

# DECISION AND ORDER

**Decision Issue Date**      Friday, July 29, 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): CITY OF TORONTO; BEVERLY CAREY

Applicant(s): ACTION PLANNING CONSULTANTS

Property Address/Description: 95 JAMES ST

Committee of Adjustment File

Number(s): 18 172843 WET 06 MV (A0471/18EYK)

**TLAB Case File Number(s): 19 230369 S45 03 TLAB**

**Hearing date: November 6, 2020**  
**February 26, 2021**  
**March 5, 2021**  
**March 29, 2021**  
**April 16, 2021**

**Deadline Date for Closing Submissions/Undertakings: April 30, 2021**

**DECISION DELIVERED BY Panel Member JOHN TASSIOPOULOS**

## REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Action Planning Consultants	Applicant	
1882291 Ontario Inc.	Party/Owner	Amber Stewart
City of Toronto	Appellant	Lauren Pinder/Derin Abimbola
Beverly Carey	Appellant	
Judy Gibson	Party	

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Name	Role	Representative
David Godley	Expert Witness	
Sandy Donald	Participant	
Elizabeth Edwards	Participant	
Christine Mercado	Participant	
Steve Vella	Participant	
Ruth Weiner	Participant	

## **INTRODUCTION**

On Thursday September 12, 2019, the City of Toronto (City) Committee of Adjustment (COA) approved three variances requested for the COA file number **A0471/18EYK** along with two conditions, for the property located at 95 James Street, to construct a new detached dwelling with an attached garage.

The subject property is located within the former municipality of Etobicoke in the southwest corner of the City, south of Lakeshore Boulevard, north of Lake Ontario and east of the boundary with the City of Mississauga. It is designated *Neighbourhoods* in the City Official Plan (OP) and zoned Residential Multiple (RM) under Zoning By-law 569-2013.

The COA's approval of the variances was appealed to the Toronto Local Appeal Body (TLAB) by the City of Toronto on September 20, 2019 and by Pat and Beverly Carey on October 1, 2019. and the TLAB issued a Notice of Hearing setting a Hearing date for February 7, 2020.

In attendance at the Hearing dates listed were:

- Amber Stewart, legal counsel for the Owner, and Expert Witnesses Franco Romano (Land Use Planning) and Peter Wynnyczuk (Arboricultural);
- Judy Gibson, representative for the Long Branch Neighbourhood Association;
- Derin Abimbola and Lauren Pinder, legal counsel for the City of Toronto;
- Beverly Carey, Appellant;
- David Godley, Local Knowledge Expert Witness
- Sandy Donald, Participant;
- Elizabeth Edwards, Participant;
- Steve Vella, Participant; and,
- Christine Mercado, Participant.

This matter was heard over five non-consecutive days as indicated in the Hearing dates above. The first Hearing day, November 6, 2020, was adjourned as Ms. Gibson and the LBNA expressed concern that the late submission of the arborist report from Ms. Stewart (November 4, 2020) did not allow sufficient time for the LBNA to review these materials. To ensure that a full and fair proceeding took place, I adjourned the Hearing and TLAB provided all Parties and Participants with the new Hearing date of February 21, 2021.

At the beginning of the February 21, 2021 Hearing day the City's counsel, Ms. Derin Abimbola, stated that the City and the Applicant had reached a settlement with respect to the proposal, and they would no longer be participating as an opposing Party but rather as an observer in the proceedings. She further indicated that due to this agreement and the City's revised position, the City's arborist, Ms. Verbitsky, would not be providing expert evidence regarding this matter. Ms. Gibson expressed concern about the City's arborist not providing evidence as she intended on cross-examining this witness and that the LBNA did not have an arborist expert witness as they were relying on the expert evidence of the City's arborist and felt this disadvantaged the LBNA. Ms. Stewart explained that Mr. Wynnyczuk, the Applicants arboriculture expert witness, had signed and filed an Acknowledgement of Expert's Duty (Form 6), which requires him to provide the TLAB with opinion evidence that is fair, objective and non-partisan. Ms. Abimbola concurred that there was no need to duplicate the arborist opinion evidence and that Mr. Wynnyczuk should be able to provide arborist expert evidence. She further explained that should Mr. Wynnyczuk be inconsistent with the opinions expressed in his witness statement or in his report, she would raise an objection at that time. Having heard the concerns, I was of the opinion that given the City and the Applicant had reached a settlement based on the arborist report and materials submitted by Mr. Wynnyczuk in November 2020, I would not request Ms. Verbitsky to provide opinion evidence.

The remaining Hearing days of March 5<sup>th</sup>, March 29<sup>th</sup>, and April 16<sup>th</sup>, 2021 took place in order to hear all the evidence and presentations from the Parties and Participants related to this matter. Closing arguments were written and submitted to the TLAB for April 30, 2022.

I advised, as per Council direction, that I had visited the site and surrounding neighbourhood and reviewed the pre-filed materials in preparation for the Hearing, but it was the evidence to be heard that was of importance.

## **MATTERS IN ISSUE**

This is an appeal of the COA's approval of the requested variances. Being a *de novo* Hearing, the TLAB must be satisfied that applicable policy and all four tests of the *Planning Act* have been satisfied.

At issue is whether the removal of the mature silver maple tree in the subject property rear yard is permitted in terms of the as-of-right zoning for the property or does the Toronto Municipal Code Chapter 813, Trees as-of-right definition preclude its removal?

## BACKGROUND

The following variances are requested:

### 1. SECTION 900.6.10.(2)(D)(I), BY-LAW 569-2013

The maximum permitted floor space index is 0.35 times the area of the lot (97.56 m<sup>2</sup>).

The proposed dwelling will have a floor space index equal to 0.61 times the area of the lot (171 m<sup>2</sup>).

### 2. SECTION 900.6.10.(2)(F)(I), BY-LAW 569-2013

The minimum required side yard setback is 0.9 m.

The proposed dwelling will be located 0.61 m from the east side lot line.

### 3. SECTION 10.80.40.10.(2)(B)(II), BY-LAW 569-2013

The maximum permitted height of all side exterior main walls is 7.0 m.

The proposed dwelling will have a front exterior main wall height of 7.32 m.

## 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**

A summary of evidence is presented here for the purpose of providing some context for the following sections of this Decision. All of the evidence and testimony in this matter have been carefully reviewed and the omission of any point of evidence in this summary should not be interpreted to mean that it was not fully considered, but rather that the recitation of it is not material to the threads of reasoning that will be outlined in the *Analysis, Findings, Reasons* section below.

### **Expert Land Use Planning Witness Franco Romano**

Ms. Stewart called upon Mr. Franco Romano as an expert witness, and he was affirmed. Mr. Romano, having appeared numerous times in front of TLAB and the Chair, and noting no objection from the Parties in attendance, was qualified to provide opinion evidence in land use planning. He provided a brief synopsis of his retainer and indicated the material he would cover in his witness statement and supporting materials (Exhibit #1).

Mr. Romano advised that there is no consistency in terms of built form and there is a variety of built form types and the regeneration that has taken place within the neighbourhood is also varied. The proposal maintains and is compliant with the existing context.

Mr. Romano spoke to the existing building on the property indicating that the western sideyard setback ranged from 0.31 m at the front to 0.34 m at the rear and the eastern sideyard setback ranged from 0.63 m at the front to 0.53 m at the rear. He noted that in terms of FSI, if a second storey was to be constructed over the existing footprint the total FSI would exceed 0.6 times the lot area.

He indicated that the proposed building length reaches a maximum of 14.02m which is shorter than the permitted length of 17.0 m and that it was also within the permitted building depth of 19.0 m.

Looking at the overall height of the proposed building, he noted that it was compliant with heights with the exception of the wall height of the side and rear elevation which are 7.32 m, whereas 7.0 m is permitted, and is only for the portions further behind the front elevation.

Mr. Romano explained that in his review of the proposal against the OP, he considered both the OP that was in effect when the application was submitted, which predates OPA 320, and the OP following incorporation of the changes incorporated into the OP via OPA 320. He noted that his opinion with respect to the proposal was consistent regardless of which version of the OP is applied to the application.

He opined that FSI was not a clear a determinant of how a house may fit into a neighbourhood and that it is a quantitative assessment that is mostly internal to the proposed building and cannot be seen but the qualitative aspects of height, setbacks and length do have an impact on what can be seen and better indicate the impact of mass and scale than the FSI figure alone.

Mr. Romano presented a photo survey he had of his neighbourhood study area comprised of 232 properties, and specifically of the immediate context along James Street, noting that there was no consistent architectural style, built form, and residential type.

His review and analysis of the neighbourhood area, immediate context, and the analysis of past decisions within these areas indicate a varied FSI and when taken as a whole there is no homogeneous or prevailing built form type and character or lot sizes. In the immediate context for example, opposite the subject property, there are low rise apartment buildings on larger properties and one to three two storey residential dwellings. In his review of the former OP and that of the OP following OPA 320, the development criteria in section 4.1.5, he opined that the proposal is in keeping with the varied nature of both the immediate context and the neighbourhood area. The proposal in his opinion does respect and reinforce the existing physical character in the neighbourhood and immediate area.

Mr. Romano, in his review of built form criteria for new development, in section 3.1.2 of the OP, indicated that policy 1.d) states “*preserving existing mature trees wherever possible and incorporating them into landscaping designs*” as a criteria for ‘fit’ within its existing or planned context. He opined that this was a recognition in the OP that preservation of mature trees may not be possible and noted that was consistent with the proposal where front yard trees will be preserved but the mature tree in the rear yard would not.

Mr. Romano quoted section 3.4 *The Natural Environment* in policy 1.d):

- “d) preserving and enhancing the urban forest by:*
- i. providing suitable growing environments for trees;*
  - ii. increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees; and*
  - iii. regulating the injury and destruction of trees;”*

He explained that the proposal provides ample rear yard for the growing of trees and maintains them in the front yard. Although the tree in the rear yard was to be removed replacement trees would be provided as a condition to the variances, in lieu of its removal, and would contribute to the tree canopy. He concluded that 1 d) iii) anticipates and expects the injury and destruction of trees and that the proposal implements the regulatory framework for tree protection and conforms with this policy.

With respect to meeting the intent and purpose of the Zoning By-law he indicated that the proposal was appropriate in terms of its physical form and size, and it is sited to be compatible within its context. He explained that the FSI variance of the proposed floor area has been “*reasonably deployed on the lot*” and that “*the proposed GFA and FSI is compatible with the GFA and FSI represented elsewhere within the Subject Site’s physical context*” (Exhibit #1).

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With respect to the east side yard variance of 0.61 m when 0.9 m is required, he noted that it was consistent with the existing condition ranging from 0.53 m to 0.63 m and that the lack of uniformity and consistency of side yard setbacks was commonly found in this context.

Mr. Romano explained that the proposal's side wall height variance of 7.32 m where 7.0 m was minor, that it occurred on the sides of the dwelling not visible from the front, the 0.32 m difference would be imperceptible from the street, and still maintained the two storey heights found in the neighbourhood area.

Mr. Romano reviewed the proposal with respect to tree removal when located within the "as-of-right" allowance and referred to Mr. P. Wynnyczuk's witness statement and indicated that where a private tree is located within that allowance, the City would authorize tree removal.

Mr. Romano said that the proposal was desirable and appropriate for the development of the lot because the proposal is appropriate and compatible in terms of site design and built form which is reasonable and contributes to a mix of housing choices.

He concluded that the proposal was minor as it is low rise in scale, does not create unacceptable adverse impacts, the tree impacts are no different than what would be anticipated with an "as of right" development. The order of magnitude of each of the variances and cumulatively was also minor in nature.

Mr. Romano indicated that the proposal complied with the Long Branch Character Guidelines and noted that its design and the variances sought were in keeping and met the criteria in the review checklist of these guidelines. He again that the removal of the private rear yard tree was within "as-of-right" permissions.

During Ms. Gibson's cross-examination, Mr. Romano was asked if his reference to "as-of-right" was using the definition as found in the Toronto Municipal Code Chapter 813, Trees which states:

*"AS OF RIGHT - Development that complies with the Ontario Building Code, local zoning by-laws and other applicable law and is permitted without further approval by City Planning."*

Mr. Romano replied, "I used the common land use planning term of "as-of-right" and in relation to the tree this is the term for as-of-right that I was referencing" (February 26, 2021 Hearing excerpt). When asked if this definition was the same as that of the Toronto Municipal Code Chapter 813, Trees definition, he replied that it was not. Mr. Romano noted that the difference between the definitions is that the common land use planning would consider what is permitted by the Zoning By-law and the OP whereas the Municipal Code goes further to include the Building Code, other applicable law and does not require further approval from City Planning.

Ms. Gibson then asked if this meant the proposal was not "as-of-right" because it required three variances and Mr. Romano replied that the proposal did require these variances but that the Municipal Code speaks to what can be done without those

variances which would be “differently constituted but also larger than what is proposed under the variance application.” Ms. Gibson asked if “as-of-right” required compliance and he agreed.

Ms. Gibson referred to the Toronto Municipal Code section 813-18(10) where it states that the General Manager is authorized to issue permits where “ *Development is permitted as of right.*” She again asked if this meant compliance with the Zoning By-laws and Mr. Romano replied, “*correct and the development that is permitted “as-of-right” in compliance with the zoning of this property is larger than the development that is being proposed which requires variances*” (February 26, 2021 Hearing excerpt).

Ms. Gibson asked if there was a variety of permitted residential dwelling types if the FSI was different or lower for single detached dwelling as compared to other dwelling types and he responded that there was a range depending on dwelling type.

### **Expert Arboriculture Witness Peter Wynnyczuk**

Ms. Stewart called upon Peter Wynnyczuk as an expert witness, and he was affirmed. Mr. Wynnyczuk provided a synopsis of his work experience in urban forestry and arboriculture and that he is a certified arborist and member of the International Society of Arboriculture. Given his experience, outlined verbally and in his Curricula Vitae and his signed Acknowledgement of Expert’s Duty (Exhibit #6), I qualified Mr. Wynnyczuk to provide opinion evidence in arboriculture.

Mr. Wynnyczuk was engaged by the Owner to prepare an Arborist and Tree Preservation and Removal Plan to assess the tree saving requirements of the City of Toronto’s Urban Forestry Services and to make recommendations in relation to affected trees on the subject property and those adjacent to it.

He noted that there were no street trees present on the property but indicated that there a Colorado Blue Spruce (referred to as Tree #1 in Exhibit #6) that was in good condition on the adjacent property at 93 James Street in its front yard.

The tree present on the subject property was a large Silver Maple located in the rear yard, within the “as-of-right” zoning setback and was in relatively good condition (referred to as Tree #2 in Exhibit #6). He noted there was no significant deadwood in the canopy but there were anomalies in the trunks at the base that would require further investigation. He said these types of trees are usually damaged from storms but that this Silver Maple was mature and did not appear to be damaged from recent storm events. He estimated that this tree was approximately 100 years old, either just before or after the building of the existing house.

He indicated that the tree protection zone (TPZ) required for this Silver Maple (154 cm in diameter), based on the requirements of the City of Toronto, would be a minimum diameter zone of 6.0 m for a 100 cm diameter tree plus 6 cm of protection for each centimetre above that diameter, resulting in a 9.24 m TPZ for this tree.



Mr. Wynnychuk recommended that when work is performed within the TPZ an arborist would need to be on site and that the City would also make that a condition with respect to the TPZ. There would be no excavation within the TPZ of the Colorado Blue Spruce because the and the proposal is set back further from the existing and there shouldn't be any impact on this tree.

During Ms. Gibson's cross-examination she referred to the Staff Report Actions to Grow Tree Canopy (Exhibit #8) and asked if the reference to "large stature trees in urban areas" along with the associated benefits of such trees outlined in the report, would apply to the rear yard Silver Maple, and Mr. Wynnychuk agreed it was a large stature tree and generally agreed to the perceived benefits, but they were not readily measurable. When asked if the benefits of the tree would also be provided to the neighbouring properties, he mentioned they would.

Ms. Gibson asked Mr. Wynnychuk who ensures that the arborist is on site for supervision when work is to be done within the TPZ and he explained that 3 days before work is to begin the owner is to contact the arborist and City forestry.

Ms. Gibson asked if the City's requirement tree replacement of 3 trees for a tree removal was appropriate with respect to the silver maple and he responded that this was the City's requirement and could not speak to their approach. She asked for an estimate of how many replacement trees would be required to match the canopy provided by the silver maple's canopy, he noted that this analysis would require some time to determine but agreed that it would require more than 30 replacement trees.

Ms. Gibson asked if he was aware of the definition of "as-of-right" in Toronto Municipal Code Chapter 813, Trees and asked if this definition is applicable with respect to the following provision: "the General Manager shall not issue a permit for destruction of the tree where the tree is a heritage tree or should in the opinion of the General Manager be recommended for designation as a heritage tree." She asked if this means that even if the tree is not a heritage tree but has the potential to be one it can be protected as a heritage tree. Mr. Wynnychuk replied that based on the wording, that was correct and open to interpretation from City staff.

Ms. Carey asked if there was any sign of disease or damage on the silver maple tree and he noted that there were no signs of disease when he visited, however, it was a winter condition review and at that time there was no evidence of decay. He also indicated that he had not assessed the tree when it was in full foliage.

Mr. Wynnychuk said that even though the silver maple is in good health there is no way to predict its future performance and health. He indicated that some potential issues for mature silver maples, such as the one on the subject property, can include potential issues from weather events such as limb breakage and shedding and potential structural issues, although this tree did not show signs of damage due to weather events at the time of his visit.

Mr. Wynnychuk noted that the life cycle of trees in general is not predictable because it is dependent on many factors and stated that silver maples could range from 100 to 175 years depending on environmental conditions.

### **Local Knowledge Expert Witness David Godley**

Ms. Gibson called upon David Godley as an expert witness, and he was affirmed. Mr. Godley provided a synopsis of his work experience in urban planning and urban design. Given his experience, outlined verbally and in his Curricula Vitae, his signed Acknowledgement of Expert's Duty (Exhibit #13), and having been previously qualified as a local knowledge expert at the TLAB previously, I qualified Mr. Godley as a local knowledge expert in urban planning and urban design.

Mr. Godley noted that the development criteria in policy 4.1.5 f) and g) includes a reference to prevailing setbacks and rear yard patterns and that the proposal's further setting back from the existing frontage does not comply with these policies.

Mr. Godley stated that the proposal, as submitted, was not "as-of-right" because there are other applicable laws and policies that apply such as the Municipal Code Chapter 813, Trees and that the variances being sought do not comply with its definition of "as-of-right".

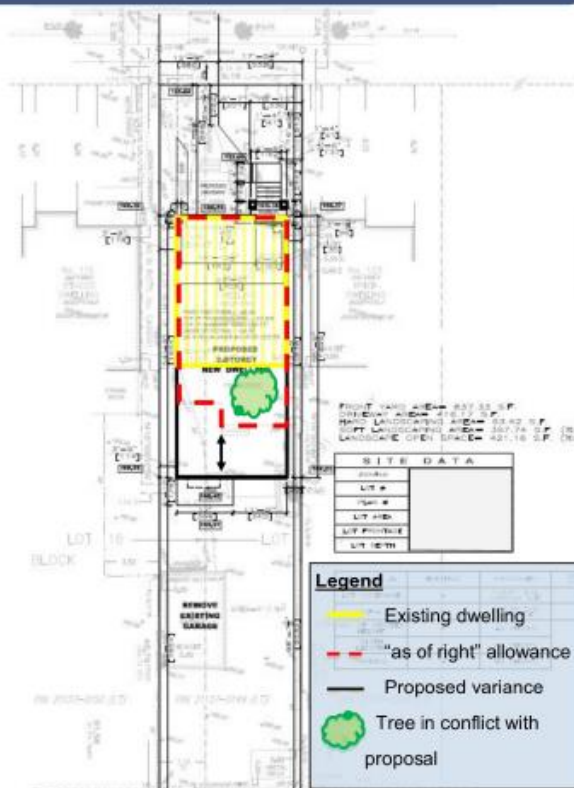
Ms. Stewart asked Mr. Godley had reviewed the "as-of-right" drawings that Mr. Romano had spoken to and if he agreed that its dwelling depth length of 17.0m was greater than the proposal. Mr. Godley agreed it was a greater depth but in addition to this length the tree by-law must also be considered. Referring to Exhibit #6, Ms. Stewart directed Mr. Godley to the report entitled Tree Protection through the Committee of Adjustment Process, dated December 13, 2017, which stated:

*"Section 813-18(10) of the Private Tree by-law authorizes the issuance of tree permits where injury or destruction is required where development is permitted as-of-right."*

Ms. Stewart then referred to a presentation of the Parks and Environment Committee, entitled *Tree protection through the Committee of Adjustment process*, February 23, 2018 and the following slide:

**Scenario #1: Tree is located within the “as of right” portion of development proposal**

- Private tree is in ‘as-of-right’ allowance, minor variance would have no additional impact on tree removal requirements.
- **With or without a minor variance, tree removal would be authorized.**



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Figure 1: Tree protection through the Committee of Adjustment process, February 23, 2018, Slide 7

She asked Mr. Godley he agreed this was the “City’s published practice that if a tree was located within the ‘as-of-right’ portion of the building envelope then Urban Forestry will issue a permit to remove a healthy tree even when there is a variance application associated” (Hearing excerpt, March 29, 2021). Mr. Godley responded that it may be done out of practice but that it was not good practice.

**Participant, Christine Mercado (LBNA Chair)**

She indicated that as part of the LBNA objectives was to understand the extent of the Long Branch neighbourhood tree canopy inventory and that they have been assisted by University of Toronto Forestry student in developing the inventory so that the neighbourhood could understand the condition within their neighbourhood in order to protect and preserve the existing tree canopy.

Ms. Mercado presented a broader neighbourhood study area that was slightly larger area than the neighbourhood study map presented by Mr. Romano and was comprised of 94 lots. She provided a map indicating the FSI for properties within her study area (Exhibit #9, p.140). Her analysis indicated that within the study area, 94 lots had frontages under the required minimum lot frontage required and there were 17 instances where single detached houses had an FSI of above .6 times. She indicated this FSI was more typically associated with semi-detached dwellings in the

neighbourhood. She concluded that the occurrence of this FSI is not significant in the neighbourhood and is not prevailing as per the requirement of section 4.1.5 of the OP. In cross examination by Ms. Stewart, asked if density had appeared in the OP prior to OPA 320 and Ms. Mercado indicated that it was not but was present in the current OP, section 4.1.5 c).

Ms. Mercado indicated that the proposal was in keeping with the Long Branch Neighbourhood Character Guidelines by building into the existing slope of the lot, however, it is not in keeping with the guideline direction that new development should not result in the loss of mature trees.

Referring to the *Long Branch Neighbourhoods Inventory* (Exhibit #14), Ms. Mercado noted silver maples was number 4 within the top 30 species within Long Branch and was in fact number 1 because it is a native species of canopy tree and is not coniferous. She went on to explain that based on the inventory the greatest number of trees with a diameter of 30 cm was made up of 216 silver maples out of a total of 1,716 trees and were the most numerous species with a diameter of 70 cm and the one with the greatest canopy size. Based on this information the silver maple, proposed for removal, was in her opinion a very mature, significant, and rare in terms of size.

#### **Participant, Steven Vella**

Mr. Vella was concerned about the proposed removal of the silver maple and was appearing in opposition to the proposal because he was concerned that the FSI proposed was an overdevelopment resulting in the removal of the Silver maple which is rare and significant in size being approximately 150 cm in diameter.

#### **Participant, Elizabeth Edwards**

Ms. Edwards appeared because of her concern that the “Black Barn Maple of Eastwood” silver maple would be removed and the impact that would have on the canopy. She expressed concern that the proposal has been set further back from the location of the frontage of the existing dwelling.

#### **Participant, Sandy Donald**

Mr. Donald characterized the proposal as intensification and referenced section 2.3.1 in the OP which he stated that it was to ensure that new development be stable and reinforce the neighbourhood and that this did not mean intensification.

He indicated that the OP states that the urban forest should not be compromised and therefore it should be given ample weight and referred to the OP section 3.4.1 d):

- “d) preserving and enhancing the urban forest by:*
- i. providing suitable growing environments for trees;*
  - ii. increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees; and*
  - iii. regulating the injury and destruction of trees;”*

Mr. Donald disclosed that he was the director for Ontario Wildlife Rescue and works with the Ministry of Natural Resources and has extensive experience with respect to wildlife habitat. He suggested that the impact of the silver maple's removal has not been considered with respect to wildlife and that the silver maple is a mini biodiversity ecosystem. Its removal would have an impact on local wildlife and does not meet the general intent and purpose of section 3.4 of the OP and the biodiversity policy of Toronto's Biodiversity Strategy.

### **Appellant, Beverly Carey**

Ms. Carey, the immediate neighbour to the subject property, expressed concern with respect to the length and the added height of the proposal in that it will extend beyond her rear wall significantly and will have an impact on light into the rear of the home and backyard.

She explained that the owner had not approached her with their plans and that the only discussion she had was with the one of the Architects during a previous COA meeting and she would have liked to have had an opportunity to discuss her concerns.

## **ANALYSIS, FINDINGS, REASONS**

Of the variances sought by the Applicant, the request to increase the FSI to .61 times is the most impactful as, in addition to the question of appropriate density, the proposed deployment of the gross floor area on the site precipitates the removal of the significant silver maple tree in the rear yard.

During the course of the Hearing general acceptance was expressed by Parties and Participants regarding the height and façade of the proposal. The most significant issues identified by the Appellants and the Participants were with respect to the proposal being setback further into the rear yard and the removal of the mature silver maple tree in the subject property's rear yard. There was also concern expressed regarding the impact of construction on the Colorado Blue Spruce located in the neighbouring property's (93 James Street) front yard.

Having considered all of the evidence presented by the Expert Witnesses, Participants, and Parties, I identified the central issues on this matter:

- The interpretation of "as-of-right" as presented by Mr. Romano and Mr. Wynnyczuk during their respective testimonies and their contention that in practice the City permits the removal of trees when located within "as-of-right" zoning on the property as illustrated by the Parks and Environment Committee's presentation (see Figure 1);
- The contention by the LBNA that the Toronto Municipal Code Chapter 813, Trees definition of "as-of-right" is more specific with respect to tree removal and that once variances are sought this permission no longer applies;

- The proposal would result in the removal of a mature silver maple tree approximately 154 cm in diameter which would impact the tree canopy and the physical character of the Long Branch neighbourhood;

With the exception of Ms. Carey's concern that the proposal would impact her access to light in the rear of her home and backyard, not much concern was expressed regarding the appearance of the proposed residential dwelling and its variances for wall height and side yard setbacks. The FSI variance was generally opposed due to its perceived impact of overdevelopment of the site and that it ultimately triggered the proposed removal of the silver maple tree.

Mr. Romano during his testimony stated that the "as-of-right" footprint permitted by zoning would result in the silver maple being removed because it would be located within it, and a permit could be submitted to urban forestry for its removal (Figure 2).

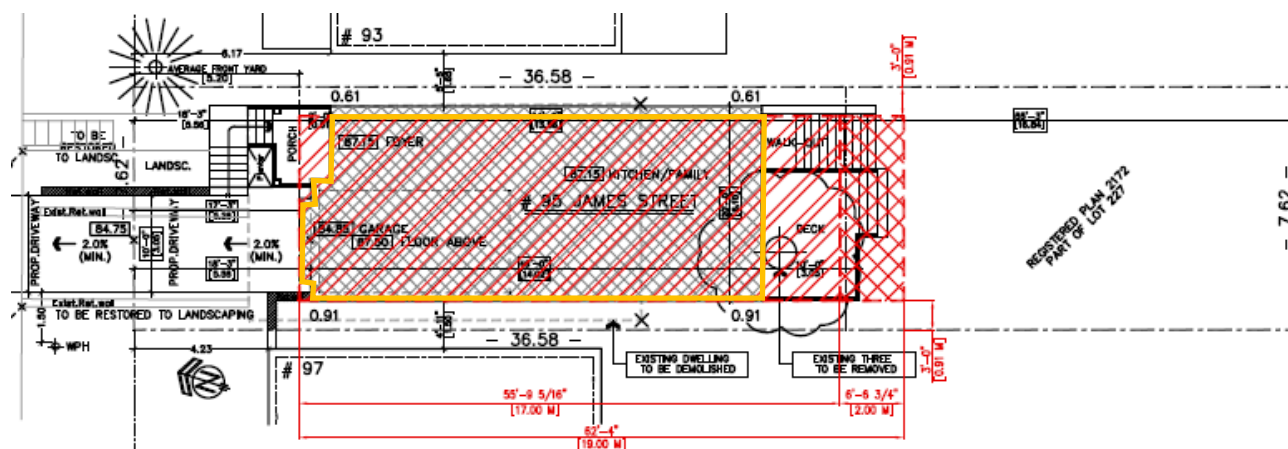


Figure 2: As-of-right Excerpt from Peter Wynnyczuk Witness Statement, Exhibit #6 (orange outline added to indicate proposal footprint; red hatch beyond illustrates extent of "as-of-right" footprint)

Based on the in figure 2 that would appear to be the case, however, the "as-of-right" footprint is not what is being proposed or before the TLAB for review. Furthermore, during cross-examination Mr. Romano did agree that the application of "as-of-right" in this analysis was different from the definition provided Toronto Municipal Code Chapter 813, Trees. Mr. Romano also mentioned that it was the practice of Urban Forestry to permit for the removal of trees when within "as-of-right" portion of the property (Figure 1). This was reiterated in the written closing submissions of Ms. Stewart. I consulted the Toronto Municipal Code Chapter 813, Trees definition of "as-of-right", which describes it as "**Development that complies with the Ontario Building Code, local zoning by-laws and other applicable law and is permitted without further approval by City Planning**" (emphasis is mine). In my reading of this definition, I find that it refers to what is "as-of-right" and in compliance with the Zoning By-law as it exists and is in force. I do not understand this to include a development proposal that requires variances.

Although it is the practice of Urban Forestry to permit the removal of trees when development is within the "as-of-right" allowance, nothing in the definition suggests that "as-of-right" includes development proposals with variances. If the proposal met all of

the zoning requirements for the subject property and included the extent of the “as-of-right” footprint, then this definition would apply, but again, this is not the proposal put before the TLAB.

Ms. Stewart in her closing submissions indicated that Mr. Romano had demonstrated that the FSI proposed was appropriate for the development of the property and that FSI was disputed by the LBNA and Participants “*the real objection was to the building length, and then primarily because it would result in the removal of the existing Silver Maple Tree in the rear.*” I would agree with that assessment, but I do not agree that those two elements are mutually exclusive. Although, as Mr. Romano noted, FSI is not always perceptible from street view and the building form, it is the deployment of the proposed gross floor area on the lot in terms of massing and form that could impact neighbouring properties and in this case lead to the removal of a significantly sized mature silver maple. FSI must be considered in terms of not only its quantitative but also its qualitative impact when assessing its variance.

Furthermore, other than Mr. Romano noting that if a second storey was to be constructed over the existing building footprint the total FSI would exceed 0.6 times the lot area, there was no indication that such a design had been explored. This would have been an alternative deployment of building massing on the site that would have an equivalent gross floor area and FSI and limit the impact on the silver maple, that Mr. Wynnyczuk described as being in good health.

I did not hear any evidence suggesting that the silver maple was impacted by the existing residential dwelling. In Mr. Wynnyczuk’s witness statement (Exhibit #6) he indicated in his arborist report that the silver maple (tree #2) removal is due to proximity in “As-of-right” zoning area. When he was asked if he would recommend removal of the tree to the owner if there wasn’t a development application for the property, he responded that he would not.

During the Hearing there were numerous references to OP policies related to tree preservation and urban forest enhancement that are relevant to the removal of the silver maple on the subject property. Mr. Romano in his review of policy 3.4.1 d) and in particular d) “*iii) regulating the injury and destruction of trees*” concluded that this policy anticipates and expects the injury and destruction of trees, and that the proposal conforms with this policy. However, the same policy also contemplates preservation and enhancement by “*ii) Increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees.*”

Mr. Romano indicated that section 3.1.2. policy 1.d) “*preserving existing mature trees wherever possible and incorporating them into landscaping designs*” was a recognition in the OP that preservation of mature trees may not be possible and was applicable to the proposal. Although it may not always be possible, the key term in the policy is *wherever possible* and suggests all attempts and consideration be given to ensuring existing mature trees are preserved. It is important to note that the policy is specific to preserving mature trees. I have seen no indication of any concerted effort to accommodate the mature tree on this property.

The importance of preserving mature trees and their canopy was further illustrated during the cross-examination of Mr. Wynnyczuk he was asked for an estimate of how many replacement trees would be required to match the canopy provided by the silver maple canopy and he estimated it would exceed 30 replacement trees.

### **Conclusion**

I find that the proposal in its current form does not satisfy the general intent and purpose of the OP and its policies regarding tree preservation. Furthermore, the deployment of FSI on the subject property will impact not only the silver maple but its contributions to the tree canopy and its removal is not minor nor desirable, and for the reasons I have outlined above, the proposal cannot be supported.

Finally, I should note that this Decision is specifically related to this proposal and its associated context, this particular lot and its situation, and the existence of a significantly sized tree with a large tree canopy located within it. Referencing of this Decision should consider the unique and specific attributes related to this application.

### **DECISION AND ORDER**

The appeal is allowed, and variances are refused. The decision of the Committee of Adjustment is set aside.

**X**

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John Tassiopoulos  
Panel Chair, Toronto Local Appeal Body