meet the four tests and he did not opine or comment on them.

The submissions of the Participants who spoke to the TLAB were detailed and wide-ranging. I shall respond to some of the expressed concerns in summary form.

- Development on the subject property is too big and too complex to be considered “minor” and there are far-reaching implications for the development.

The matter before the TLAB is confined to the three additional storeys that are proposed. The consideration of whether the application falls within the jurisdiction of the COA, and on appeal to the TLAB, does not rest on the size or complexity of the overall development. In this case, the zoning permits the use that is proposed and only variances to the performance standards set in the Zoning By-law are required.

- Parking Study

The Participants linked the requested variance to the crowded parking conditions they described in the downtown core because the parking spaces that exist in the building are publicly available. The contention by the Participants is that the study presents a flawed look at the available parking in the area and therefore the number of parking spots used within the building.

I appreciate that the existing residents experience parking challenges because of increased development in the Downtown and periodic increases in parking pressures due to events. The purpose of the parking study in context of the application, however, is to assess the demand for parking generated by the proposal, not the wider demand for public parking. The study contemplated future demand for residents’ parking and stated that where future demand exceeds the number of reserved spaces, public parking spaces may be converted to serve the building.

The balance between publicly available parking and parking dedicated to residents is a matter for the cooperative management of the existing parking supply, as is, in my opinion, the location and supply of disabled parking spots.

- Shadow study is dated.

The contention of the Participants is that the shadow study does not reflect the impacts of developments that have been approved or built since the study was completed.

The impacts of shadowing, particularly on Clarence Square Park, will have been considered in each of those approved developments and weighted in the context of the policies of the Official Plan. The shadow that would be cast by the proposed addition itself does not impact the park. The nature of the incremental shadow cast by the proposed addition is to be expected in a downtown area targeted for intensification.

- Adverse impact

Many of the further concerns documented by the Participants express a genuine frustration with the impacts that the proposed addition would have to the amenities and views that they currently enjoy, or focus on the elements of the design that the Participants believe could have been better.

In a growing and changing City, and especially in a dense downtown neighbourhood planned for intensification, new development will change views, adapt transitions to the public realm and change the context for existing buildings.

Case law has generally established that the test is not that there be no impact, but rather that the imputed impact not rise to the level of being an adverse impact of a planning nature. In the context of this district of the City, I find that the changes that would result from the proposed addition to be expected, and that there are not undue adverse impacts of a planning nature.

## CONCLUSION

I accept the evidence of Mr. Rendl contained in Exhibit 1 that the requested variances are consistent with the Provincial Policy Statement, 2020 and conform to the Growth Plan for the Greater Golden Horseshoe, 2019.

I accept the evidence of Mr. Rendl contained in Exhibit 1 that the proposal maintains the general intent and purpose of the Official Plan.

With respect to all variances other than Variances 8 and 14 which have to do with separation distance, I accept the evidence of Mr. Rendl and the concurrence of Mr. Ashbourne that all the other requested variances maintain the general intent and purpose of the Zoning By-law.

With respect to all variances other than Variances 8 and 14, which have to do with separation distance, I accept the evidence of Mr. Rendl and the concurrence of Mr. Ashbourne that all the other requested variances are minor and are desirable for the development of the land.

To ensure that construction occurs consistent with the justification that has been presented to the TLAB, variances 1 through 7, and 9 through 13 will be approved subject to a condition that the Applicant submit to the TLAB revised plans excluding the area of the proposal impacted by the minimum separation distance.

## DECISION

The appeal will be allowed in part, subject to:

1. Submission of a revised set of drawings that reflect the minimum separation distance as set in **Chapter 50.10.40.80.(2) By-law 569-2013** and **Section 7(3) Part II 8(i) By-law 438-86**.
2. The revised drawings are to reflect only changes necessary to effect the required separation distances referenced above. In all other respects, the exterior of proposal is to remain as justified in these proceedings.

**Decision of Toronto Local Appeal Body Panel Member: A. Bassios**  
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3. Revised drawings are to be submitted to the TLAB within two months from the date of this Interim Decision.
4. A Final Order will be issued on receipt of a satisfactory set of drawings reflecting the above Interim decision, or upon advice from the Applicant that revised plans will not be submitted.
5. Failure to meet the conditions of this Interim Decision will result in a Final Order upholding the decision of the Committee of Adjustment dated September 1, 2021.

X 

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A. Bassios  
Panel Chair, Toronto Local Appeal Body