

DECISION AND ORDER

Decision Issue Date Thursday, July 28, 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): ECHBER INC.

Applicant(s): SCHILLER ENGINEERING LTD

Property Address/Description: 192 Dunvegan Rd

Committee of Adjustment File

Number(s): 2021 194625 STE 12 MV (A1026/21TEY)

TLAB Case File Number(s): 21 251181 S45 12 TLAB

Hearing date: June 10, 2022

DECISION DELIVERED BY TLAB Panel Member: A. Bassios

REGISTERED PARTIES AND PARTICIPANTS

Appellant	ECHBER INC.
Appellant's Legal Rep	OVERLAND LLP
Appellant's Legal Rep	MICHAEL CARA
Applicant	SCHILLER ENGINEERING LTD
Party (TLAB)	WILLIAM BELLINGHAM
Party's Legal Rep.	AMBER STEWART
Expert Witness	FRANCO ROMANO
PARTICIPANT	DEBRA ZUCKER
PARTICIPANT	CHARLENE MOORE

INTRODUCTION

This is an Appeal of the Toronto and East York panel of the City of Toronto (City) Committee of Adjustment's (COA) refusal of an application for variances for the property known as 192 Dunvegan Rd (subject property). The purpose of the application is to construct a new three-storey detached dwelling. The subject property is located in the Forest Hill neighbourhood of the former City of Toronto. It is designated *Neighbourhoods* in the City Official Plan (OP) and zoned RD (f15.0; d0.35) (x1332) under Zoning By-law 569-2013, and R1 under the former City of Toronto Zoning By-law 438-86 (By-laws).

In attendance at the Hearing were:

- Michael Cara, legal counsel for the Owner, and Expert Witness Franco Romano (Land Use Planning);
- Party William Bellingham and Participants Charlene Moore and Debra Zucker.

BACKGROUND

The Applicant proposes to demolish the existing detached dwelling and construct a new three-storey single detached dwelling.

The application for variances has been amended from that which was refused by the COA. The revised variances are as follows:

Chapter 10.20.40.10.(1)(A), By-law 569-2013

The maximum permitted height of a building or structure is 11 m.
The proposed height of the dwelling will be 12.47 m.

Chapter 10.20.40.10.(6)(6), By-law 569-2013

The maximum height of the main pedestrian entrance is 1.2 m above established grade.
The main pedestrian entrance will have a height of 1.58 m above established grade.

Chapter 10.20.40.70.(3)(D), By-law 569-2013

The minimum required side yard setback is 1.5 m.
The proposed dwelling will be located 1.22 m from the north side lot line and 1.2 m from the south side lot line.

Chapter 10.20.40.30.(1), By-law 569-2013

The maximum permitted building depth for a detached dwelling is 19 m.
The proposed building depth will be 27.1 m.

Chapter 10.20.40.20(1), By-law 569-2013

The permitted maximum building length for a detached house is 17 m.
The proposed building length will be 29.1 m.

Chapter 10.20.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index of a detached dwelling is 0.35 times the area of the lot (272.57 m²).

The proposed dwelling will have a floor space index equal to 0.85 times the area of the lot (661.26 m²).

Chapter 10.5.50.10.(1)(D), By-law 569-2013

A minimum of 75% (46 m²) of the required front yard landscaping must be soft landscaping.

In this case, the front yard soft landscaping area will be 64% (39.2 m²).

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

The maximum permitted building height is 11 m.

The proposed building height will be 11.38 m.

MATTERS IN ISSUE

The Applicant has modified the proposal since the COA refusal of the variances. The matter at issue is whether the revised application for variances meets the four statutory tests of s.45(1) of the *Planning Act*.

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

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 has 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.

Mr. Romano (Expert Witness)

Mr. Romano identified a geographic neighbourhood and immediate context area as required by OP Policy 4.1.5.

Mr. Romano characterized the neighbourhood as follows:

- The area contains a mixture of physical characteristics upon a larger lot fabric.
- The lot fabric emanating from the non-uniform road network produces compatible, yet differentiating, lots, site design and dwelling layouts.
- There is more than one prevailing physical character.

Mr. Romano described the proposal as follows:

- The property is currently occupied by a three-storey detached dwelling that will be demolished. Currently an attached rear garage is accessed via a driveway on the south side.
- The proposal is to construct a new three-storey detached dwelling with integral garage.
- The proposed house has an elevated first floor at the front of the property and is closer to grade at the rear because of a 4m rise in topography from the front to the rear of the site.
- Three of the four private trees on the site are to be retained, as well as the three City trees.

Mr. Romano described the revisions that have been made to the proposal since the decision of the COA. They are as follows:

- The cabana that is proposed in the rear yard has been relocated in order to allow for the retention of a tree (Tree “B” on the Tree Inventory and Preservation Plan (Exhibit 1, page 202)).
- The basement walkout that was previously proposed along the west side of the house has been relocated to the rear to preserve Tree “C”.
- One variance, for rear yard soft landscaping, has been deleted. The remaining variances are unchanged from those before the COA.

In support of the application, a tree inventory and preservation plan was prepared by a qualified arborist and a shadow study was included in the submission of documents.

Mr. Bellingham (Party)

Mr. Bellingham resides at the property immediately to the south/east of the subject property. His statement was included in the record and marked as Exhibit 3. Mr. Bellingham testified that he was concerned by the multiple variances requested. He felt

that the variances were excessive and constituted overdevelopment of the property. He was concerned about the cumulative effect of all the requested variances.

Specifically, Mr. Bellingham objected to the reduced side yard setback proposed between his property and the proposed house, to the length of the proposed house and to the projection of the front porch and stairs.

Ms. Moore (Participant)

Ms. Moore shares a rear lot line with the subject property. Her combined statements were marked as Exhibit 4. Ms. Moore echoed Mr. Bellingham's statements regarding the size of the house and emphasized that the proposed house is too large for the neighbourhood and surrounding area. She expressed her concern that the look, history and character of the area are being destroyed by too many large houses being built.

Ms. Moore expressed her concern regarding the removal of mature trees on the property.

Mrs. Zucker (Participant)

Mrs. Zucker preferred to be addressed as "Mrs".

Mrs. Zucker's home is located immediately north/west of the subject property. Her combined statements were marked as Exhibit 5.

Mrs. Zucker reiterated the concerns of her neighbours and stated that the proposal is "grossly over-sized and in no way will it be compatible with the surrounding neighbourhood". She expressed her concern that the proposed length and depth of the house extends excessively deeply into the lot and would negatively impact the neighbours' enjoyment of their rear yards.

Mrs. Zucker noted that the examples of comparable houses Mr. Romano has shown are located on the other side of Dunvegan Rd and that the building features have less of a visible impact because the topography drops (in a northerly direction). She observed that with the integral garage underneath, the proposal looks like a four storey home.

Mrs. Zucker referred to "Tree 12" and stated that Tree 12 grows substantially over her back yard and provides much needed shade in summer.

ANALYSIS, FINDINGS, REASONS

Prior to the COA meeting, the Applicant worked with City Planning staff to revise the originally filed application and bring it closer to a proposal that staff could support. The staff report recommended a number of modifications to the proposal. Ultimately, the COA refused the application.

The Applicant has further revised the application for variances in the submission before the TLAB. The Applicant reports that the revisions involve moving some elements of

the proposal to different locations on the site in order to preserve trees. The requested variance for rear yard soft landscaping has been deleted, but otherwise the scope of the remaining variances is unchanged.

Zoning Notice

Of concern to me is that the City Planning staff report references a Zoning Notice (dated November 30, 2021) that is not included in the materials submitted into evidence at the TLAB and is also not found on the Application Information System (the repository of documents included in the COA file and subsequently, the TLAB file). Proceeding without a Zoning Notice, issued by the City's Zoning Examiner, is a risk to the Applicant as any errors that are made in formulating the variances could thwart the issuance of a building permit.

The determination of required variances by a City Zoning Examiner has legal standing which lends a level of certainty for both the Applicant as well as the Adjudicator and the other people involved in the Appeal.

It is obvious that it is very important to be sure that the requested variances reflect the drawings and the correct dimensions and measurements. For example, a request for floor space index variance should include only the amount of floor space that is described and justified in the proposal; it should not include any additional amount in the requested variance that is not reflected in the drawings and not justified in the Witness Statements. Equally important, the consideration of how a proposal "fits" depends on a comparative assessment of the neighbourhood context that relies on a correct description of the dimensions of the proposal and the variances required.

I hasten to add that I have no reason to question Mr. Romano's statement of the required variances. He is an experienced and professional Planner and I have confidence in his expertise. Nonetheless, a Zoning Notice would have added a level of certainty to the analysis that I would have welcomed since I have relied heavily on the comparison of the proposal to the variances contained in the Decision Summary Table (Exhibit 1, page 40) for the analysis of neighbourhood physical character and "prevailing" characteristics referenced in Official Plan policies.

Were I intending to approve the requested variances, I would have required a Zoning Notice to be submitted as a condition of approval.

Test 1: General Intent and Purpose of the Official Plan

Mr. Romano provided comprehensive evidence and opinion regarding policies of the Official Plan. I consider two sets of policies in the Official Plan to warrant discussion in this Decision, policies in the Natural Environment section that address the urban forest and those in the Neighbourhoods section that set out Development Criteria for new development in *Neighbourhoods*.

❖ Policy 3.4.1 - Environment

This policy directs environmentally friendly actions. Of relevance to this discussion is OP Policy 3.4.1 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. Romano's opinion is that the proposal conforms to and meets the general intent and purpose of the applicable natural environment policies. He goes on to say that the proposal maintains a "substantial amount of existing City and private trees".

The Applicant's Disclosure identifies that the application has been modified from the original proposal to move the cabana and basement walkout so that Tree B and Tree C, as labelled in the arborist's report¹, can be "retained". The plan contained in the Arborist's report shows that Trees B and C are located on Mrs. Zucker's property. (See Figure 6 below).

The modification to the proposal that very slightly repositioned the cabana and the walkout achieved only the removal of these elements from within the tree protection zone of trees on Mrs. Zucker's property. The "retention" of these trees was never in question; at the most, a permit to construct within the tree protection zones of those trees would have been required.

Although twelve trees on the subject property are noted for removal, the Arborist's report identified four of those trees as being within the ambit of the City of Toronto Tree Protection By-law (trees with diameters of 30cm or more). Three of the regulated trees are proposed to be removed. The three trees are identified as Trees 2, 7 and 12², a cherry tree, and two shademaster honey locust trees. (The City's street trees are unaffected).

¹ Tree Inventory and Preservation Plan prepared by Kunz Forestry Consulting Inc. and dated June 18, 2021. The report by Kunz Forestry Consulting included in Exhibit 1 is dated June 18, 2021, revised April 19, 2022.

² There is an inconsistency between Mr. Romano's Expert Witness Statement and his testimony. His Expert Witness Statement says three of the four "regulated" trees are to be retained; his testimony at the Hearing was consistent with the Arborist's report that three of the regulated trees are to be removed.



Image 6. Trees 12 (right) and C (back)



Image 4. Trees 5-8 (from left)

Figure 1: Two of the trees to be removed. EX 1, Arborist's report, Kuntz Forestry Consulting

In summary, the report documented 20 trees on the property, and three neighbouring trees which have a tree protection zone affected by the proposal. Of the twenty trees on the subject property, 12 are proposed to be removed. Of the 12 proposed to be removed, three are trees which are regulated by the City's Tree Protection By-law.

The general intent and purpose of OP Policy 3.4.1 d) is to increase tree canopy coverage, especially of long-lived and large shade trees and to limit the injury and destruction of trees. Trees are important to the City environment, and the Official Plan recognizes this importance. This means that tree preservation policies should be considered during the planning for the development and the design of the proposal, especially in the case of large, mature and long-lived shade trees. I do not read the intent of the tree preservation policies to be the retention of every mature tree in neighbourhoods, but equally, the policies should not be dismissed as merely

aspirational, or meaningless, but should be another factor to be integrated with the other criteria of the Official Plan.

In this application, I do not find that the Applicant has made serious efforts to respect the intent of the tree protection policies and I see no evidence that the design of the proposal has made any concerted effort to respect the presence of significant trees on the property.

In addition, the removal of Tree 12, a shademaster honey locust, is of great concern to Mrs. Zucker, whose property benefits from the shade and screening provided by this tree.

Mr. Romano, in his testimony, said that tree 12, which is located beside the existing wall is “within the area of influence of the as-of-right”. To be clear, there is no entitlement to a variance, the obligation is on the proponent to demonstrate to the decision-maker that the tests are met on the balance of probabilities. The as-of-right condition for any new construction on the subject property would be limited at a building depth of 19m, well back from Tree 12. The proximity of the footprint of the existing brick garage does not presuppose that new, more expansive, construction will be similarly allowed, nor does it diminish the importance of this mature and healthy tree.

❖ **OP Policy 4.1.5. – Physical Character of *Neighbourhoods***

In his Expert Witness Statement, Mr. Romano asserted that the Official Plan “provides for an assessment associated with development criteria-based proposal assessment”. In this vein, I consider the criteria outlined in OP Policy 4.1.5 to be worthy of further discussion in this Decision, primarily with respect to OP Policy 4.1.5 c), f), and g):

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

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

f) prevailing setbacks of buildings from the street or streets;

g) prevailing patterns of rear and side yard setbacks and landscaped open space;...

OP Policy 4.1.5 c) – prevailing heights, massing, scale and density

As the list of requested variances include height, building length and depth, side yard setbacks and floor space index, it is the above policy of the Official Plan that is primarily engaged since these variances collectively influence the massing, scale and density of the proposal.

Massing, scale and density are all architectural terms having to do with the size and relationship of a building to what surrounds it. In this context, massing refers to the general perception of the shape and form, as well as size of a building. Scale refers to a building's size in relation to something else, for example an adjacent building or a person. Density, in this context, means the size of the building in relation to the lot on which it is located. In the Zoning By-law, FSI is the numerical indicator of what the OP refers to as "density".

Massing

The proposal presents as four storeys of construction at the street, having an integral garage at "street level", and three storeys above, the highest of which is contained within the roofline.

With respect to massing, Mr. Romano described the prevailing characteristics in the neighbourhood as two and three storeys (overtop basements), roof styles which are sloped and flat, and with enclosed garages as part of the prevailing character.

Mr. Romano highlighted the following features of the proposal to support his opinion that the proposal reflects the prevailing characteristics: the "three storey component" has "sloped features", terminating in "discreet roof peaks" which slope down to "zoning by-law compliant building wall heights" and the articulated roofline incorporates the third floor, "mitigating and minimizing the perception of massing from surroundings".

STREET VIEW

While Mr. Romano describes the prevailing form as two and three storeys overtop basements, it is the combination of the proposed three storeys overtop a fully visible integrated garage that contributes greater massing to the front of the house. Mr. Romano concentrated on the mitigating effect of incorporating the third floor into the roofline, but did not specifically address the visual effect of the proposed three storeys on top of a garage.

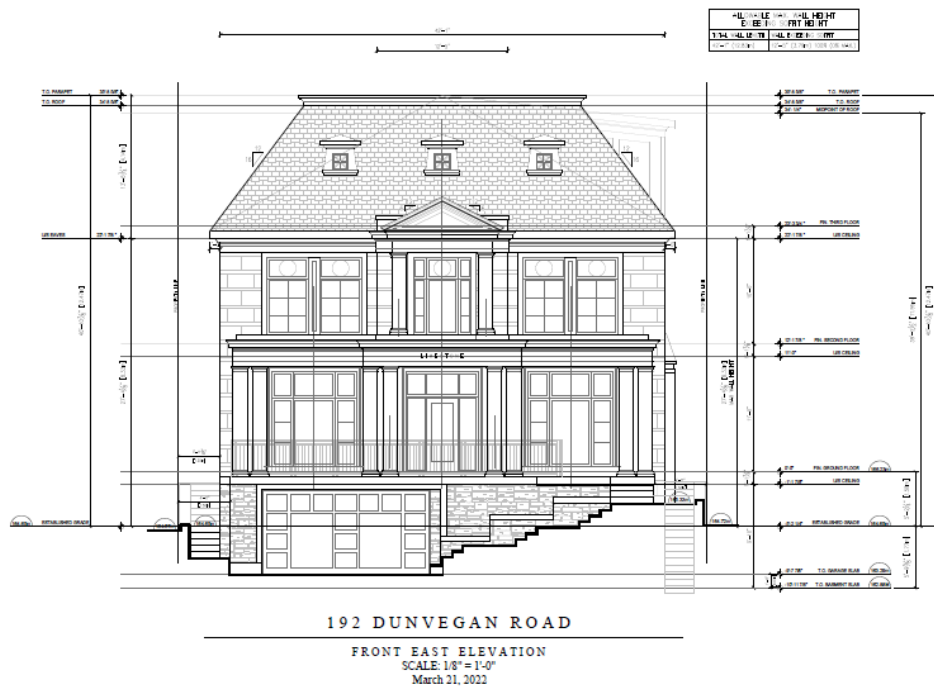


Figure 2: Front Elevation, EX1, page 197

Mrs. Zucker expressed the concern regarding the front massing of the proposal most succinctly when she said it looks like a four storey house, which in her opinion does not fit.

Height

A primary contributor to the presentation of massing to the street is the overall height of the proposal. Prevailing height is also a characteristic referenced in OP Policy 4.1.5. c). The Official Plan policy requires that development reinforce the *prevailing* heights and massing in the neighbourhood, which is defined as being the most frequently occurring.

Mr. Romano has included a decision summary table which details variance decisions within the last 10 to 15 years. There have been five height variance approvals on Dunvegan Rd (the Immediate Context area as prescribed by the OP policy) within that timeframe, none of which approve heights as tall as what is proposed for the subject property. There were one or two variance for approvals documented in the broader neighbourhood.

Variances for overall height are requested from two By-laws, the harmonized City of Toronto By-law 569-213 and the former City of Toronto By-law 438-86. In his testimony, Mr. Romano explained the difference in the way height is measured under the two By-laws. Mr. Romano explained that under both By-laws, the building height is

measured from a starting point which is “belowground” and closer to the midpoint of the basement.³

As Mr. Romano referenced, there is a difference in grade of about 4m between the street and the rear yard of the property. The established grade as calculated by the Applicant is shown in Exhibit 1, page 197 and shown in Figure 1. In his Expert Witness Statement, Mr. Romano said that the first floor of the house exits at the rear of the house at ground level. Thus, the established grade, from which the height of the house is determined, sits lower than the ground level at the back of the house and some 1.36m (approximately 5 feet) higher than the bottom of the garage. As observed from the street, the perceived height of the structure from the bottom of the garage to the parapet would appear to be 13.83m (1.36m of garage below established grade and 12.47m above established grade to the top of the house).

The change in grade on the site could be considered a design advantage in that it allows what would otherwise be the front wall of the basement level of the house (on a flat site) direct access from the street. A number of other houses on Dunvegan Rd have employed the slope in a similar way.

Looking at the photographs contained in Mr. Romano’s Witness Statement (Exhibit 1), I find that in addition to a substantial number of houses with a visible integrated garage below the living space, there are three houses relatively close to the subject property that present a similar form of three storeys above an integral garage, 184, 208 and 210 (212)* Dunvegan Rd.



Figure 3: Photo 2, 184 Dunvegan Rd. EX 1 page 36



Figure 4: Photo 8, 208 Dunvegan Rd. EX 1 page 36

³ Zoning By-law 569-2013 Chapter 800.50 (240) Established Grade means the average elevation of the ground measured at the two points where the projection of the required minimum front yard setback line is 0.01 metres past each side lot line.



Figure 5: Photo 9, 210 Dunvegan Rd. EX 1, page 37

** I believe that this photo has been mislabeled, that the address is actually **212** Dunvegan Rd*

I note that the Table of Decisions (Exhibit 1) does not document that any height variances were granted for these addresses. I note that, in comparison, the proposal appears to have a more substantial roof component in addition to the “three-storey on top of a garage” form.

The comparative consideration of height in this location is complicated by the variable grades (and therefore the level at which the measurement of overall height of the building is taken), however, I note that no variances for height in the immediate context have been granted for the height that is proposed, and perhaps only one or two variance approvals in the entire neighbourhood study area exceed the proposed height.

Mr. Romano advised that there is already a raised first floor in the existing house, but I have not been advised as to the existing height.

OP Policy 4.1.5 c) identifies prevailing height as one of the characteristics that is to be evaluated in the context of the neighbourhood, and in this neighbourhood context the evidence does not, on balance, support the assertion that the proposed height respects and reinforces the prevailing heights in the neighbourhood.

I am led to a conclusion that the overall height of the proposal exceeds the prevailing height of the neighbourhood as the height variance request exceeds any other documented height variance approval in the immediate context; the pedestrian entrance, marking the main floor, has been lifted above the established grade and requires a variance to the maximum height permitted (contributing to overall height); and the combination of a prominent roof and an integral garage below adds a massing that is not manifest in the other examples on the street (the immediate context).

MASSING ON THE LOT

The consideration of massing is not confined only to the perception of the building from the street, or the public realm. The parts of the house proposed behind the street face are also important in the consideration of height, scale and massing and, in this case, are tied to the proposed building length, height and floor space index. Thus, while building length and depth are not specifically identified characteristics in OP Policy 4.1.5 c), in this Decision I shall organize discussion of these features as elements in the overall massing of the proposal. Certainly, from the neighbour's perspective, the length and depth of the proposed house and the total amount of floorspace proposed generates a massing abutting their properties that they believe is inappropriate.

Mr. Romano characterised the broader context and the immediate context as having different building lengths and depths. He stated that the general intent and purpose of the building depth and building length provisions is to ensure that the dwelling is appropriately sized in relation to the lot, oriented towards the front of the lot and not constructed too deep into the lot. It is Mr. Romano's opinion that the proposal is "context suitable".

Mr. Romano's witness statement documents that building lengths exceeding the zoning by-law permissions (17m) are well represented within the immediate context. This is true, but this fact alone is not a sufficient basis to justify a building length of 29.1m. The immediate question is whether a building length of 29.1m generates a massing on the property that does not respect the prevailing massing in the neighbourhood.

The properties on the same side of Dunvegan Rd are of greater relevance in understanding the general alignment of the prevailing massing behind the public face of houses, focusing on the experience of the rear walls and rear yards.

Mr. Romano's table of Decisions documents one variance for length and depth on the westerly side of Dunvegan Rd, where the subject property is located. This variance was granted for 180 Dunvegan Rd and allowed a length of 20.35m and a depth of 20.94m, at least 8m shorter than the proposal. Four approvals for length and depth greater than the proposal have been documented for the opposite side of Dunvegan Rd, the downslope side.

Mr. Romano's Geographic Neighbourhood Photo Reference plan (Exhibit 1 page 33) provides a picture of the building lengths on Dunvegan Rd as it shows building footprints. I will note that the information shown on the drawing could be somewhat dated, but it provides an overall reference for existing building lengths and depths that is not available from a table of variance decisions.

In the figure below, I have drawn an approximated line to show the building length of the *existing* house at 292 Dunvegan applied to the rear of the properties on the south/west side of Dunvegan Rd.

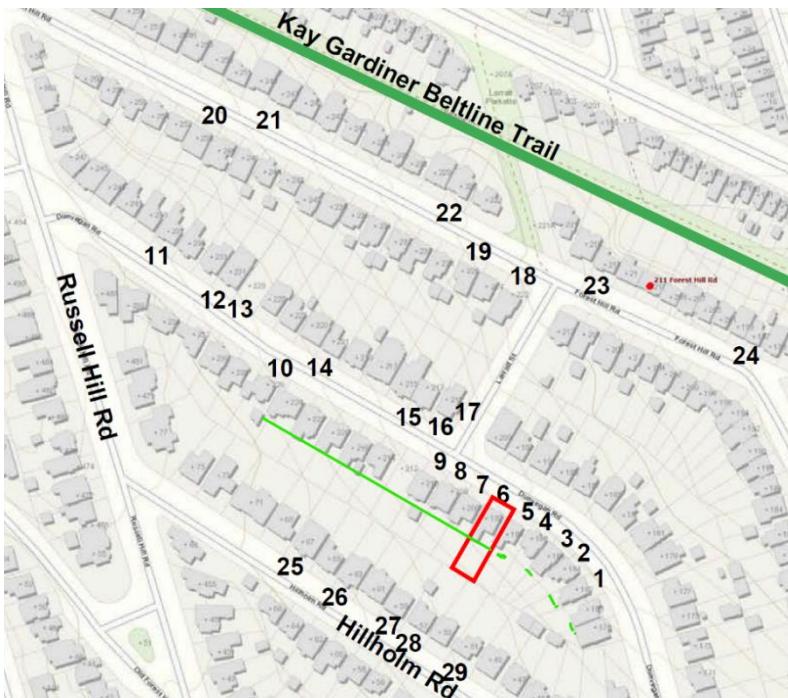


Figure 6: Neighbourhood Reference Plan, showing building footprints. Ex 1. ANNOTATED

I conclude that the *existing* building depth on the property is amongst the deepest on the south/west side of Dunvegan Rd and is generally in alignment with the other rear walls on the south/west side of the block.

The Site Plan indicates that the proposed rear wall of the three-storey main house projects 1.55m beyond the rear wall of Mrs. Zucker's house. In addition, the covered porch extends a further 4.6m beyond the rear wall.

Little description of the existing house on the subject property was provided. During the Hearing, when I enquired about the footprint of the existing house in relation to the proposal, I was referred to the arborist's drawing on page 216 of Exhibit 1.

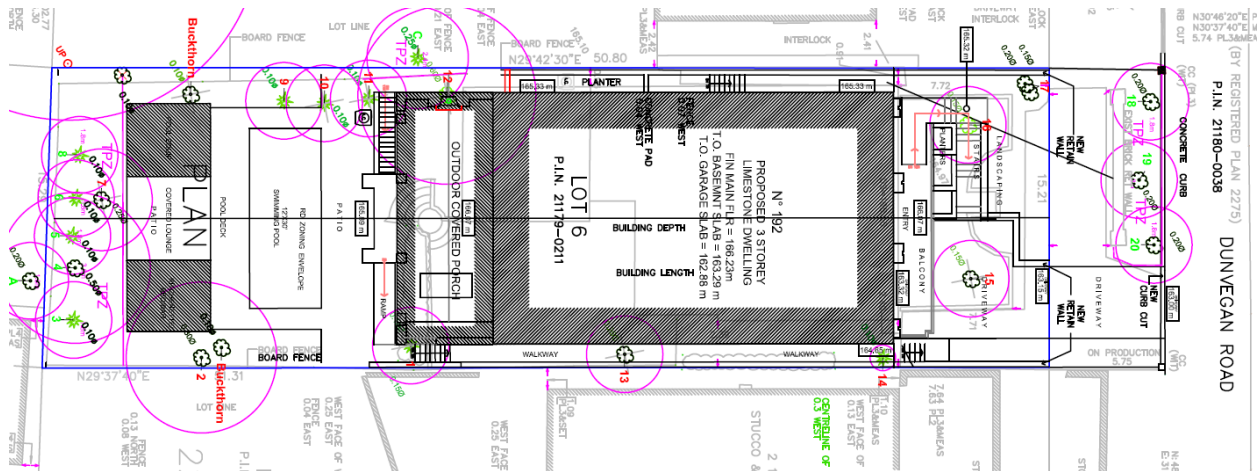


Figure 7: Arborists Drawing showing footprint of existing house and proposal, EX1, page 216

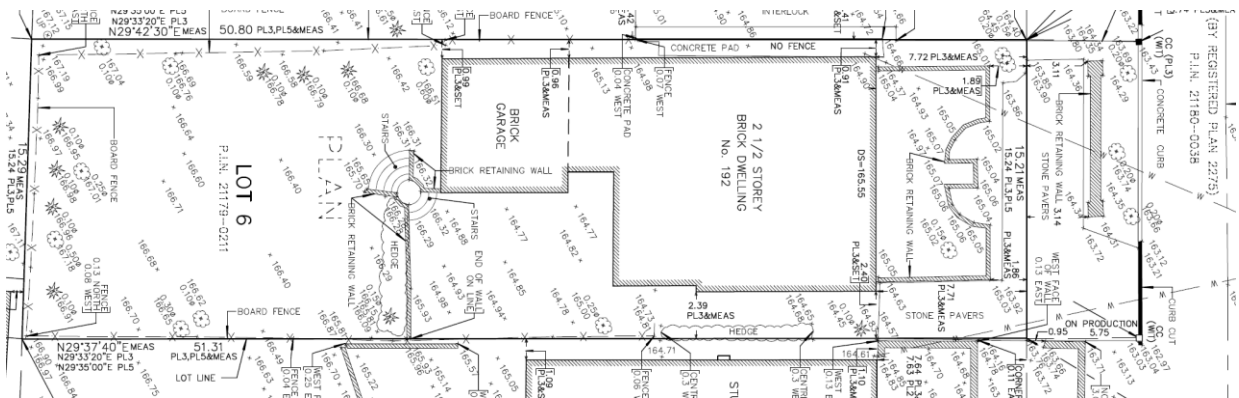


Figure 8: Survey, Ex 1

Relying on the arborist's drawing, as well as the survey, I conclude that while the three-storey rear wall of the proposal does not extend further into the rear yard than the existing single storey brick garage at the rear of the existing house, the outdoor porch is a more substantial feature than is often the case for a rear yard deck, and accounts for massing at the rear of the house to a depth that does not seem to be prevailing in the context. In addition, unlike the neighbouring houses and the existing house on the subject property, the rear elevation of the proposal extends almost the full width of the property, with reduced side yard setbacks, and manifests a substantial roof structure, at the full requested height, with dormers and other components of the flat roof sections in view.

Density

Floor Space Index Variance

The Zoning By-law employs floor space index (FSI) as a numerical indicator of "density" on a site. FSI is the ratio of total floor space to the area of the lot. The FSI number is generally used as an indicator of whether the amount of building/ floor space on a lot constitutes "overdevelopment" within the context.

The Zoning By-law allows certain areas enclosed within the house to be exempted from the count of gross floor area in certain circumstances, including the floor area of a basement, the area of a void in a floor, the area of required parking spaces or the area used for one additional parking space in a detached house. Thus, it may be that two houses with the same FSI have quite different massing and scale.

A review of decisions regarding FSI variances within the immediate context (Exhibit 1, page 40) indicates that there are a number of previously granted variances for FSI in the immediate context that are for the same FSI as the proposal, or greater. The neighbourhood is characterized by grand homes on larger lots. The proposal requests an FSI that is amongst the highest in the immediate context, but there are sufficient other examples of this same or greater FSI that I am satisfied that the proposal is not an outlier with respect to the FSI number.

In coming to grips with OP Policy 4.1.5 c), which references prevailing height, massing, scale, density and dwelling type, there are certain aspects which can be described using metrics – overall height in metres and FSI. Dwelling type is easily described. The consideration of massing and scale, however, relies on an understanding of proportion and balance in relation to the surrounding context.

With respect to height, I recognize the influence of different established grades when comparing the height of houses in this context. I am led nonetheless to a conclusion that the overall height of the proposal exceeds the prevailing height of the neighbourhood as the height variance request exceeds any other documented height variance approval in the immediate context; the pedestrian entrance, marking the main floor, has been lifted above the established grade and requires a variance to the maximum height permitted (contributing to overall height); and the combination of a prominent roof and an integral garage below adds a massing that is not manifest in the other examples on the street (the immediate context).

The FSI number is a useful indicator and in this case the proposed FSI is somewhat represented in the neighbourhood context. Despite the comparable FSI, however, I find that the massing of the proposal is not the prevailing massing in the neighbourhood. I have noted above that the prominent roof and an integral garage below adds a massing that is not manifest in the other examples on the street (the immediate context). At the rear, the covered porch is at a depth on the property that does not seem to be prevailing in the context. In addition, the scale of the proposal in relationship to the neighbouring houses is not consistent as the rear elevation of the proposal extends almost the full width of the property, with reduced side yard setbacks, and manifests a substantial roof structure, at the full requested height, with dormers and other components of the flat roof sections in view.

- **OP Policy 4.1.5 f) – prevailing setbacks of buildings from the street**

I address the issue of the positioning of the proposal on the property and the location of the front wall and porch elements only in response to the concerns expressed by the Participants. There is no variance requested for a front yard setback.

Mrs. Zucker objected to the extent that the front of the proposal projects towards the street and said that it would narrow the sightline from her home and would have her looking at a wall.

I understand that Mrs. Zucker would prefer that the proposed house remain set further back on the property, however the legitimate front setback line for any house in this circumstance is determined by the average of the two abutting houses. In this case, the proposed house is set in accordance with the By-law, at a front setback line that is further back than Mr. Bellingham's house and forward of Mrs. Zucker's house.

Reference to the Site Statistics contained in the revised architectural drawings included as the Applicant's Disclosure in Exhibit 1 would indicate that the projection of the proposed house beyond the front of Mrs. Zucker's house is 29cm.

- **OP Policy 4.1.5 g) - prevailing patterns of rear and side yard setbacks and landscaped open space**

Variances have been requested for side yard setbacks, but not for rear yard setback. A variance that had been requested for landscaping in the rear yard has been eliminated in this revised proposal. A variance is requested for soft landscaping in the front yard.

As these are large and deep lots, the permitted rear yard setback limit has not been breached.

I accept Mr. Romano's assertion that the proposed side yard setbacks respect and reinforce the prevailing patterns. The table of decisions in Exhibit 1 shows a number of similar setbacks variances have been granted in the immediate context.

Mr. Bellingham's objection regarding the side yard setback variance is founded on a concern that construction will affect his foundation. I understand and recognize Mr. Bellingham's concern. The mandate of the TLAB is focused on Planning matters, and although there is an intersection and overlap with some construction issues, safe construction practices, inspections and the protection of neighbouring structures would be addressed through the Ontario Building Code and through the issuance of a building permit for this proposal.

CONCLUSION OFFICIAL PLAN

With respect to OP Policy 4.1.5, I find that the proposal contemplates a large house, larger than most of its neighbours, and that the proposed height, massing, and scale are at the limit, and in some cases beyond, maximum benchmarks in the neighbourhood. I find that the proposed height, massing, scale and density, in combination, do not respect and reinforce what is already prevailing in the neighbourhood and particularly in the immediate context.

With respect to OP Policy 3.4.1 d), I find that the proposal does not maintain the general intent and purpose of the Official Plan in preserving and enhancing the urban forest.

Test 2: General Intent and Purpose of the Zoning By-law

The overall purpose of the Zoning By-law is to implement the policies of the OP. I have found that the proposal does not meet the first test with respect to the Official Plan and this finding is sufficient for the application for variances to be denied. Nonetheless, for the sake of completeness, I shall briefly summarize further comments regarding the intent of the Zoning By-law and the third and fourth tests mandated under s. 45(1) of the *Planning Act*.

- Variances 1 and 2: Height and Maximum Height of Pedestrian Entrance

My finding that the proposed height does not respect and reinforce the prevailing height in the neighbourhood relied in part on the Decision Table of previous variance requests entered into evidence by Mr. Romano.

Mr. Romano advised that the intent of the height provision in the Zoning By-laws is to “maintain a low rise building” and the intent is satisfied. I find this to be a somewhat generalized statement of the intent of the height provision. The provisions of the Zoning By-law implement the intent of the Official Plan through numerical site standards⁴, and the Official Plan directs respect of the prevailing heights. The intent of the By-law is therefore not only to maintain a low rise building, (however that may be defined) but to maintain a consistent maximum height in relation to other buildings in the neighbourhood. As the Table of Decisions shows, the proposal exceeds the height of any previous approvals in the immediate context and is exceeded by one, or perhaps two, previous approvals in the broader neighbourhood. I therefore find that with respect to the variance for height, the general intent and purpose of the Zoning By-law has not been maintained.

Evidence has been provided regarding the variance for maximum height of a pedestrian entrance. I recognize that the varying slopes on properties in this context challenge the intent of a consistent main floor height and therefore that flexibility in the placement of the main pedestrian entrance may be warranted. However, since this variance for maximum pedestrian entrance height is so closely tied to the design of the proposal, which will not be supported, I make no finding with respect to the variance for maximum height of pedestrian entrance.

- Variance 3: Side Yard Setbacks

⁴ OP Policy 4.1. 8: Zoning by-laws will contain numerical site standards for matters such as building type and height, density, lot sizes, lot depths, lot frontages, parking, building setbacks from lot lines, landscaped open space and any other performance standards to ensure that new development will be compatible with the physical character of established residential *Neighbourhoods*.

Mr. Romano advised that the intent of the side yard setback provision in the Zoning By-law is to ensure that there is adequate space for access purposes for traversing or maintenance as well as appropriate spatial separation. In the context of this neighbourhood, and recognizing that similar side yard setbacks exist on Dunvegan Rd, the requested variances for side yard setback would have been supportable.

Since the proposal has not met the first test and some of the variances requested have not met the general intent and purpose of the Zoning By-law, the variances for side yard setbacks will not be supported as stand-alone approvals without a viable design.

- Variances 4 and 5: Building Length and Building Depth

According to the definition contained in the Zoning By-law, building length is measured from the portion of the front main wall closest to the front lot line, to the portion of the rear main wall of the building closest to the rear lot line.⁵

Building depth is measured from the front yard setback required on a lot, not the front wall.⁶ In general terms, the building length regulation deals with the actual length of the building between the main walls. Building depth relates to the location of the building, whatever its actual length, and limits how far back on the lot the back wall of a structure may be located.

Lest there be any confusion regarding what a “main wall” is defined as⁷, and therefore what elements are included in this measurement, in this proposal, building length has been measured from the front of the balcony to the rear of the ramp. Building depth has been measured from front yard setback to the rear of the covered porch.

One of the important purposes for the building depth provision in the Zoning By-law is to preclude construction too deep into the lot because the irregular length of buildings in the rear of properties affects the experience in the rear yards of neighbouring properties. The general intent and purpose of the provision for building depth is different from that which regulates rear yard setbacks. The building depth provision controls building coverage and massing in the rear of the property, in conjunction with the rear yard landscaping provision.

⁵Chapter 800.50 (105) Building Length

means the horizontal distance between the portion of the front main wall of a building on a lot closest to the front lot line, and the portion of the rear main wall of the building closest to the rear lot line, measured along the lot centreline. If the main walls are not intersected by the lot centreline, the measurement is from the point on the lot centreline where a line drawn perpendicular to the lot centreline connects with the main wall.

⁶ Chapter 800.50 (100) Building Depth

means the horizontal distance between the front yard setback required on a lot and the portion of the building's rear main wall furthest from the required front yard setback, measured along a line that is perpendicular to the front yard setback line.

⁷ (455) Main Wall

means any exterior wall of a building or structure, including all structural members essential to the support of a roof over a fully or partly enclosed area.

The proposed building depth is inconsistent with the existing building depths on the south/west side of the block that forms the immediate context, and requires the removal of a large, regulated tree in the back yard. For these reasons, the proposed building length and depth are not supportable.

- Variance 6: Floor Space Index (FSI)

I have noted that there are a number of examples in the neighbourhood of similar and greater FSI than the proposal. As FSI is very sensitive to the particular elements any proposal, there is little usefulness in further comment on this aspect as the proposal will not be approved as submitted.

- Variance 7: Front Yard Soft Landscaping

The Zoning By-law requires that for this lot, 60% of the front yard must be landscaping, but where the lot does not have a driveway in the front yard, a minimum of 75% of the front yard must be **soft** landscaping.

Mr. Romano advised that the front yard landscaping overall is compliant with the minimum required by the By-law but that the required soft landscaping component requires a “modest” variance. I note that the area that remains for front yard soft landscaping is influenced by the area that is required for retaining walls and stairs to reach the front entrance which is elevated above established grade.

Tests 3 and 4: Is the proposal desirable for the use of the land? Is the proposal Minor?

The test for “minor” is not that there be no impact, and it is not only evaluated on the basis of size or degree, but rather whether the imputed impact rises to the level of being an unacceptable adverse impact of a planning nature.

The impacts of shadowing and the destruction and injuring of trees have been cited as concerning impacts of the proposal. The Applicant submitted a shadow study (and an arborist’s report) in support of their opinion that there are no undue adverse impacts of a planning nature from the proposal.

Shadow study

Mr. Romano noted that shadow studies are not required by the City for smaller scale applications such as this, only for applications over 20m or 6 storeys in height. He advised that a shadow study was nonetheless prepared to illustrate the shadows generated by the proposal in comparison to what already exists.

I find the submitted shadow study somewhat limited in its usefulness as it does not include the profile of shadows cast by trees, fences, and other features, only the existing building and the proposed building in two separate drawings. Also, the additional shadow cast by the proposal in comparison to the existing has not been differentiated and the reader is left to “eyeball” two side by side drawings.

I recognize that in an urban setting, a certain amount of shadow cast by adjacent buildings is to be expected and that the benchmark to prove an undue adverse impact from shadowing in this context is a threshold that is difficult to reach.

Trees

Mrs. Zucker and Ms. Moore expressed their great concern at the impact the removal of trees would have on the enjoyment of their properties. The shade and screening provided by trees is highly valued, in contrast to the three-storey structure which is proposed.

In particular, I note that the removal of Tree 12 to allow for the construction of the covered porch would have impact of some consequence on the type of shade and the screening that Mrs. Zucker would experience.

As I have found that the proposal does not maintain the general intent and purpose of the Official Plan or the Zoning By-law, I also find that the proposal is not desirable for the use of the land.

CONCLUSION

I find that the proposal does not maintain the general intent and purpose of the Official Plan in respect of the combined height, massing and scale proposed and regarding policies for the preservation and enhancement of the urban forest. For the same reasons and as set out above, I find that the proposal does not maintain the general intent and purpose of the Zoning By-law and that the proposal is not desirable for the development of the land.

DECISION AND ORDER

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

X



A. Bassios
Panel Chair, Toronto Local Appeal Body