

DECISION AND ORDER

Decision Issue Date Wednesday, October 12, 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): JOHN MALEVRIS

Applicant(s): SKYSPACE GREEN ROOFS

Property Address/Description: 90 SUMACH STREET – UNIT 312

Committee of Adjustment File

Number(s): 22 111706 STE 13 MV (A0194/22TEY)

TLAB Case File Number(s): 22 147761 S45 13 TLAB

Hearing date: Friday, October 7, 2022

DECISION DELIVERED BY TLAB Panel Member G. Swinkin

REGISTERED PARTIES AND PARTICIPANTS

Appellant	John Malevriss
Appellant's Legal Rep	Zachary Fleisher
Applicant	Skyspace Green Roofs
Party (TLAB)	Lynn Marie Lawson
Participant	Bill Eadie
Participant	Richard Skikiewicz
Expert Witness	David Igelman

INTRODUCTION AND CONTEXT

John Malevris (the “Owner”) is the owner of Unit 312 within Metropolitan Toronto Condominium Corporation No. 1235 (the “Property”). This condominium corporation governs an apartment building municipally known as 90 Sumach Street, in the City of Toronto.

The Owner sought, and obtained, condominium board approval for the construction/improvement of a terrace on the portion of the parking garage roof abutting Unit 312, which will be detailed further below. The Owner was granted rights, in a formal written agreement, by the condominium board to use that portion of the roof (which constitutes part of the common elements of the condominium corporation) for outdoor terrace purposes.

Shortly thereafter, the Owner submitted a zoning review application request with respect to the proposed terrace in June, 2018 to the City Zoning Examination Section. The Owner obtained a zoning certificate to enable application for a building permit. The zoning examiner did not identify any variances as being required. A building permit was applied for in October, 2020 and the City issued a building permit on January 13th, 2021. Construction of the terrace was substantially complete in September, 2021.

In November, 2021, the City issued a letter to the Owner advising that the building permit was issued mistakenly due to zoning non-conformities, that construction must cease immediately, and that the necessary planning approvals would need to be obtained in order for the building permit to be valid.

An application was made to the Committee of Adjustment (the “Committee”) in January, 2022 by the authorized agent of the Owner to seek approval of four (4) variances from the applicable zoning provisions in order to permit the then existing terrace.

The application was presented to the Toronto East York panel of the Committee on April 27, 2022. During the presentation to the Committee, in addition to the authorized agent of the Owner presenting the application, there were multiple neighbours who spoke in opposition to the application. The Committee refused the requested variances.

The Owner chose to appeal that decision, which thus triggered this hearing before the Toronto Local Appeal Body (the “Tribunal”).

THE LEGISLATIVE AND POLICY FRAMEWORK

Provincial Policy – S. 3

A decision of the Tribunal 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 Tribunal 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.

SUMMARY OF EVIDENCE

The Tribunal heard evidence in support of the proposal from the Owner's land use planning consultant, David Igelman. Mr. Igelman was qualified to offer opinion evidence on land use planning matters in the hearing.

The Tribunal also heard evidence from three neighbours who reside in proximity to the building. Lynn Lawson, who resides at 459 Shuter Street, elected Party status. Bill Eadie, who resides at 455 Shuter Street, elected Participant status. Richard Skikiewicz, who resides at 96 Sumach Street, elected Participant status. All were opposed to the requested variances.

The Property Location and its Features

The Property, which comprises approximately 6,300 square metres, is located in the middle of a block located on the north side of Queen Street East, south side of Shuter Street, west side of Sumach Street and east side of Sackville Street. The Property is within the neighbourhood referred to as "Regent Park" in the City.

The Property is of an irregular shape, with 22.12m of frontage along Sumach Street, and having vehicular and pedestrian access from Queen Street East and Shuter Street. Queen Street East is a main street with a mix of commercial and residential

uses. The other three streets essentially accommodate residential uses, primarily in the form of townhouses.

The Property presently accommodates a seven-storey residential live/work building containing approximately 110 dwelling units (the "Building"). The Building was converted from its previous use as a commercial/industrial building originally constructed in the 1960's, which was tenanted by the Canadian Broadcasting Corporation throughout the period from its construction to its conversion.. The Building extent has largely remained as it was originally constructed even after the conversion with the exception of a reduced mass at the north main wall, which was cut back approximately 6.7 metres from the 3rd floor to the 7th floor as part of the conversion, leaving a small rooftop area along most units on the north side of the 3rd floor, save for a jutting out portion which accommodates a stairwell and portions of the abutting residential units. Unit 312 is one of the abutting units.

There are windows on the north and east elevations of the Building which overlook the rear yards of the low-rise residential dwellings. While some windows are frosted so as to limit impacts of privacy and overlook, most windows are standard clear glazing and extend essentially from floor to ceiling.

The Zoning History of the Property

As it was critical to understanding the application, Mr. Igelman provided the Tribunal with the history of the building and the zoning amendment in 1994 which facilitated its conversion from an industrial building to a live/work apartment building.

After extensive community and agency consultation and review, based upon applications for official plan amendment and zoning amendment by the then owner of the Property, on July 25, 1994, City Council passed By-law 0445-94, which adopted Official Plan Amendment 630, and passed By-law 0446-94, which amended the parent Zoning By-law 438-86 to rezone the Property to permit its conversion to a live/work residential apartment use.

These amendments were appealed by a number of area residents, including two who are Participants in this proceeding. Apparently, following the appeals, discussions continued to take place among the stakeholders in an effort to find a resolution of the objections. Design changes were agreed to by the proponent owner.

The Ontario Municipal Board (the then prevailing appeal body with respect to municipal planning decisions) held a hearing, out of which issued its decision on the appeals. That decision, issued on December 5, 1996, was pronounced by Vice Chair M. Eger.

Vice Chair Eger offered a variety of comments on the revised proposal, which she approved, that provide assistance to the Tribunal in this proceeding in terms of how to approach the planning intent.

Specifically, at paragraph 25 of the Board decision, she says: “There are no balconies permitted on the northerly or easterly building faces or on the northerly portion of the westerly building face. This is to minimize overview of the rear yards and adjacent residential buildings at these locations. In addition, a mix of translucent and clear glass panels in primary windows on the northerly and easterly faces of the building is proposed to further reduce opportunities for overview.”

As Mr. Igelman rightly pointed out in this proceeding, the Board’s perception of the objective regarding the non-presence of balconies and the nature of the glazing along the northerly and easterly façades is to *minimize* overview, not to preclude it.

The Application to the Committee

After the Owner was advised of the revocation of his building permit, and with the benefit of a fresh Zoning Examiner’s Certificate, which set out what were the now apparent deficiencies regarding the zoning conformity of the terrace proposal, the Owner made application to the Committee for variance relief. The application for relief tracked precisely the deficiencies noted by the Zoning Examiner.

The application thus sought the following relief:

1. Section 1(5), Site Specific By-law 1994-0446 (OMB)
No building above grade on the lot is located otherwise than wholly within the area delineated by heavy lines and shown on the attached Map 2, except for balconies (with a maximum projection of 1.5 m), and an exhaust duct for the parking garage located on the westerly or southerly face of the building.
The balcony will project 6.67 m.

2. Section 1(6), Site Specific By-law 1994-0446 (OMB)
No balconies are to be located on the northerly or easterly face of the building or on the westerly face of the building within 14 m of the northerly boundary of the lot excluding the part of the lot shown as Pan 3 on Reference Plan 64R-14789. The balcony will be located on the northerly face of the building.

3. Section 1(14), Site Specific By-law 1994-0446 (OMB)
There are no doors between 29 m above grade and 7 m above grade on the north and east elevations of the building.
The access door to the balcony will be located between 29 m above grade and 7 m above grade on the north side elevation of the building.

4. Section 1(24), Site Specific By-law 1994-0446 (OMB)
The area of the roof above the parking garage is used for no purpose other than maintenance of the roof.
The balcony will be located on the roof above the parking garage.

City Community Planning Staff provided a memorandum to the Committee, which raised no objection to the application but recommended, if the Committee saw merit in the application, that a condition be imposed. Specifically, Community Planning Staff recommended in that circumstance, that a condition that the applicant shall install planters along the northerly side of the terrace be imposed. Mr. Igelman advised that the understood convention in these matters is that if the Planning Department does not articulate an objection, then it should be understood that they do not oppose the application on policy grounds. And he pointed out that, as the planter was in place prior to the Committee application, it would be evident that the condition would be fulfilled..

The Committee refused the application, As is customary with Committee decisions, other than a declaration that, in the Committee's opinion, the application does not satisfy the four tests of Section 45(1) of the *Planning Act*, there are no further reasons available to understand the basis for that decision.

In his testimony regarding the determination by the Zoning Examiner, it was clear that Mr. Igelman had some reservations as to the identification of the first variance, which he explained by referring to the lines on Map 2, which clearly shows its heavy line coincident with the furthest extent of the north face of the building. In this instance, the terrace is entirely behind that line and presumably not contravening this provision. However, as it is itemized on the Zoning Examiner's Notice as a non-conformity, the application to Committee has included it. The Tribunal here understands Mr. Igelman's point of view and tends to concur but will nonetheless address the variance request in order to be comprehensive.

Planning Policy Evolution and Development in the Downtown since 1994

The Official Plan designation for the Property is "Mixed Use Areas" as shown on the City of Toronto Official Plan Land Use Map #18.

The Official Plan also identifies the Property as being within the "Downtown and Central Waterfront" area as per Map 2, and further identifies the Property as being within the "Downtown Toronto Urban Growth Centre" as per Map 6.

The Property is identified as being within the "Downtown" Secondary Plan and is designated "Mixed Use Areas 3 – Main Street" as per Map 41-3.

Mr. Igelman's opening assertion with respect to the Official Plan, and a point which he relied heavily upon in connection with his interpretation of the Official Plan, and indeed referred to numerous times in his oral testimony, is that the Property is not designated as "Neighbourhoods". It is located within the Downtown of the City, which contains a very tight-knit and compact urban fabric. The area is slated for much more intensification and development as compared to what was planned for the area back when the Building was converted to a residential building over 20 years ago. Today,

there is a different policy context and different expectations of living within the Downtown.

He says that the area has been incrementally transforming over time. He provided a list of variance applications that have taken place over a period of time. He advised that there have been variances which have been approved in the last 10 -15 years that are similar to the variances being requested through this proposal.

As well, new developments have been approved in the area with balconies facing rear yards of low-rise residential dwellings. Some of these developments include 512 King Street East, 52 Sumach Street, and 200 Sackville Street. 512 King Street East was a development proposal for an 8-storey mixed-use residential and commercial building that has north and east-facing balconies which face the rear yards of low-rise residential dwellings to the north and east. The building at 512 King Street East currently exists and was supported by City Staff in 2009 when the proposal was going through the planning application process.

He further advised that there are many other examples of similar conditions where terraces/balconies have overlook onto the rear yards of nearby/adjacent low-rise residential dwellings within Downtown. Such examples include 64-86 Bathurst Street, 90 Niagara Street, 560 Front Street West, 203 Jarvis street and 103 Shuter Street, 195 Davenport Road and 131 Hazelton Avenue, 126-128 Hazelton Avenue, and 2131 Yonge Street.

In addition to the new denser development, he points to the circumstance of low rise overlook. His visual evidence showed that there are residential dwellings which front onto Sumach Street which have 2nd and 3rd floor balconies/terraces which have direct views into the rear yards of the flanking residential dwellings which front onto Sumach Street. Specifically, the following addresses have balconies/terraces overlooking the rear yards of adjacent/abutting/flanking low-rise residential dwellings: 116 Sumach Street, 112 Sumach Street, 110 Sumach Street, 118 Sumach, 433 Shuter Street, and 439 Shuter Street.

On the strength of all of this evidence, his view is that this is a decidedly urban environment and some level of overlook and privacy impact is to be expected.

In his opinion, the proposal represents a modest alteration to an existing residential building by providing additional amenity space for Unit 312. The proposal includes a 1.32 m wide planter box located at the north edge of the terrace which provides a setback to reduce view planes and includes vegetation that will further screen views to and from the north of the proposed terrace. He asserts that the terrace has been constructed to modern standards to meet the needs of a modern family/occupant while observing the intent of the Official Plan by maintaining the style and built form that is already in the area.

He says that the rooftop terrace does not change the existing shape, scale or design of the existing Building in any substantial way. However, the rooftop terrace will enhance the liveability of Unit 312 by providing an attractive and pleasant outdoor amenity space for the use of the occupants of that unit. He links this to Official Plan policy, enhancing liveability.

His position is that while the rooftop terrace will enhance the liveability of the unit, at the same time, it has been designed in a manner that significantly mitigates any potential privacy and overlook impacts associated with the low-rise residential uses to the north. He goes on to assert that the potential privacy and overlook impacts associated with the proposed rooftop terrace are effectively no different than what can be experienced through the existing north-facing windows of the Building.

Mr. Igelman spoke to Policy 3.1.3.3 of the Official Plan in the Built Form section of the Official Plan, which addresses the protection of privacy within adjacent buildings by providing setbacks and separation distances from neighbouring properties and adjacent building walls containing windows.

He says that the proposal will protect privacy within the adjacent residential buildings to the north by providing a 1.32 m wide planter box on the north side of the rooftop terrace. The planter box serves as a buffer to the residential buildings to the north by effectively creating a setback on the terrace which ensures any users of the terrace are at least 1.32 m away from the north side of the terrace at all times. In this regard, he produced photos (about which the Tribunal will have more to say below) from the terrace of the views into the rear yards of the residential buildings to the north, which are significantly limited when standing right at the planter box. It was further his opinion that in the normal course of using the terrace persons would likely be using the couches or sitting in the dining area, the effect of which is that any privacy or overlook impacts will be further limited or non-existent.

The planter box along the north side of the terrace contains vegetation which acts as privacy screening and contributes further to mitigating any potential impacts on privacy. On questioning by the Tribunal, Mr. Igelman took advice from the Owner during a break and informed the Tribunal that the planted material consists of small birch trees and yew bushes, the latter being evergreen conifers, which will therefore maintain their screening quality throughout the year.

Mr. Igelman canvassed Policy 3.1.3.13 of the Official Plan, which addresses outdoor amenity spaces and states six objectives to be achieved. He briefly discussed each of these and was of the view that the proposal here was in conformity with those objectives.

Mr. Igelman took the Tribunal through the relevant Mixed Use Areas policies and through the relevant Downtown Secondary Plan policies, and advised that the proposal here was in keeping with the general intent and purpose of those policies.

As noted earlier, Mr. Igelman provided evidence of new development in the Downtown and other similar rooftop structures/terraces on the Building and on other existing buildings within the area which demonstrates that the area is beginning to experience regeneration and transition. As he put it, there are other buildings in the area with similar conditions as the proposal in that there are other buildings with balconies facing the rear yards of residential dwellings, including new buildings designed with such a condition overlooking new townhouses. As a nearby example of this, he turns to 200 Sackville Street in Regent Park.

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With respect to the general intent and purpose of the Zoning By-law, as discussed above, Mr. Igelman is not certain that Variance 1 is actually required, and the Tribunal appreciates this point of view. However, out of prudence it has been included.

Regarding the other three variances, he acknowledges that the intent of each of those by-law provisions is the same – to limit the locations of balconies on the northerly, easterly, or westerly face of the building within 14 metres of the northern boundary of the lot in order to mitigate privacy impacts on the surrounding low- rise residential areas, primarily the area to the north.

To this he again says that the proposal will be located on the northerly face of the Building and includes a large planter box along the north side of the terrace which spans the entire width of the terrace. This planter box, along with the vegetation within it, serves to screen views into and from the rooftop terrace and protect the privacy of the residential dwellings to the north.

The planter box on the terrace as designed and constructed is 1.32 m wide (or deep) and has a height of 1.07 m with vegetation extending further upwards. The width and height of the existing planter box ensure that any users of the terrace will be at least 1.32 m away from the north side and will have practically no northward views when sitting down on the terrace.

He concludes on this point by suggesting that as a result of the existing planter box, the rooftop terrace is functionally a west facing balcony and will have practically no impactful views to the north further than what the by-law contemplates.

Having laid out the clear advantages to the Owner of an exclusive outdoor amenity space directly accessible from the dwelling unit, he concluded that the proposal was undeniably desirable for the use of the Property.

And finally, based upon his assessment that there will be no, or negligible, impact on neighbouring properties, and definitely no undue adverse impact, the proposal could also clearly be understood to be minor in nature.

Provincial Planning Policy

The Provincial Policy Statement and the Growth Plan are high level policy documents which are not typically engaged in a specific way on variance applications. Mr. Igelman was of the opinion that the proposal here was consistent with the PPS.

Mr. Igelman did highlight one provision in the Growth Plan which he thought was relevant. In particular, Section 1.2 - Vision for the GGH “Urban centres will be vibrant and characterized by more compact settlement and development patterns ...and will provide a diversity of opportunities for living, working, and enjoying culture.”

It was his opinion that the proposal would conform with the Growth Plan.

Photographic Evidence

Given that the Property here is located two levels above grade and is only accessible through the private domain of the Owner, despite the custom of the Tribunal to pay a site visit to properties under appeal that was not practical here. Of course, a view of the property provides context and allows for an independent assessment of the property.

The Tribunal here wishes to commend Mr. Igelman on his work in providing a comprehensive visualization of not only the Property and this terrace but also in capturing the general area around the Property.

This case proved the adage that a picture can be worth a thousand words. Of course, Mr. Igelman had access to the terrace and he took a number of views in all directions from various points on the terrace so that the Tribunal could formulate a sense of that visual experience. Furthermore, he employed a drone to capture views of the terrace from a height, the rear lane between the Building and the properties to the north as well as views of the rear of those properties.

These photographs were invaluable to the Tribunal and proved to be very persuasive in making out and substantiating the assertions and opinions expressed by Mr. Igelman as well as to test the comments received from the neighbours.

The Evidence of Lynn Lawson

As noted above, Ms. Lawson resides at 459 Shuter Street. She has lived there since 2005, so her residency began after the conversion and occupation of the Building as a live/work apartment building. It is also to be understood that her property backs onto the Building to the east of what is referred to as “the jut out” of the stairway component. As such, Ms. Lawson advises that although she cannot see the terrace from ground level, she can see it from her second floor bedroom window.

In addition to concerns about overlook into the properties north of the Building, she also advises that use of the terrace has generated noise when there have been large gatherings on the terrace. Based on the evidence, although this circumstance has apparently occurred on more than one occasion, it did not seem to be a regular occurrence, nor was there any indication of the magnitude of the sound at the point of reception.

Ms. Lawson believes that the site specific zoning provisions applicable to the Property were the result of a negotiated arrangement, endorsed by the Ontario Municipal Board, and that they are clear and unambiguous, and designed to eliminate a potential impact. She says that there has been no material change in the immediate area, in the sense that there have been no changes to the low rise residential dwellings along Shuter Street and Sumach Avenue in this block since the approval of that site specific zoning amendment and thus there is no proper basis to change the rules.

Ms. Lawson was candid that the impact which she fears, and which impelled her to object to the proposal at the Committee stage and here on appeal, is the precedent that an approval would set and what might then ensue from that. Specifically, she perceives that the establishment of outdoor terraces on the other north facing units on the third floor of the Building may very well directly impact her property and its use. She is concerned that an approval for Unit 312 may very well be used as justification for one or more of these other third floor property owners to pursue a similar approval for their units.

The Evidence of Bill Eadie

Mr. Eadie resides at 455 Shuter Street and has been resident there since 1983. It is a townhouse dwelling and, like Ms. Lawson's, it lies east of the "jut out" of the Building.

Mr. Eadie was involved in the planning exercise that led to the site specific zoning for the Property. He echoed the comments made by Ms. Lawson that the restrictions regarding the north and east faces of the Building were carefully crafted and as there has been no material physical change to the surrounding low density residential uses, those restrictions should not be relaxed.

Mr. Eadie communicated his frustration in trying to get answers from the City upon his awareness of the creation of this outdoor terrace. It appears that the complaints of the neighbours to the north were the precipitating event for the City's notice to the Owner that a mistake had been made in the issuance of the original Zoning Notice and that his building permit was being revoked.

Mr. Eadie took the position that adequate provision had been made in the Zoning By-law for outdoor amenity space for the residents of the Building and if the Owner had wanted exclusive use amenity space, he could have purchased a unit with a balcony or one of the 7th floor units with its own rooftop amenity area.

Mr. Eadie underlined the matter of noise impact as he said that on two occasions he was awoken from sleep at night by party noise and he is sure that this terrace was the source of the noise. He said that noise from 7 metres up carries with more impact than ground level noise as it is unimpeded. He also offered the view that although there is a noise by-law, his experience is that the City is not terribly good at enforcement of this by-law. And this is compounded by the fact that as the Building does not have a concierge, there is no effective way to complain to the occupant of the Building who may be responsible for it.

And finally, he echoed the concern expressed by Ms. Lawson that any favourable decision and approval here may create a precedent and lead to further applications from other owners on the north face of the third floor of the Building.

The Evidence of Richard Skikiewicz

Mr. Skikiewicz resides at 96 Sumach Street, which is a townhouse unit lying east of the Building. In fact, the unit is near the visitor parking area for the Property. He cannot see the terrace but he alleges that he has heard loud noises from that area.

Mr. Skikiewicz was an active participant in the zoning process that led to the conversion of the Building and was a named appellant before the Ontario Municipal Board. He believed that the restrictions arising out of that decision should be strictly maintained. He pointed out that the decision by the Committee on this application was unanimous in their refusal of the application.

He asked what would prevent a person from looking over the planter.

And he closed with the same concerns as the other two neighbours, that an approval here would create an undesirable precedent that may give rise to further applications by owners of other third floor north facing units. He says that allowing the use of terraces serving these units will result in impacts on residents of the townhomes on Sumach Street as well as Shuter Street.

ISSUES AND ANALYSIS

Is There A Different Standard of Review for an Existing Condition?

This question came up during Ms. Lawson's cross-examination of Mr. Igelman. Rightly, Mr. Igelman responded that the fact of the terrace's existence should not figure into the required examination of the planning issues associated with the proposal. He did say, also rightly, that the experience of the terrace though can be taken account of in connection with attempting to assess any impacts that may arise from its use.

As it should never be an advantage to an applicant to simply undertake a project and then seek approval after the fact, in the course of which attempting to get a leg up by saying that it exists and is a sunk investment, each case must nonetheless be understood according to its peculiar facts but as if the improvement has not yet been undertaken.

Although it does not affect the planning and legal analysis, in this case the Owner took what he thought was the responsible course of securing all of the required permissions and was blindsided by the municipal authority. To such circumstances, some equity attaches in the sense that the Tribunal will not cast any opprobrium on the appellant and will essentially 'forgive' the Owner this trespass.

Do Policy and the Zoning By-law Evolve and How Does That Relate to Site Specific Amendments?

Mr. Igelman spent a considerable amount of time and effort on tracking the changes in planning policy since the enactment of the site specific By-law 1994-0446 relating to the Building. He produced a plethora of examples of zoning amendments and developments in the immediate area of the Property and in the Downtown, and beyond, which demonstrate that in connection with creating a denser urban environment, the control and restraint of overlook and protection of amenity space privacy has undergone a loosening.

He takes the position that the matter of understanding the general intent and purpose of the official plan and Zoning By-law should be now viewed through these changing lenses. When so viewed, the superficial rigidity of interpretation which is being advanced by the Party and Participants in this proceeding should be understood as a failure to keep in step with the evolution of the Downtown itself as well the prevailing policy and regulatory instruments.

The Tribunal here concurs with Mr. Igelman. Even the Official Plan overtly recognizes that the City's physical landscape is not static and that the goal on an ongoing basis is to aim for a more liveable environment in this intensifying urban environment.

Mr. Fleischer put before the Tribunal a decision of the Ontario Municipal Board issued on January 15, 2018, styled *Berkeley Parliament Inc. v. Toronto (City)*, 2018 CanLII 1861 (ON LPAT). The appeal before the Board in that instance was from a decision of the Toronto Committee of Adjustment [before the inception of the Tribunal] which refused an application for a number of variances arising out of an intended modification of a high rise apartment building proposal which had been the subject of a site specific zoning amendment the year before.

The argument of the proponent in that case was that much had changed from a policy perspective since enactment of the site specific zoning amendment to the time of the application to Committee, as well as actual physical developments in the immediate area being beyond what was envisaged at the time of the site specific zoning amendment. Although the City conceded some of the variance requests, on the matter of height and density, the City took the position that the site specific zoning provision should continue to be respected.

After considering all of the evidence, the Board (as pronounced by Members T. Hodgins and D. Lanthier) had the following to say at paragraphs [71] and [72]:

[71] The Board understands the position of the City and the St. Lawrence Neighbourhood Association that it is not, in principle, appropriate to vary to any significant extent a site specific Zoning By-law that was the topic of much discussion, negotiation and concern within the community during its processing and adoption. They feel that variances and changes to the project undermine and negate their original efforts to achieve an appropriate and acceptable project and offend the concepts of finality and closure. The Board understands these sentiments but notes that the Applicant is nevertheless permitted by law to apply for the variances, and in doing so,

the variances are to be considered upon the evidence as it now exists, and in the context of what now exists, including such changes that have occurred since the earlier form of the development was first approved. The variances must be authorized in the event the applicable legislative tests are met.

[72] It is the Board's view that the application for the variances should be viewed upon that approach rather than one that is resistant to go beyond that which was already approved through the community consultation process. Certainly, the prior processes that led to the agreed-upon components of the development should not be lightly ignored in the absence of new evidence or changes in circumstances and contextual parameters. Where however, as in this case, the context of the Site has changed in a significant manner since that time, it is the obligation of the Board to consider such evidence and such changes, in context. Where appropriate, and if, and only if, the four tests can be satisfied, the Board may then find that such additional variances are warranted.

The Tribunal here believes that the Board in that case took the correct approach and that that approach applies in this instance as well, especially as almost 30 years have now elapsed in this case since that site specific zoning amendment.

Does Precedent Figure Into the Tribunal's Decisionmaking?

All three of the persons heard in this proceeding who were opposed to the requested variances made manifestly plain that a core concern of theirs was the precedential value of a favourable decision on this application. As noted above, the fear is that a favourable decision may spawn applications by one or more other north side third floor Building owners to seek the same permission and enable the establishment of one or more outdoor terraces associated with their units. Such terraces would be situated much closer to these northerly owners.

It is trite to say that each application to Committee, and each appeal to the Tribunal, is assessed on its own peculiar merits. This isn't to say that decisions don't have precedential value but that value has to be understood in its context. Context varies, sometimes dramatically, from one case to the other.

In this instance, as Mr. Igelman pointed out in his testimony, Unit 312 is unique in this landscape as it is the only unit which lies west of the 'jut out' and the screening which that physical feature provides. Also, the portion of the garage roof adjacent to Unit 312 is isolated from the balance of the garage roof. There may very well be considerations of privacy *inter se* in the creation of outdoor terraces serving the other third floor owners. But that is not a consideration for this Tribunal. Clearly, any such initiatives would have to be taken before the condominium board for their consideration and disposition as a first step before they proceed further. The Tribunal will not venture to speculate on that process or how it may turn out, nor need it do so.

CONCLUSION

The Tribunal is persuaded by the evidence called by the Owner through Mr. Igelman that the variances sought by the Owner's application are appropriate for approval.

The Tribunal accepts that the intent and purpose of the Official Plan and Zoning By-law has to be read in a current context against the background of the City as it is developing in the Downtown. That Downtown is a denser, highly urban place. Absolute avoidance of overlook is not City planning policy.

Furthermore, taking directly from the reasons expressed by the Ontario Municipal Board at the time of the disposition of the appeal against By-law 1994-0466, and the manner by which it was amended, the goal of that site specific zoning amendment was the minimization, not the elimination, of overlook.

The Tribunal accepts the testimony of Mr. Igelman, and is bolstered in that by the photographic evidence, that the planter along the north edge of the terrace will be a material factor in the mitigation of potential overlook to the properties to the north.

From the evidence before the Tribunal in this hearing, the Tribunal is satisfied that the requested variances are in keeping with the general intent and purpose of the Official Plan and the Zoning By-law, that they are desirable for the use of the Property and that they are minor, thereby satisfying all four tests of Section 45(1) of the *Planning Act*.

Furthermore, the Tribunal is satisfied that the requested variances are consistent with the Provincial Policy Statement and conform with the Growth Plan.

As it is a critical feature in achieving the mitigation upon which the approval is to be granted, and on the recommendation of Mr. Igelman and the City Planning Department, the Tribunal will be imposing a condition on the approval requiring the maintenance of the planter which has been constructed.

DECISION AND ORDER

The Tribunal ORDERS THAT the appeal is allowed and the variances as follows are approved, subject to the Condition noted below:

1. Section 1(5), Site Specific By-law 1994-0446 (OMB)
No building above grade on the lot is located otherwise than wholly within the area delineated by heavy lines and shown on the attached Map 2, except for balconies (with a maximum projection of 1.5 m), and an exhaust duct for the parking garage located on the westerly or southerly face of the building.
The balcony will project 6.67 m.

2. Section 1(6), Site Specific By-law 1994-0446 (OMB)

No balconies are to be located on the northerly or easterly face of the building or on the westerly face of the building within 14 m of the northerly boundary of the lot excluding the part of the lot shown as Pan 3 on Reference Plan 64R-14789. The balcony will be located on the northerly face of the building.

3. Section 1(14), Site Specific By-law 1994-0446 (OMB)

There are no doors between 29 m above grade and 7 m above grade on the north and east elevations of the building.

The access door to the balcony will be located between 29 m above grade and 7 m above grade on the north side elevation of the building.

4. Section 1(24), Site Specific By-law 1994-0446 (OMB)

The area of the roof above the parking garage is used for no purpose other than maintenance of the roof.

The balcony will be located on the roof above the parking garage.

The CONDITION is that a planter having a height of 1070mm, a depth (width) of approximately 1320mm (set adjacent to a railing affixed to the outside wall of the Building) and a length of 11036mm (essentially coincident with the length of the terrace) shall be maintained at all times and shall be planted with vegetation containing, in part, evergreen species.



X

G. Swinkin
Panel Chair, Toronto Local Appeal Body