

DECISION AND ORDER

Decision Issue Date Friday, October 14, 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/Applicant: ANDREW WARREN PEEL

Property Address/Description: 102 DONLANDS AVE

Committee of Adjustment File
Number(s): 21 245755 STE 14 MV (A1461/21TEY)

TLAB Case File Number(s): 22 135908 S45 14 TLAB

Hearing date: October 4, 2022

DECISION DELIVERED BY TLAB Panel Member T. Yao

REGISTERED PARTIES AND PARTICIPANTS

Applicant/Appellant	Andrew Peel
Party (TLAB)	City of Toronto
City's lawyers	Michelle LaFortune, Nathan Muscat
City's Expert Witness	Sean Guenther

INTRODUCTION AND CONTEXT

Mr. Peel wishes to re-insulate his house and expand a third-floor portion to create one new main unit and two secondary dwelling units. His goal, as well as creating more housing, is to build a demonstration project showing that rental accommodation can be energy efficient and carbon neutral. He requests the variances set out in Table 1 to accomplish this. Faced with this unusual project, the City needed some time to fully understand all aspects of the project, and is now supportive. As a result, a settlement has been reached and been brought to the TLAB.

A City planner, Mr. Guenther, gave oral evidence and I have also incorporated Mr. Peel's and Ms. LaFortune's written statements in these reasons. I qualified Mr. Guenther as able to give opinion evidence in the area of land use planning.

Table 1. Variances sought for 102 Donlands (Variances from Zoning By-law 569-2013)			
		Required/Permitted	Proposed
1	Main wall height (rear)	7.5 m	9.97 m.
2	Floor Space Index	0.6 times area of the lot	1.62 times area of the lot
3	South side yard setback	0.45 m	0.05 m
4	Size of secondary suite	45% of main suite (The layout is unit 1 basement; unit 2, first and second floor; unit 3 third floor)	the third-floor suite is 49% of unit 2
5	Number of parking spaces required	1	0

On March 30, 2021, the Committee of Adjustment refused these variances. Mr. Peel appealed and so this matter came to the TLAB.

MATTERS IN ISSUE

Under s. 45(1) of the Planning Act, the variances 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.

Although this is a settlement, the TLAB must consider whether these legal tests are met. The most relevant Official Plan policy is s. 4.1.5 in which the physical form of the development must “fit in” physically with the surrounding neighbourhood. But this is a demonstration project meant to incentivize others and could not be accommodated if the planning tools were restrictively applied. Accordingly, the Planning Act speaks of the “general” intent of the Official Plan and there are specific provisions on energy efficiency and private rental housing that need to be considered, not just “fitting in”. Mr. Guenther testified that the intent of the Official Plan as a whole, was maintained, as well as the other statutory tests. I accept his opinion. In this settlement hearing, a concern of the City was to ensure that this project’s high FSI not be used by other proponents, who were not in a like situation with Mr. Peel.

ANALYSIS, FINDINGS, REASONS

Presumptive acceptance of a settlement

I find useful guidance in the Law Society case of Stephen Alexander Cooper:

[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.¹

This presumptive acceptance of a settlement in which the City is a participant makes this settlement different from those cases where the City does not participate. This is not a precedent unless there are similar facts; and this is a unique development.

The project

Mr. Peel intends to add insulation to both the inside of walls and re-clad the exterior. The result will be a wall 12 inches thick with an R-38 rating. There are other energy efficiencies.

Mr. Peel proposes to make main unit floors 2 and 3; with a newly created secondary unit on each of the basement and ground floor levels. The existing FSI of 0.87 will be bumped up to 1.62.² Mr. Guenther found no other FSI in the near vicinity at this level. As well as energy efficiency, there are other Official Plan objectives such as development on major streets, encouraging transit use, decreasing incentives for car ownership by not providing a parking space and increasing the supply of privately provided rental housing in a walkable neighbourhood. I agree with the City that while this "fits" in, it should not be a precedent for other projects that do not address those objectives.

The following are Official Plan policies dealing with energy efficiency:

- Section 3.1 (private sector environmentally sustainable design)³;

¹ Law Society of Upper Canada V. Stephen Alexander Cooper, 2009 ONLSAP 7 (CANLII) and <https://www.canlii.org/en/on/onlst/doc/2009/2009onlsap7/2009onlsap7.html?searchUrlHash=AAAQAGY29vcGVyAAAAAE&resultIndex=1>.

² The permitted maximum floor space index is 0.60 times the area of the lot: 76.86 square metres. The proposed new additions will increase the existing floor space index to 1.62 times the area of the lot: 207.80 square metres. [10.10.40.40.(1)(A) Floor Space Index]

³ The City can play its part by organizing, designing, maintaining and improving the streets, parks and public buildings. The private sector can do its part by building the structures and landscapes that define and support these public places. This Plan demands that both the public and **private sectors** commit to high quality architecture, landscape architecture and urban design, **environmentally sustainable design**, consistent with energy efficiency standards. (3.1 the Built Environment);

- Energy efficiency for Neighbourhoods⁴

This is not an apartment building, but the project is analogous to one, albeit on a smaller scale. The Plan has explicit provisions for retrofitting existing apartments for energy efficiency which indicate the Plan's interest in promoting this public interest goal.⁵

Mr. Peel gave me the following written statement:

This project involves a semi-detached home in Toronto that will be retrofitted to a 3-unit private sector apartment to the EnerPHit standard (<https://passipedia.org/certification/enerphit>). The house has a common design that is representative of many homes across the city. This project seeks to establish a technically and financially feasible model for low carbon residential retrofits that can be replicated at scale. It also serves to increase density without changing the characteristics of the neighbourhood. An important aspect of this project is the information dissemination and knowledge transfer to other developers, renovation contractors, and homeowners to facilitate broader adoption of the EnerPHit standard in Toronto and beyond.

. . . This aligns with the City's ambitious GHG emissions reductions targets of Net Zero by 2040 (<https://www.toronto.ca/news/net-zero-by-2040-city-council-adopts-ambitious-climate-strategy/>). Retrofitting the existing stock of homes is crucial to these goals. Yet, the vast majority of the residential construction industry has no experience with deep energy retrofits and homeowners are generally either not aware of or believe they cannot afford the necessary measures. Thus, many retrofits are being undertaken with limited GHG reduction improvements.

EnerPHit is the world's most advanced building retrofit standard for carbon emissions reductions, achieving up to 80% GHG emissions reduction and 70% in energy savings. Unfortunately, to date, no EnerPHit retrofit has been completed in the city (<https://passivehouse-database.org/index.php?lang=en>). Without a similar project to reference, homeowners and design professionals cannot readily learn how an EnerPHit

We can work together in our neighbourhoods to create a healthier Toronto by reducing waste, better managing storm water runoff, greening our communities, reducing harmful emissions and conserving energy and water. (2.3.1 Healthy Neighbourhoods)

⁴ Environmental sustainability will be promoted in *Neighbourhoods and Apartment Neighbourhoods* by investing in naturalization and landscaping improvements, tree planting and preservation, sustainable technologies for storm water management and **energy efficiency** and programs for reducing waste and conserving water and energy. (2.3.1.6 Healthy neighbourhoods)

⁵ Although significant growth is not intended within developed Apartment Neighbourhoods on a city-wide basis, compatible infill development may be permitted on a site within a developed Apartment Neighbourhood with one or more existing apartment buildings which improves the existing site conditions by means such as: . . . r) **encouraging improved energy and water efficiency in existing buildings through renovations, retrofits** and changes to management practices. (4.2.3 Apartment Neighbourhoods)

retrofit can be achieved. This project will serve as this reference.

[Mr. Peel then referred to the City's Official Policies on rental housing and intensification along major streets such as Donlands]

The creation of two secondary suites is unusual in Neighbourhoods, as most homes are not large enough to accommodate three units. Only one other property in the neighbourhood with two secondary suites has been identified (92 Donlands) and it is on a much larger lot (200m² vs 128m²). Creating a requirement for EnerPHit certification to permit an increase in FSI to accommodate the additional insulation would send a clear signal to industry and homeowners that 3-unit building conversions are feasible, desirable, and encouraged provided they achieve substantial GHG emissions reductions. [Mr. Peel's response has been edited by me for brevity]

The City further put forward its settlement evidence in writing:

While City Planning had written in opposition to the Variances requested before the Committee of Adjustment, now having had the benefit of understanding the proposed dwelling construction methods and the resulting construction being a passive house, the City and City Planning, including Environmental Planning, agree that the proposal has engaged additional Official Plan policies relating to climate change. Mitigating those climate change impacts and engaging policies (found in 3.4.1) on balance with the typical policies surrounding built form and the Neighbourhoods (found in policies 3.1.3.5, 4.1.8 & 4.1.5) meet the tests under section 45(1) of the Planning Act and result in an acceptable impact. While the proposed FSI would result in the highest in the area, the additional mass is largely driven by the additional insulation required to meet the EnerPHit and Passive House Standards.

As you heard from Mr. Guenther, City Planning took a balanced and nuanced approach in assessing this application with the additional information provided by the applicant. The conclusion is that the introduction of a passive house is meritorious and considering the goals of the City, found in the Official Plan, relating to climate change efforts, meet the requisite tests for approval. Further the Variances sought, proposes to add additional rental residential units, which the City and City Planning take no issue with and continue to support.

Conclusion

After hearing and accepting Mr. Guenther's planning evidence and reading Mr. Peel's and Ms. LaFortune's statements, I accept the settlement and find the tests are met

DECISION AND ORDER

The variances in Table 1 are authorized on the following conditions:

1. The development shall be constructed substantially in accordance with the plans, prepared by Kelly Fisher, including but not limited to the southern side yard setbacks and the floor space index on Drawings: A3 (Site Plan), A12a

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(Front Elevation), A14 (Side Elevation) and A15a (Side Elevation) and received by the Committee of Adjustment on March 24, 2022 ("The Plans");

2. Prior to the issuance of the building permit, the owner shall provide a Design Stage Assurance Letter from a third-party Passive House Certifier, who is accredited by the Passive House Institute in Darmstadt Germany, confirming that the Plans meet all of the EnerPHit design requirements for the dwelling to be certified to the EnerPHit Building Standard.

3. Variance #3, related to the south side setbacks, be limited and constructed in accordance with the dimensions shown on the Plans.

X



Ted Yao
Panel Chair, Toronto Local Appeal Body