

DECISION AND ORDER

Decision Issue Date Tuesday, August 16, 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): MICHAEL GOLDSTEIN

Applicant: CZ DESIGNS & CONSULTING INC

Property Address/Description: 251 OLD FOREST HILL RD

Committee of Adjustment Case File Number: 21 234170 NNY 08 MV (A0775/21NY)

TLAB Case File Number: **22 110754 S45 08 TLAB**

Hearing date: Wednesday, July 27, 2022

DECISION DELIVERED BY TLAB Panel Member G. Swinkin

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Michael Goldstein
Appellant's Legal Rep	Peter Gross
Applicant	CZ Designs and Consulting Inc.
Party (TLAB)	Michael Wharton
Party's Legal Rep.	Peter Gross
Party (TLAB)	Arielle Kaplan
Party's Legal Rep.	Zachary Fleisher

INTRODUCTION

Arielle Kaplan and Daniel Sliwin (the “Owners”) are the owners of the property municipally known as 251 Old Forest Hill Road (the “Property”). They recently purchased the Property. It is improved with a detached single family dwelling. They wish to demolish that dwelling and construct a new single family detached dwelling. The design of the new dwelling fails to comply with certain provisions under the Zoning By-law with respect to floor space index, building length and the width of the proposed stairs at the rear of the dwelling.

The Owners, through their agent, made application to the Toronto Committee of Adjustment (the “Committee”) for variance relief, which was granted by the Committee. That Committee decision was appealed by the property owner to the west, Michael Goldstein (the “Appellant”), who lives at 253 Old Forest Hill Road. In this hearing, the property owner to the east at 249 Old Forest Hill Road, Michael Wharton, has elected Party status in order to also advance his objections to the Committee decision. The Appellant and Mr. Wharton are represented by the same counsel, Peter Gross.

This appeal hearing before the Toronto Local Appeal Body (the “Tribunal”) extended over the course of a full day, the Tribunal hearing evidence from two land use planning witnesses. Final submissions were delivered in writing subsequently.

BACKGROUND

As the hearing proceeded as a hearing *de novo*, the Tribunal heard from the Owners’ land use planning consultant first. Jane McFarlane is a Registered Professional Planner who is a principal and Vice President at Weston Consulting, with approximately 16 years of experience in the field of land use planning. She was qualified to provide opinion evidence in the proceeding.

Ms. McFarlane provided a locational and descriptive background for the Tribunal. The Property is situated in what is known as the Forest Hill North neighbourhood.

Specifically, the Property is located on the north side of Old Forest Hill Road near its western terminus abutting Allen Road, west of Glenarden Road. Old Forest Hill Road extends eastward from Allen Road where it curves south to intersect with Eglinton Avenue West and continues southeast through the Forest Hill neighbourhood.

The Property is a rectangular-shaped lot with a frontage of 11.19 metres, a lot depth of 36.6 metres and an approximate lot area of 405 square metres. It is currently accessed from Old Forest Hill Road on the south side of the lot by a private driveway toward the west side of the lot.

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The Property contains some vegetation, mostly along the property lines in the rear of the lot, providing a significant amount of privacy and screening. There is a large deciduous tree in the front yard (on City property). No protected private or City-owned trees are proposed to be removed or affected by the construction,

Directly west of the Property, at 253 Old Forest Hill Road, is a two-storey detached dwelling with a driveway on the west side leading to an integral garage. It is an original home that has been renovated with front and rear additions that extend beyond the existing home on the Property.

Directly east of the Property, at 249 Old Forest Hill Road, is a two-storey detached dwelling with a driveway on the west side leading to an integral garage. It is an original home that has been renovated with a rear glass addition that protrudes from the rear main wall on the first floor.

The lands in this area are zoned Residential Detached (RD) (f9.0; d0.6) (x1329) under the City-wide Zoning By-law 569-2013 (the "Zoning By-law"). This zone label permits construction and use of single detached dwellings on the land with a minimum frontage of 9m and a Floor Space Index ("FSI") of 0.6 times lot area. There is an exception provision applicable but it was not relevant to this proposal.

Ms. McFarlane described the redevelopment proposal as a 3-storey residential dwelling with an integral garage and one-storey breakfast nook bump-out at the rear. The proposed development will have a floor area of 351.33 square metres and an FSI of 0.84. The proposed 3-storey dwelling has a height of 10.72 m with a reduced interior floor area on the third floor (42.5 square metres). At present, the third floor is identified as office space. Ms. McFarlane described the proposal as a contemporary style home with traditional elements designed to respect and reinforce the existing physical context of 2- and 3- storey detached homes in the area.

The length of the first storey of the proposal is 18.52m owing to a one-storey breakfast nook bump-out at the rear, which is a common feature on both renovated original homes and replacement dwellings in the Study Area. Without the one-storey breakfast nook, the length of the proposed development is 16.67m, the permitted length under the Zoning By-law being 17m.

She advises that while an FSI variance is required in order to permit the third storey, no variance for height or number of storeys is required and the building envelope (with the exception of the length variance sought to permit the one-storey breakfast nook) adheres to the maximum height, length, depth, and setback performance standards in the Zoning by-law. If the third storey did not contain living space, she advises that the FSI would be 0.737 with an identical building envelope.

The application to the Committee sought the following:

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

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Chapter 10.5.40.60.(3), By-law No. 569-2013

Exterior stairs providing pedestrian access to a building or structure may encroach into a required building setback if the stairs are no wider than 2.0m.
The proposed rear stairs are 8.64m wide.

Chapter 10.20.40.20.(1), By-law No. 569-2013

With a minimum required lot frontage of 18.0m or less, the permitted maximum building length for a detached house is 17.0m.
The proposed building length is 18.52m.

Chapter 10.20.40.40.(1), By-law No. 569-2013

The permitted maximum floor space index is 0.60 times the area of the lot. The proposed floor space index is 0.84 times the area of the lot.

Discussions were initiated with the neighbours. On January 12, 2022, CZ Designs Inc. submitted a letter to the Committee confirming discussions with the owners of 85 Ridge Hill Drive, which is the property directly behind the Property. As a result of those discussions, the Architectural Plans were revised to shift the location of the balcony on the 3rd floor from the rear to the west side of the proposed house to address that neighbour's concerns. The west side of the house was chosen as there are no second storey windows that would result in privacy impacts on 253 Old Forest Hill Road, where 249 Old Forest Hill Road contains such windows. As a result, a letter of opposition from 85 Ridge Hill Drive was retracted. These changes did not alter the proposed building envelope, nor the proposed variances, as the balcony is permitted as-of-right and is apparently required for the purpose of adherence to Building Code fire-egress requirements.

Comments from City of Toronto Community Planning were issued in a staff report dated January 19, 2021. The comments state that City Planning Staff "have no objections to the variances" and recommend as a condition, if the Committee should approve the application, that the building length be developed substantially in accordance with the site plan drawing filed. Additionally, Community Planning notes that the requested building length of 18.52 metres is due to a one- storey "bump out" at the rear of the dwelling. Without the "bump-out", the proposed dwelling has a building length of approximately 16.67 metres.

Comments from City of Toronto Urban Forestry Staff were not adverse and did not seek forestry conditions to be imposed on the Application.

Opposition was expressed by way of six letters of objection. Five letters of support were filed.

The Committee approved the requested variances and made its decision subject to the condition requested by the Planning Dept., that the building length be developed substantially in accordance with the site plan drawing attached to its decision.

MATTERS IN ISSUE

There was concurrence between the planners and counsel that this appeal does not raise issues with respect to consistency with the Provincial Planning Policy Statement 2020 nor regarding conformity with the Growth Plan for the Greater Golden Horseshoe.

The principal issue was whether the proposal conforms with the policy of the City of Toronto Official Plan ("OP"), most particularly as it is expressed in Policy 4.1.5, and consequently whether the proposal meets the four tests set out in Section 45(1) of the *Planning Act*.

JURISDICTION

Planning Act, Section 45(1)

45 (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained. R.S.O. 1990, c. P.13, s. 45 (1); 2006, c. 23, s. 18 (1); 2009, c. 33, Sched. 21, s. 10 (11).

EVIDENCE

As noted above, Ms. McFarlane provided professional planning evidence on behalf of the Owners. On behalf of the Appellant and Mr. Wharton, Mr. Gross called Michael Manett. Mr. Manett has land use planning experience going on to 48 years in both the public and private spheres. In support of his land use consulting, Mr. Manett takes to the air and conducts his own aerial photography, as was the case in this proceeding. He too was qualified to provide opinion evidence on land use planning matters in this proceeding.

Ms. McFarlane identified the policies in the City OP that she believed were of relevance in this proceeding. In this regard, she identified the following policies:

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Section 2.3.1 of the OP contains policies related to Healthy Neighbourhoods, which are considered to be low rise and low density and physically stable. In addition, the introductory text to this policy explains that Neighbourhoods are not static, and that some development is expected to occur.

Section 3.1.2 of the OP addresses built form. Section 3.1.2.3 indicates that new developments are to be designed to fit harmoniously into the existing or planned context and that the massing should limit the impact on neighbouring streets, parks and open space by providing adequate light and privacy, while limiting shadowing and uncomfortable conditions.

Section 3.2.1 of the OP contains policies relating to Housing in the City of Toronto. Section 3.2.1.1 states that a full range of housing, in terms of form, tenure and affordability, across the city and within Neighbourhoods, will be provided and maintained to meet the current and future needs of residents.

Policy 4.1.5 of the OP contains policies that address development within established neighbourhoods. Development in established neighbourhoods shall respect and reinforce the existing physical character of each geographic neighbourhood, including street patterns, size of lots, height, massing, scale, dwelling type, and landscaped open space.

Mr. Manett focussed on Policy 4.1.5. This policy requires that assessment of a development proposal will be informed by the character of an identified study area which consists of a broader general neighbourhood and a narrower immediate context. This policy was brought into the OP by Official Plan Amendment 320, which was finally approved by the Provincial tribunal in 2018.

The first significant point of note in comparing and contrasting the evidence of the two planners is the delineation of their respective study areas. As it is rather precisely defined in the policy, there was consistency in the identification of the immediate context, being those properties on both sides of the same block as the Property. This encompasses the properties fronting on both the north and south sides of Old Forest Hill Road lying between Glenarden Road to the east and the terminus of Old Forest Hill Road at the walkway adjacent to the Allen Road in the west, being 24 properties in all.

However, Mr. Manett's general neighbourhood was much more constrained. His study area comprised 140 lots whereas the study area delineated by Ms. McFarlane ranged further north and east and comprised approximately 400 lots.

The branch of this policy which was focussed on particularly was that expressed in clause (c), which refers to *prevailing heights, massing, scale, density and dwelling type*.

Ms. McFarlane asserted that the geographic neighborhood contains a mix of physical characters with variability in prevailing heights, massing, scale and density. This is a mix of older original dwellings (some with additions or modification) and newer, more modern dwellings. Generally, the newer dwellings are larger in massing and scale,

with clearly defined third stories (i.e. small windows in the roof signifying living space) and more modern design and materials compared to the original dwellings in the Study Area. She produced an extensive set of photos to illustrate this mix. The photos illustrate that there are a variety of original houses, altered dwellings and many new houses. Her assertion is that a consistent pattern of the general interspersed of newer replacement dwellings, which are generally larger in scale, amongst the original housing stock can be seen in the study area.

On the question of the elements contributing to neighbourhood character, Ms. McFarlane also pointed out that the pattern of sidewalks is variable through her study area. Certain blocks have no sidewalks, including Old Forest Hill Road and Ridge Hill Drive west of Glenarden Road. Other blocks have sidewalks on one side of the street, including Aldburn Road, Wembly Road and Hilltop Road. Some blocks have sidewalks on both sides of the street. A portion of Old Park Road and Old Forest Hill Road east of Old Park Road contain a landscaped median.

Ms. McFarlane produced a chart which identified approvals for exceedances of FSI and length authorized by the Committee since 2010. There were 40 approvals for variances above 0.6 FSI with approvals as high as 1.15 FSI at 100 Wembley Road. She pointed out that the available data only goes back to 2010 and there are many dwellings, in particular on Old Forest Hill Road, which visually are much larger, denser, higher and have larger massing and scale, including 262 and 257 Old Forest Hill Road, which were built prior to 2010 and are therefore not illustrated on the Chart. As there is no reliable building data prior to 2010, she expressed the opinion that site visits and photos should be used as a tool to understand prevailing building character. She said that especially when an FSI variance is not accompanied by other built form variances (such as height, length - this application being an exception regarding the one-storey breakfast nook involved - and setbacks), a qualitative analysis of fit and compatibility is of greater importance than a quantitative assessment focusing solely on the numerical FSI figure.

While she acknowledges that the FSI is on the higher end of what is found in the geographic neighbourhood, she says that it does exist in substantial numbers especially on replacement homes that differ in character and scale from original dwellings. Over 50% of the applications to the Committee include an FSI variance and therefore FSI values greater than 0.6 on replacement homes are very common, rather than being an exception. She underlines that the OP directs new development to respect and reinforce the prevailing "massing, scale, density" of nearby residential properties, not the prevailing FSI in isolation.

Her view is that in the absence of height and front-, rear-, and side-yard setback variances, the proposal fits within the building envelope contemplated by the Zoning by-law. She postulates a situation that if the third storey did not contain habitable space and part of the first floor contained a two-storey volume (to accommodate a grand dining or living room, for example) and complied with the 0.6 FSI in the Zoning by-law, the building envelope would remain unchanged. This brings her to conclude that, other than with respect to the one-storey breakfast nook, the postulated building envelope, which is the proposed building envelope, would comply as-of-right

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On this basis, it is her opinion that the intent of the policies of the OP in relation to prevailing densities are to assess how this additional floor area manifests itself in terms of massing and scale and how that relates to both the character of the area and whether that results in impacts on adjacent properties.

In this instance, she advises that the proposal will not generate any negative impacts and given the extent of by-law compliance, should be treated as conforming with the OP's massing, scale and density policy.

Mr. Manett acknowledges that this neighbourhood is an older neighbourhood originally developed in the 1930's to 1950's and has experienced significant reinvestment through renovations, additions and replacement buildings.

Mr. Manett requested property data and Committee decision information from the City for the preceding ten-year period. He ascertained from that data that there have been 28 applications for variance relief involving one of the heads of relief sought in this application. And of those 28 applications in his general neighbourhood, 23 involved requests for greater FSI. In terms of the relief granted by the Committee, four were for FSI between 0.6 and 0.69, 13 for FSI between 0.7 and 0.79, and 5 for FSI greater than 0.8. Of the five greater than 0.8, he says that three were granted prior to the approval of OPA 320. Of the 28 applications in the general neighbourhood, the majority of approvals greater than 0.8 FSI were located on Wembley Road, which, in his view, has a different land-use context as it backs onto Eglinton Ave. West properties which are mixed use buildings and higher intensity use.

No approvals for FSI greater than 0.8 occur in the immediate context.

Mr. Manett has determined that the average FSI throughout the study area is on the order of 0.5. He says that if approved, the proposed FSI of 0.84 would exceed the average in both the immediate context and the broader neighbourhood. On the basis of these figures, he says that the proposed FSI is inconsistent with the prevailing densities in both the immediate context and broader neighbourhood and therefore not in conformity with OP policy.

Ms. McFarlane addressed the building length variance by declaring that the general intent and purpose of the building length regulation is in part to ensure appropriate space is maintained in the rear yard, while also providing for a consistent built form and light.

She reiterated that the proposed building length of 18.52 m is needed to accommodate a one-storey "bump out" at the rear of the proposed dwelling. The bump out is approximately 3.8 m wide and does not encompass the entire width of the first floor. This bump out is also setback further from the east main wall of the dwelling by 0.77 m and west main side wall of the dwelling by 5.92 m.

If there were no one-storey bump out, she advises that the proposed dwelling would have a building length of approximately 16.67 metres, below, and therefore compliant with, the maximum building length provision in the Zoning By-law.

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She further advises that the requested variance is in line with length variances granted for other properties in the Study Area, some of which were greater than the requested length of 18.52 metres, including various examples at 46 Wembley Road (19.46 m), 84 Wembley Road (20.03 m), 100 Wembley Road (19.94 m), 117 Wembley Road (21.5 m), 244 Old Forest Hill Road (20.4m), 77 Shallmar Boulevard (22.1 m), and 79 Ridge Hill Drive (20.68 m).

She reminds the Tribunal that prior to 2013, there was no Zoning By-law provision regulating building length and therefore, many older dwellings may have existing conditions where the dwelling exceeds the 17 m regulation.

In keeping with her view that part of the intent of the Zoning By-law is to ensure compatible built form, and in order to assess this compatibility, she indicated that a building length analysis was also undertaken to illustrate the various existing building lengths, location of rear walls and rear yard setbacks along Old Forest Hill Rd., Wembly Road and Ridge Hill Road. This analysis was produced in the document disclosure. That material disclosed that several dwellings (that do not have a confirmed variance for building length) on these three streets exceed the 17 m requirement.

The material discloses that there is a varied location of rear walls and in many cases side walls from adjacent dwellings are exposed to neighboring properties. The northward curve of the street also enhances this condition which starts two properties to the west of the Property.

Currently, as the circumstance exists with the dwelling now on the Property, both adjacent properties to the Property have rear walls that extend further to the north than the Property, exposing blank side walls. This condition has existed for some time and has not apparently resulted in unacceptable adverse impacts.

It was therefore her opinion that the intent of the By-law with respect to length is still being maintained in this situation as there is a varied rear wall condition (that apply to both dwellings less than and above 17 m) that is further enhanced due to the curvature of the street.

Mr. Manett, based on his data review, advises that building length variances are rare in this neighbourhood, there having been only eight in the ten year span for which he has data. He asserts that this variance would allow for a building which will extend considerably deeper than the adjoining buildings and would thus create a situation which will impinge upon the privacy and peaceful enjoyment of the rear yards of these properties.

Although Mr. Manett acknowledges that there is a length variance in the immediate context for 20.42m, he distinguishes this as an isolated example and says that it does not reflect a prevailing condition.

On the matter of the rear stair width variance, Ms. McFarlane asserted that the intent of the Zoning By-law is to regulate projections from main parts of the dwelling and to ensure compatible and consistent built form.

She points out the the variance is needed for only 3 stairs that align with the width of the depth, which is an architectural element and will create no impact nor adverse effect on adjacent properties. City Community Planning staff reviewed the proposed design and did not have objections to the stair width.

Ms. McFarlane's position is that the variance for the proposed stairs is mostly technical, however, they are compatible with the existing built form and will not create any impact on adjacent properties or the public realm. She therefore concludes that It is her opinion that the variance for outdoor stair width maintains the general intent and purpose of the Zoning By-law.

Mr. Manett advises that there are two properties within the immediate context which have received stair width variances, however these variances were for stair widths of 2.4m and 2.8m, which variances are nowhere near on the order of the 8.64m being requested here. In his view, this feature just compounds the intrusion into the rear yard which is generated from the building length variance request and is therefore unacceptable.

The Tribunal had the benefit of reviewing the extensive aerial and ground related photographic evidence adduced by both planners as well as the architectural drawings produced by the Owners. Those latter plans do show that the proposed dwelling will extend beyond the rear walls of both of the 249 and 253 Old Forest Hill Road dwellings but it is also apparent that that would be the circumstance with respect to an as-of-right 17m length dwelling. The extent of the extension of the rear wall adjacent to 253 Old Forest Hill Road, which rear wall sits at less than the permitted depth and does not require variance relief, is for all intents and purposes modest. The further extension to accommodate the breakfast nook, is stepped back from the east wall and is quite distant from the west wall. The Tribunal expects that the wooden fence presently between the Property and 249 Old Forest Hill Road will remain in place and perhaps the trees which seem to provide a significant screen between the properties. As noted by Ms. McFarlane, the 249 Old Forest Hill Road property itself sports a breakfast nook situated at its eastern side, so this may indeed be described as a neighbourhood feature as it appears that this feature is also present on other properties in the vicinity.

The aerial photography in particular discloses that there is indeed no uniformity in rear wall location for the properties in this neighbourhood, so that the prevailing condition is a mixed bag. And the Tribunal in this instance treats the application of stair width as quite distinct regarding stairs from a rear deck, not having the aesthetic considerations which would apply to front yard stairs.

ANALYSIS, FINDINGS, REASONS

It is this panel's view that an OP is a policy document which is intended to be read more as a conceptual framework or vision statement and not as a prescriptive instrument in the manner of a zoning bylaw. This is essentially stated in Section 3 of Chapter 1 of the OP.

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The purely arithmetic approach adopted by Mr. Manett has the effect of removing context from the assessment of the proposal and diminishing the qualitative features from their role in an all encompassing judgment

The question which must be approached on any application is whether its unique contribution reinforces the character of the neighborhood, the character involving the interplay of public and private realms, recognizing that each realm is naturally evolving by maturation and renewal.

The judgment of 'fit' is at some level a visceral one and not simply a tabulation of data. That judgment properly comes from a 'walk' about the neighbourhood, what a pedestrian perceives from the street.

This more holistic approach is grounded in the penultimate paragraph text in Policy 4.1.5 of the OP, which says that no changes will be made through rezoning, minor variance, consent or other public action that are out of keeping with the *overall physical character of the entire Neighbourhood* (emphasis added).

The Zoning By-law is in many ways a crude generic regulatory instrument which is insensitive to individual sites and relationships between and among buildings and properties as well as the natural and public features which make up the context. It is inevitable that its application will require adjustment to site specific conditions to settle on a reasonable result. That is why there is a Committee, and its function is necessary in order to achieve the proper contextual implementation of policy.

The magnitude of applications coming before the Committee on a weekly basis seeking what on their face may appear to be significant relief that do not attract objection from Planning Department staff, and which are approved by the Committee, is testament to the truth that this is not simply an arithmetic exercise but rather one informed by context and anchored in some sense of the reasonableness of the outcome from the street, the subjective view of a pedestrian observer.

This street is a case in point of the juxtaposition of old and new forms of architecture. With each new build the look of the street as a whole evolves but physically each of the individual elements fits with the others and functions compatibly. Deviations from the by-law to get to this state do not of necessity destabilize the neighborhood. The character remains one of being a low rise residential neighborhood. In fact, such changes are often what rejuvenates and regenerates the street.

Perspective matters. Mr. Manett's aerial photography of the area discloses what is plainly a relatively uniformly laid out low rise residential district. This is entirely consistent with its Neighbourhoods designation. Review of the individual photos of the contributing properties of the neighbourhood discloses that each property has its own identity and presence. Despite the variations in architectural style, age, massing and landscaping, the assembly of parcels nonetheless ends up being compatible, and variations in by-law conformity do not undermine this outcome.

On the strength of the evidence as a whole, the Tribunal prefers the evidence presented on behalf of the Owners and is satisfied that the variances requested by the

Owners, and approved by the Committee, individually and collectively, meet the four tests of s.45(1) of the *Planning Act*.

DECISION AND ORDER

The Tribunal Orders that the appeal by Michael Goldstein is dismissed.

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read "G. Swinkin".

X

G. Swinkin
Panel Chair, Toronto Local Appeal Body