

# DECISION AND ORDER

**Decision Issue Date** Friday, July 8, 2022

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

Appellant(s): GF 2 REGAL ROAD LTD

Applicant(s): MACNAUGHTON HERMSEN BRITTON CLARKSON PLANNING LIMITED (MHBC)

Property Address/Description: 2 Regal Rd

Committee of Adjustment File

Number(s): 21 131424 STE 09 MV (A0481/21TEY)

**TLAB Case File Number(s): 21 220284 S45 09 TLAB**

**Hearing date: May 30, 2022**

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

**DECISION DELIVERED BY TLAB Panel Member S. Makuch**

## REGISTERED PARTIES AND PARTICIPANT

Appellant	GF 2 REGAL ROAD LTD
Appellant's Legal Rep	AARON PLATT
Applicant	MACNAUGHTON HERMSEN BRITTON CLARKSON PLANNING LIMITED (MHBC)
Party (TLAB)	LORALEE GILLIS
Party (TLAB)	STELLA MOLA
Expert Witness	ELDON THEODORE

Participant	TENZON ZONGDHO
Participant	DAVID SHERWITZ
Participant	MARJORIE CORMIER
Participant	SIOBHAN COLE
Participant	JENAN GHAZAL
Participant	BRYAN TIMM

## **INTRODUCTION**

This is an appeal from the refusal by the Committee of Adjustment of variances to permit the alteration of the existing eight-storey apartment building at 2 Regal Rd. (the property) by the construction an additional storey above the seven-storey portion and an eight-storey addition to the southeast corner of the building, for a total of 15 new residential dwelling units. The alteration will also provide for additional indoor and outdoor amenity space, changes to the parking provided and the relocation of the garage and loading area. The variances applied for relate to increases in height and density, and reductions in setbacks and parking requirements. They are set out in detail in Appendix 1.

## **BACKGROUND AND MATTERS IN ISSUE**

The appealed variances would allow for the enlargement of an existing apartment building in the residential area made up of detached and semidetached homes. Since the area is zoned R, (Residential) the apartment building use is permitted. However, its size and height are not. As a result, the variance to permit the additions is required to permit a total building floor area of 10,867.5m<sup>2</sup> while the bylaw only permits a total floor area of 2,251.0m<sup>2</sup>. Similarly the bylaw permits a height of 10m and the variance is to permit a building of 26m. The variances must address the set backs for the existing building and parking requirements for the tenants.

The matters in issue at the hearing related to the following:

- (1) building management - , the tenants asserted the building was poorly managed as electrical and water service was often cut off without adequate notice.
- (2) impact of the addition and alteration on access as a main stair case was to be removed and access would be made more difficult as would the moving of furniture into and out of the building.
- (3) loss of green space, although new amenity space is to be created.
- (4) loss of views and sunlight from some units as a result of the 8 story addition.

- (5) insufficient parking.
- (7) destruction of trees

(8) the failure of the variances to respect and reinforce the character of the neighbourhood.

## **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**

The evidence was presented in favour of the appeal by the appellant's solicitor through two experts, and in opposition to it by numerous tenants of the property and neighbouring property owners who appeared in person at the hearing. The City was not present although planning staff had written a report to the Committee of Adjustment which did not oppose the application, but rather, suggested conditions of approval to secure amenity space, affordable rental housing, and a construction management agreement. In addition numerous written submissions were provided in opposition to the appeal.

The planning case in support of the appeal was provided by the solicitor, Mr. Platt, through Elden Theodore, who was qualified to give expert land use planning evidence. That evidence was clear and concise. The property was designated Neighbourhood in the Official Plan and the apartment building currently is part of the

character of the neighbourhood. The alterations would maintain the character of the area and meet all the relevant criteria of section 4.1.5 of the Official Plan. The addition on the top would be set back and thus would hardly be visible from the street and the 8 story vertical addition would have no significant impact on any tenants or neighbours and would respect and reinforce the character of the apartment building and thus the character of the area. The proposal would provide 15 additional rental units in a location which was within 500-600 metres of the TTC street car on St. Clair Ave. A traffic report indicated parking would be sufficient. This was a suitable site for intensification and in keeping with the Growth Plan and PPS. Mr Theodore also addressed tenants concerns regarding access to the building, the general condition of the building and problems raised by the tenants regarding services such as water and electricity. He recommended a building construction agreement also be a condition of approval to address these concerns and others regarding construction.

In addition, evidence in favour of the application was provided by Mr. Kuntz who was qualified to give forestry evidence. His evidence was based on a report prepared by an employee who was no longer with his firm and upon a recent site visit he made. It was clear that the study was undertaken after the plans for the additions and alterations were prepared. The report basically determined which trees would have to be removed to undertake the proposed development. The report itself specified those trees to be removed regardless of their condition as good, fair, or poor. He gave evidence that certain trees rated fair to good were a “nightmare” and needed to be removed for the relocation of space for the garbage and loading area. He also gave inaccurate evidence that a tree was against a wall and should be removed for the eight story addition to be built when that tree was not against a wall. No arborist report was undertaken to determine which trees should be preserved prior to preparing a plan for the additions and alterations. Mr. Kuntz gave no consideration or evaluation of whether the destruction of 12 trees, as proposed, would comply with the Official Plan policies respecting trees and forest canopy preservation. He acknowledged City had some concerns regarding the removal of some trees. A City Forestry report requested applications for the removal of trees.

As stated, tenants and neighbours appeared in opposition and many letters were sent in opposition to the appeal and to the Committee of Adjustment. These concerns could be summarized as follows: blocking views from certain balconies, reduction of sunlight in some units, loss of access to units by removal of a wide stair case, loss of green space, the increase in height, reduction in setback, the increase in the number of tenants with no improvement in service, reduction in parking, and the enlargement of a building which was already too large. Although formal required notice of some of these concerns was not provided, no significant objection to raising them at the hearing was raised as there was no significant basis for the appellant to argue prejudice or unfair surprise.

## ANALYSIS, FINDINGS, REASONS

I find that the variances should not be approved. They do not meet the four tests, either individually or cumulatively for the following reasons:

- (1) The building as enlarged and altered will not respect and reinforce the character of the neighbourhood and thus will not maintain the general intent of the Official Plan. Of particular concern is the failure to take into account Section 3.1.4 of the Official Plan which addresses built form and height.
- (2) The proposal fails to meet the general intent of Official Plan to preserve and enhance the urban forest, section 3.1.1(16).
- (3) Some units will have their views adversely impacted and will have sunlight diminished for those units the impact of the variances would not be minor.
- (4) The alteration will adversely impact on the access to units and is therefore not desirable.

- (1) Failure to respect and reinforce the character of the Neighbourhood.

There is no doubt that a general intent and purpose of the Official Plan is to protect the character of a neighbourhood. The character of this neighbourhood is one of low rise buildings. This is a building of 7-8 stories. There was no evidence of other buildings of this height in this neighbourhood. The Official Plan does not require conformity with other building heights in the area nor does it require that buildings be identical in any way. However, the Plan's general intent is to ensure that a building does not stand out, and that it fits in an area. This building clearly does not fit and stands out. Although an apartment is a permitted use, a building of 7-8 stories in height is not envisaged for this type neighbourhood. As the Official Plan states in describing neighbourhoods:

"Neighbourhoods are considered physically stable areas made up of residential uses in lower scale buildings such as detached houses, semi-detached houses, duplexes, triplexes and townhouses, as well as interspersed walk-up apartments that are no higher than four storeys."

This neighbourhood is a low scale neighbourhood, with this one exception which does stand out and therefore is not typical, or representative of the character of the neighbourhood.

Variances which add an additional story and a bump out which is eight stories high to such a building do not reflect, respect or reinforce the character of the area. Moreover, the zoning bylaw, which implements the Official Plan, and must conform with it, prohibits such a height. No exception is made for the height on this site. Thus, the intent of the zoning bylaw is to prevent a building of such a height. To permit the variances would in my view run counter to that intent.

In addition, it should be noted that a variance is required for density or massing to permit such a height. This building is a nonconforming use and thus is already too high and too big for the site according to the bylaw. The permitted floor space index is .6 while floor space index of over 4 times that amount is sought. There is no evidence of buildings of such a density in the neighbourhood.

A variance is sought for the setbacks to permit the resulting density. As stated the density on the site is already in excess of what is permitted for this site and to permit its increase it by reducing the setbacks will not respect and reinforce the character of the area or meet the intent of the zoning bylaw which is to ensure that setbacks in the area are similar. There is no evidence of similar setbacks in the area.

As a result of the above analysis I find that the variances for height, density, and setbacks do not meet the general intent of the Official Plan and zoning bylaw.

(2) Protection and Enhancement of the Urban Forest.

Section 3.4.1 of the Official Plan states: “changes to the built environment ...will be environmentally friendly, based on... (d) iii.. providing suitable growing environments for trees; increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees; and by regulating the injury and destruction of trees.” Moreover section 3.1.1(16) provides that: “The preservation, long-term growth and increase in the amount of healthy trees will be a priority for all development. Development proposals will demonstrate how the protection, provision and maintenance of trees and their growing spaces above and below ground will be achieved”.

I find the general intent of these provisions is to develop and redevelop land in a way that is sensitive to the preservation of trees and the tree canopy. As a result, an arborist report should be completed before a site plan is prepared so that servicing locations and building additions can be located taking into account the preservation of trees and the tree canopy. In this way proper regulation can be undertaken to give priority to protecting trees. This was not done in this case. The arborist report was undertaken after the site plan and location of garbage and loading space was selected and after the location of the eight story eight story addition was determined. It was a study to determine which trees needed to be destroyed or injured given the plan and not a report to determine which trees were healthy enough to be preserved and protected when preparing the plan.

Moreover the evidence of the expert in Forestry was not credible. He gave evidence that trees in fair to good health should be destroyed because of a fence in the same area. A close examination of the site and photos of it showed the fence did not interfere with the trees or their rating in the Arborist Report. He had not examined the City's Forestry policies and suggested that all trees in the City overhanging sidewalks or roads were dangerous and should be removed.

I find that the variances permit a development for which the location of the garbage and loading area is not an appropriate use of the land in that it requires the destruction of a number of trees in fair to good condition and thus will not maintain the general intent of the Official Plan.

### (3) Impact on Sunlight and Views

There is no doubt that there is no legal right to a view or sunlight. However, this Body, as a matter of policy, can take such impacts as the loss of a view or sunlight into account in deciding whether the variances are “desirable for the appropriate use of the land building or structure”. The extension of a wall into a backyard can adversely impact on the character of a neighbour’s rear yard, views from it and its sense of openness. Such an extension can, as well, impact on the amount sunlight entering into a neighbouring rear yard or internal rooms. Such impacts can and should be considered regardless of legal rights.

In this case there is such impact on the units adjacent to the eight story bump out. Evidence was given by one tenant (Ms. Gillis) whose unit was adjacent to the bump out on the loss of a southerly view from her and other balconies adjacent to the bump out and the increase shadowing and loss of light for part of the day as a result of the bump out in those adjacent units. I find Mr. Theodore’s evidence that these were not a significant impacts unpersuasive in spite of his expertise. The impact on views and sunlight can be demonstrated. Ms. Gillis demonstrated how the bump out would look from her balcony. The shadow study showed additional loss of sunlight for part of the day to those units adjacent to the bump out. While Mr. Theodore advised that such impacts were insignificant and that balconies should not be considered as rear yards, as there is no right to a balcony, I do not agree. For tenants living in an apartment building, balconies are part of their home. As such, they are as worthy of consideration for protection as a homeowner’s rear yard.

### (4) Impact on Access

The tenants also complained of the impact of the bump out on access to the building as it would result in the loss of a central stair case. The staircase is not protected by any provision of the Official Plan or zoning bylaw, but I must, as with the impact on views and sunlight, determine if the loss is desirable for the appropriate use of the building. I find it is not. To eliminate the access and replace it by a circuitous route and restrict the ability to move furniture in and out of the building is not desirable. I am not persuaded that a construction management agreement, as suggested by Mr. Theodore, would address this or other servicing issues. Although such an agreement was recommended by staff, the City is not a party to this hearing and I have no further knowledge of its position on this matter.

### Conclusion

In conclusion I find that the variances should be all be denied and the appeal dismissed for the reasons set out above. I include the parking variance as it is not desirable given the rejection of the other variances. I make this finding in spite of a desire for additional

rental units to be built in the City. This Neighbourhood and this site are not designated for intensification and the site is not close to major transit station area. While increased rental housing is important, it is not a policy which overrides the policies referred to above. As stated in the Housing policy section of the Official Plan (s.3.2.1.1.2): “New housing supply will be encouraged through intensification and infill that is consistent with this Plan”. Therefore, I find the general intent of the plan is not to avoid the application of the above policies. For similar reasons I find that the general intent of Policy 3.1.2.1 that “Development will be located and organized to fit with its existing and planned context .” also means that the above Neighbourhood policies should apply to this site, as its planned contexts determined by its Neighbourhood designation in the Official Plan. In addition policy 3.1.2.1 (e) should also apply: it states the intent of “preserving existing mature trees wherever possible and incorporating them into the development site.” Moreover it is not appropriate or desirable for new rental housing be approved to the detriment of existing tenants.

Finally I note that I do not find it necessary to address consistency with provincial requirements since the variances do not meet the four tests of the Planning Act.

## DECISION AND ORDER

The appeal is dismissed, and the decision of the Committee of Adjustment upheld.

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S. Makuch

Panel Chair, Toronto Local Appeal

## Appendix 1

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

The minimum required number of parking spaces for the residents is 54 parking spaces. In this case, 36 parking spaces for residents will be provided.

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

The minimum required number of parking spaces for the visitors is 16 parking spaces. In this case, 13 parking spaces for visitors will be provided.

### 3. Chapter 10.10.40.10.(1)(A) By-law 569-2013



The maximum permitted height of a building or structure is 10.0 m.  
In this case, the height of the building will be 26.0 m measured to the top of the eighth storey addition.

**4. Chapter 10.10.40.40.(1)(A) By-law 569-2013**

The maximum permitted floor space index is 0.6 times the area of the lot (2,251.0 m<sup>2</sup>).  
In this case, the floor space index will be equal to 2.9 times the area of the lot (10,867.5 m<sup>2</sup>).

**5. Chapter 10.10.40.70.(3)(C)(ii) By-law 569-2013**

The minimum required side yard setback for an apartment building with a height more than 12.0 m is 7.5 m.

In this case, the side yard setback will be 0.2 m.

**6. Chapter 10.10.40.70.(2) By-law 569-2013**

The minimum required rear yard setback is 7.5 m.

In this case, the rear yard setback at the eighth floor level will be 6.1 m.

**7. Section 4(2)(a) By-law 438-86**

The maximum permitted height of a building or structure is 10.0 m.

In this case, the building will have a height of 26.0 m measured to the top of the eighth storey addition.