

# DECISION AND ORDER

**Decision Issue Date** Monday, September 20, 2021

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

Appellant(s): ZOE KALMANSON

Applicant(s): RICHARD WENGLE ARCHITECT INC

Property Address/Description: 23 GLEN CEDAR RD

Committee of Adjustment File

Number(s): 20 164162 STE 12 MV

**TLAB Case File Number(s): 21 117619 S45 12 TLAB**

**Hearing date: July 12, Aug 4, 2021**

**List of revised variances filed Sept 14, 2021**

**DECISION DELIVERED BY TED YAO**

## REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Richard Wengle Architect Inc	Applicant	David Bronskill
Zoe Kalmanson	Owner/Appellant	
Michael Bissett	Expert Witness	
Susan Valencia	Party	
Susan Wengle	Party	
Paul Bain	Participant	
Diane Smith	Participant	

## INTRODUCTION

The Kalmanson/Grossman family wish to tear down their house at 23 Glen Cedar Road and build a new three storey house. In order to build the architectural design and size of house they desire; they seek the variances in Table 1.

<b>Table1. Variances sought for 23 Glen Cedar Rd</b>			
		Required	Proposed
<b>Variances from Zoning By-law 569-2013</b>			
1	Flat roof height	7.2 m (11 m for pitched roof)	11 m
2	No. of stories for flat roof house	2	3
3	Building length	17 m	20.78 m (formerly 20.93 m)
4	Building depth	19 m	20.22 (formerly 20.38 m)
5	Floor space index	0.4 times the area of the lot	0.8396 (formerly 0.8695) times the area of the lot
6	Max. number of balconies per façade	1	2 (total of four balconies)
7	Max. area of each balcony	4 m <sup>2</sup> .	5.15 m <sup>2</sup> .
8	Front yard setback	8.64 m	7.99 m
9	Rear yard setback	9.36 m	8.47 (formerly 8.31 m)

## **BACKGROUND**

The Committee of Adjustment refused the application on Feb 4, 2021. Ms. Kalmanson appealed and so the application came to the TLAB.

## **MATTERS IN ISSUE**

The Provincial Policy Statement and the Greater Golden Horseshoe Growth Plan must be considered, but they contain a high level of generality. For example, the Provincial Policy Statement discourages lot creation on prime agricultural land and prefers municipal water and sewage over private systems and so on. I do not find these policies offer guidance for a replacement house, in which the major issue is whether the variance for 7.2 m height is minor compared to the 11 m permitted if the roof were pitched instead of flat. The zoning employs a complicated formula that allows a sizable flat portion of a pitched roof, so long as it is not more than 11 m high.

The variances must comply with s. 45(1) of the *Planning Act* and must cumulatively and individually:

- maintain the general intent and purpose of the Official Plan;

- maintain the general intent and purpose of the Zoning By-laws;
- be desirable for the appropriate development or use of the land; and
- be minor.

The Official Plan of the City of Toronto must be considered; particularly, ? .2.1 Housing and 4.1.5 Neighbourhoods Policy in which the physical form of the development must “fit in” physically with the surrounding neighbourhood. There is a second relevant policy in 3.4, the Natural Environment: “Protecting Toronto’s natural environment and urban forest should not be compromised by growth,” which is considered in the context of the arborist report. This was produced at my request after hearing the evidence of Ms. Valencia (a neighbour).

### **Right to develop**

The obligation is on the proponents (Ms. Kalmanson and Mr. Grossman) to demonstrate to the decision-maker that the tests are met on the balance of probabilities; there is no right to a variance.

### **EVIDENCE**

I heard from Michael Bissett, Ms. Kalmanson’s expert land use planner. Ms. Wengle and Ms. Valencia, back-door neighbours of Ms. Kalmanson, testified on their own behalves. Mr. Bain, the neighbour across the street from Ms. Kalmanson, attended part of the hearing as observer and responded to questions from Ms. Valencia. Ms. Smith, daughter of a Glen Cedar neighbour, also attended part of the hearing on behalf of the owners of the house immediately to the north of the subject property.

### **Member’s Site visit**

As required by my conditions of employment I visited the site for the sole purpose of better assessing the evidence given at the hearing.

### **ANALYSIS, FINDINGS, REASONS**

Ms. Wengle and Ms. Valencia were the only opponents to attend the entirety of the hearings and to give evidence against the proposal. The hearings took place on two days. On Day 1 (July 12, 2021) I heard the case in full and then asked the parties to discuss settlement. On Day 2 (August 4, 2021), I was informed that the parties continued to disagree and more evidence was heard. The owners eliminated the side yard variance<sup>1</sup> next to Ms. Smith’s parents and reduced some of the other variances.

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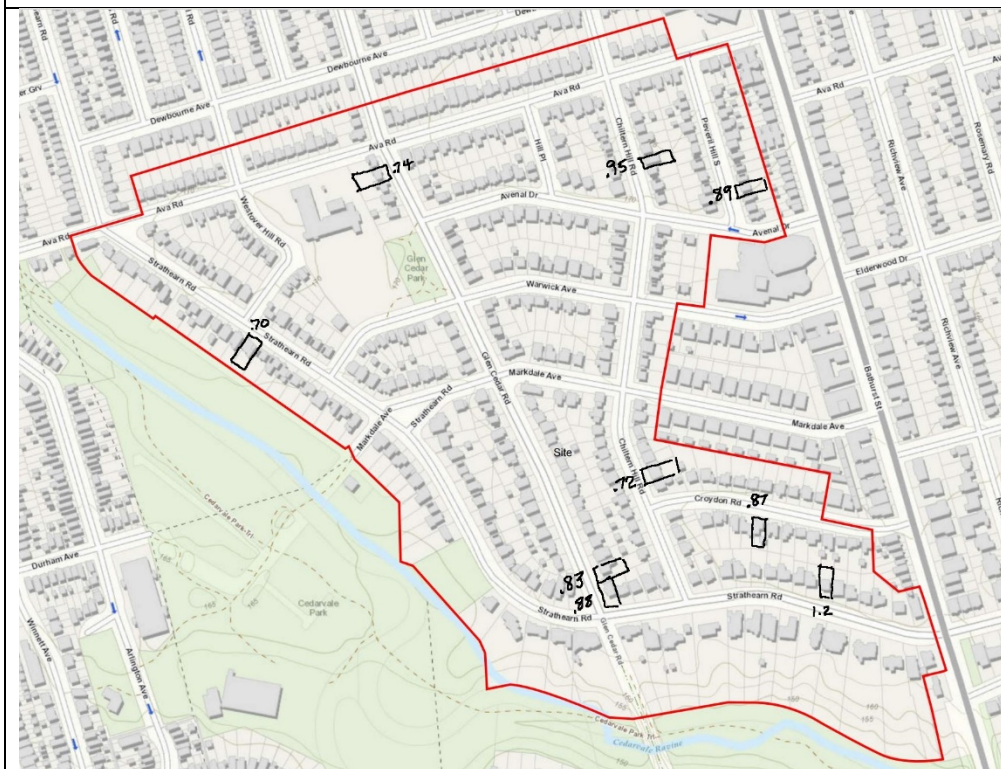
<sup>1</sup> Ms. Kalmanson originally sought a south side yard setback of 0.92 m ( required setback 1.2 m).

The opponents' concerns focused on two issues:

1. The project is too big and too high. It may form a precedent for other overly-dense homes in the neighbourhood, particularly for 10 Glen Cedar, whose owners also seek minor variances.
2. Both neighbours object to the number and size of the balconies, particularly those facing the rear. At the close of Day 2, Ms. Wengle said

The concern is noise and dust. Like Ms. Valencia, [our concerns are] just the impact of a large FSI, and a very large excavation, as I said before, the impact that may have on the water tables, the environment, I'm not an engineer, I assume you would have consulted with one, to build such a degree of excavation, but it is a concern, and I don't really see the third floor height, or the impact of the overlook has changed, but I gather that is your concern so finally, Mr. Yao, the concern is also noise and dust, if there's any way that can be contained. . . that would be appreciated. If balconies are not under review, height is not under review, floors are not under review, it's just the privacy that I hope can be mitigated.

**Figure 2. Bissett Study Area**



I interpret Ms. Wengle's comments to be that the owners are to be put to the requisite standard of proof; their application should not be "automatically" granted, despite the neighbours not hiring professionals. The owners seek a 0.8396 FSI where the permitted density is 0.40; a height of 11 m where the permitted height is 7.2 m and

three stories where only two are permitted. This seems like a large request when viewed in purely numeric terms. However, the numbers don't tell the whole story because of the way the zoning by-law defines a pitched roof.

I would add that the TLAB must consider only the planning tests as set out in "Matters in Issue." It cannot prevent "noise and dust" because this can occur even if a home is built entirely within the zoning by-law limits.

### **The neighbourhood and its characteristics**

On the previous page (Figure 2) is shown Mr. Bissett's study area -- between Cedarvale Park and Bathurst (West to east) and Ava Road to Strathearn (north to south). I accept this study area, except for the very large lots on the south side of Strathearn Road. None of the comparables he cited are from this section.

He found nine higher density homes, which I have marked on his study area (previous page):

<b>Address</b>	<b>Approved Density</b>
Proposal – 23 Glen Cedar	0.8659 x
1 Glen Cedar Road	0.8751x
3 Glen Cedar Road	0.83x
11 Chiltern Hill Road	0.7185x
91 Chiltern Hill Road	0.95x
19 Croydon Road	0.867x
137 Strathearn Road	0.7x
14 Strathearn Road	1.19x
154 Glen Cedar Road	0.74x
7 Peveril Hill S	0.89x

The fact that there are only nine higher density homes suggests that these are not the norm. After indicating "that the area consists primarily of two-storey single-detached dwellings originally constructed generally between the 1940s and 1950s," but with widespread redevelopment in a variety of architectural styles, Mr. Bissett noted that the area contained 17 flat-roof buildings, 57 three-storey buildings, and two with both a flat roof and three stories. He did not state the total number of homes in the study area, but it is probably several hundred. This also suggests that a three-storey flat-roof house is also not the norm.

Mr. Bissett's document book contains a complete record of all letters of support and objection. A letter from Paul Bain, retired planner from the City of Toronto, noted



that he was initially concerned about the FSI of 0.895<sup>2</sup>, but is now extremely supportive, because of the particular architectural design<sup>3</sup>.

Mr. Bain was the chief City witness in support of Official Plan Amendment 320 at the Ontario Land Tribunal hearing approving the present wording of the “respect and reinforce” test in the City’s Official Plan: that the proposed development should respect and reinforce the physical characteristics prevailing in the neighbourhood. This is the most important test that the TLAB uses to determine whether a project will “fit in” with the neighbourhood.

Mr. Bissett’s document book also contains all of the FSIs on the block. This is an aerial photo produced for another case, 10 Glen Cedar. The author is IBI, whose clients were residents opposed to that other TLAB case. I reproduce it below, with the FSIs in boxes to make them more readable. The arrow pointing downward is drawn by me and indicates the subject (23 Glen Cedar); number 10 Glen Cedar is enclosed in the red rectangle.

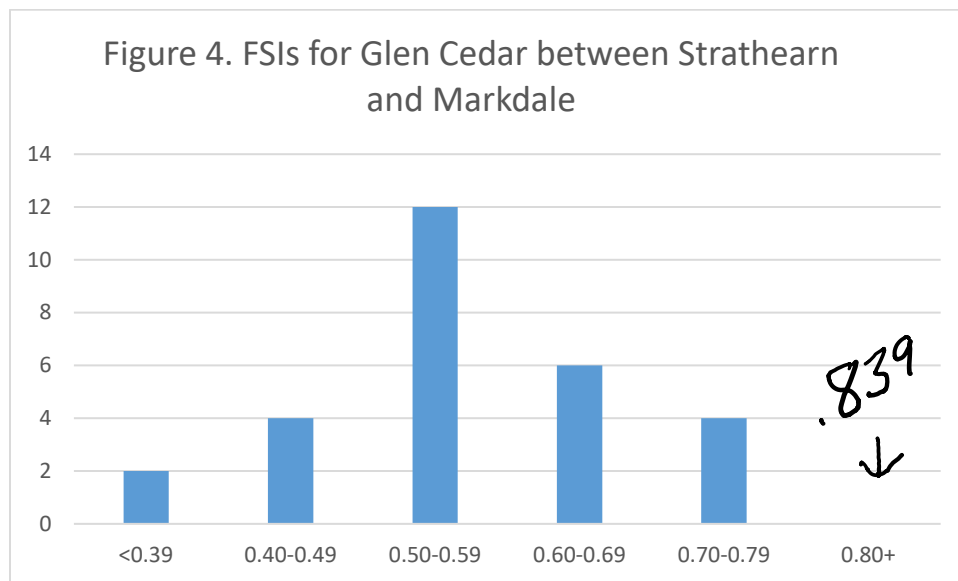
**Figure 3. FSIs for immediate block, created by IBI**



<sup>2</sup> Now reduced to about 0.84.

<sup>3</sup> According to the submission to the Committee of Adjustment by Aird and Berlis in objection to this proposal, the estimated average built density on this block of Glen Cedar Road is approximately 5.7 times the lot area. Nevertheless, when I received a notice from the Committee of Adjustment for a new dwelling with a density of .895 times the lot area, I was very concerned....until I reviewed the plans. The plans revealed a master class in how to mass floor space in a sensitive manner to minimize the impact on a streetscape and neighbouring properties. The drawings affirmed that sometimes the notion that ‘density is just a number’ can ring true. (Bain letter, May 19, 2021)

.67	.51	.38	.45	.72	.54	.65	.58	.67	.55	.50	.55	.54	.46
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I charted these FSIs above in Figure 4. The proposed FSI would be the highest on the block. (This is as of August 2021 as I do not know the result of the 10 Glen Cedar application). The chart also demonstrates that every house on the street with the exception of 28 Glen Cedar is already above the zoning maximum. I find that since higher FSIs are the rule rather than the exception, the test of the intent of the zoning drives me to look at specific impacts created by the overage in height and number of stories. Mr. Bain indicates that although the building is flat roofed, it differs from an as-of right third storey in only minor and compatible way<sup>4</sup>. Mr. Bain's letter was included in Mr. Bissett's material and he invited me to read it as corroborative of his own planning opinion and I accept Mr. Bissett's opinion as supported by Mr. Bain's.

### **The height and stories variances are bound up with the architectural design choice**

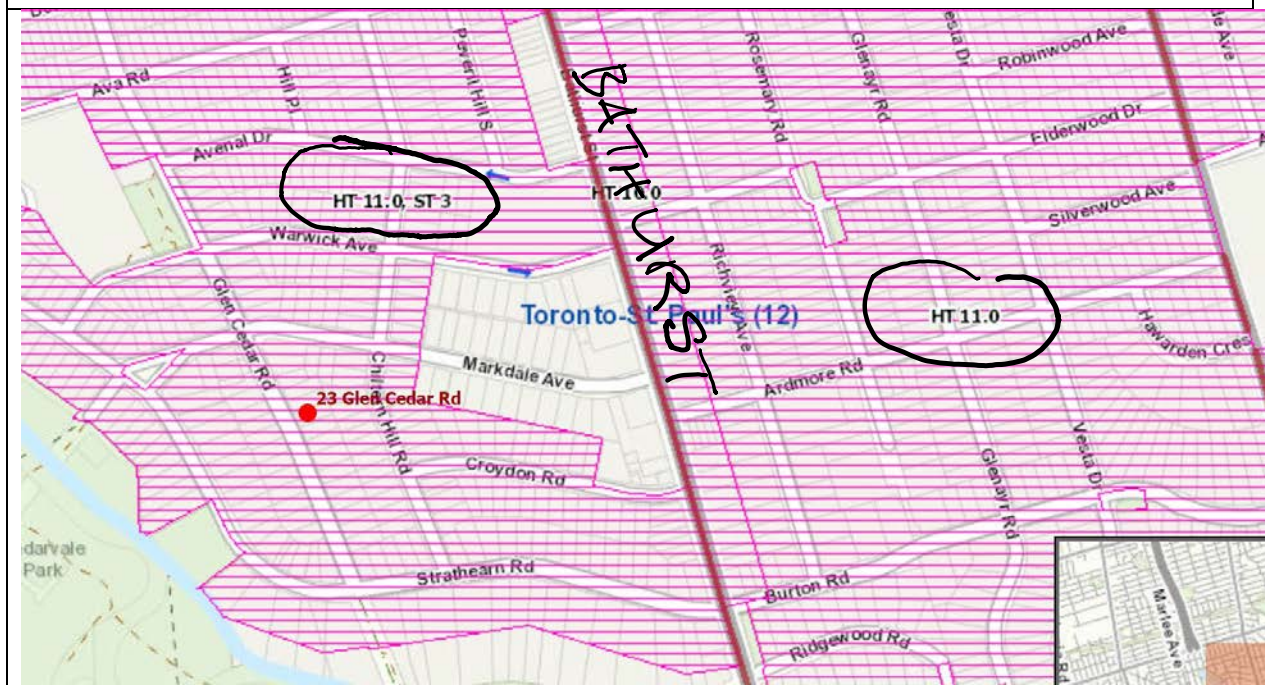
I start with the zoning's by-law's height and number of stories' "overlay" maps (Figure 5.) Bathurst Street marked the boundary between the former Cities of York (west of Bathurst) and Toronto (east of Bathurst). York used both height and number of stories to control the mass of the building whereas Toronto used only height. Both set a height limit of 11 m, enough for three storey building, and so the storey limit would seem

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<sup>4</sup> The third storey of the proposed modern-style house was designed with a flat roof to maximize the floor space available on the partial third floor, without expending three-dimensional space on a peaked roof. Yet the third storey was set back up to 6 metres from the main front wall to minimize the visual impact when viewed from many vantage points on the street. The result is a dwelling that is a good fit with the block in terms of the visual scale, setbacks and landscaped open space despite a density that exceeds the average on the block. It will be less imposing on the streetscape than other new homes with high peaked roofs adorned with faux dormers that have been built on Glen Cedar Rd. and Chiltern Hill Rd. in recent years.

to be superfluous. However, this becomes important because for both east and west of Bathurst, there are identical flat roof restrictions. These impose a two storey limit and a height limit of 7.2 m<sup>5</sup> if the owner decides on a flat roof option. To maximize the upper floor space in many parts of Toronto the design solution has been to pull down the roof over an upper storey, creating what resembles a mansard style roof. The architect has attempted to preserve the best of both worlds, obeying for the most part the pitched roof envelope, but rejecting the mansard roof-looking treatment.

Figure 5. Overlay map in Zoning By-law for height and number of stories

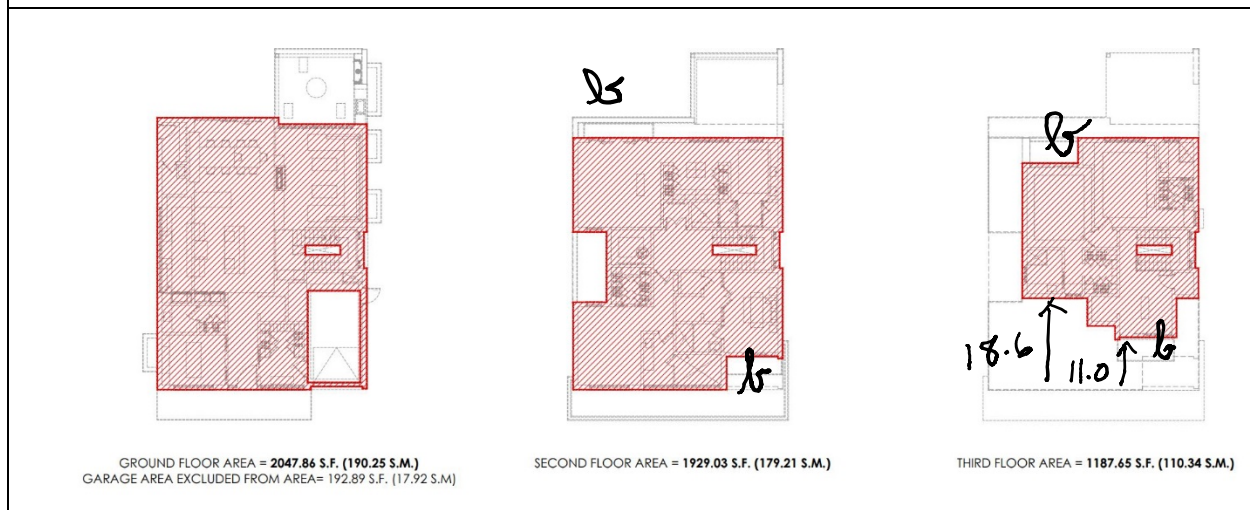


The architect has also stepped back the third floor. The floor by floor footprints in Figure 6 (next page) illustrate this. The numbers are in feet. In addition, the architect has carved out a 6 x 14 ft “notch” in the second floor and placed that notch on the north side, to maximize the beneficial effect of increased light.

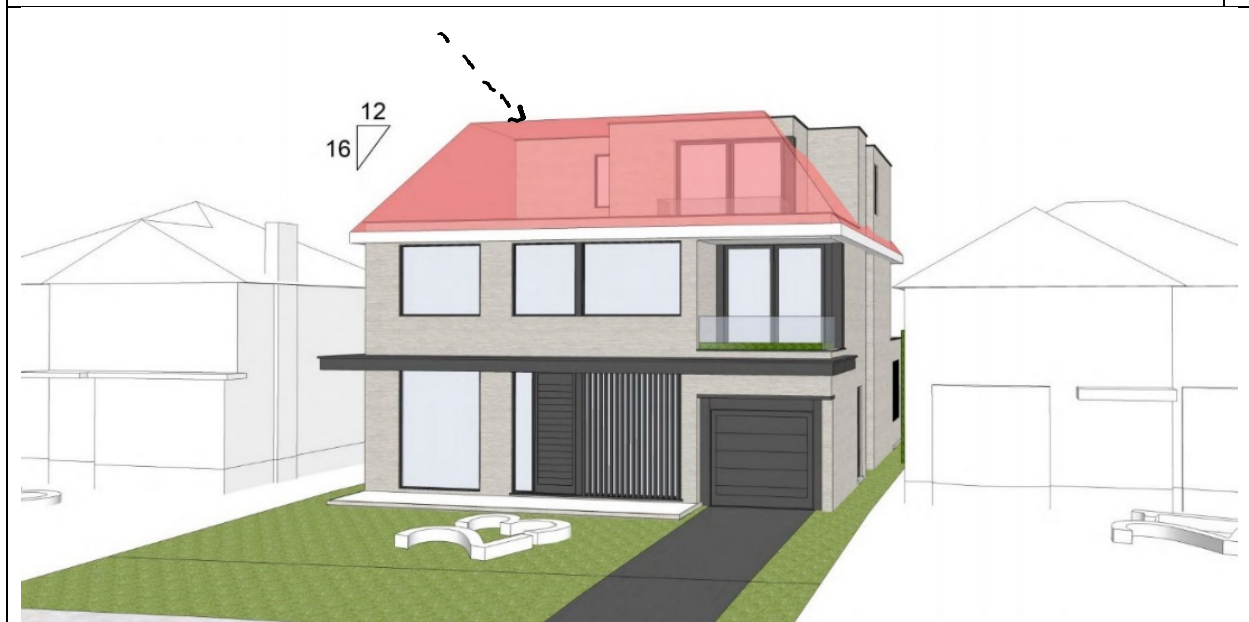
<sup>5</sup> (4) Restrictions for a Detached House with a Flat or Shallow Roof If a detached house in the RD zone has a roof with a slope of less than 1.0 vertical units for every 4.0 horizontal units, for more than 50% of the total horizontal roof area: (A) despite [the overlay map regarding height], the permitted maximum height of the building is **7.2 metres**; (B) [main wall height restrictions do] not apply; and (C) despite [overlay map regarding number of stories], **the building may have no more than two storeys**. (10.20.40.10 Height, Zoning By-Law)

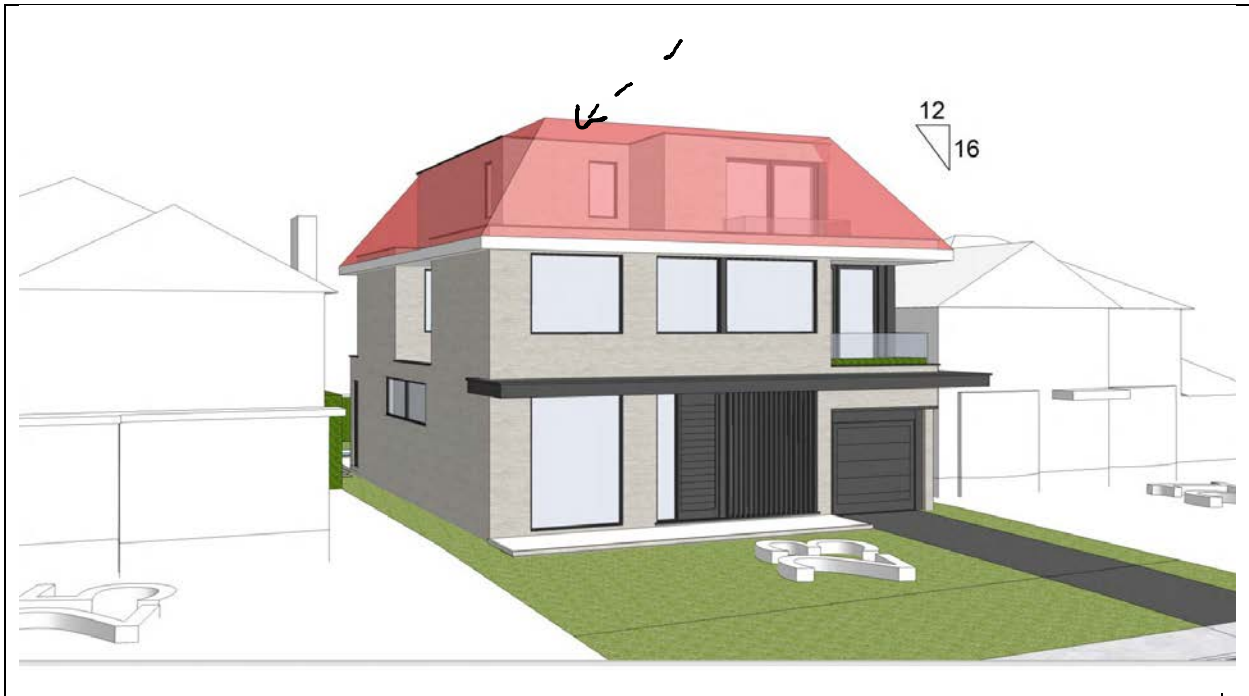


**Figure 6. Floor by floor footprints**



**Figure 7. Architect's rendition of as-of right roof (pink) and proposed (grey)**





#### The architect's illustration of an as-of right roof

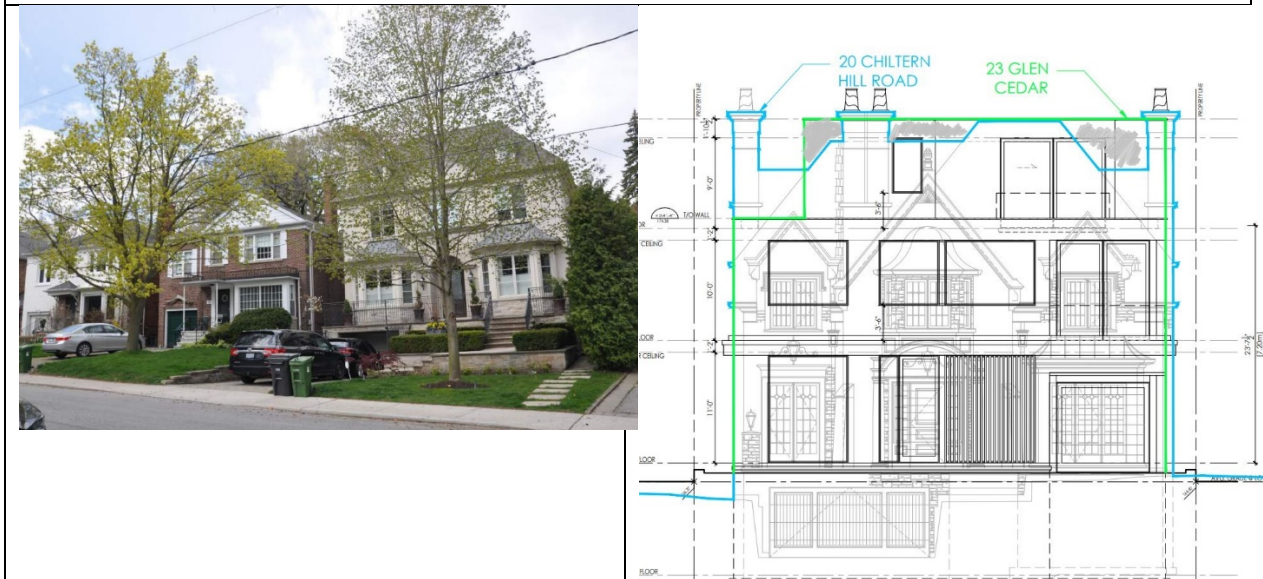
Figure 7 shows two diagrams created by the architect comparing the permitted pitched roof with the proposal. They are both front elevations. The previous page's rendition shows the relationship to the house on the right (number 21), whereas the rendition of this page is oriented to the left house (number 25). The as-of-right roof is depicted as a reddish translucency, whereas the deviation (which may be thought of as a "poking upwards" through the red, is depicted in grey. There is only a projection on the number 21 side; the proposal is entirely within the as-of-right envelope on the number 25 side. The architect has deliberately taken into account that in Toronto a southern building casts a shadow on the adjacent northern one; the design has responded to this factor.

In the rendition on this page, I asked Mr. Bissett whether the red and the grey were properly drawn and was told that it was. Perhaps this may be seen more clearly in the previous rendition, and I have placed a dotted arrows to show the reader where to look. It shows the subject's third floor rooftop is coterminous with the as-of right pitched roof. Despite its name, a pitched roof may also have a sizable flat portion and still be considered "pitched" for zoning purposes.

Ms. Smith attended the hearing on Day 2 but did not give evidence. She expressed concern about the shadowing of the proposed roof on number 25 Glen Cedar (her parents' house). Ms. Valencia went further. She said that the proposed house was "completely out of character", an "overdevelopment" in an area where the majority are two stories with "fake dormers."

Although the onus of proof is on the Kalmanson/Grossmans, this does not mean that Ms. Valencia could simply rely on her assertion of “out of character”. She needs to produce some evidence. She could have, for example used Mr. Bissett’s photographs to make her argument or even pointed to her own house as an example of neighbourhood character.

**Figure87. Comparison of Valencia and Kalmanson elevations. Photo left shows 16 and 20 Chiltern Hill Road.**



Although the Valencia elevation drawn by the Kalmansons’ architect, (who is also Ms. Valencia’s architect) differs from the final construction in a number of aspects (the right chimney does not appear in the photograph) I find that the massing of the two houses is substantially similar. I have greyed out the areas in which the Kalmanson flat roof appears to exceed the Valencia envelope.

The Kalmanson FSI number is high, but I find that it is saved by the sensitive treatment the architect employed in sculpting out and setting back significant portions of the third floor, creating less of an impact and more in line with the intent of the zoning. Therefore, I find the statutory tests are met with respect to FSI, height and number of stories. I also find the remaining variances (with the exception of the number of balconies) are minor and meet the other statutory tests.

### The balconies

In the floorplate diagrams on page 9, I have written a small “b” beside each balcony, but the by-law permits only one balcony per façade<sup>6</sup>. In justification for this variance, Mr. Bissett’s witness statement states:

<sup>6</sup> 10.20.40.50 Decks, Platforms and Amenities (1) Platforms at or Above the Second Storey of a Detached House In the RD zone, a platform such as a deck or balcony with access from the second storey or above of a detached house must comply with the following: (A) **there may be**

Rear balcony on the upper storey is set back over 13 metres from the rear property line, and is an inset balcony, all of which reduce any impacts in terms of overlook and privacy. . . . The upper front façade balcony is slightly larger than the maximum but is set well back from the second floor and not protruding into the streetscape or resulting in any privacy or overlook impacts. Again, neighbours across the street at 20 and 22 Glen Cedar Road, as well as to the north and south at 25 and 21 Glen Cedar have written in support of the variances.

I have studied Mr. Bissett's photographs; there are third floor balconies for 11 Strathearn, 19 Croydon, 1 Westover and 11 Chiltern Hill. These four are insufficient to establish a neighbourhood character, particularly in view of the many other photos that show no front balcony whatsoever, let alone two balconies. In my view the test is whether the extra balcony per façade respects and reinforces the neighbourhood character, not just the considerations stated by Mr. Bissett. Therefore, I find Variance 6 does not meet two of the four tests -- the intent of the Official Plan and zoning by-law -- and I delete from the filed plans the two third floor balconies. I am cognizant of the legitimate arguments expressed with respect to overlook and privacy.

### **The trees**

After the first hearing date, I asked the Grossman/Kalmanson family to retain an arborist to ensure the trees at the rear of the property meet the canopy and tree-growing sections in the Official Plan. These policies require, in my view, that the trees be native, non-invasive and at least 30 cm in diameter.

The first tree resource is a Norway Maple with a 15cm diameter at breast height (1.4m above ground). The condition of this tree is fair, with an unbalanced canopy and severe lean of the main leader. This tree is growing at a 20cm distance from the fence. Due to its proximity to the fence, its lean and its invasive nature, the removal of this tree resource is recommended. ¾ The second tree resources is a White Mulberry with a 23cm at breast height. This tree is a nonnative species with an invasive nature. The condition of this tree is good. However due to its invasive nature its removal is recommended

Accordingly, I am satisfied that the Official Plan policies are respected and I do not consider further Ms. Valencia's concerns about the trees on the Kalmanson lands.

### **DECISION AND ORDER**

I authorize the variances set out in Table 1, except Variance 6 (maximum number of balconies per façade) is not authorized;

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**no more than a total of four platforms, and no more than one on each of the front, rear and each side of the detached house;** and (B) the maximum area of each platform is 4.0 square metres

on the following condition:

- That the construction is in substantial compliance with the plans filed August 3, 2021, but with the two third floor balconies deleted.


Ted Yao  
Panel Chair, Toronto Local Appeal Body