

DECISION AND ORDER

Decision Issue Date Tuesday, June 15, 2021

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

Appellant(s): ARASH KAMALI

Applicant(s): ARCICA INC

Property Address/Description: 191 GOLFDALÉ RD

Committee of Adjustment File

Number(s): 20 119512 NNY 15 MV

TLAB Case File Number(s): 20 176115 S45 15 TLAB

Hearing date: Friday April 9th, 2021

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY A. Bassios

REGISTERED PARTIES AND PARTICIPANTS

Applicant	ARCICA INC
Appellant	ARASH KAMALI
Appellant's Legal Rep.	ANDREW EVERTON
Appellant's Legal Rep.	N. JANE PEPINO
Party	City of Toronto
Party's Legal Rep.	MARC HARDIEJOWSKI
Party Legal Rep	WILLIAM ROBERTS
Party	MARY ANN HUGHES
Party	BRUCE STEWART
Party	PATRICK COWIE
Party	SCOTT STEVENS
Party	SUZANNE TYSON
Party	MARK CAVANAUGH
Participant	JUDY MCKAY
Participant	NANCY POPE
Participant	TARA WILLISTON
Participant	MARSHA GIFFEN
Participant	BRUCE CAMPBELL
Participant	LUCIE VALLEE
Participant	RONALD DIMOCK
Participant	PAUL CONWAY
Participant	DAVID GIFFEN
Participant	CYNTHIA GRATIAS
Expert Witness	MARTIN RENDL
Expert witness	TERRY MILLS

INTRODUCTION

This is an Appeal of the North York panel of the City of Toronto (City) Committee of Adjustment's (COA) refusal of an application for variances at 191 Golfdale Rd. (subject property). The purpose of the application is to construct a new dwelling. The subject property is located in the Teddington Park neighbourhood in the Yonge St and Lawrence Ave E area of the former City of North York. It is designated *Neighbourhoods* in the City Official Plan (OP) and zoned RD (f15.0; d0.35;) (x1427) under Zoning By-law 569-2013 (By-law).

In attendance at the Hearing were:

- Jane Pepino, legal counsel for the Applicant/Appellant, her colleague Andrew Everton and Martin Rendl, the Appellant's expert witness;
- Marc Hardiejowski, legal counsel for the City of Toronto;
- William Roberts legal counsel for the opposing Parties - Bruce Stewart, Patrick Cowe, Scott Stevens (on behalf of the Teddington Park Residents Association (TPRA)), Mark Cavanaugh - and Terry Mills, expert witness for the opposing Parties.
- Participants Judy McKay, Nancy Pope, Marsha Giffen, Bruce Campbell and Paul Conway.

I advised those present at the Hearing that I had attended at the site and the surrounding area and had reviewed the pre-filed materials but that it is the evidence to be heard and referenced that is of importance.

I wish to thank all of the Parties and Participants, and most especially the legal counsel in attendance, for their assistance in completing this Hearing within the allotted timeframe of one day.

BACKGROUND

The Appellant proposes to demolish the existing two-storey dwelling with an attached garage and construct a new dwelling.

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

- 1. Chapter 10.20.40.40., By-law No. 569-2013**
The maximum permitted floor space index is 0.35.
The proposed floor space index is 0.599.
- 2. Chapter 10.20.40.10.(1), By-law No. 569-2013**
The permitted maximum building height is 7.2m.
The proposed building height is 7.8m.

- 3. Chapter 10.20.40.70., By-law No. 569-2013**
The minimum required east side yard setback is 1.5m.
The proposed east side yard setback is 1.2m.

- 4. Chapter 10.20.40.70., By-law No. 569-2013**
The minimum required west side yard setback is 1.5m.
The proposed west side yard setback is 1.2m.

MATTERS IN ISSUE

The matters at issue in this Hearing are focused on the size, scale, height and massing of the proposed new dwelling. The maximum floor space index (FSI) permitted by the Zoning By-law is set at 0.35 and has been almost routinely varied in the neighbourhood. (FSI is a ratio calculated by dividing the floor area of a building by the area of the lot).

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

Expert Witness – Applicant

I qualified Martin Rendl to provide expert opinion evidence in the field of land use planning. His Expert Witness Statement was marked as Exhibit 1 and the Applicant's disclosure, in three volumes, was marked as Exhibit 2.

Neighbourhood Context

Mr. Rendl provided an overview of the subject site and neighbourhood context, relying on diagrams and photographic evidence contained in Exhibits 1 and 2. Golfdale Rd runs east from Yonge St and is located seven blocks north of Lawrence Ave E. The subject property is located east of Mt. Pleasant Ave, on the south side of Golfdale Rd. He described the area as a stable but not static neighbourhood that is experiencing a high degree of investment in the form of new construction and additions to existing dwellings.

Mr. Rendl referred to examples of replacement houses throughout the area and described these replacement houses as usually being larger than the houses they replaced, in keeping with modern building trends in the City's established neighbourhoods. He referred to the photographs in Exhibit 2 to illustrate how these new houses coexist with the existing dwellings in the neighbourhood.

In keeping with the parameters set by OP Policy 4.1.5, Mr. Rendl identified a Neighbourhood Study Area. Mr. Rendl described the variety of lot sizes in the study area and identified the increase in lot sizes moving north, from Glenforest Rd to Glen Echo Rd. He noted that although the lots are of varying size, only the lots on Glenforest Rd, the smaller lots, have a higher maximum FSI than permitted by the By-law at 0.6 FSI. All the other streets in his study area have FSI maximums of 0.35.



Source: page 5 of Exhibit 2

Mr. Rendl defined the Immediate Context Area, as directed by Policy 4.1.5, to be the properties on both sides of Golfdale Rd – “properties that face the same street as the proposed development in the same block and the block opposite the proposed development”.

Referring to data from COA and TLAB decisions, Mr. Rendl stated that approvals range from 0.418 FSI to 0.60 FSI on Golfdale Rd and, within the Neighbourhood Study Area, approvals on properties subject to the 0.35 FSI range from 0.38 to 0.86 FSI. The source data for this summary was provided in table form in Appendix A to Exhibit 1.

Proposal

Mr. Rendl reviewed the requirements of the Zoning By-law relevant to the proposal. Zoning By-law 569-2013 permits a two-storey detached dwelling and a maximum floor area of 0.35 times the area of the lot (0.35 FSI). The maximum building height for a

sloped roof is 10m and for a flat roof, 7.2m. Minimum side yard setbacks are set at 1.5m.

The existing house has a floor area of approximately 239m², corresponding to an existing FSI of 0.41. The proposed FSI is 0.599. Mr. Rendl noted that the FSI of the existing house is greater than the maximum 0.35 permitted by the By-law. He advised that the variance requested for side yard setbacks on both the east and west sides are greater than the existing setbacks and therefore they would improve the current condition. The pitched roof on the existing building peaks at 10.66m, which exceeds the By-law maximum, whereas a flat roof is proposed at 7.8m.

It is Mr. Rendl's opinion that the requested variances are consistent with the PPS and conform to the Growth Plan.

The four tests

General intent and purpose of the Official Plan

Mr. Rendl reviewed the relevant policies of the OP and highlighted OP Policy 2.3 that he said acknowledged that *Neighbourhoods* are stable but not static. He stated that physical change is expected to occur in neighbourhoods like this over time through enhancements, additions, and infill housing. He summarized the objective of this policy as being to reinforce the stability of the neighbourhood by ensuring any new development respects the existing physical character of the area. In Mr. Rendl's opinion, "respect" does not mean a proposal must duplicate the same architectural style, massing, height and other characteristics of existing housing stock. In his opinion, new development is to be compatible with existing development and "compatible" does not mean "the same as", or even, "similar to", rather it means something that can co-exist in harmony with its surroundings.

OP Policy 4.1 states that changes to established neighbourhoods are expected to be "sensitive, gradual and fit" the existing physical character by "respecting and reinforcing" the general physical patterns in neighbourhoods. In Mr. Rendl's opinion, the use of the word "general" in the policy means that development does not have to replicate or copy existing development in the vicinity.

Mr. Rendl emphasized that the OP does not assess the compatibility and fit of new development in numerically, but by stating objectives for change and new development in neighbourhoods. He referred to OP Policy 4.5.1 in its entirety as the basis for evaluation of new development in *Neighbourhoods* and, in particular, the criteria which are to be considered in assessing the appropriateness of proposed development.

Mr. Rendl referenced the following criteria as relevant to the proposal:

- 4.1.5(c) Prevailing, heights, massing, scale, density and dwelling type of nearby residential properties;
- 4.1.5(d) Prevailing building types;

4.1.5(g) Prevailing patterns of side yard setbacks and landscaped open space.

In Mr. Rendl's opinion, the 7.8m building height results in a massing and scale for the proposed two-storey house that is visually less than would be the case for a two-story house with a pitched roof built to the 10m maximum. In his opinion, the "lower height" of the proposed house results in a lower scale and massing than the existing house, which has a 10.66m height measured to the roof peak.

In Mr. Rendl's opinion, the proposal's density (FSI) of 0.599 is within the range of FSI variances approved for other new dwellings and additions in the neighbourhood. He asserted that the newer houses on Golfdale Rd, with approved FSI's between 0.48 and 0.6 are part of, and help define, the existing physical character of the neighbourhood.

With regard to prevailing building types, Mr. Rendl observed that two-storey detached houses are the prevailing type.

With regard to side yard setbacks, Mr. Rendl noted that the proposed side yard setbacks for the proposal are greater than the 0.91m setback and 1.03m setback of the adjacent houses at 187 and 193 Golfdale, respectively. He also emphasized that the proposed setbacks for the new house are greater than the setbacks of the existing house on the property.

In Mr. Rendl's opinion, the height, massing, scale and density of the proposed two-storey dwelling is consistent with that of other two-storey dwellings on Golfdale Rd and elsewhere in the neighbourhood; the proposal respects and reinforces the existing physical character of the neighbourhood; the proposal fits the existing context; the variance for FSI is within the range of variances approved for other new dwellings; and the variances do not constitute a change that threatens the stability of the neighbourhood.

It was Mr. Rendl's opinion that the variances maintain the intent and purpose of the OP.

General intent and purpose of the Zoning By-laws

It was Mr. Rendl's evidence that built form is determined by several factors acting together and he included FSI, building height, main wall heights and building depth as features impacting built form. He commented that the proposed new house involves only two of these built form factors, FSI and height. In his opinion, the general intent and purpose of regulating floor area (FSI) and building height is "to control the three dimensional massing of a dwelling and to avoid a house that is out of scale with its lot and surroundings or overdevelopment of the lot".

Mr. Rendl described the proposed floor area as being generally within the two-storey building envelope prescribed by the By-law's regulations for height, length, depth, and front and rear setbacks. He opined again that the 0.6 FSI of the proposed building is

within the range of approvals granted for other new two-storey dwellings on Golfdale Rd as well as on other properties in the neighbourhood.

Regarding the height variance request, Mr. Rendl asserted that the “reason” for the lower height for a flat roofed house is to prevent the construction of three storeys in houses with flat roofs, were the height to be the same 10m as for a sloped roof. Mr. Rendl asserted that to add 0.6m additional building height is a minor increase above the 7.2m By-law maximum. In his opinion, this minor increase in height would not be perceptible from the street and commented that the proposed building height results in a lower building than the adjacent two-storey sloped roof houses.

It was Mr. Rendl’s opinion that the variances related to the built form of the proposed dwelling, for FSI and height, maintain the general intent and purpose of the Zoning By-law.

Mr. Rendl asserted that the purpose of a side yard setback is to provide appropriate separation between the side lot line and the side wall of the house to allow for access between the front and rear yards and space for maintenance of the house. In his opinion, the proposed setbacks, at 1.22m, improve the setback condition on the subject property.

It was Mr. Rendl’s opinion that the variances maintain the intent and purpose of the Zoning By-laws.

Desirable and Minor

Mr. Rendl addressed the shadow study that had been completed for the subject property, while noting that the City does not require shadow studies for COA applications and only for buildings over six storeys in the case of a rezoning. The shadow study shows, he attested, that the proposed new house with a building height of 7.8m casts less shadow on adjacent properties than an “as-of-right” house built with a sloped roof to the 10m maximum permitted building height. In his opinion, the privacy and outlook impacts on adjacent and nearby properties are not materially different than those of the existing house on the property.

It was Mr. Rendl’s opinion that the variances would result in development that is appropriate for the subject property and would not create any adverse impacts on nearby properties.

Under cross-examination, Mr. Rendl was referred to OP Policy 4.1.5.

OP Policy 4.1.5 Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular: ...

c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;

Mr. Rendl was referred to the term “prevailing” and asked if he had done any mapping analysis of where flat roofs exist. Mr. Rendl responded that he had not and noted that there is one flat roofed house a few doors to the west and commented that the zoning by-law permits flat roofs, and that flat roofs do fit the context. In his opinion, flat roofs do not have a negative, destabilizing effect on the neighbourhood.

In summary, it was Mr. Rendl’s opinion that the minor variances before the TLAB meet the four tests of s. 45(1) of the *Planning Act* and represent good land use planning.

Expert Witness – Opposing Parties

Terry Mills was qualified as an expert in the field of land use planning. His Expert Witness Statement was marked as Exhibit 3. All of the supplementary files, including visuals, that were submitted in conjunction with Mr. Mills’ expert witness statement were marked as Exhibit 4.

Mr. Mills attested that although he had been retained by individual Parties (Suzanne Tyson, Patrick Cowie, Mark Cavanaugh, Mary Ann Hughes, Bruce and Lene Stewart), the Teddington Park Residents Association, represented by Scott Stevens, has “become the main client”.

Neighbourhood Context

It was Mr. Mills’ opinion that the massing and scale of proposed house fails to respect and reinforce the existing physical character of the site’s immediate context, as is required by the OP and, in particular, Policy 4.1.5. He observed that the prevailing pattern of the existing housing stock consists of sloped roofs on original buildings as well as replacement houses. Furthermore, he asserted that the proposed FSI of 0.599 exceeds the streetscapes’ prevailing patterns of density.

It was Mr. Mills’ opinion that cumulatively, the proposed building’s tall flat roof, in concert with the proposed density, conflicts with the existing physical character of Golfdale Rd and that the immediately adjacent buildings would be adversely impacted by the height, scale, and massing of the proposed development. It was his opinion that the proposal would not fit sensitively or harmoniously and would not respect and reinforce the character of the immediate context and the neighbourhood.

Referring to Page 3 of the “Visuals” section of Exhibit 4, Mr. Mills identified a neighbourhood study area which tallied generally with that of Mr. Rendl, but which excluded the lots on Glenforest Rd and included the very large lots on a portion of Riverview Dr.

His immediate context study area included not only the lots facing Golfdale Rd, but also included for analysis purposes the lots backing on to those lots as well. Under cross-examination, Mr. Mills was questioned regarding the boundary he identified for the Immediate Context. He responded that he understood the lots facing on to Golfdale, as

well as the lots backing on to those, constituted the Immediate Context but offered that he “preferred” the Immediate Context area identified by Mr. Rendl, (being only those lots which face onto Golfdale in the immediate block on which the subject property is situated).

Mr. Mills noted that the zoning in the neighbourhood is in bands to allow big properties on the brow of the ravine.



Note: South to North orientation.
Source: Exhibit 4 – visuals

Mr. Mills referred to property data contained in Exhibit 4. After a question from me, and later under cross-examination, Mr. Mills acknowledged that the property data has some significant flaws and that data which describes COA decisions is more reliable. Mr. Mills included data on COA decisions on page 25 of the “Visuals” section of Exhibit 4.

Mr. Mills described the character of Golfdale Rd as having an average lot frontage of 15.17m and a depth of 39.14m. The prevailing building character was described as detached centre-hall plan houses with sloped roofs.

Proposal

Mr. Mills referred to page 12 of his Visuals section to show an “indicative mockup” on the subject property, delineating the maximum flat roof height under the By-law at 7.2m, the proposed flat roof height at 7.8m and the parapet height at 8.1m. He noted that all of the building occurs at the front wall line, and asserted that the design does not recess and provide the relief that a sloping back (roof) would give. Mr. Mills disagreed with Mr. Rendl on the reason why a lower height is mandated for flat roofs in the Zoning By-law. In Mr. Mills’ opinion, the purpose of a lower height is not to prevent a third floor, but to integrate a flat roofed building so that it fits harmoniously with the existing character of the neighbourhood in which sloped roofs prevail.

Under cross-examination, Mr. Mills conceded that his “indicative mockup” obscures the peak of the existing house, which he acknowledged as being 10.66m in height. He conceded that diagram was an illustration that “he cannot say is exactly right”.

Mr. Mills referred to a diagram of comparative building sizes on page 14 of the visuals section of Exhibit 4, which illustrates the footprint of the proposed home on the subject property in context with the adjacent houses, which are both owned by Parties to the Hearing, to show the scale of the proposal in context of the adjacent houses.

The four tests

General intent and purpose of the Official Plan

In Mr. Mills’ opinion, the proposed development does not meet the intent and purpose of OP Policy 2.3.1.1. which he referred to as a “cornerstone” policy with the objective that new development respect the existing physical character of buildings, streetscapes and open space patterns in Neighbourhoods. In his opinion, the proposed development does not meet the intent and purpose of OP Policy 3.1.2.3 because new development is required via this Policy to be massed and its exterior façade designed to fit harmoniously into its existing or planned context. It is his opinion that the proposal does not meet the intent and purpose of OP Policy 4.1.5 in that it the proposal does not respect and reinforce the existing physical character of the geographic neighbourhood, in particular with respect to prevailing heights, massing, scale and density. On this basis, Mr. Mills concluded that the proposal does not maintain the general intent and purpose of the Official Plan.

General intent and purpose of the Zoning By-laws

In Mr. Mills’ opinion, the FSI variance requested, if granted, would not maintain the general intent and purpose of the Zoning By-law. He asserted that the proposed development’s FSI, at 0.599, would exceed the densities recorded along Golfdale Rd in the data of COA decisions. Mr. Mills’ Witness Statement refers to the record of COA decisions and noted that the COA modified the FSI for five other developments along Golfdale Rd down to 0.52 FSI or less. Two of these reductions, he noted, were appealed and the resultant decisions maintained a reduced FSI.

In Mr. Mills' opinion, a flat roofed building is not part of the prevailing building form in either the Broad Study Area or the Immediate Context. There is one flat roofed building on Golfdale Rd, which meets the By-law maximum height requirement of 7.2m.

It is Mr. Mills' opinion that the requested side yard setbacks would not maintain the intent and purpose of the Zoning By-law.

Mr. Mills concluded that the proposal as a whole does not maintain the intent and purpose of the Zoning By-law.

Desirable and Minor

Mr. Mills asked that the TLAB not consider the application minor, on the basis that the FSI variance request exceeds the "planned context" density by 71%. In Mr. Mills' opinion, the proposal does not fit harmoniously and does not respect the existing physical character and therefore it would result in unacceptable adverse impacts on the adjacent houses. He therefore opined that the variances cannot be considered minor.

Mr. Mills asserted that he does not consider granting the requested variances to be desirable for the appropriate development of the site, primarily on the basis that the scale and massing of the proposed development exceeds the existing and planned context.

In summary, it was Mr. Mills opinion that the proposed development does not meet the four tests of s. 45(1) of the Planning Act.

PARTY AND PARTICIPANT STATEMENTS

I heard from Parties and Participants in attendance at the Hearing. I am appreciative that the Parties and Participants had coordinated amongst themselves and the statements I heard from those that spoke were focused and to the point. I was able to hear from the neighbours most affected by the proposed development. All were decades-long residents of Golfdale Rd.

Mark Cavanaugh is co-owner of the property immediately east of the subject property. He stated that he is not opposed to development but would have liked the Applicant to work with the community and make some modifications to the solid front wall design of the proposal. His two principal objections to the proposal were that it does not respect and reinforce the physical character of the street and that "it just does not fit". He also expressed concerns about the proposed building overshadowing his back yard, noting that the proposed building would "jut out 40 feet" beyond his house.

Dr. Stewart is the owner of the property immediately west of the subject property. He stated that he is deeply concerned regarding drainage from the subject property as much of it will be covered by the building. He does not want the construction of a long blank wall next door which will impose on their back yard, which his wife has nurtured for many years.

Mark Cowie owns the property directly across Golfdale Rd from the subject property. He is of the opinion that the proposal is insensitive to the character of the neighbourhood and is not a good precedent for the future. He agreed that the neighbourhood should not be static but expected that development should be sensitive. He referenced the flat roof and that there were no gaps between peaks to soften the impact of the design.

Scott Stevens lives on Golfdale Rd and is president of the Teddington Park Residents Association. He supported the evidence of Mr. Mills and the other Parties who spoke. Under cross-examination, Mr. Stevens was asked if a flat roof would be more acceptable to him if it was at the allowable By-law height maximum of 7.2m. He responded in the negative and referred to the total impact of the proposal “as big and square as it is”. Mr. Stevens was asked to acknowledge that if the proposal had been designed with a sloped roof, that the side walls could be higher than 7.2m.

I also heard from Paul Conway and Marsha Giffen.

ANALYSIS, FINDINGS, REASONS

First, a brief discussion regarding the purpose of a Zoning By-law, which is to serve as an articulation of community standards within the policy context provided by the OP. Compliance with the standards set out in the By-law allows a person to apply for a building permit without any further planning process or requirement for public process (as of right). Development in the City of Toronto which proposes to go beyond the By-law maximums and minimums is generally required to obtain authorization for variances from the COA or, on appeal, from the TLAB.

When a standard in the By-law, such as the FSI maximum, is set substantially below what has tacitly become acceptable in the neighbourhood, the process of considering variances becomes more troublesome. There was an intimation in the Hearing that few actually expect that a new home on Golfdale Rd will be built at the 0.35 maximum FSI mandated by the By-law, but that maintaining the By-law at that lower level initiates a “process” where the neighbourhood can have a say in what will be approved. This approach is problematic from a number of viewpoints, not least of which is that this approach weakens the usefulness and effectiveness of the By-law maximum as a benchmark for development. In this situation, both the community and potential applicants are left without a useful tool for framing expectations of what a reasonable FSI variance would look like.

Density/ Floor Space Index Variance

Both experts agreed that the purpose of the FSI maximum in the By-law is to prevent overdevelopment on a lot. What constitutes overdevelopment, however, is the matter at issue.

The Applicant takes the position that the three-dimensional space defined by the maximum building length, maximum building depth, maximum height, and by the

various setback requirements prescribed in the By-law – collectively known as the building envelope – is “as of right”. The shadow study prepared for the Applicant and submitted in Exhibit 2, Tab 15, references this concept of “as of right” in comparison to the shadow cast by the proposal. From the depiction of the Applicant’s concept of “as of right” in the shadow study, it can be seen that the proposal, at 0.599 FSI, only differs to a small degree from a full build-out of the building envelope. From the Applicant’s perspective, the FSI is presented as a number with limited importance or meaning, as just a number, while the building envelope is relied upon as the primary reference for the consideration of potential overdevelopment.

The opposing Parties understand the FSI maximum to serve as a *prior* constraint, i.e., a constraint to the size of the building within the building envelope not beyond the building envelope. In this perspective, the building envelope is a set of theoretical lines within which a building of a particular floor area can be located. With this approach, an “as of right”, proposal might take up the full building width allowed, but could not achieve the maximum building length and height at two storeys and still be considered truly “as of right” i.e., within the FSI maximum.

It is true that a particular total floor area could be achieved by any number of different designs. For example, an FSI less than what is proposed for the subject property could result in a shorter building with less visual imposition on the backyards of the two neighbouring properties, or alternatively it could result in a narrower building with a diminished presentation to the street. In colloquial terms, such an example would have less of an all-round effect than a building built to the limits of the building envelope.

I prefer the opinion of the Opposing Parties that the building envelope does not preempt the intent and purpose of an FSI limitation in the Zoning By-law. There would be little purpose to the inclusion of an FSI limitation in the By-law if it were indeed subservient to the other parameters set out in the By-law. I concur that the intent of the FSI maximum in the Zoning By-law is to limit the total amount of floorspace on the property, allowing that total amount of floorspace to be positioned on the site according to design and within the limits represented by the other requirements of the By-law. Variance to an FSI maximum remains a privilege and not an entitlement, even in situations where it is the only variance requested. However, this is not to say that I agree that an FSI of 0.35 as set in the Zoning By-law remains a serviceable maximum for this neighbourhood. The question thus remains whether the proposal at 0.599 FSI constitutes overdevelopment of the subject property. The OP provides policy, guidance, and context in this regard.

OP Policy 4.1.5 stipulates *that 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.*

Massing, scale and density are all architectural terms having to do with the size and relationship of a building to what surrounds it. In this context, massing refers to the general perception of the shape and form, as well as size of a building. Scale refers to a building’s size in relation to something else, for example an adjacent building or a

person. Density, in this context, means the size of the building in relation to the lot on which it is located. In the By-law, FSI is the numerical indicator of what the OP refers to as “density”.

OP Policy 4.1.5. continues, in part, as follows:

“Proposed development within a Neighbourhood will be materially consistent with the prevailing physical character of properties in both the broader and immediate contexts. In instances of significant difference between these two contexts, the immediate context will be considered to be of greater relevance. The determination of material consistency for the purposes of this policy will be limited to consideration of the physical characteristics listed in this policy...

The prevailing building type and physical character of a geographic neighbourhood will be determined by the most frequently occurring form of development in that neighbourhood. Some Neighbourhoods will have more than one prevailing building type or physical character...

While prevailing will mean most frequently occurring for purposes of this policy, this Plan recognizes that some geographic neighbourhoods contain a mix of physical characters. In such cases, the direction to respect and reinforce the prevailing physical character will not preclude development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers within the geographic neighbourhood, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood and already have a significant presence on properties located in the immediate context or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood.”

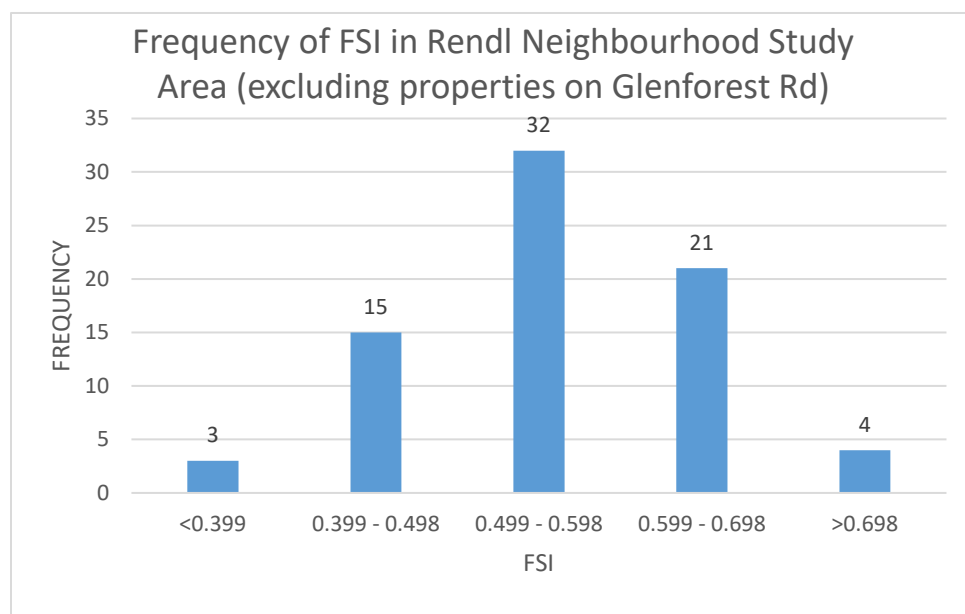
The geographic neighbourhood defined by both experts does not differ markedly and generally described a similar general physical character. What is centrally at issue is whether the proposed development is materially consistent with the prevailing physical character of properties in both the broader and immediate contexts. Prevailing physical character is to be determined by *the most frequently occurring form* of development in the neighbourhood (my emphasis).

Policy 4.1.5 restricts the determination of material consistency with the prevailing physical character to those physical characteristics listed in the policy, one of which is density. I have considered the data contained in Appendix A of Mr. Rendl’s Witness Statement. This data reflects only approvals for variances granted by the COA, or on appeal, within the last twelve or so years. It is therefore likely to over-represent the larger houses in the neighbourhood given the trend to larger homes over this time period, a trend recognized by both Mr. Rendl and Mr. Mills at the Hearing. Even a sample thus skewed towards the upper end of the actual on-the-ground prevailing density is a useful snapshot of more reliable data than what was provided by Mr. Mills from the City’s property data. This more reliable data from Mr. Rendl was highlighted by counsel for the Applicant in cross-examination and in closing arguments.

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Mr. Rendl relied on the COA decisions data and advised that approved FSI's in the Neighbourhood Study Area for new houses range between 0.465 to 0.86 and that approved FSI's for new houses on Golfdale Road range between 0.48 and 0.6 FSI. One of the reasons Mr. Rendl cited for his recommendation that the TLAB approve the variances is that 0.60 FSI of the proposed dwelling is within the range of approvals granted for other new two-storey dwellings on Golfdale Road as well as on other properties in his neighbourhood study area. This opinion does not greatly assist the TLAB in understanding what the *prevailing* density in the neighbourhood is, which the OP Policy 4.1.5 defines as the *most frequently occurring*. It is the *prevailing* density that OP Policy 4.1.5. says development must respect and reinforce.

Data from COA decisions and appeals has been submitted by both experts. A simple graph of the data provided by Mr. Rendl for the Neighbourhood Study Area in his Exhibit 1 Appendix A illustrates the general distribution of FSI frequencies. For the purposes of this analysis, I excluded those properties in Mr. Rendl's study area on Glenforest Rd as they have a permitted FSI of 0.6 and are located on smaller lots, (which was noted by both Experts). Mr. Mills did not include the lots on Glenforest Rd in his study area, and in consideration of the guidance of OP Policy 4.1.5. that zoning is one of the factors for consideration in delineating the geographic neighbourhood, I too have excluded the lots on Glenforest Rd from the FSI frequency analysis below.



Note: categories = greater than the first number and inclusive of the second number
Data Source: Exhibit 1, Appendix A. Martin Rendl

From this simple analysis, it appears that FSI's lesser than the proposal (0.599) prevail in the sample data drawn from COA approvals within in the last 12 to 14 years. Fifty of the Decisions in the sample set of 75 Decisions were at FSI's below 0.599.

OP Policy 4.1.5 provides that development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers within the geographic neighbourhood not be precluded, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood *and already have a significant presence on properties located in the immediate context or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood*. OP Policy 4.1.5 also states that in instances of significant difference between these two contexts, (broader and immediate contexts), the immediate context will be considered to be of greater relevance.

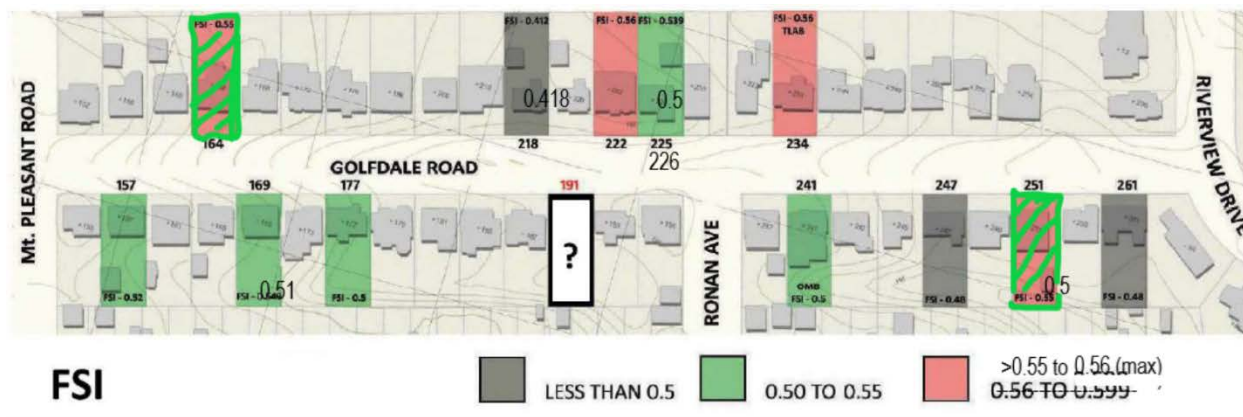
Mr. Rendl's analysis of Golfdale Rd addressed the alternative noted above of considering and including in the analysis the immediately adjacent blocks within the geographic neighbourhood. Mr. Rendl's analysis of Golfdale Rd serves as a thoughtful subset of the geographic neighbourhood, for comparative purposes, given the distinct and different lot frontages that occur along each of the east/west streets in the Neighbourhood Study Area he defined (Teddington Park Ave (22.5m), Golfdale Rd (15m) and Snowdon Ave (9m)). Of the 21 Golfdale Rd properties Mr. Rendl identified in Appendix A to Exhibit 1, only three exceed 0.56 FSI and only two of the properties are recorded at 0.6 FSI, which is the maximum FSI that has been allowed by the COA and/or by appeal on Golfdale Rd. Thus, while Mr. Rendl is correct to say that the proposed FSI is within the range of FSI's approved on Golfdale Rd, the prevailing density, or the most frequently occurring density, on Golfdale Rd is not as high as that which is proposed for the subject property.

Mr. Rendl identified the immediate context as being "the properties that face the same street as the proposed development in the same block and the block opposite the proposed development". He did not provide a depiction of the immediate context area nor an analysis of the address ranges that fall within this definition. The immediate context, as defined by the OP and quoted by Mr. Rendl, consists of the **same block** and the **block opposite** the subject property.

Mr. Mills' opinion was that the proposal, at 0.599 FSI, exceeds the prevailing patterns of density but similarly to Mr. Rendl, did not provide an analysis of prevailing density/FSI in the manner that is described by OP Policy 4.1.5. Instead, Mr. Mills referenced *average* FSI's in one part of his Witness Statement, and in another part of his Witness Statement provided frequency of COA approvals, but for geographic areas other than his Neighbourhood Study Area and the immediate context as defined by the OP.

On page 25 of the "Visuals" section of Exhibit 4, Mr. Mills provided an illustration which depicts the immediate context as defined by the OP. I have corrected data errors by cross checking with both Mr. Rendl's and Mr. Mills' data, and by reference to Tab 20 in Exhibit 2 which contains copies of the Decisions.

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Source: Document Disclosure of Arash Kamali (Exhibit 4 Visuals)

Shown in the diagram above are the 12 properties within the immediate context area as defined by the OP for which there is reliable data, (and recognizing that these properties are the most recently redeveloped and likely the largest houses in these blocks). None exceed 0.56 FSI. The proposal, at 0.599 FSI, is not within the prevailing density of the immediate context.

I have not been provided sufficient evidence to determine that the proposal, at 0.599 FSI, falls within the prevailing density of the neighbourhood. The proposed FSI has not been shown to be the prevailing, or most frequently occurring, or even significantly represented density on Golfdale Rd and there are no properties identified in the immediate context with an FSI as high as the proposed density. Therefore, the Applicant has not established that the variance requested for density/ maximum FSI maintains the general intent and purpose of the Official Plan.

Both experts agreed that the purpose of the FSI maximum in the By-law is to prevent overdevelopment on a lot. The Applicant relies on the premise that the building envelope defined by the By-law provides the frame of permissible development and that therefore the proposal, which is within this building envelope, does not constitute overdevelopment of the site. I did not find this premise to be founded as this approach relegates the consideration of the FSI maximum to a subservient and secondary consideration in relation to the other requirements of the By-law, which I find to be contrary to the general intent and purpose of the Zoning By-law.

The intent and purpose of the Zoning By-law is to set performance standards to ensure that new development will be compatible with the physical character of established residential *Neighbourhoods* (OP Policy 4.1.8). For the reasons outlined in my analysis above, I find that the evidence that has been submitted by the Applicant is insufficient to find that the proposal meets the general intent and purpose of the Zoning By-law.

In considering the applications for variances from the Zoning By-laws, the TLAB must be satisfied that the applications meet all four tests under s.45(1) of the Act. An adjudication that even one of the four tests is not met is sufficient for the requested variance to be denied. In this matter, I have found that, for the reasons outlined above, the first two tests (general intent and propose of the OP and the Zoning By-law) have

not been met. For the same reasons, I find that evidence that the proposal is desirable for the appropriate development of the land is insufficient for the purpose of meeting the third test. For the same reasons, I find that the evidence asserting no adverse impact, and that the proposal is minor, is insufficient for the purpose of meeting the fourth test.

Height Variance

A building with a flat or shallow roof at a maximum building height of 7.2m and a building with a sloped roof at 10m are both permitted under the Zoning By-law and are equally acceptable, requiring no height variances. The opposing Parties contended that flat roofed buildings do not prevail in the neighbourhood and such buildings are not part of the physical character of the neighbourhood. In response, Mr. Rendl asserted that flat and shallow roofs are permitted by the By-law and are therefore an acceptable and permitted form. In this regard, I prefer the evidence of Mr. Rendl. A building with a flat or shallow roof could be permitted at any time as of right in any part of the neighbourhood provided that the design complied with the maximum height of 7.2m and other requirements of the By-law. In this proposal, it is the height of the building which is at issue, not the flat roofed design, which is permitted under the By-law.

Mr. Rendl contended that the reason that the By-law sets a lower height limit for a flat or shallow roofed building is to prevent the construction of three storeys in houses with flat roofs. Mr. Mills disagreed and asserted that the purpose of a lower height is not to prevent a third floor, but to integrate a flat roofed building so that it fits harmoniously with the existing character of the neighbourhood in which sloped roofs prevail. I concur with Mr. Mills that the intent and purpose of the By-law in setting a different maximum height for flat or sloped roofs is not exclusively to prevent construction of a third storey, but also to mitigate the effect of the different massing a flat roofed building presents.

On a flat roofed building, the full height of the structure is experienced for the full length/width and height of the wall, with no recessing or expanding sky view that is experienced as a sloped roof approaches its peak. On a more conventional house with a pitched roof, the highest point of the roof is generally set back from the front wall of the house. Viewed from the street, a traditional house with a pitched roof where the maximum height is set back from the front of the property offers visual relief of an angled shape allowing sky view as opposed to a rectangular block running the full width and height of the building that is presented by a flat roofed structure at a similar height.

The requested height variance exceeds the maximum permitted under the By-law by 0.6m. No evidence has been provided regarding the occurrence of variances to flat or shallow roofed building heights in the neighbourhood. The primary question before the TLAB is whether the proposed increase in height is in keeping with the general intent and purpose of the OP regarding massing, scale, and the prevailing physical character of the neighbourhood. What adverse impacts, if any, would there be in approving the requested height variance? The challenge in adjudicating these questions is that the influence of massing, scale and density are all closely inter-related and mutually reinforcing. The impact of an increased height is potentially compounded by the scale (size) and massing of a proposal. It is for this reason that most TLAB decisions address both individual and cumulative impacts of requested variances for any proposal.

Under cross-examination, Mr. Stevens, Chair of the Teddington Park Residents Association referred to the total impact of the proposal “as big and square as it is”. Mr. Stevens was asked to acknowledge that under the Zoning By-law, the exterior main walls of a detached house with a pitched roof would be permitted at a height of 7.5m on the subject property. Section 10.20.40.10 (2) of Toronto Zoning By-law 569-2013 (see Tab 19, Exhibit 2) provides that:

“(2) Maximum Height of Specified Pairs of Main Walls

In the RD zone, the permitted maximum height of the exterior portion of main walls for a detached house is the higher of 7.0 metres above established grade or 2.5 metres less than the permitted maximum height in regulation

10.20.40.10(1), for either (A) or (B) below:

(A) for no less than 60% of the total width of:

- (i) all front main walls; and*
- (ii) all rear main walls; or*

(B) all side main walls:

- (i) for no less than 60% of the total width of the side main walls facing a side lot line that abuts a street; and*
- (ii) for no less than 100% of the total width of the side main walls that do not face a side lot line that abuts a street.”*

Recognizing that the By-law permits a building with exterior walls at a height of 7.5m and a roof above to a maximum of 10m, provides a comparative reference point for the proposal which requests a variance for exterior walls at a height of 7.8m with no roof structure above.

Together with the height variance, however, the scale (size) and density of the proposal has cumulative impacts in that the additional height that is being proposed is experienced for the full 17m permitted length of the proposal by neighbours to both the east and the west, as well as upon the front-facing street elevation. The impact of the increased height requested is linked to the size and scale of the proposal.

My previous finding that the proposed variance for FSI does not maintain the general intent and purpose of the Official Plan and the Zoning By-law is sufficient grounds to cause the proposal to fail as the proposed design is not realizable in light of this finding. It is a tautology in the jurisprudence of the Local Planning Appeal Tribunal (formerly the Ontario Municipal Board) and the TLAB that if a variance fails any one of the four tests, the variance itself fails and the application, including that variance, may fail with it. In this case, the “key variance” has failed. In some cases, variances may be approved as standalones, as approvals which are not dependent on the design and features of a proposal. The impact of a height variance, however, is so highly dependent on the design of the proposal that in this case an approval for a height variance cannot be supported untethered from specific plans and elevations (which in this case are not realizable without the requested FSI variance). Therefore, as a consequence of this dependency, I find that the requested height variance cannot be independently adjudicated against the four tests, absent an approvable design.

Side Yard Setback Variances

I recognize that the variances requested for side yard setbacks on both the east and west sides are closer to the By-law requirements than the existing side yard setbacks on the subject property. However, similarly to my finding regarding the height variance, side yard setbacks have an influence on scale, massing and streetscape. The issue of building massing and the influence of the proposal on the streetscape has been a contested issue in this hearing. I find that the requested side yard variances cannot be independently adjudicated against the four tests absent an approvable design.

CONCLUSION

I recognize that the 0.3 FSI set in the Zoning By-law for this neighbourhood is impractically low in this case and has already been exceeded by the existing house on the subject property and also by many of the recent decisions of the COA in the immediate context. Nonetheless, the burden remains with the Applicant to demonstrate that the proposal at 0.599 FSI meets the four tests of s.45(1) of the *Planning Act*.

I have found that Applicant has not provided sufficient grounds to establish that the variance requested for FSI has met the four tests under s. (45(1) of the *Act*. This finding alone is sufficient for the requested FSI variance to be refused. Without the requested FSI variance, the overall design of the proposal cannot be realized and therefore the requested height variance and the side yard setback variances have no basis and justification for approval.

DECISION AND ORDER

The Appeal is dismissed. The Committee of Adjustment decision noted above is final and binding, and the file of the Toronto Local Appeal Body is closed.

X 

Ana Bassios
Panel Chair, Toronto Local Appeal Body