

## DECISION AND ORDER

**Decision Issue Date** Friday, September 23, 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): MOEZ KASSAM / MICHAEL GARDINER

Applicant(s): GOLDBERG GROUP

Property Address/Description: 43 RUSSELL HILL ROAD

Committee of Adjustment File

Number(s): 21 124928 STE 12 (A0320/21TEY) / 21 196314 STE 12 MV  
(A1029/21TEY)

**TLAB Case File Number(s): 21 196982 S45 12 TLAB / 21 229075 S45 12 TLAB**

**Hearing date: September 13, 2022**

**DECISION DELIVERED BY TLAB Panel Member T. Yao**

### REGISTERED PARTIES AND PARTICIPANTS

Appellant	Moez Kassam
Appellant's Legal Rep.	David Bronskill
Mr. Kassam's planning witness	Michael Goldberg
Mr. Kassam's noise witness	Ian Matthew (Valcoustics)
Appellants	Michael and Heather Gardiner (15 Clarendon Cr), 2170362 Ontario Inc. (Terry Canham, 5 Clarendon Cr) For readability, when I refer to the Gardiners I include the number company.
Gardiners' Legal Rep.	Alan Heisey
Gardiners' planning witness	Christian Chan
Mr. Gardiner's noise witness	Brian Howe (HGC Engineering)
Party	City of Toronto
Party's Legal Rep.	Derin Abimbola, Jessica Jakubowski
Participant	Kelly Gray

**Decision of Toronto Local Appeal Body Panel Member: T. Yao**  
**TLAB Case File Number: 21 196982 S45 12 TLAB / 21 229075 S45 12 TLAB**

Participant	Edward Nash
Participant	Tracy Simpson
Participant	Rita Shefsky
Participant	Bina Shah

Mr. Kassam is engaged in extensive renovations to 43 Russell Hill Road, on a lot much greater than the size of the other Russell Hill properties. The house is located far to the back of the lot, with a rear patio and one storey portion virtually on the rear lot line.

Among the renovations is an 87.67 m<sup>2</sup> roof terrace, (i.e., essentially an area open to the sky, for guests to stand on and socialize). It would have required a variance because any open area (such as a balcony or terrace) above the ground level may be no larger than 4 m<sup>2</sup>. In addition, the height would be 20.m plus (65 feet), more than the maximum of 7.2 m. These lands are part of the same escarpment that forms the hill south of Avenue Road and St Clair) and this results in the Gardiners and other rear yard neighbours' bedrooms being close to the proposed terrace.

<b>Table1. Variances sought for 43 Russell Hill Rd</b>			
		Required	Proposed
<b>Variances from Zoning By-law 569-2013</b>			
1	Building height	7.2 m	20.72 m
2	Number of stories	2	4
3	Front main wall height	7.0 m (23 ft)	8.99 m (29.5 ft)
4	Number of ancillary structures <sup>1</sup>	2	4
<b>Variances from former Toronto zoning by-law 438-86<sup>2</sup></b>			
5	Building height	7.2m	11.69 m

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<sup>1</sup> Th two extra structures are a garden shed and children's play structure.

<sup>2</sup> Because there are appeals from by-law 569-2013 still outstanding, Toronto's plan examiners must review the plans under both the present by-law and the previous by-law, in this case, the City of Toronto By-law 438-86, which measures height from "average grade", whereas the more recent by-law measures height from "established grade". There is a 9.03 m difference between average and established grade in this case.

Mr. Kassam applied to the Committee of Adjustment twice: once with the rooftop terrace and once without it. The “with terrace” application ends in the TLAB file number “075”. The Committee approved the “without” terrace application, and denied the “terrace” application. Both were appealed and thus the TLAB is now dealing with both.

TLAB Vice Chair Bassios scheduled a mediation before me, in which a settlement was reached. The proposed open terrace has now become a third floor “entertainment and viewing room” (my words) with strict conditions as to soundproofing. Additional soundproofing measures will be put in place with respect to the ground floor patio, pool areas, and placement of speakers, lights and so on. These “off book” modifications will be subject to private agreement rather than conditions to this decision.

Table 1 (previous page) sets out the new proposed variances.

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

Since this is a settlement, I will only briefly discuss the policy framework. I find that the Provincial Policy Statement and Growth Plan are inapplicable to a houseform modification on single lot in a settlement area. The variances must comply with s. 45(1) of the *Planning Act* and must cumulatively and individually:

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

I will dispense with a detailed quoting of the Official Plan and zoning by-laws.

### **No new notice**

Mr. Bronskill has asked that an order be made that further notice of the revisions is not needed. The settlement has resulted in a slightly higher roof and since it is not “downward”, the usual jurisprudence does not apply. As I discuss later on page 5, the impact is not unacceptable as a result of these very modifications. Therefore, I find the changes to be minor, and I make the order requested. In any case, all interested parties, including the City, were present at the mediation.

### **The TLAB encourages settlements**

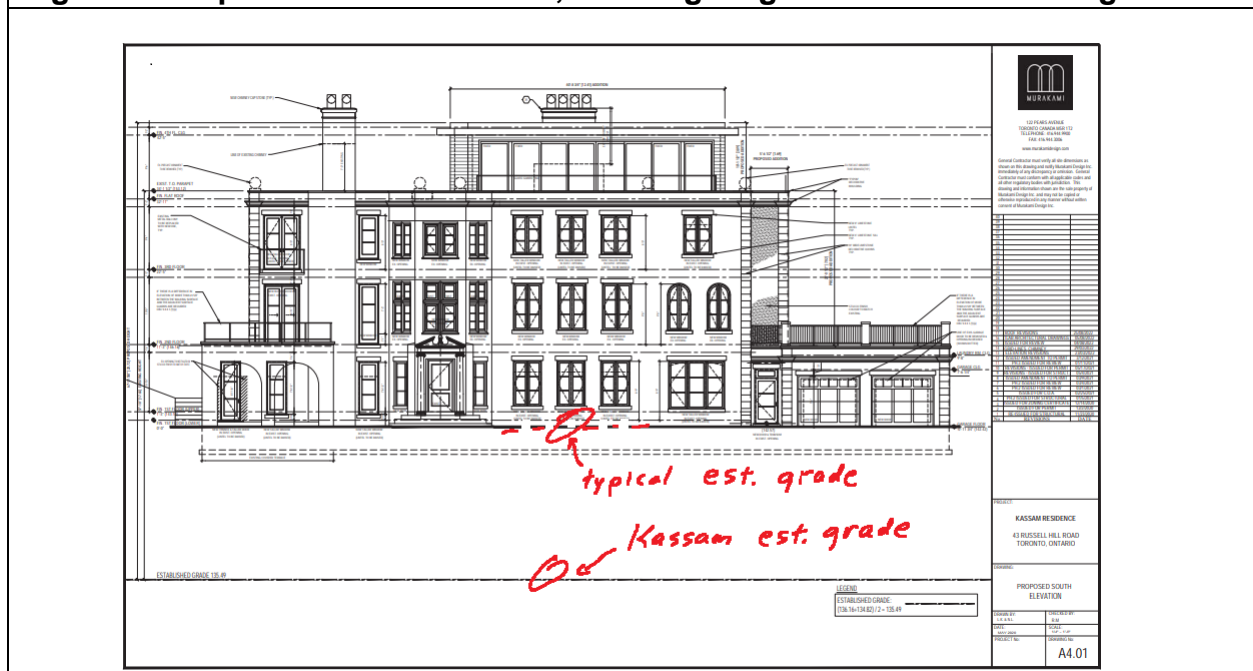
I find a useful statement on incentives to enter into settlements in the Law Society case of Stephen Alexander Cooper:<sup>3</sup>

[18] What motivates that jurisprudence (and Convocation's policy) are compelling policy reasons to presumptively accept joint submissions. The presumptive acceptance of joint submissions promotes resolution, the saving of time and expense, and reasonable certainty for the parties. If joint submissions are regularly disregarded, there is less incentive to enter into them.

The Russell Hill Rd settlement was actively facilitated by the TLAB, which makes it different from the Cooper case. In Cooper the panel explained that the tribunal was always able to reject a joint submission, but could only do so judicially. In other words, it was never obligated to “rubber stamp” a consensual result. Here, it is obvious that the parties would not have settled if they thought at the end of the process the TLAB would reject the result. I feel the settlement leaves only two details to explain:

- The building height variance; and
- Official Plan compliance, where the usual test is for “fitting into the neighbourhood”. This usually requires finding other similar developments or comparables but there are none in this case.

**Figure 2. Proposed south elevation, showing height from “established grade”**



<sup>3</sup> Law Society of Upper Canada v. Stephen Alexander Cooper, 2009 ONLSAP 7 (CANLII)

### **Building height and “established grade”**

After reviewing the settlement proposal, Mr. Goldberg<sup>4</sup> (Mr. Kassam’s planner) gave his opinion that, “This is a very large lot” (37 x 66 m or about 122 x 219 ft), and sloped, and therefore the 20.72 m height variance is misleading. The by-law measures the “established grade” at the front yard setback line, about 30 m away from the actual front wall . This results in a baseline (the established grade) about a storey and a half below the basement floor (Figure 2, above).

The typical application of the zoning bylaw does not produce an established grade two and a half stories below the ground level. Mr. Goldberg suggested a better starting point would be to consider the variance under the previous by-law<sup>5</sup> (the last line in Table 1), specifying a height variance of 11.69 m instead of 7.2 m. I agree with Mr. Goldberg; that the lot is unique in size and that the height of 20.72 m is not the result of an overly tall roof but of an atypically low established grade. I find the building height variance meets the requisite tests under s. 45 of the Planning Act.

### **The “fit” test**

The “cornerstone” test in s. 4.1.5 test in the Official Plan is that the variances must individually and cumulatively “respect and reinforce” the physical characteristics of the neighbourhood and the development must “fit in”. Applying s. 4.1.5, I go back to basic principles, not merely applying this test by rote or “one size fits all”.

The basic principle is that TLAB must look at all the factors, and balance the public interest in stability of residential neighborhoods with the owner’s desire to develop as she or he wishes. While there are four tests in s. 45, they often run together. OP conformity in this case hinges on whether the impact is minor, which the Divisional Court states must not create an “unacceptably adverse” impact. In this case, I find the unusual character of the Kassam lot, the different lot sizes on Russell Hill Road and Clarendon Crescent, the varying topography and abundance of mature trees and above all, the careful specification by expert sound engineers of various mitigation measures that the settlement proposal **does not create unacceptable adverse** impacts on Mr. Heisey’s clients.

Accordingly, I accept Mr. Goldberg’s planning conclusion that the statutory tests are met.

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<sup>4</sup> Mr. Goldberg was duly sworn and qualified as an expert entitled to give opinion evidence in the area of land use planning.

<sup>5</sup> The previous by-law used “average grade” instead of ‘established grade’.

### **The ground level fence**

In addition to measures to mitigate sounds on the roof, Mr. Kassam and Mr. Gardiner have agreed to build a double board fence, not related to the TLAB decision. The City has asked that this wording be inserted in this decision, and I have agreed to do so:

The City does not endorse the noise fence/barrier, the noise fence/barrier is a private matter between the other two parties. Furthermore, the TLAB in approving the revised plans for the settlement is not making a decision or determination on the noise fence/barrier.

I wish to thank the parties, their counsel and their professional assistants for reaching this settlement.

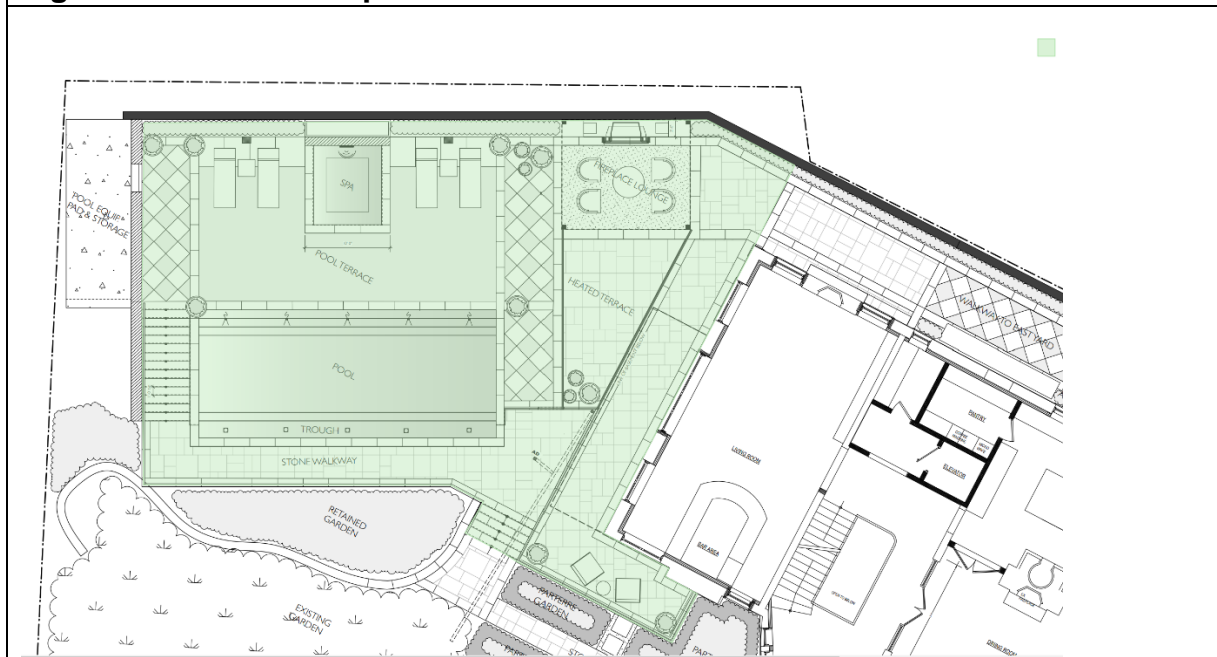
### **DECISION AND ORDER**

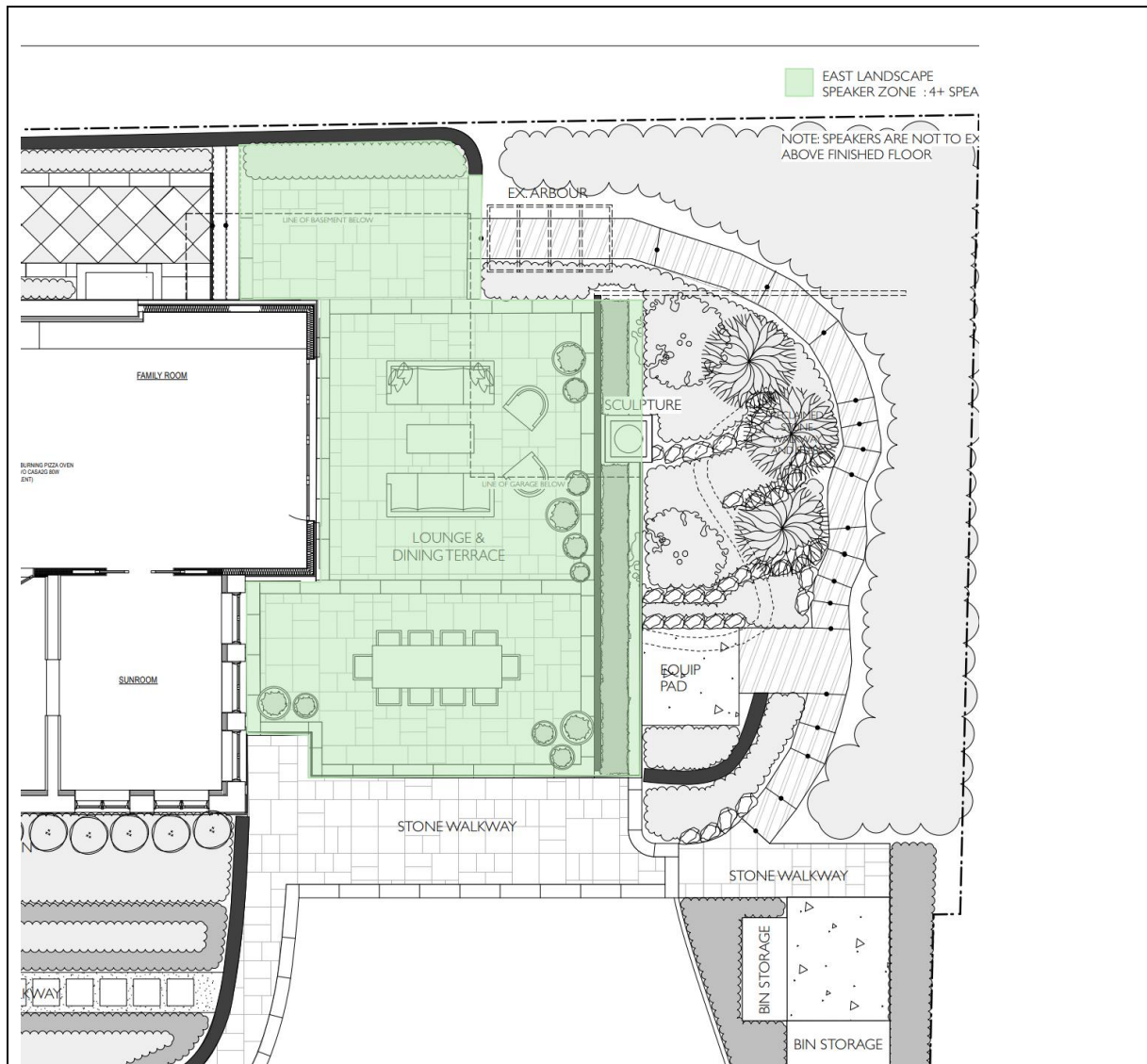
I find the modifications to the original applications to be minor and make the order under s. 45(18.1.1) of the Planning Act that no further notice is necessary. Both appeals shall be allowed in part, and I authorize the variances set out in Table 1 on condition that:

- i. Construction shall be substantially in accordance with the Revised Plans. Any variances or relief that may appear on the Revised Plans, but are not listed in the Revised Variances, shall not be authorized. Any future alteration of the building and/or these conditions that would continue to require any of the relief from the conditions or imposed or provided by the authorized variances, whether or not the proposed revisions comply with the zoning then in place, require a new minor variance application for review.
- ii. The construction of the 4<sup>th</sup> floor roof addition shall be substantially in accordance with Drawings A3.04, and Elevations A4.01, A4.02, A4.03, A4.04. No further expansion(s) of the 4<sup>th</sup> floor/storey Roof Addition shall be permitted.
- iii. No windows or openings are permitted on the fourth floor except for those shown on the Fourth Floor Plan (A3.04). The only permitted operable windows or openings shall be on the south elevation (A4.01). Any windows on the east or west elevations (A4.03 and A4.04) shall be sealed and non-operable.
- iv. There shall be no new outdoor decks or terraces constructed on the 2<sup>nd</sup>, 3<sup>rd</sup>, or 4<sup>th</sup> floor roofs of the dwelling. Rooftop access to the 3<sup>rd</sup> and 4<sup>th</sup> floor exterior roof areas shall be limited to emergency and/or

- maintenance purposes.
- v. There shall be no HVAC equipment on any part of the roof or walls of the dwelling.
  - vi. Any HVAC at-grade shall be designed and certified by an acoustical consultant to be a maximum 45 dBA at the second storey windows at both 5 Clarendon and 15 Clarendon.
  - vii. The air conditioning unit(s) shall be an aggregate sound power level limited to approximately 80 dBA re 10<sup>-12</sup> Watts.
  - viii. All lighting and security cameras will be directed inward to the Subject Property and away from any adjoining property, including but not limited to 5 Clarendon and 15 Clarendon.
  - ix. All windows on the fourth floor shall have a Sound Transmission Class 35 rating, with the exception of the doors on the south elevation, which shall have a Sound Transmission Class 30 rating.
  - x. All exterior walls and the ceiling of the fourth floor shall consist of materials with a Sound Transmission Class 54 rating.
  - xi. There shall be no amplified outdoor music except in the pool area to the west of the dwelling and the lounge/dining terrace to the east of the dwelling, as shown on the plans, excerpts of which are in Figure 3.

**Figure 3. Location of speakers**





- xii. The outdoor sound system in the pool area shall consist of a minimum of ten small, distributed speakers, with no stand-alone bass speakers or woofers, all of which must be within 1.0 metres of the adjacent floor or deck. The outdoor sound system in the lounge/dining terrace area shall consist of a minimum of four small, distributed speakers, with no stand-alone bass speakers or woofers, all of which must be within 1.0 metres of the adjacent floor or deck.
  - xiii. No outdoor kitchen area shall be located east of the pool area or westerly wall of the dwelling.
2. The owner shall submit a complete application to injure or remove Privately-owned trees, pursuant to Chapter 813 of the Municipal Code, Articles III.

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T. Yao  
Panel Chair, Toronto Local Appeal Body

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