

DECISION AND ORDER

Decision Issue Date Monday, October 31, 2022

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): MAHDY GANDOVANI SHEIDAEI

Applicant: ALI SHAKERI

Property Address/Description: 14 Brookfield Rd.

Committee of Adjustment Case File: 18 266685 NNY 15 MV (A0841/18NY)

TLAB Case File Number: 19 119013 S45 15 TLAB

Hearing date: Monday, February 03, 2020

DECISION DELIVERED BY S.GOPIKRISHNA

APPEARANCES

NAME	ROLE	REPRESENTATIVE
ALI SHAKERI	Applicant	
MAHDY GONDOVANI SHEIDAEI	Appellant	AMBER STEWART
D. HUGH REDELMEIER	Participant	
STEPHEN MORSON	Participant	
YORK MILLS VALLEY ASSOCIATION	Participant	
CHRIS HEWAT		
SUSAN LIPCHAK	Participant	
CHRISTINE ACCONCIA	Participant	
JACQUES KONIG	Participant	

TORONTO AND REGION CONSERVATION AUTHORITY STEVEN HEUCHERT	Participant	
DIANA SABINA BLANK	Party (TLAB)	
DOMENIC DIMANNO	Party (TLAB)	
DANIEL MIDA	Party (TLAB)	WILLIAM ROBERTS
JAMIE SAMOGRAD	Party (TLAB)	
CITY OF TORONTO	Party (TLAB)	MICHAEL MAHONEY
TERRY MILLS	Expert Witness	
SIMONA RASANU	Expert Witness	
JONATHAN BENCZKOWSKI	Expert Witness	

INTRODUCTION AND BACKGROUND

Mahdy Gondovani- Sheidaei is the owner of 14 Brookfield, located in Ward 15 of the City of Toronto. He applied to the Committee of Adjustment (COA) for the approval of variances that would facilitate his building a new house at the Site. The COA refused the application in its entirety, and the Applicant appealed the decision to the Toronto Local Appeal Body (TLAB) on February 25, 2019.

In addition to the Appellants, the following Parties elected for Party status: The City of Toronto, Mr. Daniel Mida,, Mr. Jamie Samograd, and Mr. Domenic DiManno,, while the Toronto Regional Conservation Authority (TRCA) elected for Participant status.. Mr. Domenic Di Manno, who elected for Party Status, did not participate in the Hearing. Mr. Hugh Redelmeier, Ms. Susan Lipchak and Mr. David Austin, all of whom are community members, elected for Participant status. By way of an editorial note, the addresses of the Parties, or Participants are not provided in the interests of privacy.

The Applicant/Appellant was represented by Ms. Amber Stewart, a lawyer, and Mr. Jonathan Benczkowski, a land use planner, the City was represented by Mr. Michael Mahoney, a lawyer, and Ms. Aileen Keng, a land use planner, and Party Mida was represented by Mr. William Roberts, a lawyer, and Mr. Terry Mills, a land use planner. The other neighbours, both Parties and Participants, represented themselves- the TRCA opted to be an observer, and did not provide any evidence

The Proceeding was spread out over ten days, starting on April 25, 2019, and culminating on April 7, 2022, with final submissions being completed on May 15, 2022, - the first four days were spent on settlement discussions between the Parties, while evidence was heard on the last six days.

It is very important to note that the design went through various changes over the length of the Proceeding, including the elimination of a balcony on the third floor, resulting in multiple changes to the Plans and Elevations, and a series of “updated Plans and Elevations” to the TLAB. This Decision relies on the list of variances listed at the end of the Proceeding, on April 7, 2022.

This fact is repeated at the beginning of the Evidence Section, as well as the Analysis, Findings and Reasons Section because the Evidence, as recited, relies on numbers and measurements stated by the Witness at the Hearing they gave evidence, though the measurements, and variances may have changed by the completion of the Proceeding on April 7, 2022,

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body (‘TLAB’) must be consistent with the 2014 Provincial Policy Statement (‘PPS’) and conform to the Growth Plan of the Greater Golden Horseshoe for the subject area (‘Growth Plan’).

Minor Variance – S. 45(1)

In considering the applications for variances from the Zoning By-laws, the TLAB Panel 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

MATTERS IN ISSUE

1. Section 12.4, By-law No. 7625

The minimum required front yard setback is 6.5 m. The proposed front yard setback is 5.58 m

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2. Section 12.7, By-law No. 7625

The maximum number of permitted storeys is 2. The proposed number of storeys is 3.

3. Section 12.7A, By-law No. 7625

The maximum permitted balcony area is 3.8 m². The proposed balcony area is 18.2 m².

4. Section 12.7, By-law No. 7625

The maximum permitted building height is 8.0 m. The proposed building height is 9.25 m.

The above measurements, and variances reflect the final recital of variances provided by the Applicants on April 7, 2022, after the completion of the Proceeding

EVIDENCE

At the Hearing held on June 12, 2021, Mr. Jonathan Benczkowski, was affirmed, and recognized as an Expert Witness in the area of land use planning. The highlights of his evidence are as follows:

The application before the TLAB, respecting 14 Brookfield, proposes to construct a new three-storey, four-bedroom dwelling with parking located in an integral garage. The lot has an unusual topology, because it steady rises from the frontage facing Brookfield Street to the back of the lot, which faces Old Yonge Street- there is an increase of 18.67 metres in height from the front to the rear of the lot. He emphasized that given how part of the lot came into an environmentally sensitive area of interest to the Toronto Regional Conservation Authority (TRCA), the owner had retained Terraprobe, an independent consulting Geotechnical and Environmental Engineering firm, to conduct a Geotechnical/Slope Stability/Erosion Risk Assessment for the proposed new dwelling that indicated the development as presented is feasible, and that the TRCA “did not object to the proposal”.

14 Brookfield Road is located in the neighbourhood known as “Hoggs Hollow”. The study area selected by Mr. Benczkowski in connection with the Applications is bounded by York Mills Road to the north, Plymbridge Road to the south, and Yonge Street to the east., “because it generally reflects what a resident of the area would experience in their day-to-day lives, as they walk on the streets” He added that “in accordance with OPA 320”, he also reviewed a location more proximate to the Subject Property, including the immediate block of Brookfield Road, where the site is located”. He said that the phototour would demonstrate how there is diversity in the style of dwellings in terms of the built form, and that newer replacement dwellings are scattered throughout the study area. He opined that the massing of buildings is directly related to the age and the style of construction, and that newly constructed dwellings are often larger than existing dwellings as well as taller.

Describing the relationship between the proposal, and the Provincial Policy Statement (PPS,2014), and Growth Plan for the Greater Golden Horseshoe (Growth Plan, 2019), Mr. Benczkowski said that the proposal satisfies the PPS because of the emphasis on intensification, and added that although a replacement of “a single dwelling with a single

dwelling is the most modest form of intensification, it allows for a more efficient and compact use of land within the urban area”, allowing families adequate space as they grow in size,, while providing for the regeneration of an older dwelling in an established neighbourhood.

Mr. Benczkowski opined that the proposal is consistent with the applicable policies of the Growth Plan, which promotes intensification and the achievement of complete communities with a mix of housing options to accommodate households of different sizes at all stages of life. The Growth Plan promotes intensification within built up areas and the achievement of complete communities with a mix of housing options, including detached housing.



PICTURE 1- THE YELLOW COLOURED AREAS ARE THE STUDY AREA CHOSEN BY THE APPLICANTS

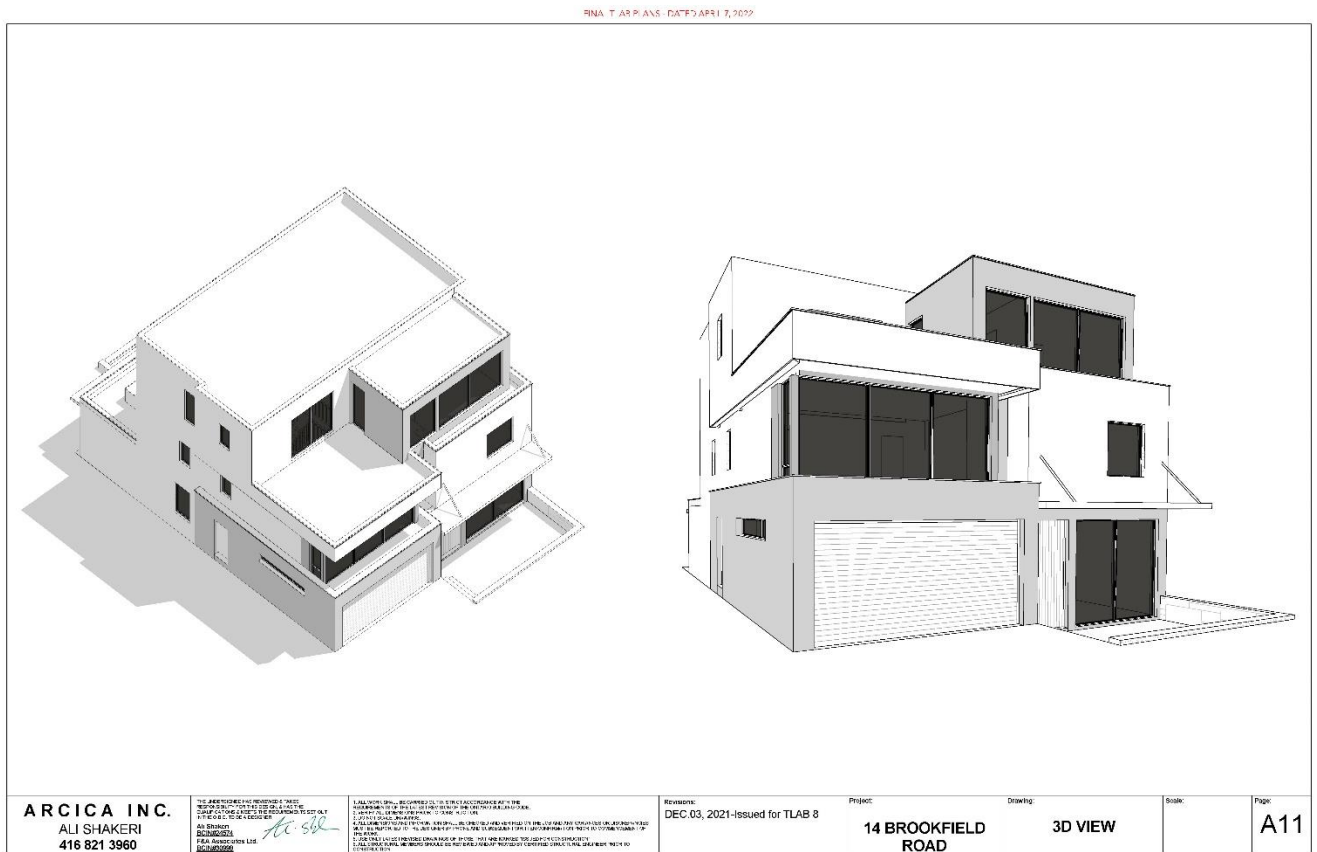
Describing the property, Mr. Benczkowski said that the property is currently occupied by a 1 storey detached brick dwelling, which will be demolished to build a new house if the Appeal were successful. He said that this property has no rights-of-ways or easements registered to the property. The property is irregular in shape as it “flares out to along the western lot line and then narrows as it continues to the rear property line”.

Speaking to the variances, Mr. Benczkowski said that the Application requests a proposed front yard setback of 6.5m. He added that “As both the east and west lot lines of this site have heavy shrubs ,the proposed dwelling will not disrupt the street presence of the adjacent dwellings”. In addition, the proposed front wall of 16 Brookfield Road is set back further than the front wall of the adjacent dwelling to the East at 18 Brookfield Road, as a result of which, the front yard setbacks will be consistent. He asserted that the proposed variance relating to the height and maximum number of storeys, will not result in overlook or shadowing that will create unacceptable adverse impacts on neighbours, before describing the proposed dwelling to be “a true flat roof dwelling”, that contains two functional floors of living above grade, such that the proposed second floor balcony does not extend past the rear wall of the first floor below. He said that the proposed balcony is built within the exterior walls of the dwellings, and any impact of overlook will be mitigated by privacy screening along the eastern portion, before declaring that because there is no neighbour to the rear, and the dwelling to the west is a shallow lot, “ there are no privacy concerns resulting from the deck.

Mr. Benczkowski then spoke to the relationship between the proposal, and the Official Plan (OP). He acknowledged that the Application is subject to the “new OP”, because it was filed on December 10, 2018, after the approval of OPA 320. The Site is classified by the OP as *Neighbourhoods*, which permits low-rise residential uses up to “four storeys in height”. He said that the proposed variances maintain the general intent and purpose of the OP, and comply with the criteria for development in *Neighbourhoods*. The Site is subject to the former North York By-law 7625, but is not subject to the Citywide By-law 569-2013.

The OP recognizes that neighbourhoods will experience physical change and are not frozen in time. The proposal respects and reinforces the physical character of the neighbourhood, which includes a variety of architectural forms as well as a number of new replacement dwellings that have become part of the fabric of the neighbourhood. He added that intent of the OP is to ensure that new development does not propose changes to the neighbourhood that are out of keeping with the existing physical character of other developments within the area.

PICTURE 2 – THE SITE PLAN



PICTURE 3 - PROPOSED HOUSE AT 14 BROOKFIELD - TWO ISOMETRIC VIEWS

Mr. Benczkowski said that in the Neighbourhoods Section 2.3.1 (1), the Official Plan states that ‘Neighbourhoods and Apartment Neighbourhoods are considered to be physically stable areas. On the basis of an extensive photo tour, Mr. Benczkowski described the changes that had taken place in the community, and stated that the proposal was part of a continuum of a change in his Study Area, such that smaller houses were continuously replaced with bigger houses. He asserted that the proposal “respected and reinforced what existed in the community, because it did not offend” the same.

Describing the relationship between the proposal, and the Built Form Policies, Mr. Benczkowski said that the Official Plan states that ‘New development will be located and organized to fit with its existing and/or planned context.’ He described how Built Form policy 3.1.2 (3) requires that new development limit impacts on adjacent streets and properties. This does not require a test of no impact, but ensuring that impact is acceptable given the Site’s existing physical context. Mr. Benczkowski proceeded to describe the challenges resulting from the topology of the Site, and how little land is available to develop the dwelling, as a result of the restrictions imposed by the

environmentally sensitive land of interest to the TRCA, and the topology of the land. He justified how this proposal satisfied the intent of this Policy, while striving to “provide adequate space for a modern family”.

Speaking to the relationship between the proposal, and the development criteria stated in Policy 4.1.5, Mr. Benczkowski said that although OPA 320 introduced the concept of “prevailing” into a number of the criteria,” it does not reduce planning to a numbers game”, before stating that the qualitative aspects of a proposal in totality still must be assessed against the character of the neighbourhood as a whole.

Speaking specifically to the height variance, Mr. Benczkowski said that “the prevailing characteristic in terms of heights, massing, scale and density is mixed.” According to Mr. Benczkowski, original dwellings are typically lower in density than replacement dwellings. In terms of the range of approved variances over a ten-year period, almost all replacement dwellings required a height variance. Given that the scale and height of the proposal is “very modest relative to other replacement dwellings in the neighbourhood, including in the immediate context of the Subject Property, the proposal is part of the prevailing character in the neighbourhood”. Mr. Benczkowski asserted that that the proposal is materially consistent with the prevailing physical character of properties in both the Immediate Block of the Subject Property, and the broader Geographic Neighbourhood, on the basis of which he concluded that the proposal satisfied Policy 4.1.5.

Mr. Benczkowski also noted that that OPA 320 did not modify policy 4.1.8 of the OP, which is a policy recognition that the Zoning By-law standards are intended to ensure compatibility of a new development with the physical character of established residential Neighbourhoods. The proposal’s substantial compliance with the zoning standards is an indication that the proposal is compatible with the physical character of this neighbourhood, although there are some elements of difference, concluding that “*two things can be different, and yet still compatible*”.

Based on this evidence, Mr. Benczkowski concluded that the proposal satisfied the test of the maintaining the General Intent and Purpose of the Official Plan.

I specifically asked Mr. Benczkowski if he had completed a numerical study to establish the “prevailing type”, as stated in Policy 4.1.5, to which he stated that he had not completed such a study. I then asked him to define the “prevailing type”, to which he said that it referred to “the most frequently occurring type”. I then asked him if the expression “most frequently occurring type pointed in the direction of a counting exercise, because the most frequently occurring type can be established if, and only if somebody compiled statistics on the basis of a counting exercise. He agreed with my statement, before repeating his earlier evidence about how “planning is not a numbers game”.

Mr. Benczkowski then spoke to how the proposal satisfied the general intent, and purpose of the Zoning By-Law. After reiterating that the Site is governed only by By-law

7625, where it is zoned R3, Mr. Benczkowski said that the general intent and purpose of Zoning By-laws is to ensure compatible built form within the area, and to ensure that new development does not cause unacceptable adverse impacts on the existing neighbourhood. He asserted that this proposal maintains the intent by not introducing an inappropriate building form, before again emphasizing how the site is very unique in terms of the grading, and lot lines of neighbouring properties. Describing the adjoining lots, Mr. Benczkowski said that the adjacent property to the west along Brookfield Road is at a greater elevation by 1m, there is no lot adjoining lot at the rear of this lot, and the adjacent property to the west is 0.2m below the Subject Property.

Speaking next to the variance respecting the Front Yard Setback, he said that front yard setback intent and purpose is to maintain a consistent street frontage, and the requested variance maintains the street presence of Brookfield Road, as the proposed dwelling is built in-line with the adjacent dwelling to the east. Mr. Benczkowski said that unlike the City wide By-Law 569-2013, the former municipality of North York 7625 Zoning By-law does not take the average of the adjacent dwellings to establish the appropriate front yard setback, but works with a static number, and illustrated how the proposed front wall of 14 Brookfield Road, is in fact slightly behind the adjacent dwelling at 16 Brookfield Road, on the basis of the Site Plan in the Witness Statement. On the basis of this evidence, Mr. Benczkowski asserted that the variance respecting the Front Yard Setback met the intent and purpose of the Zoning By-law.

Speaking next to the By-law respecting the maximum building height, and maximum number of permitted storeys, Mr. Benczkowski said that the purpose of the Zoning By-law respecting maximum building height and maximum number of storeys, and to “create a consistent built form as it relates to height”. He then discussed how Brookfield Rd. has numerous architectural styles that contribute diversity in terms of built form, and how it contains bungalows, two storeys, as well as three storey dwellings. After asserting that newer replacement dwellings are often large, Mr. Benczkowski said that such proposals typically request for increases to the Zoning By-law provision in height as well as storeys, and demonstrated the same from the COA Approvals Chart.

Speaking lastly to the variance respecting the maximum permitted balcony area, Mr. Benczkowski said that the maximum permitted balcony area intent and purpose is to ensure that there is adequate privacy for neighbours, before reiterating yet again, the Challenges posed by the unique site with extreme grade changes. He then discussed how privacy screens would be installed on the balcony, to mitigate privacy concerns resulting from the balcony, before concluding that the variance respecting a balcony, met the purpose and intent of the Zoning By-law.

On the basis of this evidence, Mr. Benczkowski concluded that the proposal satisfied the test of fulfilling the intent, and purpose of the By-laws.

Mr. Benczkowski next discussed how the proposal satisfied the test of minor. He said that requested variances are within the range of other variances in the neighbourhood, as evidenced in the COA Approvals chart. He insisted that the impact of the requested

variances does not push the limits of the Zoning By-Law, and will provide a built form that is compatible what exists in the area. He opined that in view of the proposed “modest height” corresponding to three floors, there was no need to introduce a Sun and Shadow Study. Given the lack of unacceptable adverse impact on the neighbours, he concluded that the proposal met the test of minor.

Lastly, speaking to the test of appropriate development, Mr. Benczkowski said that proposal will provide a modest sized replacement dwelling, which will allow for a functional family home for the owners, and the requested variances will result in a development that is compatible with the surrounding area which has “an array of architectural styles, including modern flat roof dwellings”. Emphasizing that the variances requested are similar to those that have already been approved in the neighbourhood, and are consistent with the development pattern within the study area, Mr. Benczkowski concluded that the proposal met the test of appropriate development.

Given that the proposal satisfied all the four tests under Section 45.1 of the Planning Act, Mr. Benczkowski concluded that the variances should be approved, and that the Appeal should be allowed. He added that the following conditions should be imposed on the approval of the variances:

- 1) That construction occur substantially in accordance with the Revised Site Plan and Elevations
- 2) That there be privacy screens installed on the south and west sides of the proposed balcony.

Through his Cross-Examination of Mr. Benczkowski, Mr. Mahoney established that notwithstanding the undulating nature of the neighbourhood, the Site itself, did not have a major increase in grade from the street, to which the former agreed. Mr. Benczkowski also agreed that the Site could be “intensified”, as stated in the Provincial Policies, through a different design that had fewer storeys, or a smaller house which did not require variances. When discussing Policy 4.1.5, where the issue of “prevailing” was brought up, Mr. Benczkowski reiterated that “planning is not a numbers game”. Mr. Mahoney then recited Policy 4.1.5, parsed different phrases in the Policy, and asked Mr. Benczkowski if a house with three floors “prevailed” along Brookfield, or if the physical character of the proposed three storeyed house was consistent with what existed in the street, to which Mr. Benczkowski’s unwavering answer was a “Yes”, which he justified on the basis of “massing” as observed from the street. Mr. Mahoney suggested that the idea of “respect and reinforce” went “significantly beyond” “not offending the status quo”, as suggested by Mr. Benczkowski, to which the latter kept insisting that the “not offending”, and “respect and reinforce”, “are one and the same”.

In his brief Cross-Examination of Mr. Benczkowski, Mr. Roberts pointed out that By-law 7625 did not permit more than 2 storeys, and restricted the area of the flat roofed portion of the house to 25% of the ground floor, and asked the former how did the design maintain the intent, and purpose of this By-law. Mr. Benczkowski stated that the massing of the house was such that it would not be different from that of other houses in

the neighbourhood, even if the other houses had two floors, and a smaller height. Mr. Roberts also noted the numerical nature of the determination of “prevailing”, as being “the most frequently occurring”, and asked Mr. Benczkowski how many three storey houses, with a fully developed, and visible third storey,, existed in the community, to which Mr. Benczkowski stated that he didn’t know the answer. In response to a question if the proposal opposed the intent and purpose of the By-law, by “transposing” the heights of the flat roofs, and sloped roofs i.e. a flat roof, with the height exceeding that of a sloped roof, Mr. Benczkowski again emphasized how the massing would be comparable to what existed in the community.

Mr. Samgorad asked Mr. Benczkowski to state the distance between the Subject Property and his house, at the height of the lower balcony, and was advised that the separation was 19 feet. When asked about the height of the lower balcony, Mr. Benczkowski said that it would approximately be 9 feet- he agreed with Mr. Samgrad, that the height of the lower balcony of the proposed house, would be at the same height as the second floor of Mr. Samgrad’s house. Mr. Samograd expressed concerns about the “permanency” of the planters on the second floor, and said that the arrangement did not “sound permanent at all”, because of how “easily” the planters could be replaced.

Mr. Mida was the next Witness to give evidence. He expressed concern about how the proposed building, “with three floors, and huge balcony” would impact the community, given its imposing presence, and resulting concerns from the neighbours about their loss of privacy. In Cross-Examination, he agreed that different kinds of houses could co-exist with each other. However, he disagreed with Ms. Stewart, when she suggested that if his “two storey house had a pitched roof, instead of a flat roof, and had dormer windows, it would be comparable to what existed next door to his house, stating that the houses would look very different”. When Ms. Stewart suggested that the proposal had a “partial third floor”, because it had 59% of the GFA of the first floor, Mr. Mida disagreed strongly, expressing his opinion about the proposal having a very prominent, distinctive third storey, by saying that “if something walked like a duck, quacked like a duck, and looked like a duck, then it had to be a duck!”

Ms. Aileen Keng, a land use planner who works with the City, was the next Witness to be affirmed, and recognized as an Expert Witness in the discipline of land use planning. Ms. Keng acknowledged that she had adopted the Witness Statement of Ms. Simona Rasanu, the City Planner who was originally scheduled to testify in this case. The highlights of Ms. Keng’s testimony are as follows:

She acknowledged the unusual shape of the lot, and that the elevation increases significantly from the front of the Property, adjacent to Brookfield Road towards the rear of the lot near Yonge Street, with the front elevation being 125 metre above sea level, and 144 metres above sea level at the back of the property.

The neighbourhood is bounded generally by Old York Mills Road to the north, Donwoods Drive and Knightswood Road to the south (including properties fronting

these streets), York Mills Park/Jolly Miller Park to the west, and York Valley Crescent (including properties fronting this street) to the east.

Ms. Keng said that her Neighbourhood Study Area consisted of 344 lots, all of which are designated *Neighbourhoods* under the OP- However, a few properties are subject to City of Toronto Zoning By-law No. 569-2013, including certain properties located on Brookfield Road. Ms. Keng spoke to how the surrounding area has a very distinctive character, with the neighbourhood study area is located in the Hoggs Hollow neighbourhood in North Toronto. The meandering Don River and its valley shape the topography of the neighbourhood, resulting in a curvilinear street network, cul-de-sacs and steep hillsides. She described the community as being a “quiet, suburban neighbourhood with almost no sidewalks”, and stated that “extensive landscaping and large, mature trees “are also part of the neighbourhood's character.

She added that her Neighbourhood Study Area is characterized by spacious dwellings of varying architectural styles situated on large, deep lots. Most (approximately 93%) of the lots have a width of at least 15 m, with approximately 54% of the lots having a depth of at least 50 m. According to Ms. Keng, “most (approximately 64%) of the lots, including the Subject Property, have an area of at least 1,000 sq.m”, and “two-storey detached dwellings are the most common building form”. She added that there are a few bungalows located in the neighbourhood., and a small minority of the more recent replacement dwellings are identified as “three-storey dwellings under the Zoning bylaw(s)”.

Speaking to the relationship between the proposal, and the higher level Provincial Policies, Ms. Keng said that while “she did not take issue with specific policies in the higher Provincial Policies, it is important to remember that the Official Plan is meant to implement these Provincial Policies and that conformity with the Official Plan is required to fully implement these provincial policies. The Official Plan, in turn, is implemented through planning instruments, including Zoning By-laws”.

Discussing the relationship between the proposal, and the OP, Ms. Keng reviewed Sections 2.1.3 , 3.1.2, and 4.1.5 of the OP, before describing the proposal, “which presents itself as a three-storey dwelling in a contemporary/modern architectural style - three sets of windows corresponding to the three proposed floors are clearly evident on the drawings”. Ms. Keng pointed out four windows are evident on the front elevation drawing as the basement window is also clearly illustrated.

Ms. Keng contrasted this proposal with other variances for a third storey, approved by the COA, which “do not present like three-storey dwellings from the street, because the storeys are hidden (i.e. part of) the rooflines”. She specifically spoke to 3 Brookfield, and 41 Brookfield, “where a variance was approved for a third floor, such that the third storey appears as a discreet part of the roofline”. In addition, Ms. Keng said that given the unusual topography of the neighbourhood, because building height under the Zoning By-law is measured from the elevation of the centre line of the street (i.e. established grade), some houses are located on hillsides, and at a significant distance

from the road, and therefore trigger a significant height variance if redeveloped. She demonstrated how this phenomenon is illustrated by the dwelling at 16 Donino Avenue, where a significant height variance was approved for a dwelling on the property that was set back, above established grade, which is measured from the centre line of the street. She added that the Property under appeal does not have to contend with this site-specific challenge, as the elevation of the front portion of the property fronting Brookfield Road is similar to the elevation at the centre line of the street (at a height of 125-126 m above sea level), before noting that only the rear of the Property has a significantly higher elevation.

After distinguishing between pitched roofs and flat roofs, Ms. Keng said that in contrast to a pitched roof, “a tall flat roof distributes its massing more evenly over the entire roofline, creating a box-like effect that can make the house appear taller and more massive from the street than other designs”, and underlined the fact that this is why the Zoning By-law has a taller height permission for a pitched-roof house in comparison to a flat-roofed house. She said that it is important to note that the proposed dwelling would have a building height of 10.95 m, which represents a significant increase of 2.15 m over the building height associated with any roof, including a pitched roof, which has a permitted height of 8.80 m. She emphasized that the proposed dwelling would not be permitted as-of-right, even if the roof slope was changed to comply with the technical requirements of a pitched roof.

Ms. Keng said that if approved, the proposed dwelling would be the tallest flat-roofed structure on Brookfield Road, and emphasized that the height combined with the design of the dwelling, would be noticeably out of keeping with the height, massing and scale of nearby properties. She concluded by stating in her opinion, the proposed number of storeys and excessive building height do not respect and reinforce the existing prevailing heights, massing and scale of the geographic neighbourhood and its physical character

Ms. Keng said that the balcony, don't meet the intent of By-Law 7625, because the Zoning By-law permitted a maximum area of 3.8 sq.m/balcony. She said that the intent of the balcony area permissions is to restrict the number of people who can occupy the space at the same time to mitigate privacy and overlook impacts. The areas of the proposed balcony, present privacy concerns for the adjacent properties and do not consequently meet in the intent of the Zoning By-law. This large balcony have the potential to accommodate a large number of people who can look over into the backyards of the properties to the east and west

Referring to her COA decision table, Ms. Keng said that 158 minor variance applications were identified in the study area since 2000. On the basis of this decision table, she said that new two-storey dwellings have been the predominant type of replacement building form. For example, of the 58 minor variance applications that were approved for height and/or storey variances and therefore relevant for the review of the Application, over 80% of the replacement dwellings have been two storey dwellings

Given that three storeys are being requested, with a 10.95 metre flat roof on top of the three storeys, Ms. Keng concluded that the Application does not meet the intent of the Zoning By-law as the variances, especially the number of storeys and the building height, are a significant departure from the zoning permissions.

Speaking to the test of minor, Ms. Keng concluded that the requested variances are not minor quantitatively, because the proposed building height is a significant departure from the permitted zoning permission, and the proposed number of storeys and building height, cumulatively, would not respect and reinforce the prevailing heights, massing and scale of the surrounding geographic neighbourhood. She also added that the requested variances qualitatively did not meet the test of minor, because of significant concerns over privacy, as well as the cumulative effect of an excessively tall flat-roofed structure would not be in keeping with the existing Brookfield Road streetscape, as well as the surrounding geographic neighbourhood.

Ms. Keng did not express an explicit opinion regarding the test of appropriate development. She concluded that given that the proposal did not meet at least three out of the four tests under Section 45.1 of the Planning Act, all the requested variances should be refused.

Ms. Stewart's cross-examination of Ms. Keng, focused on the relationship between neighbouring houses on Brookfield, Ivor, Danino and Old Yonge Streets. While Ms. Keng agreed with Ms. Stewart about the ability of different types of houses, with different architectural styles, and different number of storeys to co-exist with each other, she demurred, and said that she had to "think to see if she could agree", when Ms. Stewart suggested that the massing on the proposed house, with three floors that are distinctive and distinguishable, and a flat roof, could "co-exist" with other houses on the street, given that the latter are shorter houses, with pitched roofs. While Ms. Keng was willing to concede that a house with three floors, such that the third floor was built into the roof, could co-exist with houses with two storeys, and different arrangements of roofs, she did not answer in the affirmative when asked about a house with three storeys, such that the top floor could be clearly seen from the street, capped with a flat roof. Ms. Keng also did not agree with Ms. Stewart's suggestion that a house, where the top floor had 59% of the floor area of the ground floor, could be considered to be a "partial third floor".

Mr. Jamie Samograd, the next Witness, spoke to "how the 10.95 metre high house, towering over my 6 metre high home" would "destroy the privacy of our backyard, and block significant sunlight". He spoke about the specific privacy concerns caused as a result of the residents of the Subject Property, and how guests standing in the proposed balcony, could look over onto the pool at the back of Mr. Samograd's property, which was used by his three children, "including two young girls". He also expressed concerns about how the second floor balcony of the proposal "will look directly into their second floor bathroom window, and how noise originating from the recreation area on the 2nd floor "will spread freely to our backyard without any possible attenuation of sound by shrubbery, ground impedance of sound, or even a "privacy fence".

The next Witness to testify was Mr. Terry Mills, who is a trained land user planner by profession, and was retained by Party Mida. It is important to note that many of his remarks are not repeated here, because they resonate with concerns expressed by other Witness, whose evidence has been recited earlier in this Section. I therefore recite some of the interesting, “value-add” points made by Mr. Mills, below:

The Subject Lot contains a small tableland area at the base of the ravine's slope. The existing house is situated on this tableland, and the proposed replacement house is to be situated in this same location.

Mr. Mills’ Study Area includes bottom-lands that are governed by By-law 7625, properties are governed by By-law 569-2013, properties that are built at the 'toe' of the ravine and are governed by By-law 569-2013, and Campbell Crescent (to capture the “bottom lands”, governed by By-law 569-2013).

Mr. Mills said that he collected MPAC data for the 250 houses in his Study Area to establish a profile of all the properties in this neighbourhood, “ranked and sorted the data, to generate a series of charts to summarize the neighbourhood’s statistics”. He noted that MPAC uses a system of effective measurements for frontage, depth and site area for irregular lots, to enable meaningful comparison between different shaped lots.. Based on this analysis, Mr. Mills concluded that in the entire array of 250 houses in the Study Area, only 13 (5%) were identified as having more than two-storeys. He also provided information about how MPAC classified the buildings based on the number of storeys

- one was identified as 2¼-storeys
- six were identified as 2½-storeys
- three were identified as 2¾-storeys, and
- two were identified as being 3-storeys

Mr. Mills said that based on his observations, the houses referenced to above, have sloped roofs rather than flat roofs, with partial third-floors beneath the roof line with dormer windows. He opined that these houses appear to have been built with their third floors at the outset, with the exception of 34 Donino Avenue, where the third storey was a later add-on. He said that these houses were predominantly built prior to the introduction of By-law 7625, and that 86 Plymbridge Road was built in 2015, and is better described as a two-storey house built on a knoll with an integral garage, suggesting a three-storey configuration.

Mr. Mills’ Immediate Context consists of include Brookfield Road as a whole, including the four houses situated east of the Plymbridge Crescent intersection.

He said that based on his research, along the north side of Brookfield Road, the houses from No.14 to No. 22, are closely arranged beside each other on relatively consistent lot widths, and have front yard setbacks that are substantially in line. The front yard variance relates to the edge of the underlying street allowance edge, and it does not

relate to the visible path of the roadway. The proposed building's encroachment into the front yard setback at this bend in the street allowance line will have an amplifying effect when considered along with the cumulative effects of the proposed building's three-storey flat-roof box form design, and its 2.15m additional height beyond the standard, resulting in Mr. Mills' conclusion that the proposal cannot be envisioned as respecting and reinforcing the existing context.

Beyond 28 Brookfield Road, Mr. Mills said that his research suggested the houses are set back 18 metres, or more, from the road. He added that the separation from the house to the roadway increases the need to provide an adequate soft landscaped sleeve, and to accommodate the tree canopy that is a characteristic throughout the Study Area. As a result of this observation, Mr. Mill found the proposed encroachment of the development into the front yard setback to be "undesirable".

Based on this analysis, Mr. Mills concluded that the proposal does not respect and reinforce the existing character of the neighbourhood.

In addition to the approvals already mentioned, Mr. Mills stated that the MPAC data identified another thirteen houses within the Study Area's 250 houses as being greater than two-storeys, all of which were built prior to 2007. At present the highest excess (proposed -vs- permitted) approval recorded is 2.2m, at 86 Plymbridge Road. He noted that under By-law 7625, height is measured from the crown of the centre of the road, and 86 Plymbridge Road is set on top of a knoll more than 1.5 metres in height, whereas, the building site on 14 Brookfield Road is "flush with the road".

The front yard setbacks of the adjoining properties to the east (4 Brookfield Road) and west (16 Brookfield Road) of 14 Brookfield Road are 6.68m and 6.27m respectively. Mr. Mill pointed out that these distances need to be considered in the light of the bends in the street line, "which are not carried into the road's alignment creating a greater curb to building face distance with respect to 4 Brookfield Road". He pointed out that 14 Brookfield Road proposes to encroach into the required 6.5m front yard setback by 0.92m, adding, that if this were permitted to occur, then 14 Brookfield Road will be situated 1.0 metre forward of the alignment of the adjoining houses, and in addition, visibly out of alignment with the general array of houses. He also emphasized that this streetscape pattern extends along the north side of the street from #2 through to #28 Brookfield Road, at which point the setback expands to 18m.

On the basis of this evidence, Mr. Mills concluded that the proposed development does not meet the requirement that: "no changes will be made through minor variance that are out of keeping with the physical character of the neighbourhood,

He then focused on Policy 5.6.13 of the OP, which is recited below:

Policy 5.6.13.

When an application for rezoning or minor variance is received in a Neighbourhood [...]

where no numeric height or density limit is specified in this [Official] Plan:

c) a determination will be made as to whether or not such height and/or density limits as are contained in the applicable Zoning By-law implement the Plan, irrespective of whether enactment of the By-law pre-dates approval of the Plan; and

d) where they implement the Plan, such limits will be considered to be an important element and point of reference in the assessment of the application. Any increase beyond these limits will require appropriate planning justification consistent with the policies of the Plan.

Mr. Mills expanded on the Policy above to conclude that there is no planning justification for increasing the density, before concluding that the requested variances do not maintain the general intent and purpose of the Official Policy (OP).

Speaking next to the general intent and purpose of the Zoning By-laws, Mr. Mills spoke to the request for a front yard setback of 6.5 metres. He said that the intention of this standard is to establish and maintain a harmonious streetscape, and to modulate the relationship between adjacent house and nearby houses. Shifting the proposed house forward by approving a reduced front yard setback of 5.58m will result in the building standing out in front of the present alignment by 0.9m (3-feet). Mr. Mills pointed out that this reduced setback is to be appreciated in particular in terms of the cumulative effects of being a flat-roof box form building that is 2.95m higher than the maximum permitted building height, and being three-storeys, where only two-storeys is permitted.

Speaking to the variance requesting for three storeys, Mr. Mills said that the intention of the "two-storey standard" is to modulate the scale and mass of buildings throughout a neighbourhood, and to carry this down through to the relationships amongst adjacent buildings. The proposed three-storey flat-roof box form building involves a distinctly different typology, different from the few examples (14 out of 250 houses) of three-storey houses to be found within the Study Area which have housed habitable third-floor spaces, tucked into sloped-roofs with dormer windows, on the basis of which he concluded that three-storey flat-roof box form building will not fit harmoniously into this predominantly two-storey neighbourhood, as is evident in this proposal. He concluded that "there is a failure to respect and reinforce the well established existing character of the neighbourhood". Based on this analysis, Mr. Mills concluded that the introduction of a three-storey would be extremely disruptive.

Speaking to the height variance, Mr. Mills said that if the requested height variance of 10.95m were approved, it would surpass any height increase approved since 2007, noting that By-law 7625 measures height from the centre of the road. Distinguishing it from other proposals where construction has to take place part way up a slope, "which is often a contributing factor in variance requests for additional height", Mr. Mills said that there was no such factor that contributed to the height of the proposal, and concluded that the height variance should not satisfy the intent and purpose of By-Law 7625.

Speaking to the variances for the third floor, and balcony, Mr. Mills said that the upper levels of houses are above the main floor, “with its high activity functions, whereas, upper floors are primarily bedroom levels where a high degree of quiet enjoyment is expected”. Small balconies can augment the functions of a bedroom level, in providing an outdoor space extension of bedroom areas – recognizing that bedrooms have a variety of purposes besides sleeping. He added that small balconies can augment a personal private space, providing somewhere to read and study.

Mr. Mills then stated that the impact of the large balcony, in this proposal, is exacerbated by the deficiency in tableland to accommodate adequate outdoor living functions, such as those available in the neighbouring properties’ availability of outdoor space for deck based activities, playing area and pools. As a result, Mr. Mills said that he was concerned that this large balcony will experience a migration of ground-related activities to the balcony in question, increasing the degree of adverse impacts on the neighbouring properties, in terms of overview and again noise and interruptions to the bedroom strata.

Based on this analysis, Mr. Mills concluded that the requested variances did not maintain the intent and purpose of By-law 7625.

Mr. Mills said that the variances did not satisfy the test of minor, because of their individual, and collective impact, with specific reference to privacy- this component of Mr. Mill’s evidence is not recited in detail, because it mirrors the evidence of other Witnesses before him.

Lastly, speaking to the test of appropriate development, Mr. Mills said that the proposal, if approved, would result in the introduction of a third storey, with a full flat roof, which conflicts with the neighbourhood’s character in general and the Brookfield Road streetscape in particular. He expressed concerns about the approval of the two balcony, because the intention of a balcony on a higher floor, is to permit small, quiet, passive outdoor platforms above the main floor level, and to curtail more populous and active functions, to reduce adverse intrusions upon neighbours’ privacy and maintain the tranquility of the bedroom stratum. He expressed concerns about the approval of the front yard setback, because it would bring a very tall house closer to the road than other houses, adversely interrupting the character of the Brookfield Road streetscape. Based on this analysis, Mr. Mills concluded that the proposal does not satisfy the test of appropriate development, and recommended that the proposal be refused in its entirety.

Ms. Stewart cross-examined Mr. Mills about his use of MPAC data to come to conclusions regarding the proposal, which the latter defended as being accurate, and reliable, based on his “more than twenty years of experience as a designer-builder”. He disagreed with Ms. Stewart’s suggestion that the proposal could be considered a house with a partial third floor, because the top floor occupied 59% of the GFA of the first floor, by referring to the North York By-Law’s stating that a third floor could not occupy more than 25% of the ground floor. When Ms. Stewart went through a comparison of the proposal, with other houses in his Study Area, which had three (or even four) visible

floors, when seen from the street, Mr. Mills questioned the basis of Ms. Stewart's conclusions, because the houses she referred to were governed by By-law 569-2013, as opposed to the Site, which was governed by By-law 7625. While Mr. Mills agreed with Ms. Stewart that the existing foliage, and shrubbery, separating the Site from 16 Brookfield, would result in "some mitigation" of privacy concerns, he disagreed with the Applicant's position that it would significantly mitigate privacy concerns. Lastly, Mr. Mills disagreed with Ms. Stewart that the ability of a house to "co-exist" with its neighbours implied that the former respected and reinforced the latter, because "co-existence is a lower standard", than "respect and reinforce".

Given that the proposal does not satisfy any of the 4 tests under Section 45.1 of the Planning Act, Mr. Mills recommended that the variances be refused.

Ms. Susan Lipchak, Mr. Hugh Redelmeier and Mr. David Austin, all of whom are community residents, spoke in opposition to the proposal. Ms. Lipchak and Mr. Redelmeier complained about the impact of "an imposing house" on Brookfield, and the impact it would eventually have on the community, by encouraging others to build similar houses throughout the community, resulting in significant negative changes to character of the community. Mr. Austin said that he "lives opposite" the Site, and focused on how the planned windows on the third floor, would allow the Applicants to look into the bedrooms at the front of his house, which were occupied by his young children. He added that the resulting privacy issue would be worsened if the variance respecting the reduced front yard setback were approved.

In response to a question from me about the interdependence of the variances on each other, Ms. Stewart submitted that the Front Yard Setback variance was not dependent on any of the other variances. Mr. Mahoney stated that the Applicants had not brought forward any evidence to demonstrate that the front yard variance was independent of other variances, and objected to the submission.

I thanked the Parties and Participants for their evidence, and asked the Applicants to submit the final version of the Plans, and Elevations, which had undergone numerous changes, and alterations throughout the Proceeding, as well as the corresponding variances, and suggested conditions to be imposed, if the variances were approved.

The final submissions were completed on May 16, 2022.

ANALYSIS, FINDINGS, REASONS

It is important to state the principles that I will rely on for the purposes of adjudicating this Appeal:

- It is trite law to state that the Applicants bear the onus to prove their case. Consequently I have relied primarily on the Applicants' evidence to come to findings in this Appeal. Notwithstanding my primary reliance on their evidence, I have

nevertheless recited the evidence of the Opposition in some detail, with specific reference to the evidence adduced by the community members, as an acknowledgement of their consistent and constant involvement throughout the Proceeding- in other words, the community members need to be assured that their concerns have been heard loud and clear, and have been noted, and reflected upon in this Proceeding.

- It is important that the Applicants adduce adequate evidence to demonstrate that every variance satisfies all the four tests under Section 45.1 of the OP. Likewise, with respect to the test respecting the Official Policy, it is important that each variance satisfy all the relevant policies in question- a variance's failure to satisfy any one, or more of the relevant policies will result in an overall refusal of the variance.
- It is also important to identify the corpus of evidence that has not been relied upon to make findings. Notwithstanding the interesting evidence from Party Mida regarding the concept of "density", and the use of MPAC data to arrive at conclusions, I have not analyzed this information, or made findings, based on this information. My decision is the result of the earlier principle that the onus of proving their case rests with the Applicants. As will be seen at the end of this Section, it is possible to arrive at supportable findings without relying on the aforementioned information.
- As stated earlier in this Decision, and reiterated here, the proposal went through a series of changes throughout the Hearing, resulting in multiple updated submissions to the TLAB. Consequently, the measurements that the Witness cited when giving evidence, may not be reflected in the recital of variances in the "Matters" Section- these "incorrect measurements" are recited in the Evidence Section, because the recital of evidence has to faithfully reflect what was said by the Witness on the stand, even if the measurements they relied on eventually underwent multiple changes.

I reiterate that the measurements of the variances utilized for making findings reflect the recital provided by the Appellants on April 7, 2022- this list is also reproduced in the "Matters in Issue" Section of this Decision.

- I will assume the interdependence of all the variances with respect to each other- in other words, every variance is linked to the other variances requested in this Appeal. As noted in the Evidence Section, Counsel for the Applicants submitted that the front yard variance was not dependent on other variances. Counsel for the City objected to this submission, because evidence had not been adduced about how the front yard variance was not dependent on other variances, and the Opposition did not have an opportunity to cross-examine the Applicants' Witness on this question.

As such, the interdependence of some of the variances is self-evident, and the interdependence of other variance discernable through analysis. With respect to

making findings, my acceptance of the interdependence of the variances means that they are approved, or refused together.

- One of the interesting issues that was initially raised by one of the Parties is the impact of building a house close to an environmentally sensitive area, and the “Long Term Stable Toe of Slope (LTSOS)”. However, the Applicants submitted a study completed by Terraprobe, who are specialists in geotechnical issues, to the TRCA. The Applicants described the TRCA’s reaction as- “Their agreement was evident from their not issuing a report opposing the proposal.” I note that the TRCA elected for Participant status, and that a representative of the TRCA was present throughout the Proceeding, but did not provide any evidence.

On the basis of the TRCA’s lack of participation, notwithstanding their consistent presence, I find that a supportable decision can be made on the variances, without references to the environmentally sensitive nature of a portion of the lot at the Subject Site.

At the crux of this Appeal, is a large lot that has an unusual shape, with not just one, but two distinctive geographical features- on the one hand, there is a steady increase in elevation from the front of the lot, facing Brookfield Rd. to the back of the lot, which faces Old Yonge Street- the increase in elevation between the front and the back of the lot is somewhere between 18-19 metres, based on the information provided by the Parties. On the other hand, part of the lot is part of an environmentally sensitive area of interest to the TRCA, which cannot be utilized for construction

The Applicants argued that the design of the proposed house is the result of the juxtaposition of dual challenges resulting from:

- The need to build a house that responds to the needs of a “modern family”
- The shape, and topology of the lot, with little more than a “table land” available for construction.

It is important for me to state my understanding of what the Applicants want to build if the variances are approved:

- The proposed house consists of a basement, and a main floor, that is one level each.
- The second floor is a split floor. There is a bedroom located at the southwest corner of the house above the garage. Eight steps up the stairs from this bedroom, we have the master bedroom, which makes up the rest of the second floor
- On the second floor, there is a balcony, with an area of 18.2 sq.m, facing the back of the lot
- The third-floor is again split-level, such that one of the bedrooms is in the southwest corner, above one of the bedrooms on the second floor. . Eight steps up the staircase from this bedroom, there is another bedroom, and an “Office”, with an attached bathroom.
- The proposed building has a flat roof with a height of 9.25 m, whereas, the maximum permitted building height is 8m.

I prefer not to delve into a discussion of the relationship between the proposal, and the higher level Provincial Policies on the basis of how the proposal exemplifies “intensification”. On the basis of the lack of vigorous discussion, or debate from the Opposition on the proposal’s ability to satisfy the higher level Provincial Policies, I am prepared to conclude that the proposal satisfies the higher level Provincial Policies.

A fundamental thesis underlying the Applicants’ evidence is that the “massing” of the proposed building, “respects and reinforces” what already exists in the community. Another fundamental facet of the same theory is that their proposal “respects and reinforces” what exists in the community, by virtue of not “offending” what exists in the community.

Given how this theory has been a leitmotif throughout their evidence, it is important to answer two questions, one regarding the equivalence of “not offending”, with “respect and reinforce”, and the other regarding the “massing” of the proposed dwelling before proceeding to answer the proposal’s ability to maintain the intent, and purpose of the OP:

1) Is a proposal’s “not offending the community character”, the same as “respecting and reinforcing” the community character?

It is important to note that both opposing Counsel raised this question in Cross-Examination, to which the Applicants stated that “by not offending” the community character, their proposal “respected and reinforced the community character”.

I begin by noting that when the phrases “not offending”, and “respect and reinforce” are analyzed on the basis of the effort required to complete the respective tasks, it becomes difficult to equate the two because while the former involved pro-active action, the second is closer to the lack of any action- as Counsel for the City pointed out in Cross-Examination, the concept of “respect and reinforce” involves two different activities, while “not offending” is passive, and involves no action.

In planning-speak, “respect” in the context of the expression “respect and reinforce” is interpreted as “to have regard for”, an answer that was also provided in this Hearing by the Applicants. I interpret “having regard for”, as the new proposal deferring to what exists in the community, which is then followed by the action of “reinforce”, or the new proposal’s contributing to the community character, such that it emerges stronger and sturdier.

I find that the deliberate, and dynamic actions associated with the expression “respect and reinforce the character” contrasts with the relative inaction of “not offending the character”, which I interpret to mean to not transgress, or trespass on the character. If the expression “taking one’s hat off” symbolizes “respect”, “reinforce” may be visualized as “taking it (the character of the community in this case) to the next level”, while “not offensive” is the equivalent of “not stepping on the feet of others”. When visualized in

this fashion, it is evident that there is more than a discernable difference between the expressions “respect and reinforce”, when compared to “not offensive” because the former action needs to meet a much higher threshold in terms of responsibilities than the latter.

As a result, I disagree with the Applicant’s interpretation of the impact of their proposal, where it “reinforces and respects”, by not offending what exists.

2) Does the Applicants’ evidence support their contention that the massing of the proposed house reinforces and respects what exists in the community?

The Applicants’ position throughout their Evidence-in-Chief, as well as their Cross-Examination, mirrored their theory that the “massing” of the proposed house, when seen from Brookfield Road, reinforced the character of the neighbourhood, based on comparisons between the proposal, and other comparators in the community.

The response of the Witnesses in opposition, to questions stemming from this theory asked by way of Cross-Examination, was telling, and left an indelible impression on my understanding of this Appeal- ranging from the straight-forward “*if it walks like a duck, quacks like a duck, and looks like a duck, it has to be a duck*” to the cautious “*That is an interesting perspective- I really have to think to see if I can agree with that.*” To put it colloquially, no Witness “bought” the Applicants’ theory that the massing of the planned house, being comparable to the “massing” of houses that already exist in the community, with specific reference to Brookfield. The unanimity of agreement among the Witnesses, ranging from qualified Expert Witnesses to community members, who professed no knowledge of planning, was unanimous- the massing of the proposal did not “respect and reinforce” what exists in the community.

The planners for the Opposition did not agree with the Applicants’ proposition that the impact caused by the top floor, which is 59% of the area of the first floor, was comparable to the impact of a “hidden” third storey, by virtue of its windows being built into the roof of the house.

Since a picture is worth a thousand words, it is important for me to include the following photographs, beginning with the Subject Site, to make a finding about the Applicants’ theory about the design respecting the character of the community. .



PICTURE 4 - THE SUBJECT PROPERTY AS IT EXISTS NOW - NO ELEVATION AT THE FRONT OF THE HOUSE

The Applicants argued that the house, if built with the requested variances, would have a comparable massing as the dwellings featured below in Pictures 5 and 6, both of which are in the Study Area- the addresses have been deliberately omitted because of privacy concerns. I find that the impressive appearance of many of the buildings identified by the comparators, including those below, is a combination of the height, storeys, the roof style, **and** (my emphasis) the discernable height difference between the road, and the façade of the building. However, in the case of the Subject Property, the visual impression from the street is caused only by the height, number of storeys and the roof style, without reference to the height difference between the road, and the front of the house, which is negligible. Consequently, the comparison between the Subject Property and many of the other comparators put forward by the Applicants, is literally and figuratively, an apples to pineapples comparison, because of the height difference discussed earlier in this paragraph.



PICTURE 5 - A HOUSE WITH A FLAT ROOF BUILT ON AN ELEVATION



PICTURE 6 - A COMPARATOR WITH A PITCHED ROOF BUILT ON AN ELEVATION

It is also important to note that the separation between the road and fronts of the houses in the cases of these comparators, in conjunction with the foliage, and tree canopy resulting from the vegetation between the road and the dwelling, helps mitigate the impact of the buildings, when seen from the road. In the case of the Subject Site, the opposite happens- the building is closer to the road, as well as the property to the east, which means that there is less scope for tree canopy, and foliage to mitigate the visual impact of the proposed house on Brookfield Rd.

The examples of the two houses with three floors on Brookfield, namely 3 and 41 Brookfield, are not comparable, because the third floor is hidden within the sloping roof.

As a result, I find that the proposed massing does not respect and reinforce the prevailing massing of the houses in the Immediate Context

The discussion above, which focuses on massing, is also pertinent to the question of the relationship between the proposal, and its ability to maintain the intent, and purpose of the OP, which is discussed next.

3) Do the requested variances satisfy the test of maintaining the intent and purpose of the Official Policy?

With respect to the test respecting the Official Policy, the Parties provided evidence with respect to Policies 2.3.1, 3.1.2, and 4.1.5.

There is no finding made about the appropriateness of the Applicants' Study Area, since it overlaps with the Study Areas selected by the Opposition. More importantly, there is also a significant overlap between the Immediate Contexts chosen by all the Parties, which is determinative to the Appeal before me, because of the significance assigned to the Immediate Context, when there are significant differences between the Immediate Context and the General Neighbourhood. Where necessary, I will rely on the Immediate Context, as identified by the Applicants, for making findings

It is also important to note that when Cross-Examined by the City, the Appellants conceded that grade differentials between the street, and the façade of the proposed building at the Site, is not a significant issue. In other words, the topology of the Site plays no part in determining the design of the proposed house, as was originally suggested during the Applicant's Examination-in Chief

The analysis presented below focuses on Policies 3.1.2, and 4.1.5. Given my finding at the beginning of this Section, which said that the lack of evidence from TRCA is interpreted to mean that the Natural Environment Policies are satisfied, there is no need to analyze how Section 3.4 applies to the variances. The reason for not providing an analysis with respect to Policy 2.3.1 is provided at the end of this Section, which discusses why it is not necessary to make findings on all questions.

With respect to Policy 3.1.2 (Built Form), the Applicants' evidence dwelt on how the topography of the area was uneven, and how the resulting unevenness had influenced the building of houses on Brookfield, including the proposal, which were "compatible with each other", notwithstanding the differences in height, and how far, or how close they were to the street.

While the Applicant's photo tour was helpful in helping me understand how the character of Brookfield Street is a mosaic of diversity of various kinds of houses, I find that the built form of the proposal, asks for a full three floors, which are built all the way to the front of the house, with a boxy look resulting from the requested flat roof, all of which unabashedly, if not aggressively, announce a formidable presence of a building that towers over its neighbours- as stated earlier, this is a stark contrast to the perception of the third floor at 3 Brookfield, and 41 Brookfield, the two other houses used as comparators, because the third floor is unobtrusive by virtue of being "hidden"

in the roof. I find that the towering presence of the proposal at the Site, is not consistent with the “respect and reinforce” mantra advised by the OP.

This visual impact discussed earlier, is aggravated by its privacy impacts, discussed below.

It is important to note that there is a significantly balcony on the second floor. All the Parties and Participants who spoke in opposition to the proposal, specifically referred to the size of the balcony, and how approving them would result in unacceptable privacy concerns, including those that would impact the neighbours’ children, as they sleep in their bedrooms, or relax in a swimming pool in the backyard of their house. In response to these concerns, the best solution that the Applicants could offer was the installation of privacy screens on the balcony. Even if the installation of privacy screens helps address privacy concerns, it is not evident as to how they will address noise related concerns, which was also raised by the neighbours. Given the sheer size of the balcony, it is not clear about how many guests/residents would be standing here, and what impact their conversations would have on their neighbours- given the lack of appropriate evidence to satisfy me that the noise concerns, and privacy concerns would be appropriately addressed, I find that the size of the balcony causes a serious concern in terms of noise, and privacy issues.

Given that the reduced front yard setback brings the property closer to the property to the east than what is ideal, and the range of privacy, and noise concerns already caused by the proposal, I find that there insufficient evidence to demonstrate the ability of this variance to satisfy the intent and purpose of the OP. I note that there is insufficient information before me to find that the front yard setback will not result in unacceptable privacy impacts on the neighbour to the east.

In addition, I discussed the assumption of interdependence of the variances at the beginning of this Section, which means that the variances have to be approved, or refused together.

As a result, I find that the variances, individually and collectively, don’t satisfy the intent of Section 3.1.2 of the OP.

I reiterate my earlier finding, made in Question 2 of this Section that the massing of the house, does not respect nor reinforce the prevailing type in the Immediate Context, or the General Neighbourhood. Given that the massing is discussed in Policy 4.1.5 (c), as recited below

(c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;

I therefore begin this discussion by finding that the proposal does not fulfill the intent and purpose of Policy 4.1.5 (c), as a result of my finding regarding the massing of the

property. The following analysis explores the relationship between this proposal, and other variables listed under Policy 4.1.5.

Policy 4.1.5 is recited below for convenience's sake:

Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular:

- a) patterns of streets, blocks and lanes, parks and public building sites;*
- 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;*

This Policy, which focuses on development criteria in the *Neighbourhoods*, was significantly impacted by OPA 320, because the latter changed the focus of the Policy onto respecting and reinforcing the *prevailing* type, which the Policy defines to be: "*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*".

I find that the key phrase in Policy 4.1.5 "*determined by the most frequently occurring form of development*", is best expressed through an enumeration exercise, where the Applicants identify a parameter, or a variable, listed above in Policy 4.1.5, and pertinent to the community in question, and deploy the same to classify, and categorize the variability of the community, with respect to that parameter. Pertinent statistical categories/ranges are then identified on the basis of this parameter, and a counting exercise is completed to determine the "prevailing" type, purely on the basis of the counting exercise. Once the most frequently occurring type (otherwise referred to as the "*mode*" in a statistical discussion) is established, the question of how does the proposal reinforce and respect the mode has to be established through a secondary exercise. While the process of how the mode is reinforced and respected may be a qualitative exercise, the first part of the exercise, i.e. the identification of the "*most frequently occurring form of development*" is undoubtedly a numerical exercise. Unlike the former OP, which was qualitative, and allowed for the proclamation of a given area to be "eclectic" based on the co-existence of various types of houses, the new OP is more rigid, and requires rigour and vigour in order to identify the "prevailing type".

While the Policy allows the identification of an “eclectic type”, as in “multiple prevailing types”, a Party cannot jump to the conclusion that the community is “eclectic”, without completing a numerical exercise- in other words, one cannot use a “short cut” and explain how their proposal respects the prevailing type, without numbers to back their claim.

I note that the issue of the lack of numerical analysis was addressed by way of Cross-Examination of the Applicants by Counsel for Party Mida.

I acknowledge, and don’t disagree with the Applicants’ perspective about “planning not being reduced to a game of numbers”, but take this opportunity to note that if numbers cannot hegemonize the planning process, they cannot be banished from the realm of planning either.

With the above preamble in mind, I specifically asked the Applicants if they had completed a numerical exercise to determine the “prevailing type” on two different occasions, and was advised that they had not completed such an exercise. Consequently, I find that their conclusion that the neighbourhood is eclectic is based on little more than conjecture, as a result of which I find that the variances did not satisfy the intent and purpose of Policy 4.1.5. This finding fortifies my earlier finding that the proposal does not respect, nor reinforce the purpose, and intent of Policy 4.1.5, based on the discussion of “massing”.

As a result of the proposal’s lack of ability to satisfy Policies 3.1.2, and 4.1.5 of the OP, I find that the requested variances don’t maintain the intent, and purpose of the OP.

As stated at the beginning of this Section, the proposal has to satisfy each and every relevant Policy in the OP, in order to maintain the overall purpose and intent of latter. Given that the variances have been found not to maintain the intent, and purpose of Policies 3.1.2, and 4.1.5, I find that there is no value-add in exploring the relationship between the variances, and Policy 2.1.3 of the OP.

In addition to the above analysis, I find that the interdependence of the variances, means that all the variances have to be refused if some of them are found to be not maintaining the intent, and purpose of the OP.

As a result of these reasons, I find that the requested variances don’t maintain the intent and purpose of the OP.

4) Does the proposal satisfy the test of maintaining the intent and purpose of the Zoning By-law?

The common performance standard that has to be satisfied by any variance application, is the need to ensure that there are no adverse impacts resulting from the approval of the variances in question. As seen in earlier discussion in this Section, the neighbours have expressed serious privacy concerns resulting from the variances respecting the balcony, the third storey, and the front yard, in addition to noise related concerns

resulting from the balcony on the second floor. I find the privacy concerns expressed by the neighbours, to be troubling, especially when informed that children could be impacted by the approval of the variances in question. The privacy concern is exacerbated by the sheer size of the balcony, which in effect provides multiple points of observations into the neighbours' backyards- the Applicants' solution of installing privacy screens on the balcony does little to allay the privacy and noise concerns, as stated by the neighbours themselves. The individual impact of each the requested variances, which is significant in itself, interact with each other to result in cumulative unacceptable adverse impacts on the neighbouring properties.

As a result, I find the variances respecting the size of the balcony, the height of the building, and the number of storeys does not meet the intent and purpose of By-law 7625.

While the Applicants discussed the importance of maintaining consistency between buildings when discussing the design and shape of the roof, I find that there is a "double whammy" resulting from their design, which asks for a flat roof, such that its height exceeds that of a sloped roof- this point is important to note because flat roofs have a lower height limit than sloped roofs, based on By-law 7625. In conjunction with how flat roofs generally have a bigger visual impact than sloped roofs, the proximity to the road caused by the reduced front yard, the cumulative interaction of the variances respecting the numbers of storeys, the height, the shape of the roof, and the reduced front yard setback, result in an arresting, if not aggravating visual addition to the street scape, which results in an unacceptable adverse impact on Brookfield street. The front yard setback, if approved, brings the formidable and tall building closer to the property to the east, than would be ideal, with inadequate information about the resulting privacy impact. As a result, I find that the variances respecting the number of storeys, height, shape of the roof, and the reduced front yard setback should not be approved.

The evidence, in conjunction with the analysis presented in this Section, makes it crystal clear that some groups of variances cannot be approved because of their failure to satisfy the performance standard. Given the discussion about the interdependence of the variances, as stated at the beginning of this Section, the logical corollary of the aforementioned finding about some groups of variances not satisfying the requisite performance standards, is that none of the variances meet the intent and purpose of Zoning By-law 7625.

Based on the above analysis, I find that none of the requested variances maintain the intent, and purpose of By-law 7625, and should be refused collectively.

5) Does the proposal satisfy the test of minor?

The test of minor focuses on the lack of unacceptable adverse impact on the neighbouring properties. As seen earlier in this Section, there was a chorus of concerns expressed by the neighbours about the loss of privacy, and noise impacts, resulting from the approval of this proposal-.I find that the Applicants responded to these issues

through suggestions about installing screens, and discussions around foliage and trees, to address privacy concerns. It is important to note that none of the planners who adduced evidence in opposition to this proposal, nor community members found these solutions to be helpful in allaying their concerns.

As a result, the variance for the sizes of the balcony fail the test of minor

As seen earlier, the cumulative impact of different permutations, and combinations of the variances, result in demonstrable unacceptable adverse impact on the streetscape, privacy and noise concerns, besides the creation of a new type of building with three floors, and a flat roof, hitherto unknown in this community. As a result, these variances cumulatively fail the test of minor.

On the basis of the analysis presented above, I find that the all the variances fail the test of minor.

6) Does the proposal satisfy the test of appropriate development?

If the proposal were successful, it would result in a new building type with respect to Study Area for two reasons- there is a flat roof on top of a full third storey, which is new to this community. If the balcony were approved notwithstanding their size, and the resulting concerns, there is the risk of commencing a new approach, where variances can be approved, despite demonstrable evidence about unacceptable adverse concerns. While there is no guarantee of zero privacy concerns in a developed urban locality, the approval of this proposal can result in a normalization of ignoring privacy concerns all together, which does not augur well for development. As a result, I find that the proposal does not satisfy the test of adequate development.

Given that none of the variances pass any one of the four tests under Section 45.1 of the OP, I find that all the requested variances respecting 14 Brookfield Rd. should be refused. This Order confirms the findings made by the Committee of Adjustment when they listened to the Application on February 7, 2019.

DECISION AND ORDER

1. All the variances requested in the Appeal respecting 14 Brookfield are refused, because they don't satisfy any component of the four part test provided under Section 45.1 of the Planning Act.
2. The Appeal respecting 14 Brookfield Road is refused in its entirety, and the decision made by the Committee of Adjustment, with respect to 14 Brookfield, dated February 7, 2019, is confirmed herewith

So orders the Toronto Local Appeal Body

X

A handwritten signature in black ink, appearing to read 'S. Gopikrishna', is written over a light gray rectangular background.

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body