

INTERIM DECISION AND ORDER WITH INSTRUCTIONS

Decision Issue Date Thursday, October 06, 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): MARK MESSOW

Applicant(s): MEMAR ARCHITECTS INC.

Property Address/Description: 290 WAVERLEY ROAD

Committee of Adjustment File

Number(s): 21 112209 STE 19 MV (A0133/21TEY)

TLAB Case File Number(s): 21 209053 S45 19 TLAB

Hearing date: Friday, September 23, 2022

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY TLAB Panel Member S. Gopikrishna

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Mark Messow
Appellant's Legal Rep.	Ian Flett
Applicant	Memar Architects Inc.
Party	Xin Lin
Party's Legal Rep.	David Bronskill
Expert Witness	Andrew Dales
Expert Witness	Michael Manett

INTRODUCTION AND BACKGROUND

The purpose of this Interim Decision and Order is to provide a brief history of this Appeal, followed by instructions for submissions to be made by the Parties before the commencement of the Proceeding on November 4, 2022.

Xin Lin is the owner of 290 Waverley Road, located in Ward 19 (Beaches- East York) of the City of Toronto. He applied to the Committee of Adjustment (COA) for the approval of variances to alter the existing two-storey detached house at 290 Waverley Road (the “Site”) through the construction of a rear two-storey addition, a third storey addition, as well as a detached garage. The COA heard the Application on August 18, 2021, and approved all the requested variances, and imposed conditions on the approval.

On September 7, 2021, Mark Messow, a neighbour who resides at 288 Waverley Road, appealed the decision made by the COA to the Toronto Local Appeal Body (TLAB), which originally ordered a Hearing on January 18, 2022. As a result of a set of unexpected issues and technical hiccups, the Hearing was postponed to September 23, 2022.

At the Hearing held on September 23, 2022, the Applicants were represented by Mr. David Bronskill, a lawyer, and Mr. Andrew Dales, a land use planner, while the Appellants were represented by Mr. Ian Flett, a lawyer, and Mr. Michael Mannett, a land use planner.

The Parties jointly asked for an adjournment, which was granted. It was agreed that the Proceeding would be completed on November 4, 2022, and November 15, 2022.

I drew the attention of the Applicants and Appellants to the following concerns after reading their Witness Statement:

- In the Applicant’s submission, no numbers were in evidence regarding Section 4.1.5 of the OP, notwithstanding its definition of “the prevailing type” as being the “most frequently occurring”, which can be determined solely through a counting exercise.

While an area can have dual, or multiple prevailing types, the determination of how many prevailing types exist in a given area, requires a numerical determination. It is not possible to assert what the prevailing type is, or what the prevailing types are, unless the Party completes a counting exercise.

I drew the attention of the Parties to Policy 4.1.5, with specific reference to the various variables that can be relied upon to determine the “Prevailing type” and asked them to make a submission to the TLAB, which utilizes one or more of these variables, to determine the “prevailing type”.

For the convenience of the Parties, the sub-sections in Policy 4.1.5, with a reference to “prevailing” are recited below:

Development in established Neighbourhoods will respect and reinforce the

existing physical character of each geographic neighbourhood, including in particular:

- b) prevailing size and configuration of lots;***
- c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;***
- d) prevailing building type(s);***
- e) prevailing location, design and elevations relative to the grade of driveways and garages;***
- f) prevailing setbacks of buildings from the street or streets;***
- g) prevailing patterns of rear and side yard setbacks and landscaped open space;***

where “prevailing” is defined as:

The prevailing building type and physical character of a geographic neighbourhood will be determined by the most frequently occurring form of development in that neighbourhood.

In addition, the following information from Chapter 4, Page 4-5, is also important:

While prevailing will mean most frequently occurring for purposes of this policy, this Plan recognizes that some geographic neighbourhoods contain a mix of physical characters. In such cases, the direction to respect and reinforce the prevailing physical character will not preclude development whose physical characteristics are not the most frequently occurring but do exist in substantial numbers within the geographic neighbourhood, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood and already have a significant presence on properties located in the immediate context or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood.

The above passage makes it clear that even where multiple prevailing types exist, or there is a type that is present in “substantial numbers”, even when not the “Prevailing type”, the determination of the prevailing type(s), the methodology to establish the same is to complete an enumeration, or a counting exercise.

I take this opportunity to point out that for the purposes of the determination of the “prevailing type”, it would be optimal to rely on a variable that corresponds to one of the requested variances. While I recognize that not all variables are accurately measurable, it is important that the Applicants make an effort to obtain comprehensive information about ***all properties*** in the General Neighbourhood, or the Immediate Context, depending on their choice.

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I advise the Parties to submit the numerical information in question, and any conclusions to be reached regarding the “prevailing type” on the basis of this information, to the TLAB by October 31, 2022.

- While the Applicants’ Witness Statement commented on the Appellants’ references to loss of sunlight on their property, if the variances requested by the Applicants were approved, I did not see a corresponding concern in the Appellants’ Witness Statement. I advised the Parties to have a conversation between themselves about this concern, and decided whether or not Sun and Shadow Studies are required.

I explained to the Parties that if they made a decision to submit Sun and Shadow Studies based on their discussion, it would be necessary for both Parties to submit Studies, such that the material could be used for the purposes of Examinations-in-Chief, and Cross Examinations.

I also pointed out to the Parties that if they made a decision not to use Sun and Shadow Studies, on the basis of their discussion, but persisted in canvassing the issue of the loss of sunlight, it would be difficult to arrive at a finding, because the latter would be “comparable to groping in the dark”.

As a result, I advise the Parties to submit the Sun and Shadow Studies by October 31, 2022, should they decide to rely on the same for evidentiary purposes. If Sun and Shadow Studies will not be relied upon for evidentiary purposes, I advise the Parties to inform the TLAB of the same by October 31, 2022.

INTERIM DECISION AND ORDER

1. The Proceeding respecting 290 Waverley Avenue will be heard on November 4, 2022, and November 15, 2022, by way of a Webex platform based electronic videoconference.
2. The Applicants are ordered to make a submission to the TLAB by October 31, 2022, wherein they rely on one or more of the variables listed in Policy 4.1.5 for the purposes of establishing the “prevailing type(s)”, or a type that exists in “substantial numbers” even not being the prevailing type, on the basis of a counting exercise utilizing the variables in question, in the Geographic Neighbourhood, or Immediate Context of their choice.
3. The Applicants and Appellants may come to a decision about the use of Sun and Shadow Studies for evidentiary purposes, through a mutual discussion, to answer questions about the alleged loss of sunlight, if the requested variances were to be approved. Should a decision be made to include Sun

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and Shadow Studies for evidentiary purposes, both Parties are required to submit their respective Studies to the TLAB by October 31, 2022. If a mutual decision is made to not rely on Sun and Shadow Studies, the Parties are instructed to communicate the same to the TLAB by October 31, 2022.

So orders the Toronto Local Appeal Body

X



S. Gopikrishna
Panel Chair, Toronto Local Appeal Body