

## DECISION AND ORDER

**Decision Issue Date** Monday, November 22, 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): COLLEEN ANNE FRENCH

Applicant(s): RUBINOFF DESIGN GROUP

Property Address/Description: 103 ESGORE DR

Committee of Adjustment File

Number(s): 20 179018 NNY 08 MV

**TLAB Case File Number(s): 20 217166 S45 08 TLAB**

**Hearing date: June 9, 2021 and August 31, 2021**

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

**DECISION DELIVERED BY S. Gopikrishna**

## **REGISTERED PARTIES AND PARTICIPANTS**

Applicant	RUBINOFF DESIGN GROUP
Appellant	COLLEEN ANNE FRENCH
Party	SIMONE PERREAULT
Party	PETER WALKER
Party's Legal Rep	JENNIFER MEADER
Participant	SHEILA DUNLOP
Expert Witness	FRANCO ROMANO
Expert Witness	HENRY JOSEPH

## **INTRODUCTION AND BACKGROUND**

Ms. Simone Perreault and Mr. Peter Walker are the owners of 103 Esgore Dr, located in Ward 08 (Eglinton-Lawrence) of the City of Toronto. They applied to the Committee of Adjustment (COA) to construct a second storey building additions over the top of the existing house. The COA heard the application on October 22, 2020 and approved the application with conditions. Ms. Colleen French, the neighbour who lives at 105 Esgore appealed the decision of the COA to the Toronto Local Appeal Body (TLAB), which set a Hearing date for June 9, 2021. The Proceeding commenced on June 9, 2021 and was completed on August 31, 2021.

## **MATTERS IN ISSUE**

### **Chapter 10.5.40.50(2), By-law No. 569-2013**

1. The minimum required side yard setback for the front porch is 1.8m. The proposed south side yard setback for the front porch is 1.42m.

### **. Chapter 10.20.40.70.(3) E, By-law No. 569-2013**

2. The required minimum side yard setback is 1.8m. The proposed north side yard setback is 0.65m.

### **Chapter 10.5.100.1.(1), By-law No. 569-2013**

3. The maximum permitted driveway width is 3.12m. The proposed driveway width is 5.64m.

**Chapter 10.20.40.70.(3)E, By-law No. 569-2013**

4. The required minimum side yard setback is 1.8m. The proposed south side yard setback is 1.5m.

## **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').

### **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 June 9, 2021 and August 31, 2021, the Applicant was represented by Ms. Jennifer Meader, a lawyer, and Mr. Franco Romano, a land use planner. The Appellant, Ms. Coleen French represented herself, while Mr. Henry Joseph, a land use planner provided evidence on her behalf. Ms. Sheila Dunlop, a local resident and the President of the South Armour Heights Residents' Association (SAHRA), elected to be a Participant, and gave evidence in opposition to the proposal.

Mr. Romano was sworn in, and recognized as an Expert Witness in the area of land use planning. He said that the Subject Site, No. 103 Esgore Drive, is located between Avenue Road and Yonge Street, south of Wilson Avenue. Esgore Drive is a local road with a curved north-south orientation, which intersects Yonge Boulevard in an "angled manner". The Subject Site is located on the east side of Esgore Drive, six properties from its intersection with Yonge Boulevard.

The Subject Site is designated "Neighbourhoods" and is zoned RD, pursuant to Toronto Zoning By-law 569-2013, and R3 pursuant to former North York Zoning By-law 7625. According to Mr. Romano, these planning instruments permit detached residential houses to a maximum height of 10m, and two storeys.

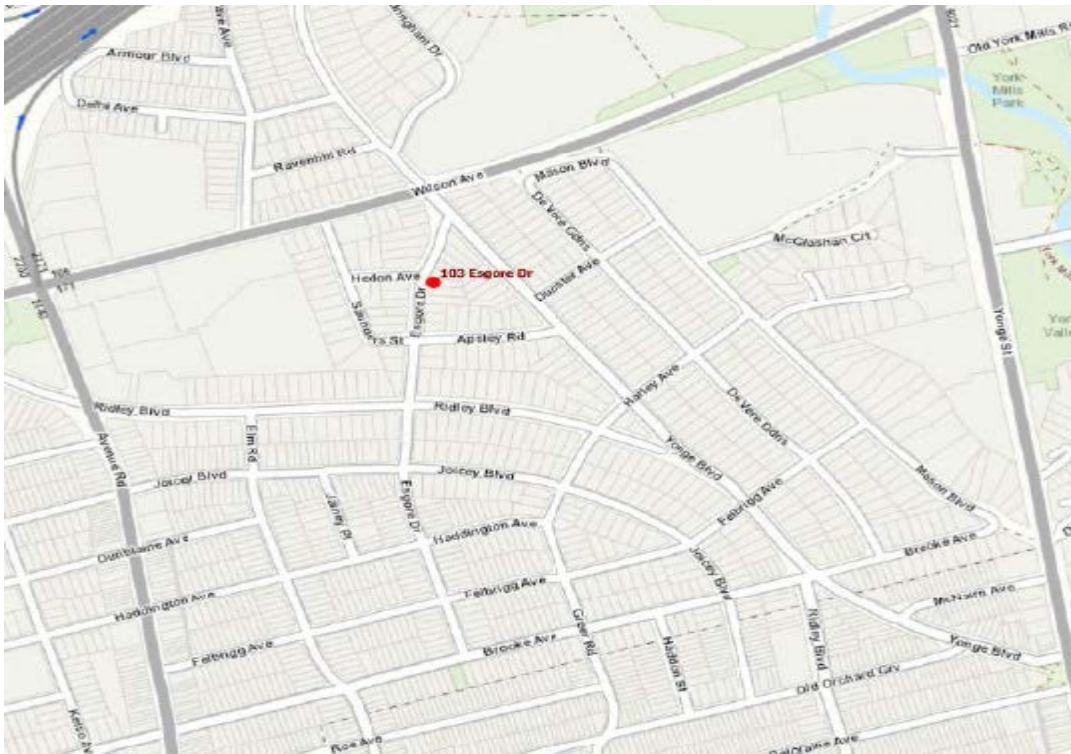
Mr. Romano stated that the Subject Site is presently occupied by a two storey, detached dwelling, with an attached garage. The Applicants propose to construct second storey building additions, over the top of the existing one storey portion at the existing dwelling, as well as the rear of the building. Mr. Romano recited the requested variances, and reviewed the COA decision, which had approved the requested variances, subject to conditions.

Mr. Romano advised that the Applicants had revised the initial proposal, after it was originally filed on August 11, 2020. The original proposal required a variance for the rear deck, and was designed to have the driveway go straight from the road to the dwelling, such that a City tree removal request was necessitated. He said that the changes made to the plans included eliminating the rear deck variance, and reconfiguring the driveway to protect the City tree. Mr. Romano discussed and illustrated the differences between the proposals submitted to the COA, and the TLAB, with the help of drawings- he emphasized that the proposal in front of the TLAB was modest compared to what had been presented to, and approved by the COA.

Mr. Romano then pointed out that the local road network within the area has a non-grid-like character ( By way of an editorial note, please see Diagram 2) - Esgore Drive , which the Subject Site fronts onto, intersects at Yonge Boulevard in an “angled manner”. According to Mr. Romano, this creates a lot pattern that “consists of irregular-shaped rectangles, or polygons. Lot lines within this lot fabric are not uniform, and intersect at angles, which results in a varied site design and overall physical character of buildings and streetscapes”. Mr. Romano demonstrated how the area is experiencing a considerable amount of regeneration, including new residential buildings, and new lots. According to Mr. Romano’s Witness Statement, the regeneration that has been occurring in the community “reflects the era of construction, differs from the preceding developments” because it utilizes “ more space” than the development that is being replaced, or improved upon.

Mr. Romano then delineated his Geographic Neighbourhood (GN) which is bounded by the interior of Wilson Avenue to the north, Avenue Road to the west, Yonge Street to the east, and Brooke Avenue to the south. He said that the lands within this portion of the neighbourhood are contextually proximate to the Subject Site, bounded by dividing features and containing low scale, low rise detached residential lots and zoning on a varied, non-grid-like local road network. Mr. Romano then discussed his analysis of the community, as well as his preference for a qualitative analysis, rather than a quantitative analysis, because the former provides for a more direct analysis of physical characteristics, which makes it possible to “opine on the physical character of buildings, streetscapes and patterns”. He discussed the application of Policies 2.3.1.1 and 4.1.5 to the proposal, and briefly touched on the application of Policies 3.1.2 and 3.2.1 to this proposal.





**DIAGRAM 2- CURVILINEAR ROAD NETWORK RESULTS IN THE UNUSUAL ORIENTATIONS OF THE HOUSES WITH RESPECT TO EACH OTHER**

Mr. Romano explained the concept of “fit” from a planner’s perspective- the proposal did not have to be the same as what already exists in the neighbourhood, but had to “generally respect” the existing and planned contexts of the neighbourhood. He emphasized how new development can have different physical characteristics, and still respect, and reinforce the overall character of the physical contexts in proximity to the development site

Speaking to Section 4.1.5 of the Official Plan, Mr. Romano pointed out that there is considerable diversity in the lot sizes, while the configuration of the lots is a mixture of rectangular and irregular-shaped lots. He emphasized that the existing lot size, with a frontage of 15.22m. and an area of 644.9 sq.m, would not be altered. According to Mr. Romano, the proposal “will continue to respect and reinforce the existing lot size at the geographic neighbourhood and localized levels”.

Mr. Romano next discussed the massing of the buildings in the Neighbourhood, and opined that while the massing of some residential buildings is consistent with Zoning regulations, there are others which “stretch beyond what Zoning permits”. He stated that many buildings are “oriented towards the front, or central portions of the lot”, and that

the massing manifested itself in modest, “uniform or articulated formats” with flat, sloped or articulated roofs in “shallow to steep formats”. He said that the proposed massing is “reasonable”, and consistent with what is seen in the neighbourhood, as described earlier, and is situated such that is comparable to other lots i.e. oriented towards the front of the lot. Mr. Romano concluded this discussion by stating that the proposal will respect, and reinforce this existing physical character aspect, and consequently maintains the intent and purpose of the Official Plan.

Speaking to the density of the houses, and the lot coverages, Mr. Romano said that there is considerable variation with respect to both variables, with some residences fulfilling the Zoning By-Law specification with a maximum of 35% of the lot area or less, while other dwellings are considerably larger, and go beyond what is allowed under the Zoning By-law. Given the variation in the lot coverage, Mr. Romano said that the proposed dwelling size result in a lot coverage of 21.1%, which he categorized as being “appropriate” given the prevailing lot coverage in the community. With respect to the density consideration ( i.e. FSI), Mr. Romano pointed out that this variable was not regulated within this geographic neighbourhood. Given that there is no maximum for the FSI, Mr. Romano concluded that the proposed 0.28 FSI was “modest” and would not detract from the prevailing character.

Discussing the mutual relationship between dwellings along Esgore Dr. in the light of 4.1.5 (f)., Mr. Romano re-emphasized that the curved nature of the street resulted in straight and angled conditions, with dwellings not necessarily parallel to each other i.e. the front walls of dwellings may not be parallel, but “at angles” to each other. He asserted that since the proposed setback of the dwelling from the street would not be altered, it will continue to respect and reinforce the prevailing setbacks, and contribute to the existing pattern of undulating, and staggered front wall alignments, along the street.

According to Mr. Romano, the prevailing patterns of rear yard setbacks are such that “they are modest to large, in excess of the zoning requirement”. The rear-yard setbacks in this neighbourhood contain open amenity spaces, and accessory structures such as sheds or detached garages. He said that the proposal maintains an “appropriately large-sized open amenity rear yard that fits in well with the area”.

Mr. Romano then demonstrated how the existing side yard setbacks within the immediate context range from 0.3m to over 3.5m. Within the immediate context, he demonstrated that the side yard setback is less than 1.0m for 55% of properties, and 1.5m or less for 91% of properties. He stated that the existing and proposed side yard setbacks will fit in well with what exists in the neighbourhood, as well as the planned context. The existing proposed side yard setbacks of north 0.65m “at a pinch-point”, widening to over 2.31m, as well as the south 1.3m widening to 1.5m, will provide for “context suitable space which satisfies the intent of the side yard setback provision”, as discussed in the test respecting the By-laws. This conforms to, and meets the general intent and purpose of the Official Plan.

He next spoke to the prevailing patterns of landscape open spaces, found within the front yards, as well as the rear yards,. According to Mr. Romano, with 64.6% of the

front yard being landscaped, and essentially all of the rear yard being landscaped, the landscaping pattern is consistent with what exists in the immediate context, which has more than 50% landscaping in both the front yard, and rear yard..

Based on this evidence, Mr. Romano concluded that the proposal satisfied the test of meeting the intent, and purpose of the Official Plan.

Mr. Romano discussed how the proposed setbacks met the intent and purpose of Zoning By-Law 569-2013. He asserted that the proposal meets the general intent and purpose of the By-Law to provide adequate space for separation between properties as well as, access, maintenance, and servicing. He emphasized that the 0.65m side yard setback, which narrows to 0.65 m “at a pinch point” of the 6.12m building length, results from the angled nature of the side lot line, and widens to 1.07m (for the aforementioned 6.12m building length). The balance of the dwelling, including the rear two storey addition, has side yard setbacks of 1.87m to 2.31m and larger. He noted that the neighbourhood includes numerous examples of side yard setbacks that are smaller than the Zoning requirement, with no consistent numeric uniformity, nor pattern. He stated that porch side yard setback provision has a general intent and purpose to ensure that the porch maintains a subordinate, accessory attachment to the dwelling, and demonstrated how this is maintained by the porch size and location in this proposal. .

Mr. Romano clarified that that the Zoning Examiner may have been stringent in the application of the By-Law, because the 1.8 m minimum was applicable only to houses , a with a frontage of 18.0m to less than 24.0m.

Speaking to the variance respecting the general intent and purpose of the driveway width, Mr. Romano stated that the performance standard is to ensure that the driveway occupies a reasonable width, in relation to the front yard, as well as facilitate the on-site parking. He said that the proposed driveway width is for a portion of the driveway, to permit a vehicle to be parked on private property without encumbering access to the single car garage. He said that the proposed driveway is minimized in the large front yard, “which is reasonable in this instance”, and meets the general intent and purpose of the Zoning By-law. The proposed driveway width of 5.64 metres is for a portion of the driveway, to permit a vehicle to be parked on private property, without encumbering access to the single car garage. Mr. Romano asserted that this is “reasonable” in this instance, and concluded that the width of the driveway meets the general intent and purpose of the Zoning By-law.

Based on this evidence, Mr. Romano concluded that the requested variances satisfied the test of fulfilling the intent and purpose of the Zoning By-law.

Speaking to the test of minor, Mr. Romano asserted that the proposal creates no unacceptable adverse impact. He said that while the proposal results in a development which will occupy more space on the Lot, the situation of the proposed building, and its built-form condition are “reasonable in the redevelopment of this Subject Site”, particularly within its geographic, and localized neighbourhood contexts. According to Mr. Romano, this form of evolution has, and continues to be, part of the ongoing physical character. He stated that the proposal will not cause any unacceptable adverse

impacts such as shadowing, privacy or overlook or any related to site development features. The as-of-right development permission associated with the Subject Site can generate similar and more impacts than proposed.

Mr. Romano spoke to a Sun-Shadow presentation, accompanying his Expert Witness Statement, which illustrated that the incremental increase in shadow, cast by the proposed extension, compared to what exists now, does not create unacceptable adverse impacts. To reiterate, an important conclusion drawn from his interpretation is that the sun-shadow studies demonstrate that the existing shadow on the alcove on the Appellant's property, is largely created by the Appellant's own house, and that the proposed extension will have minimal incremental impact on the shadow cast on 105 Esgore, and does not last long, because the shadow moves quickly. On the basis of this evidence, Mr. Romano concluded that the proposal satisfied the test of minor.

Speaking to the test of appropriate development, Mr. Romano opined that the proposed building additions represent a sensitive form of regeneration, which minimizes impacts on the property and surroundings. The proposal will result in a compatible, appropriate two storey detached dwelling Site design, and built form which is within the planning and public interest. The proposal builds upon and maintains the existing physical character in an appropriate manner, on the basis of which Mr. Romano concluded that the test of appropriate development was satisfied.

The Opposition presented its case, with Mr. Henry Joseph testifying as an Expert Witness, while Ms. Colleen French and Ms. Sheila Dunlop provided evidence as Witnesses.

Mr. Henry Joseph was sworn in, and was recognized as an Expert Witness in the area of land use planning. He spoke to the test of the Official Plan, and said that the proposed development does not meet the intent and purpose of Policy 3.1.2.3 of the OP, with respect to the proposal's physical content and its planned context. He pointed out that the new development, including expansion of an existing building, is required to be massed, and its exterior designed, so as to limit impact on the streetscape, and neighbouring properties. He emphasized that "adding essentially two storeys to a currently encroaching building, as the Applicants propose to do", is not consistent with this policy. By way of an editorial comment, I note that all references to "encroachment" reflect the Appellant's position regarding the relationship between the existing garage and the side-yard – the garage "encroaches" into the side yard of 103 Esgore, instead of being adjacent to it.

Speaking to the test of respecting the Zoning By-Law, Mr. Henry said that that "even the current garage encroaches into the side yard setback to the extent that it cannot be considered minor in nature or level of intrusion. While this has been "tolerated" as a single storey garage with no windows and a flat roof configuration, this will no longer be the case should a further storey with windows, and a full side gable roof be added".

Mr. Joseph discussed how the proposal did not fit the test of appropriate development. He said that the 105 Esgore Drive residence was "configured to work with the lot configuration", and the "building design created a kitchen and external alcove taking

advantage of a south facing opportunity which will now be further disrupted with a tall vertical wall (three times as high as the current garage) and building massing within 0.65m of the property line”.

Lastly, Mr. Joseph spoke to the test of how the proposal did not satisfy the test of minor. He said that the existing single storey garage “already encroaches 1.15m into the minimum zoning setback requirement (1.8m) by 64%”. He said that he had calculated “the existing garage roof, viewed from the kitchen wall, to be approximately 30% above horizontal; a second storey flat roof would increase it to approximately 40% above horizontal; while a side gable roof would increase it to 50% above the horizontal”- by way of an editorial note, this diagram is reproduced below as Diagram 3.

**RECEIVED**

By Toronto Local Appeal Body at 10:39 am, Jun 10, 2021



**DIAGRAM 3- APPELLANT’S SUBMISSION TO DEMONSTRATE THE LOSS OF SUNLIGHT IF THE PROPOSAL WERE COMPLETED**

Mr. Joseph described these changes “as not being minor” in terms of impact. He relied on the above diagram to demonstrate the impact of the shadows- he stated that from there is a 50 degree angle between the top of proposed extension ( i.e. top of what appears to be the third storey) at 103 Esgore, and the kitchen wall of 105 Esgore, a 41 degree angle between the top of the second storey at 103 Esgore, and the kitchen wall at 105 Esgore, and a 28degree between the highest point of the garage at 103 Esgore, and the kitchen wall at 105 Esgore. When these angles are compared with “the

maximum height of the sun at this latitude and longitude to be: 22.6 degrees in winter; 45.8 degrees in spring; 68.8 degrees in summer and 46.0 degrees in fall”, Mr. Joseph opined that the impact of the proposed construction is such, that it would increase the shadows, and have a significant impact on the following:

- an alcove off his client’s kitchen- the importance of this alcove is underlined by its use for entertainment purposes after dinner
- A rose and vegetable garden, between Ms. French’s house and the existing garage at 103 Esgore Ave.

In addition, Mr. Joseph presented a fairly long critique of the Witness Statement put forward by the Applicants. The pertinent highlights are:

- While the RD zoning permits detached residential to a maximum height of 10.0m and two storeys, the Applicants “suggests” a development of a third floor storey, as a result of faux dormer windows.
- In response to the Applicants characterizing a local road network that “creates irregular shaped lots”, and that “Lot lines within this lot fabric are not uniform, and they intersect at angles, Mr. Joseph asserted that these statements are exaggerations.
- In response to Mr. Romano stating that 55% of lots have side yard setbacks of less than 1.0m, Mr. Joseph commented that ***“This means that 45% of the lots have setbacks of at least 1.0m. Mr. Romano suggests that this ( i.e. small side yard setbacks) may be related to era of construction but provides no evidence thereof.*”**
- In response to the Applicants’ evidence that the north side yard lot line tapers inwards from the front lot line, creating “pinch points” of 0.65m to 1.07m, widening from rear to front., Mr. Joseph said that ***“ This is an unusual way to describe an encroachment into a side yard setback and suggests that it may be problematic even for the existing single storey garage. The rear pinch point is directly across from the beginning of the French residence patio/entrance way.”***
- In response to the Applicants’ introduction of sun-shadow drawings, and their contention that it demonstrated that the “proposed shadow is overall less than what could occur within the planned context (or as-of-right development context”, Mr. Joseph questioned the planning rationale of this statement. ***“An alternative shadow study using a low profile roof akin to the proposed rear addition, would have been more useful to assess the development options and their effect on the French property”*** would have been more useful to assess the development options and their effect on the French property.

Mr. Joseph also listed a number of technical issues with the sun-shadow studies, such as lack of a written description ( commentary) to describe what is being illustrated and proven, and that the studies illustrated “only two of the four dates” for which information is required, as per the City of Toronto guidelines. He also asserted that Mr. Romano ***“is clearly wrong to suggest that TLAB should compare the indicated results to a hypothetical as-of-right alternative to establish the degree of impact , whether it constitutes a minor variance. He has clearly indicated that this is a renovation/expansion on the existing non-conforming footprint”.***

He then suggested that the proposal could have other variances that have not been identified, nor investigated. ***“Even if the TLAB would allow the existing garage to constitute a minor variance, the incremental effect of the additional second floor and side gable roof that should be investigated as a further minor variance.”***

Lastly, he asked that no side windows be added to the second floor, as part of the conditions, if the TLAB chose to approve the proposal, and that ***“Any attached set of plans should include a north side elevation to protect the French interests.”***

Mr. Joseph concluded his evidence by recommending the following:

- I. deny the requested variance and leave the garage as a non-conforming use;***
- II. accept the encroachment of the garage in its current form and approve the setback variance only for the footprint of the garage;***
- III. accept the encroachment of the garage in its current form and approve the setback variance for the full length of the property line;***
- IV. accept a variance permitting a second floor encroachment with a flat roof condition into the side yard setback with or without limiting it to the garage footprint ;***
- V. accept a variance permitting a second floor encroachment with a side gable roof into the side yard setback with or without limiting it to the garage footprint ;***

At this stage, Ms. French objected to the introduction of the Sun and Shadow study because it was introduced late in the process, and she had not had an opportunity to review the presentation. Ms. Meader responded that the Sun and Shadow study had been introduced in response to the Opposition's sudden introduction of a diagram ( which appears as Diagram 3 in this Decision) to demonstrate the alleged impact of the loss of sunlight, without prior disclosure. I stated that both Exhibits would be included in the record, and that the right time to object was when the Applicants wanted to introduce the Exhibit. Ms. French pointed out that she was not a lawyer, and could not be expected to know what her rights were, to which I pointed out that as the Presiding Member, I could not be expected to act as her lawyer, and object on her behalf to the introduction of new exhibits.”

Ms. French stated the existing “encroachment” into the side-yard could be “tolerated” as long as it was a single storey addition at the side of the house. She objected to what was proposed by the Applicants in the form of second storey building additions. She highlighted what she saw as the reduced sunlight and increased shadow on her alcove, as well about the loss of sunlight onto a rose/vegetable garden between her house, and the existing garage. She complained about the “absence “ of Mr. Rubinoff ( the Architect), a unnamed designer from RDG who prepared the sun & shadow analysis, and was not made available either in person or in writing to support any of the assumptions or results arising from the analysis. Ms. French also spoke to the impact of the proposal on her property, which is not recited here, because it is identical to the evidence of Mr. Joseph.

The last Witness to speak on behalf of the opposition was Ms. Sheila Dunlop. She identified herself as a Director, and the Secretary of the SAHRA (South Armour Heights’

Residents Association). She spoke to how the SAHRA had advised Ms. French about retaining a development consultant when the owners of 103 Esgore decided to develop their property, as indicated in the proposal before the TLAB. She also stated that the SAHRA had spoken in opposition to the proposal before the COA. She acknowledged that window placement is not within the purview of the COA, but expressed a point of view that such issues could be addressed through discussions between the neighbours, and regretted that discussions between the neighbours did not result in progress. She expressed support for Ms. French's request that the den window be positioned at a height which would prevent overlook and that the window in the bedroom above the garage be frosted, and opined that they were "reasonable" requests.

Ms. Dunlop also stated that once renovated, the home at 103 Esgore "will be a large home with 5 bedrooms and 5 washrooms". Ms. Dunlop expressed agreement with Ms. French's preference of allowing a single additional storey with a flat roof or low profile pitched roof, and added that "Additional encroachment should not be allowed or should at least be tempered." She provided reasons about why the proposal did not satisfy the 4 tests under Section 45.1, which are not recited here because they match with the reasons provided by Mr. Joseph.

The Parties were given two weeks to make written submissions as opposed to oral submissions- I stated that this approach would allow the Opposition to think through their position and the Applicants' position, and allow them to distil through the arguments to make submissions, which would not be possible if the Parties had to make oral submissions, following the completion of the collection of evidence.

By way of written submissions, Ms. French stated that the evidence of Mr. Joseph should be given more weight because of his professional background included "Professional Engineers Ontario (PEO), Ontario Professional Planners Institute (OPPI), Canadian Institute of Planners (CIP) and Association of Ontario Land Economists (AOLE)", as opposed to Mr. Romano whose expertise was limited to land use planning.

## **ANALYSIS, FINDINGS, REASONS**

My analysis begins with a discussion of some important adjudication principles, which have been applied to arrive at a final Decision in the case of this Appeal.

### **DISCUSSION OF SOME IMPORTANT ADJUDICATION PRINCIPLES**

- The mandate of the TLAB is to make a decision on variances brought forward by the Applicant, and make a decision on whether each variance can be approved, approved with conditions, or refused. It has neither the mandate, nor the responsibility to consider or recommend alternative designs, and associated variances to the Applicants. As a result, the various changes, and alternatives suggested by the Opposition have been noted, but not ruled upon in this Decision.

- It is also important to address the introduction of “new” exhibits, not disclosed as part of the discovery process. Should a Party wish to bring forward a new exhibit after the commencement of the Hearing, they should bring forward a Motion to introduce the Exhibit so that other Parties can inform themselves of the introduction, and argue for, or against the introduction of the Exhibit. In this case, the Appellants, (who I recognize did not have legal representation), introduced a new Exhibit without a Motion, to which the Applicants did not object- in the absence of a specific objection, it is reasonable for the Adjudicator to conclude that there is no objection, and allow the Exhibit to become part of the record.

However, when the Applicants introduced a new exhibit on the second day of the Hearing, the Appellants objected, but only after the Applicant’s Witness completed answering questions asked by the Applicants’ Counsel. When I overruled the objection, the Appellant declared that they would have expected me to intervene when the Applicant introduced the new exhibit, given that they had no lawyer representing them. I disagreed with the argument about an Adjudicator objecting on behalf of a Party, even if the latter is unrepresented- the Adjudicator cannot “double” as Counsel for any Party, even when unrepresented. A hybrid, dual role for the Adjudicator is not possible under the existing Rules, nor is it recommended, to minimize procedural confusion, and to preserve the Adjudicator’s neutrality.

## **APPLICATION OF THE EL-BASIOUNI CASE**

Ms. Meader had stated in her opening remarks that she would bring forward authorities during Oral Argument to demonstrate that an existing, non-compliant structure did not have to satisfy the test of OP, and the test of Zoning under Section 45.1; it would be sufficient for the Applicants to demonstrate that their proposal needed to satisfy only the tests of minor, and appropriate development, to be approved. By way of submissions, Ms. Meader referred to the decision of the Ontario Superior Court in the matter of ***Elbasiouni v. Brampton (City), 2017 ONSC 1556, 2017 CarswellOnt 4874*** (the *ElBasiouni* decision), given the legal, non-conforming status of the Property. In the *ElBasiouni* case, the Appellant asked the Court to change the classification of the Zoning of his Property, “or, alternatively, an Order that he not be required to obtain permission from the Committee of Adjustments for zoning variations that he seeks”. Dismissing the Appeal, Justice Mr. Barnes of the Superior Court of Ontario answered the question “*Does the legal non-conforming use protection extend to both “use” and “standards”?*” in the affirmative, by stating at Paragraph 26 of the decision:

*“The legal non-conforming use doctrine protects prior lawful use of property by a land owner from restrictions or prohibitions on the use imposed by a subsequent zoning by law (s). A legal non-conforming use protection extends to both “use” and “standards”.*

This decision also sets out a two part test at Paragraph 51 to determine the expansion of a legal, non-complying structure

*1. Is the proposal desirable for the appropriate development of the subject property?*

*2. Is its impact upon surrounding uses unacceptably adverse?*

The Applicants argue that the above finding would apply to “three of the four variances” (Those three variances are the two side yard setback variances and the driveway width variance) because they are legal and non-conforming, and that as a consequence, they do not have to demonstrate that their proposal meets the tests of the OP and Zoning.

The *El Basiouni* decision states clearly at Paragraph 50 that a legal, non-conforming building, needs to apply to the COA for relief under the following circumstances:

*1) Enlarge or extend structures that are legal, non-conforming.*

*2) Change a legal non-conforming use to another use not permitted in the By-law*

While both the Applicants and Appellants state their awareness of the legal, non-conforming nature of what exists currently at the Subject Property, it is not clear to me that they have the same definition of “structure” in mind, since this question was not discussed. It is also not clear if *El-Basouini’s* implicit definition of “structure”, based on a property in Brampton, is consistent with the definition provided in Zoning By-Law 569-2013. It is important to note that Zoning By-law 569-201 defines “Structure” as: “

*“means anything that is erected, built or constructed of one or more parts joined together. A **vehicle** is not a **structure**.”*

While I don’t question the wisdom of the *El Basiouni* decision, I find that it cannot be relied upon for Decision making purposes because of the unresolved questions around the use of the word “structure”. Consequently, I will test the evidence of the Applicants on all four tests under Section 45.1 of the Planning Act. My approach is assisted by the important fact that both Parties provided fulsome evidence in support of, or against how the proposal satisfied the four tests under Section 45.1.

However, I would like to respect the Appellant’s submission: “*I understand that I don’t have to address the tests of OP and Zoning*”. I will test their evidence only with respect to the tests of minor, and appropriate development, since this what they focused on throughout the Hearing, including submissions. In other words, I will subject the evidence of the Applicants with respect to all four tests under Section 45.1, but will test the evidence of the Appellant with respect to only two of the four tests- the tests of minor, and appropriate development.

This approach, notwithstanding its asymmetric nature, is consistent with how evidence is analyzed in a *de novo* Hearing before the TLAB. In a *de novo* Appeal, while the Applicant is required to prove that the requested variances satisfy all four tests under Section 45.1, to be successful; the opposition has to demonstrate that the variance in

question does not satisfy any one, or more of the four tests under Section 45.1, for it to be refused.

### **ASSIGNATION OF EXPERT WITNESS STATUS**

I am in agreement with the Appellant's argument that the Witness for the Applicants is an expert land-use planner, but not an expert in interpreting sun-shadow studies. However, there is no evidence before me to demonstrate that the Appellant's own Witness has any special expertise to interpret sun-shadow studies. Consequently, the evidence given by both Witnesses with respect to the Shadow Studies will be accorded the weight appropriate for a Witness, as opposed to an Expert Witness. In this context, it is also pertinent to address the Appellant's written submission that their Witness' evidence should be given extra weight, because of his expertise in engineering, as well as land use planning. While it could be advantageous to have an Expert Witness with specialized knowledge in various disciplines, the TLAB can recognize Expert Witness status in one, or more fields only ( my emphasis) if the Party asks on an *a priori* basis ( before the commencement of the Witness' Examination-in-chief) that the individual's expertise in various fields be recognized, as opposed to recognition, after the completion of final argument, as is being suggested here by the Appellant.

Procedural fairness demands that the opposite Party be given an opportunity to ask questions of a Witness before they are recognized as Subject Matter Experts, and make recommendations about the expertise of the individual to the TLAB, where necessary.

### **Does the proposal satisfy Higher Level Provincial Policies?**

I find that the evidence satisfies the Provincial Policy Statement (PPS) 2020, by virtue of its achieving an appropriate mix and range of housing options, optimizing the use of land, making better and more efficient use of existing infrastructure. The proposal also satisfies the Growth Plan (2020) because it appropriately implements intensification policies that achieve the objective of complete communities that optimize land use and infrastructure. It is also important to note that the Appellants did not contradict the Applicants on the proposal's ability to satisfy the higher level Provincial Policies.

### **Does the proposal satisfy the OP?**

On the question of whether the proposal satisfies the intent and purpose of the Official Plan, the Applicants identified a Geographic Neighbourhood, and an Immediate Context, where the configuration of neighbouring houses is such that they are not parallel to each other, nor perpendicular to the streets, given the curvilinear nature of the road network in the community. The Applicants' photo study captured how the side-yards separating the houses were not uniform in width, but vary in width, from the front to the back of the house. The Applicants, through their evidence, demonstrated that 55% of the side yards in the Immediate Context were less than a metre in width, a fact acknowledged by the Opposition both by way of evidence, as well as submissions - "If 55% are less than a metre, then 45% are more than a metre." In other words, side-yards less than a metre constitute the "prevailing type" by virtue of being the largest

recurring type, as stated in Chapter 4 of the Official Plan. I find that the requested variances for side-yards satisfy Section 4.1.5 of the OP.

I am also in agreement with the Applicants that the majority of the houses within the Immediate Context have more than two storeys, making them the “prevailing type”. The building footprint will not change if the proposal were approved; and the proposed built form is commonly found within the Neighbourhood. I find that the proposal will respect and reinforce the prevailing type in this Immediate Context. The proposal satisfies Policy 3.1.2 of the Official Policy(OP).

The photo tour also provided many examples of how houses with two storeys, and a garage, existed side by side with one story, bungalow houses, and reinforced and respected the eclectic nature of the community. In addition, the evidence demonstrated that the landscaping at all of the properties within the Immediate Context covers more than 50% of the front yard and rear yard. The proposal maintains this same character with 64.6% of the front yard , and essentially all of the rear yard being landscaped- in other words, the variance for a widened driveway does not come at the cost of the landscaping. On the basis of this analysis, I find that the requested variances satisfy the test of OP.

#### **Does the proposal satisfy the test respecting the Zoning By-law?**

The proposal meets the performance standards for side-yards through provision of adequate space to facilitate spatial separation for accessing the backyard, maintenance and servicing. The side yards, notwithstanding variations in length from the front, to the back of the property, leave adequate space to satisfy all the standards enumerated in the previous sentence. The porch side-yard ensures that the porch maintains a subordinate, accessory attachment to the dwelling, and consequently respects the intent of the By-Law requirement. The drive-way, which will help the residents to access the garage from Esgore Drive, does not interfere with any other performance standard, does not detract from the green space in the front yard, and has been designed such that the existing tree at the front of the house does not have to be disturbed. I note that the Applicants also emphasized that the footprint of the structure will not change from what exists presently. Given how these variances satisfy the required performance standards, I find that the evidence demonstrates that the variances respect the intent and purpose of By-law 569-2013.

#### **Does the proposal satisfy the test of minor?**

With respect to the test of minor, it is important to note that the *ratio decidendi* focus on the impact of the proposed variances on the neighbouring properties, as opposed to numerical changes to the requested variances, expressed as percentages. The issue with pursuing a percentage based approach to determining the test of minor is satisfied or not, is that percentages are relative, and don't provide any information on the inconvenience caused to the neighbours. As a result, the Appellant's arguments about the magnitude of the percentage of change is not assigned any significant weight. I acknowledge, and agree with the Applicant's position, that the percentage reduction referred to by the Appellant, applies only at a “pinch point”

The major objections raised by the Opposition are twofold:

- An alcove, used for entertaining guests would be shadowed if the proposal were allowed to proceed.
- An existing rose/vegetable garden between 105 Esgore, and the existing garage at 103 Esgore, can no longer thrive if the proposal, as presented to the TLAB, would be approved.

By way of an editorial comment, while the issue of privacy was also raised, it is not discussed here, because the Applicant is amenable to the idea of frosting the window, which addresses the privacy concerns raised by the Appellant. I note that the Appellant has also put forward the idea of frosting the windows as a solution to protecting their privacy.

It is important to contrast the Sun-Shadow studies submitted by the Applicant, and the diagram submitted by the Appellant to illustrate the impact of the proposed addition on shadows cast on 105 Esgore- the Sun-Shadow studies submitted by the Applicant follows the guidelines set out by the City of Toronto, and provide requisite information about the extent of the shadows at various times throughout the day on March 21, and September 21. This approach acknowledges the very important fact that shadows are not static, but are a function of the position of the sun, as it moves from east to west. The single diagram ( included in this Decision as Diagram 3) submitted by the Appellant, on the other hand, uses an “average” for the interaction between the sun’s rays and the shadows cast- the “average” does not capture the dynamism of the length of shadows cast, as a result of the interplay between the structure, and the sun’s rays. I therefore assign greater weight to the Applicant’s Sun-Shadow Study and its conclusions- it demonstrated that the major component of the shadow cast at present on the Appellant’s property, is from the Appellant’s own building, and not the Applicant’s property, even if the proposal were approved.

With respect to the test of minor, it is trite to state that the Applicant has to demonstrate that there is no unacceptable adverse impact to the neighbours. I interpret unacceptable adverse impact to mean that the cumulative impact of a variance, ( or variances) on the neighbour, is such that it meets the threshold of being detrimental to the latter’s quality of life i.e. it negatively impacts a basic right, without which it becomes difficult to live . Thus, while intrusions on privacy, or blockage of sunshine, should certainly be examined under the test of minor, activities such as gardening, or loss of a scenic view, are not relevant to the test of minor. While gardening, or access to given view may enrich the quality of life, they are not essential to defining, or maintaining an acceptable quality of life.

Consequently, I find that the proposal meets the test of minor.

### **Does the proposal meet the test of appropriate development?**

The proposal looks to build a two storey, detached house in a Neighbourhood, where it is the prevailing type in the Immediate Context. I agree with the Applicants that this

development represents a sensitive form of regeneration, does not introduce a new dwelling type in this neighbourhood, nor does it change the footprint of the existing house. As has been found earlier in this Section, the additional impact in terms of shadowing is incremental, and will not result in unacceptable, adverse impact. I note that the Applicant is in agreement to frost a window, that looks at the Appellant's property, notwithstanding its being situated well behind the side-yard.

In terms of the test of appropriate development, it is important to note the contrast between the positions of Applicants and Appellants- the Applicant's perspective sees the proposal as part of the latest iteration of development in the community, which contrasts with the position of the Appellants, who repeatedly stated that this Appeal, is more about the relationship between the neighbouring properties, rather than their relationship to the neighbourhood. The latter perspective, where greater weight is given to the relative relationship between two neighbouring properties, to the exclusion of overall change in the context of a consistently evolving neighbourhood, is not consistent with planning principles, and is consequently not given any weight. While the Appellants raised a number of objections about the overall impact of the proposal, they did not establish the specific connection between the requested variances ( as opposed to the overall development), and the alleged impact. Lastly, it is important to note that the premise of their objections about the impact of the proposed development, rests on the alleged inappropriateness of the impact of the existing building, and the side yard. Given the legal, non-conforming status of the Subject Property, which has been acknowledged by both Parties, it is not possible to assign any weight to the alleged impact of an existing, legal and non-conforming structure.

Because of these reasons, I find the Applicant's evidence to more compelling, and find that the requested variances meet the test of appropriate development.

Given that the proposal meets all the four tests under Section 45.1. I refuse the Appeal respecting 103 Esgore Avenue, and uphold the decision of the Committee of Adjustment dated October 22, 2020.

The following conditions are imposed on the approval, as per the Recommendations of the Applicants.

1. The building will be built in substantial conformity with the Site Plan dated March 1, 2021, Front Elevation dated March 15, 2021, Side Elevations dated March 15, 2021 and Rear Elevation dated October 8, 2020, prepared by Rubinoff Design Group.
2. The following notation will be added on the Site Plan drawing, as per the recommendations of the Transportation Department: "All portions of existing access driveways that are no longer required must be closed and restored with soft landscaping and/or full concrete curbs, to the satisfaction of Transportation Services".
3. The proposed north facing second floor window shall be installed with permanent frosted or sand-blasted glazing.

## DECISION AND ORDER

1. The Appeal respecting 103 Esgore Drive is refused, and the decision of the Committee of Adjustment , dated October 22, 2020 is confirmed.

2. The following variances are approved:

**1. Chapter 10.5.40.50(2), By-law No. 569-2013**

The minimum required side yard setback for the front porch is 1.8m. The proposed south side yard setback for the front porch is 1.42m.

**2. Chapter 10.20.40.70.(3) (E), By-law No. 569-2013**

The required minimum side yard setback is 1.8m. The proposed north side yard setback is 0.65m.

**3. Chapter 10.5.100.1.(1), By-law No. 569-2013**

The maximum permitted driveway width is 3.12m. The proposed driveway width is 5.64m.

**4. Chapter 10.20.40.70.(3)(E), By-law No. 569-2013**

The required minimum side yard setback is 1.8m. The proposed south side yard setback is 1.5m.

- 3 .No other variances are approved.

4. The following conditions are imposed on the approval:

1. The construction needs to take place in substantial conformity with the Site Plan dated March 1, 2021, Front Elevation dated March 15, 2021, Side Elevations dated March 15, 2021 and Rear Elevation dated October 8, 2020, prepared by Rubinoff Design Group.'
2. A notation be added on the Site Plan drawing that "All portions of existing access driveways that are no longer required must be closed and restored with soft landscaping and/or full concrete curbs, to the satisfaction of Transportation Services".
3. The proposed north facing second floor window shall be installed with permanent frosted or sand-blasted glazing.

So orders the Toronto Local Appeal Body

X 

S. Gopikrishna  
Panel Chair, Toronto Local Appeal Body

Concrete Roll Curb

Curb Cut

Rail Fence

0.50ø

9'-10" [3.00m]

49'-11" [15.22M]

5'-11" [1.80m]

11'-4" [3.45m]

19'-0" [5.79m]

0.12ø

TREE TO BE PROTECTED

DRIVEWAY

18'-6" [5.64m]

31'-0" [9.46m]

31'-11" [9.74m]

0.15ø

34'-6" [10.53m]

3X 0.05ø

Sign

0.15ø

3'-6" [1.07m]

11'-1" [3.38m]

EXISTING GARAGE

2'-11" [0.65m]

20'-1" [6.12m]

7'-7" [2.31m]

3'-11" [1.19m]

10'-1 1/2" [3.35m]

7'-1 1/2" [2.17m]

6'-10 1/2" [2.10m]

2'-0" [0.61m]

25'-1" [7.64m]

2'-0" [0.60m]

Steps

Covered Stone Porch

Door Sill=

No. 105  
1 STOREY  
BRICK DWELLING  
DS=100.73

Gravel

Hedge

Gate

WRW

DBF

Interlock

Flagstone

NEW PORCH

10'-8" [3.25m]

0.10ø

0.15ø

PLANTER

4'-8" [1.42m]

38'-11" [11.86m]

27'-10" [8.48m]

28'-1" [7.95m]

4'-3" [1.30m]

27'-10" [8.48m]

43'-7" [13.28m]

42'-0" [12.81m]

5'-11 1/2" [1.80m]

32'-7 1/2" [9.95m]

5'-0" [1.52m]

EXISTING REAR ADDITION

NEW REAR DECK

17'-5 1/2" [5.32m]

19'-0" [5.78m]

20'-0" [6.10m]

6'-2" [1.87m]

Steps

WRW

167'-6" [51.07M]

155'-4" [47.32M]

61°49'35" (P&S)

39'-0" [11.89m]

0.30ø

0.35ø

0.40ø

Hedge

BF

Up

Frame Shed

1'-11 1/2" [0.60m]

REGISTERED

PLAN

PIN 10352 - 0007

PIN 10352 - 0006

PIN 10352 - 0005

LOT 96

LOT 95

LOT 94

2391

PIN 10352 - 0057

LOT 98

THE UNDERSIGNED HAS REVIEWED AND TAKES RESPONSIBILITY FOR THIS DESIGN, AND HAS THE QUALIFICATIONS AND MEETS THE REQUIREMENTS SET OUT IN THE ONTARIO BUILDING CODE TO BE A DESIGNER

QUALIFICATION INFORMATION  
REQUIRED UNLESS DESIGN IS EXEMPT UNDER 2.17.5.1. OF THE BUILDING CODE

GLENN RUBINOFF 22370  
NAME SIGNATURE BCIN/BCDN

REGISTRATION INFORMATION  
REQUIRED UNLESS DESIGN IS EXEMPT UNDER 2.17.4.1. OF THE BUILDING CODE

RUBINOFF DESIGN GROUP 27293

FRONT YARD SOFT LANDSCAPED AREA = 839.1 ft<sup>2</sup> [77.9 m<sup>2</sup>]  
SOFT LANDSCAPED AREA = 839.1 ft<sup>2</sup> (100%) MIN 75% REQ'D

PROJECT: 103 ESGORE DRIVE  
TORONTO, ONTARIO

697 Mount Pleasant Rd.  
Toronto, Ontario M4S 2N4  
TEL. 416.667-0322 FAX.416.667.0751 EMAIL. info@rubinoffdesign.com

PROJECT DESIGNER:  
G.R.

PROJECT NO.	
DATE:	OCT 08, 2020

CHECKED BY:  
G.R.

SCALE: 1:200

DRAWING NO.

# A

WALL TYPES LEGEND

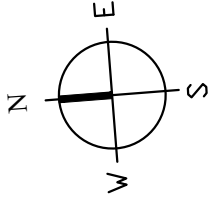
NEW 10" CONC. BLOCK FOUNDATION WALL PARGE AND DAMP-PROOFED W/ PARGEING COVERED OVER POURED CONC. FOOTING

NEW EXTERIOR FRAME WALL CONSTRUCTION, FINISH AS PER MANUF. SPECS, SHEATHING PAPER, LAYERS TO OVERLAP EACH OTHER, 3/8" EXTERIOR TYPE PLYWOOD 2"x8" WOOD STUDS @ 18" O.C. R22 BATT INSULATION IN CONTINUOUS CONTACT W/SHEATHING & CONTINUOUS VAPOUR/AIR BARRIER 1 LAYER 5/8" G.W.B.

NEW INTERIOR STUD WALL PARTITIONS

EXISTING EXTERIOR WALLS TO REMAIN

EXISTING INTERIOR WALLS TO REMAIN



BASEMENT PLAN

\*103 ESGORE DRIVE\*

EXISTING BASEMENT AREA = 726.0 ft<sup>2</sup> [67.4 m<sup>2</sup>]

Rubinoff Design Group

697 Mt. Pleasant Rd

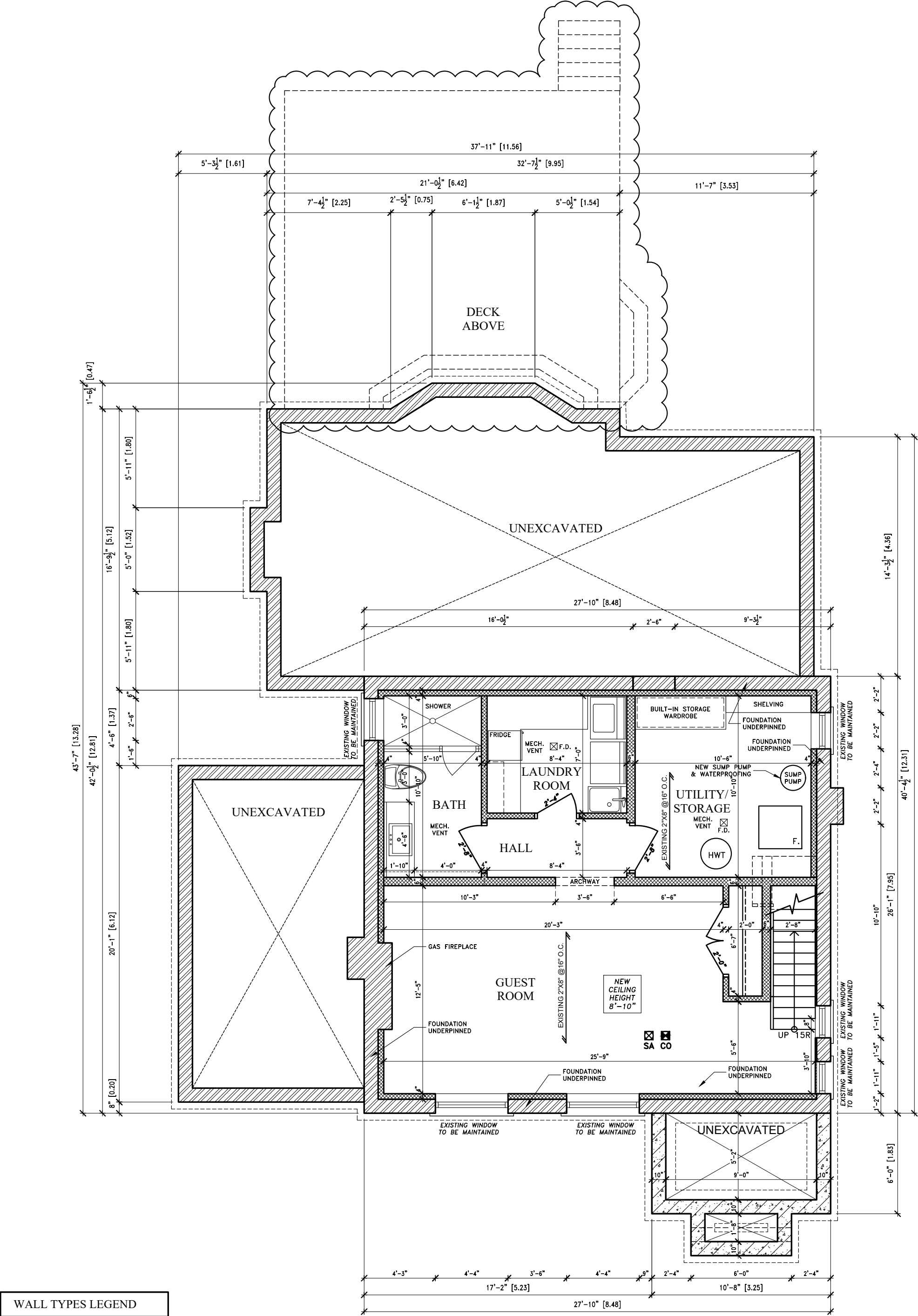
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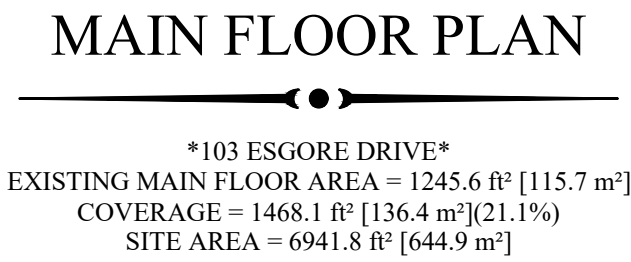
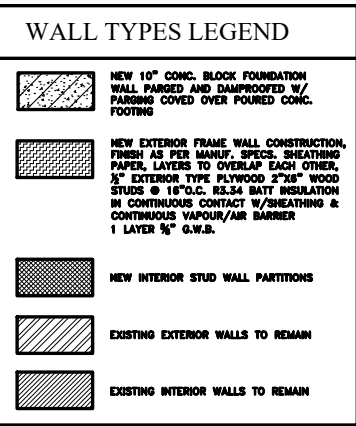
TEL. 416.667-0322 FAX.416.667.0751 EMAIL. info@rubinoffdesign.com

103 ESGORE DRIVE

TORONTO, ONTARIO

3/16"=1'-0" OCT 08, 2020

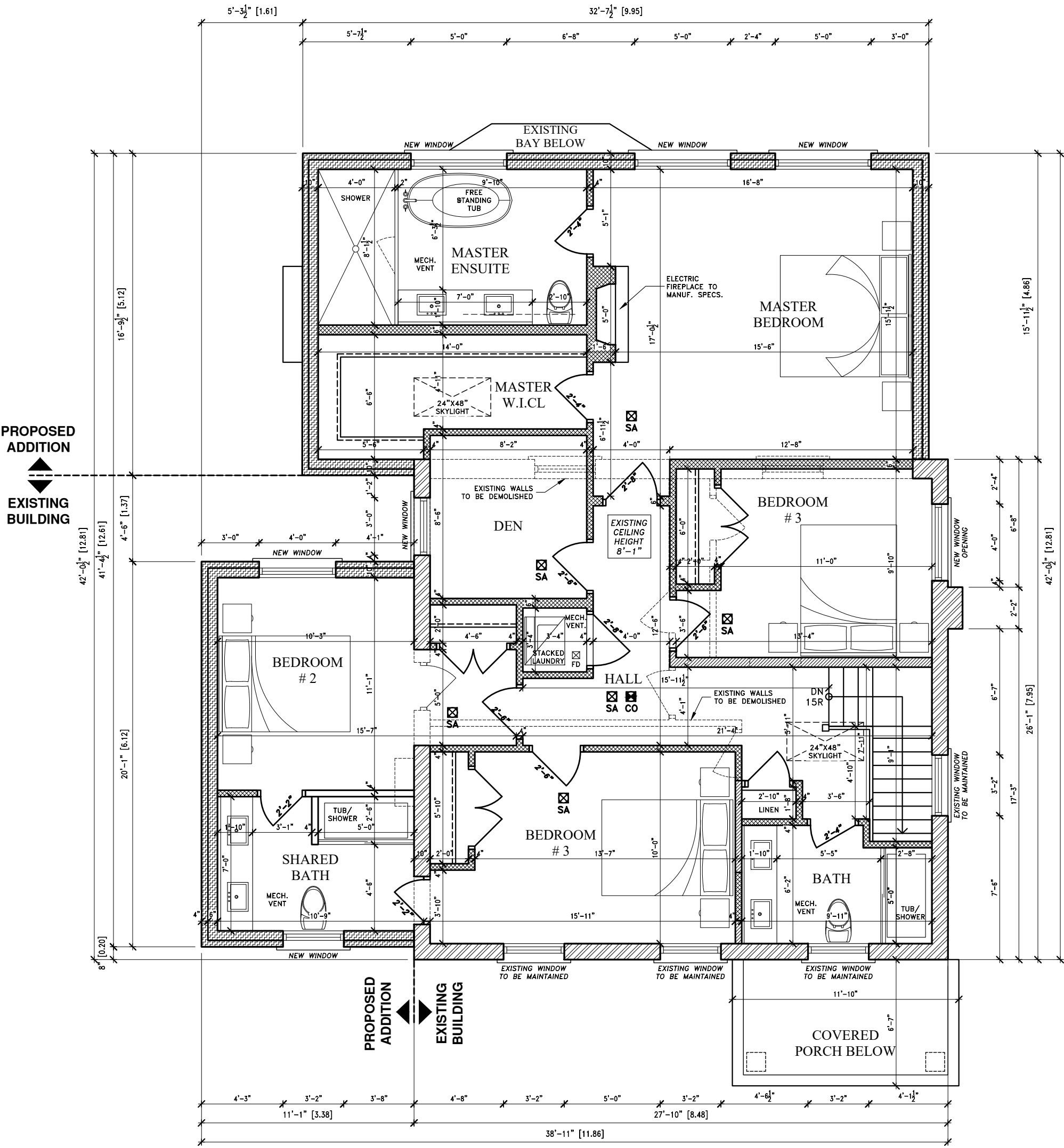




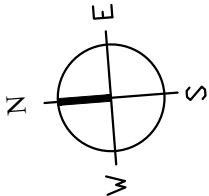
**® Rubinoff Design Group**  
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**103 ESGORE DRIVE**  
TORONTO, ONTARIO

**3/16"=1'-0"** **OCT 08, 2020**



WALL TYPES LEGEND	
	NEW 10" CONC. BLOCK FOUNDATION WALL PARGE AND DAMPROOFED W/ PARGEING COVERED OVER POURED CONC. FOOTING
	NEW EXTERIOR FRAME WALL CONSTRUCTION, FINISH AS PER MANUF. SPECS. SHEATHING PAPER, LAYERS TO OVERLAP EACH OTHER, 3/4" EXTERIOR TYPE PLYWOOD 2"x8" WOOD STUDS @ 18" O.C. R25.5A BATT INSULATION IN CONTINUOUS CONTACT W/SHEATHING & CONTINUOUS VAPOUR/AIR BARRIER 1 LAYER 5/8" G.W.B.
	NEW INTERIOR STUD WALL PARTITIONS
	EXISTING EXTERIOR WALLS TO REMAIN
	EXISTING INTERIOR WALLS TO REMAIN



## SECOND FLOOR PLAN

\*103 ESGORE DRIVE\*  
EXISTING SECOND FLOOR AREA = 726.0 ft<sup>2</sup> [67.4 m<sup>2</sup>]  
PROPOSED SECOND FLOOR AREA = 1474.7 ft<sup>2</sup> [137.0 m<sup>2</sup>]  
GFA = 2720.3 ft<sup>2</sup> [252.7 m<sup>2</sup>]

**R**ubinfoff Design Group

697 Mt. Pleasant Rd  
Toronto, Ontario M4S 2N4

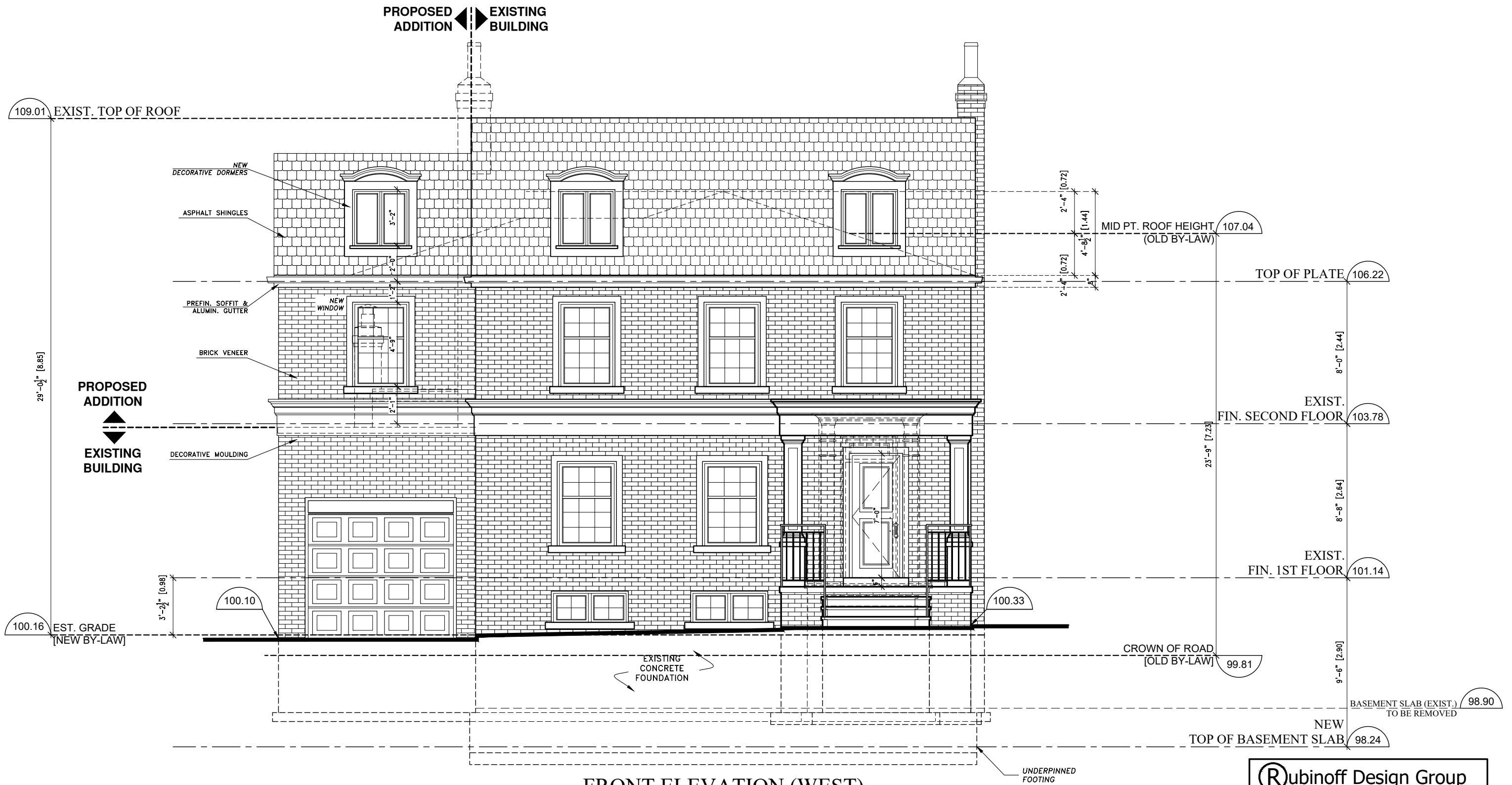
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**103 ESGORE DRIVE**  
TORONTO, ONTARIO

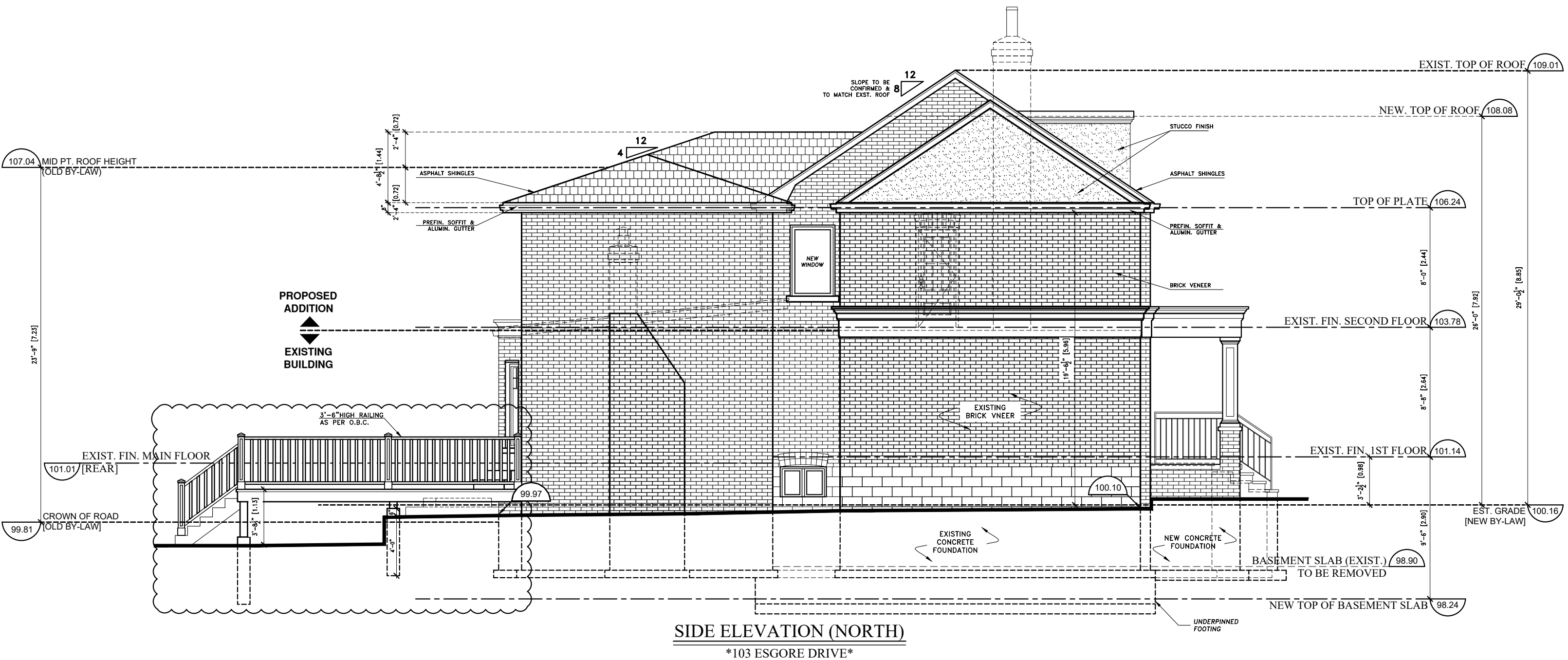
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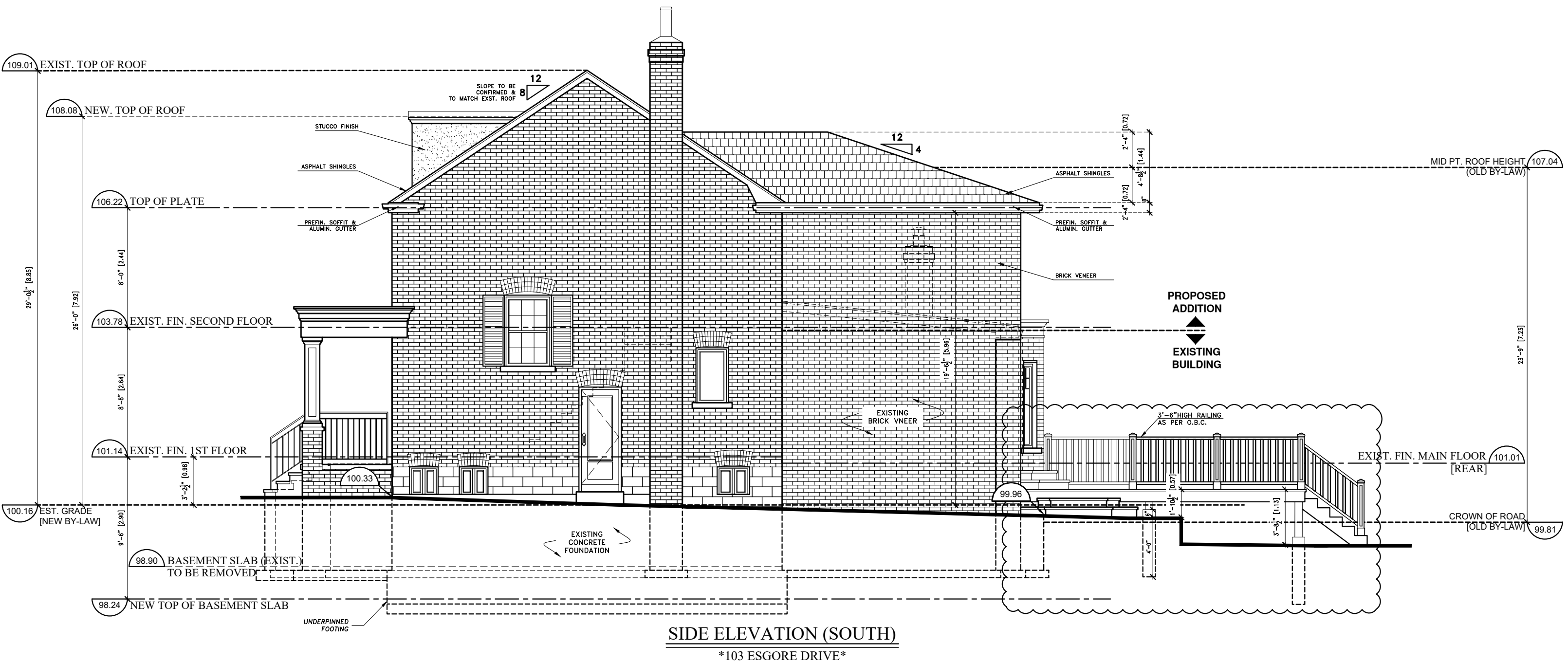
OCT 08, 2020

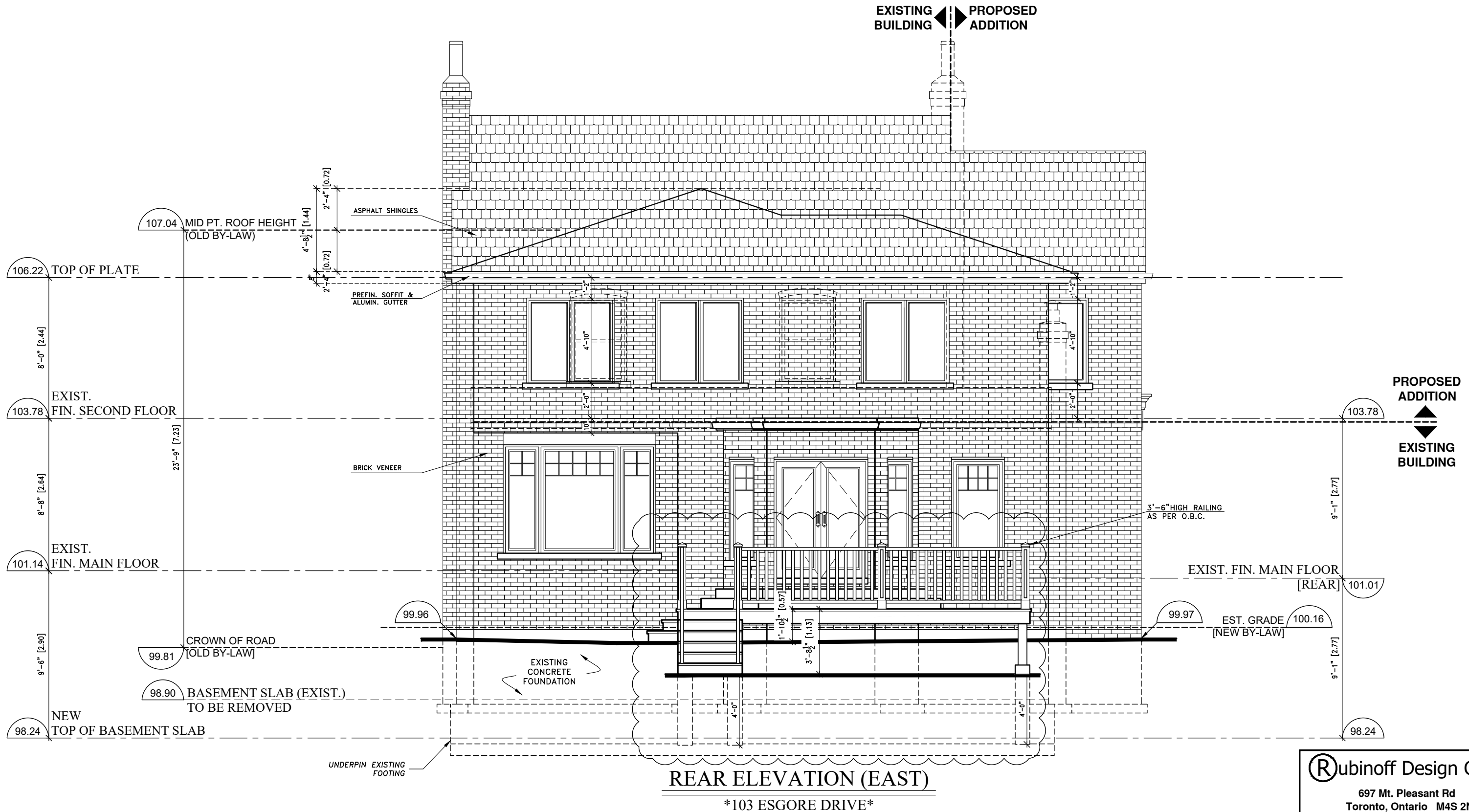




FRONT ELEVATION (WEST)  
\*103 ESGORE DRIVE\*







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**103 ESGORE DRIVE**  
TORONTO, ONTARIO

3/16"=1'-0" OCT 08, 2020